REFORMING THE MONEY LENDING EXCEPTIONS FOR TAKEOVERS

EMMA ARMSON*

The use of shares in a company as security for a loan can be inhibited by the operation of the takeover provisions in the Corporations Act 2001 *(Cth). There have been exceptions in corporate takeover regulatory regimes for many decades to allow money lenders to take security over a company's shares. However, a number of unanswered legal questions have been raised concerning the scope of the current exceptions. This article analyses the historical development of the money lending exceptions, together with the legal and policy issues arising from their operation. The article concludes that the exceptions allow lenders to obtain equity positions in a company in addition to their security interests. It makes recommendations to respond to potential abuse of the exceptions and ensure there is proper disclosure of the lenders' interests.*

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* Associate Professor, Faculty of Law and Justice, University of New South Wales. I thank the anonymous referees, Adam D'Andreti and George Williams for their helpful comments on earlier versions of this article. Please send correspondence to e.armson@unsw.edu.au.

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I Introduction

Exceptions for money lending have applied in corporate takeover regulatory regimes in Australia for many decades. These exceptions allow financiers to take and enforce their security over shares notwithstanding the provisions regulating takeovers. In particular, they have applied to the prohibition on certain acquisitions resulting in a person's voting power increasing above a 20% threshold ('takeover prohibition') since 1981.[1] The circumstances in which the exceptions for money lending apply have expanded over time, leading to concerns that there is potential for misuse.[2] Such concerns were brought into focus in the decision of the Takeovers Panel ('Panel') in *Donaco International Ltd* ('*Donaco*'), which raised a number of questions concerning the scope of the exceptions.[3] These questions focus on the extent to which the exceptions should apply where financiers obtain equity interests in the company's shares, in addition to their enforcement rights relating to the secured shares under the lending arrangements.

A person's ability to acquire control over a company's shares is limited by the takeover provisions in ch 6 of the *Corporations Act 2001* (Cth) ('*Corporations Act*'). Although this article focuses on companies listed on the Australian Securities Exchange ('ASX'), the takeover provisions apply to companies that either are listed or have more than 50 members.[4] There are two potentially conflicting sets of key purposes underpinning the takeover provisions that are set out in s 602 of the *Corporations Act*.[5] The first set of purposes provides shareholder protection and was introduced into the state-based takeover regulatory regimes applying from 1971.[6] Known as the 'Eggleston principles', these purposes are designed to provide shareholders of a company with enough

[1] *Companies (Acquisition of Shares) Act 1980* (Cth) ss 11(1)–(2), (7) ('*CASA*'). This Act set out a takeover code, which operated in each jurisdiction through legislation applying the Act: see Commonwealth, *Parliamentary Debates*, House of Representatives, 27 August 1980, 804–5 (Ransley Garland).

[2] See Legal Committee, Companies and Securities Advisory Committee, *Anomalies in the Takeovers Provisions of the Corporations Law* (Report, March 1994), 9–10, 59 ('*CASAC Report*').

[3] [2019] ATP 11 ('*Donaco*').

[4] *Corporations Act 2001* (Cth) s 606(1)(a) ('*Corporations Act*'). The takeover provisions also apply to other investments that are traded on prescribed financial markets: see especially at s 604.

[5] See generally Emma Armson, 'Evolution of Australian Takeover Legislation' (2013) 39(3) *Monash University Law Review* 654, 688–94; Justin Mannolini, 'Convergence or Divergence: Is There a Role for the Eggleston Principles in a Global M&A Environment?' (2002) 24(3) *Sydney Law Review* 336; Benedict Sheehy, 'Australia's Eggleston Principles in Takeover Law: Social and Economic Sense?' (2004) 17(2) *Australian Journal of Corporate Law* 218.

[6] See, eg, *Companies (Amendment) Act 1971* (NSW) ('*Companies (Amendment) Act*').

information and reasonable time in relation to a proposal to acquire a substantial interest in the company, as well as a 'reasonable and equal opportunity to participate in any benefits' under the proposal.[7] The second set of purposes was introduced into the legislation in 2000, although it was applied by the regulator in relation to the first national takeover legislation implemented in the 1980s.[8] These purposes have an economic focus in ensuring that acquisitions of control over voting shares take place in an 'efficient, competitive and informed market'.[9] Both these economic principles and the Eggleston principles are designed to ensure that market participants are properly informed.[10]

The takeover prohibition is central to the implementation of the shareholder protection principles underlying the provisions. It prevents a person from acquiring a 'relevant interest' in the company's issued voting shares, where the transaction would result in a person's 'voting power' exceeding (or increasing while above) the 20% threshold for the takeover prohibition.[11] Relevant interests are defined broadly to include the power to control the exercise of the right to vote or dispose of shares.[12] Voting power is determined by the votes that a person and each of their 'associates' have a relevant interest in as a percentage of the total votes in the company.[13] A person's associates include bodies they control, those that control them, and those with whom they propose to enter into an arrangement concerning the composition of the target company's board of directors or to act in concert in relation to the company's affairs.[14] If a person and their associates have relevant interests above a 5% threshold in a listed company, the person is required to disclose information relating to these interests

[7] See *Corporations Act* (n 4) ss 602(b)–(c), 602A. These paragraphs originate from Company Law Advisory Committee, *Report to the Standing Committee of Attorneys-General on Disclosure of Substantial Shareholdings and Takeovers* (Interim Report No 2, 20 May 1969) 8 [16] ('*Eggleston Report*').

[8] See generally George Durbridge, 'The Writ of Middlesex Revived' (2009) 27(1) *Company and Securities Law Journal* 45; Tony Greenwood, 'In Addition to Justin Mannolini' (2000) 11(3) *Australian Journal of Corporate Law* 308; Rebecca Langley, 'Information Access Denied … Is the Australian Takeovers Market Really "Efficient, Competitive and Informed"?' (2009) 27(6) *Company and Securities Law Journal* 344. See especially at 351.

[9] *Corporations Act* (n 4) s 602(a).

[10] See, eg, Corporate Law Economic Reform Program, 'Corporate Control: A Better Environment for Productive Investment' (Proposals for Reform: Paper No 4 — Takeovers, 1997) 10–11 ('*CLERP 4*'). See also below Part IV(A).

[11] *Corporations Act* (n 4) s 606(1)(c). The takeover prohibition ceases to apply once a person's voting power reaches 90% in light of the ability to compulsorily acquire the remaining shares at that threshold: see at s 606(1)(c)(ii), ch 6A. See especially at ss 661A, 664A.

[12] Ibid s 608(1).

[13] Ibid s 610(1).

[14] Ibid s 12(2). See also at ss 9 (definition of 'relevant agreement'), 50AA.

under ch 6C of the *Corporations Act* ('substantial holding disclosure').[15] This disclosure implements both the economic and shareholder protection principles relating to informed markets underpinning the takeover regulatory regime.

There are a number of exceptions to the takeover provisions that provide gateways for transactions consistent with the purposes underpinning the provisions. One of the most significant exceptions is where a person makes a takeover bid, which must comply with requirements designed to ensure that all shareholders of the target company receive equal offers, and have sufficient information and time to make their decision.[16] There is also an exception for certain rights issues, which involve offers of shares to all existing shareholders on the same terms on a proportionate basis and allow a reasonable opportunity to accept the offers.[17] Another key exception allows acquisitions to 'creep' up to 3% in six months if a person has already held 19% for six months ('the 3% creep exception'), which allows transactions to occur in a way that gives the market time to assimilate information concerning the acquisitions.[18] Acquisitions can also be approved by shareholders where they are provided with information that is material to their decision on how to vote on the resolution.[19]

The first money lending exception in s 609(1) of the *Corporations Act* applies in relation to the definition of 'relevant interest', which has the effect of avoiding the operation of both the takeover prohibition and substantial holding disclosure.[20] This first exception applies if four key requirements are satisfied, namely: the taking of the security over shares results from 'ordinary commercial terms'; the taking occurs in the 'ordinary course of the person's business'; the business relates to 'the provision of financial accommodation by any means'; and the financier and person granting the security interest ('grantor') are not associates.[21] On the other hand, the second money lending exception in s 611 item 6 operates in the context of the security's enforcement only as an exception to the takeover prohibition, and does not affect the substantial holding disclosure requirement. The second exception applies to the exercise of powers, or the

[15] This disclosure applies when the 5% threshold is crossed, when there is a substantial holding and a subsequent 1% change in that holding, or when the person makes a takeover bid: see ibid ss 9 (definition of 'substantial holding' para (a)), 671B(1).

[16] See ibid ss 611 item 1, 612, pts 6.3–6.9.

[17] Ibid s 611 item 10. There is a related exception applying to persons providing underwriting or sub-underwriting in the context of fundraising under prospectuses: at s 611 item 13.

[18] Ibid s 611 item 9. See generally James Mayanja, 'Why Prohibiting Creeping Takeovers Would Not Be Such a Good Idea' (2014) 29(3) *Australian Journal of Corporate Law* 322.

[19] *Corporations Act* (n 4) s 611 item 7.

[20] See ibid ss 9 (definition of 'substantial holding'), 606(1), 609(1), 671B(1).

[21] Ibid s 609(1).

appointment of a receiver or receiver and manager, under the documentation creating the security interest in circumstances satisfying the first three requirements set out above in relation to the first exception.[22]

These exceptions are supplemented by the powers of the corporate regulator — the Australian Securities and Investments Commission ('ASIC') — and the Panel. Both of these bodies have the power to exempt persons from and modify the operation of the takeover and substantial holding provisions.[23] In exercising their powers, ASIC and the Panel make their decisions having regard to the purposes of the takeover provisions.[24] ASIC has exercised its modification powers in relation to the money lending exceptions most recently in *Class Order 13/520*, including by applying them to security trustees that acquire interests or exercise powers relating to the security for the benefit of financiers satisfying the legislative requirements.[25] The Panel decides applications for review of ASIC's exemption and modification powers, and for declarations of unacceptable circumstances and orders.[26] This latter role allows the Panel to determine that circumstances are unacceptable even if financiers have complied with the exceptions set out in the legislation and/or the requirements set out in ASIC exemptions or modifications.[27]

The *Donaco* decision was the first time that the Panel had focused on the scope of the money lending exceptions in its decision-making. Prior to this, there were a handful of Panel decisions referring to the exceptions without substantive discussion.[28] Another decision raised, but did not decide, whether the availability of the money lending exception for relevant interests was affected by subsequent events.[29] The *Donaco* decision concerned an acquisition of 9.71% of the shares of an ASX-listed company, Donaco, by a non-bank lender when it had the right to enforce a security interest over 27.25% of Donaco

[22] Ibid s 611 item 6.

[23] These powers are exercised by ASIC in the first instance, and the Panel when conducting a 'de novo' review of ASIC decision-making: see ibid ss 655A, 656A, 673; Takeovers Panel, *Reviewing Decisions* (Guidance Note No 2, 27 May 2015) 2 [10(a)].

[24] See *Corporations Act* (n 4) ss 602, 655A(2), 656A(3), 657A(3)(a)(i).

[25] Australian Securities and Investments Commission, *ASIC Class Order* (CO 13/520, 17 June 2013) [6(a)], [6(g)] ('*Class Order 13/520*'). See also *Corporations Act* (n 4) s 655A(1)(b).

[26] See *Corporations Act* (n 4) pt 6.10 div 2. See especially at ss 656A, 657A, 657D.

[27] See ibid s 657A(1).

[28] See *Re Rivkin Financial Services Ltd* [2004] ATP 14, [25] (President McKeon, Deputy President Farrell and Member Bradley); *Re BioProspect Ltd 01* [2008] ATP 8, [50]–[55] (President McCann, Members Brenner and Sweetman); *KBL Mining Ltd* [2015] ATP 3, [37] (President Day, Members Dewhirst and Jablko).

[29] *Resource Generation Ltd* [2015] ATP 12, [116]–[118] (President Scheinkestel, Members Charles and Friedlander) ('*Resource Generation*'). See below Part III(A).

shares.[30] The Panel recognised that it was 'reasonable, and generally desirable, for lenders and borrowers to have time to remedy defaults' prior to disclosing them.[31] However, it was not surprising that the *Donaco* Panel concluded that there were unacceptable circumstances, due to the lender acquiring the 9.71% parcel when the market was not informed of either the security interest or the default allowing it to be enforced.[32] As a result, the Panel ordered that ASIC sell the 9.71% parcel on behalf of the lender.[33] In its decision, the *Donaco* Panel raised a number of unanswered legal questions concerning the scope of the money lending exceptions, and was particularly concerned about the lender being granted options over Donaco shares under the arrangements covered by the exceptions.[34] The Panel consequently recommended that ASIC review *Class Order 13/520* in light of the issues raised in its decision.[35]

This article provides a detailed assessment of the significant legal and policy issues arising from the *Donaco* decision in relation to the current money lending exceptions in the takeover provisions. Although there has been commentary focusing on the money lending exceptions, this has focused on past exceptions.[36] These issues are important as they have the potential to impact significantly on the availability of financing for, and consequently on the operation of, listed and large, non-listed companies. Indeed, one of the reasons that the *Donaco* Panel decided not to conclude that the lender could not rely on the money lending exception for relevant interests in s 609(1) in that case was

> the impact of such a finding on the non-traditional credit market in Australia and the uncertainty that [its] decision might cause in relation to the existing rights of non-bank lenders.[37]

However, it is also undesirable for uncertainty to remain concerning the scope of the money lending exceptions. Despite the fact that the *Donaco* Panel only recommended that ASIC review *Class Order 13/520*, a comprehensive analysis of the money lending exceptions in the *Corporations Act* is needed as the concerns raised in the decision are equally relevant to the legislative provisions. The

[30] *Donaco* (n 3) [1], [5]–[6], [12] (President O'Sullivan, Members In't Veld and McKenzie).

[31] Ibid [47].

[32] Ibid Annexure A, [19]–[22]. See also *Corporations Act* (n 4) ss 602(a)–(b).

[33] *Donaco* (n 3) Annexure B, [2]–[3] (President O'Sullivan, Members In't Veld and McKenzie).

[34] See below Part III(B).

[35] *Donaco* (n 3) [97] (President O'Sullivan, Members In't Veld and McKenzie).

[36] See Andrew Finch, 'Security over Shares' (1995) 13(5) *Company and Securities Law Journal* 292, 307–12; AG Hartnell, 'Relevant Interests: "Control" in the Eighties' (1988) 6(3) *Company and Securities Law Journal* 169, 181–3.

[37] *Donaco* (n 3) [95] (President O'Sullivan, Members In't Veld and McKenzie). See also at [92].

Donaco decision left open the fundamental question of whether financiers should have the benefit of the money lending exceptions to the takeover provisions where they obtain equity interests in addition to their rights relating to the secured shares. This raises the prospect of misuse of the exceptions, with the potential to undermine the policy underpinning the takeover provisions.

Part II of the article analyses the historical development of the money lending exceptions in the takeover provisions and modification of the provisions by the regulator. This informs the consideration of the questions affecting the scope of the current exceptions raised in the *Donaco* decision, by providing an understanding of the extent to which their application has expanded over time. Part III considers the legal issues relating to the current money lending exceptions as modified by ASIC. It focuses in particular on judicial decisions concerning the interpretation of the wording in the exceptions. Part IV then focuses on the three key aspects of the policy considerations relating to the money lending exceptions. The first section examines the basis for the policy underpinning the takeover provisions in the context of market transparency and fairness. Next, there is an analysis of the takeover policy issues arising from the historical development of the exceptions. This is followed by a comparative assessment of the regulatory approaches in analogous situations involving options, warrants, equity derivatives and rights issues. Part V sets out proposals for reform in light of this analysis, with the conclusion in Part VI.

II Extension of Money Lending Exceptions over Time

This Part analyses the development of the money lending exceptions as they have applied in each of the key corporate takeover regulatory regimes that have operated over time. Takeover regulation was first introduced in state and territory legislation (known as the *Uniform Companies Acts*) in 1961–63.[38] The analysis in this article focuses primarily on the New South Wales ('NSW') legislation, which led the way in introducing the pivotal concept of a 'relevant interest' in subsequent reforms that were implemented in legislation in 1971.[39] The second key legislative framework for takeovers was set out in the *Companies (Acquisition of Shares) Act 1980* (Cth) ('*CASA*'), which was determined at the

[38] See, eg, *Companies Act 1961* (NSW) s 184, sch 10 ('*Companies Act*'). See also *Companies Ordinance 1962* (ACT) s 184, sch 10; *Companies Ordinance 1963* (NT) s 184, sch 10; *Companies Act 1961* (Qld) s 184, sch 10; *Companies Act 1962* (SA) s 184, sch 10; *Companies Act 1962* (Tas) s 184, sch 10; *Companies Act 1961* (Vic) pt VIB, sch 10; *Companies Act 1961* (WA) s 184, sch 10.

[39] Hartnell (n 36) 169–70. See, eg, *Companies Act* (n 38) ss 6A, 126–7, 180A(5), 180D(2)(b), pt IV div 3A, as inserted by *Companies (Amendment) Act* (n 6) ss 3(c)–(f), (h).

federal level in consultation with the states and territories.[40] This legislation was particularly important as it introduced the takeover prohibition into the regulatory regime.[41] It also gave the new corporate regulator, the National Companies and Securities Commission ('NCSC'), the power to exempt persons from, and modify the operation of, the takeover provisions.[42] The NCSC was also given the power to declare acquisitions or conduct to be unacceptable based on the underlying policy, even where a person had complied with the legislative provisions.[43] The third key takeover legislative regime in the *Corporations Law* was also founded on a cooperative scheme.[44] This regime transferred the NCSC's power to make declarations in relation to unacceptable conduct to the Panel's predecessor.[45] The final section discusses the money lending exceptions under the current national regulatory regime in the *Corporations Act*, including the modifications made to the exceptions in *Class Order 13/520*.

A Companies Act 1961 *(NSW)*

Unlike the current takeover provisions, the first regulatory regime that applied in NSW did not prohibit acquisitions above a certain threshold.[46] Instead, it imposed disclosure requirements either where a person made an offer to buy all of the company's shares or, if they made an offer for only a proportion of the shares, where the person and any related corporations controlled at least one third of the company's voting power at a general meeting.[47] Companies were related if one was a holding company or subsidiary of the other, or both were subsidiaries of the same holding company.[48] An exception for money lenders applied to exclude their interests from the definition of 'subsidiary' (with a

[40] Commonwealth, *Parliamentary Debates*, House of Representatives, 27 August 1980, 804–5 (Ransley Garland).

[41] See *CASA* (n 1) ss 11(1)–(2); Explanatory Memorandum, Companies (Acquisition of Shares) Bill 1980 (Cth) 27 [46].

[42] *CASA* (n 1) ss 57–8. See *National Companies and Securities Commission Act 1979* (Cth) s 5(1).

[43] *CASA* (n 1) s 60.

[44] It was contained in s 82 of the *Corporations Act 1989* (Cth) ('*Corporations Law*'), as inserted by s 7 of the *Corporations Legislation Amendment Act 1990* (Cth), which applied in the Australian Capital Territory, and operated as a law of each of the states and the Northern Territory through application legislation in those jurisdictions: *Corporations Law* (n 44) s 5.

[45] See *Australian Securities Commission Act 1989* (Cth) ss 171, 174 ('*ASC Act*'); Explanatory Memorandum, Corporations Bill 1988 (Cth) 18 [45]. However, only the national regulator (which later became ASIC) could make applications to that panel: see *Corporations Law* (n 44) s 733.

[46] *Companies Act* (n 38) s 184, sch 10.

[47] Ibid.

[48] Ibid s 6(5).

corresponding impact on the definition of 'holding company') in determining whether the threshold of one third of the aggregated voting power was met.[49] The key elements of this exception are highlighted below, which provided that

> [i]n determining whether one corporation is a subsidiary of another corporation … any shares held or power exercisable by, or by a nominee for, that other corporation or its subsidiary … shall be treated as not held or exercisable by that other corporation if the *ordinary business* of that other corporation or its subsidiary, as the case may be, *includes the lending of money* and the *shares are held or power is exercisable* as aforesaid *by way of security only for the purposes of a transaction entered into in the ordinary course of that business*.[50]

Significant amendments were made to the takeover provisions following recommendations of the Company Law Advisory Committee, which was tasked with reporting on the levels of investor protection provided by the *Uniform Companies Acts*.[51] One of the key changes recommended by the committee was the introduction of substantial holding disclosure in its second interim report ('*Eggleston Report*').[52] The draft legislation on substantial holdings attached to this report contained an exception for money lenders that replicated the elements of the exception for the definition of 'subsidiary' set out in the immediately preceding quote.[53] There were only minor drafting changes made to the version of the money lending exception that was implemented following the *Eggleston Report*. This exception applied to the definition of 'relevant interest' introduced into the NSW legislation in 1971,[54] which was the key determinant of whether disclosure requirements relating to takeover offers, substantial holdings and directors' interests applied.[55]

[49] See ibid ss 6(1), (3)(d), (4).

[50] Ibid s 6(3)(d) (emphasis added).

[51] See Company Law Advisory Committee, Parliament of New South Wales, *Report to the Standing Committee of Attorneys-General on Accounts and Audit* (1970) 5 [1].

[52] *Eggleston Report* (n 7) 5 [3]–[4].

[53] See above n 50 and accompanying text. This exception disregarded the interests of a person 'whose ordinary business includes the lending of money and who holds [those interests] by way of security only for the purposes of a transaction entered into in the ordinary course of business': Company Law Advisory Committee, Parliament of Australia, *Second Interim Report* (Parliamentary Paper No 43, 28 February 1969) 23 s 69H(9)(b).

[54] *Companies (Amendment) Act* (n 6) s 3©, inserting *Companies Act* (n 38) s 6A(7). The second reading speech when this legislation was introduced into Parliament noted that it was 'necessary … to make provision for exclusions' and that '[p]articularly dealt with [were] the interests held by money-lenders who obtain shares as security': see New South Wales, *Parliamentary Debates*, Legislative Assembly, 9 September 1971, 913 (John Waddy).

[55] See *Companies Act* (n 38) ss 6A, 126–7, 180A(5), 180D(2)(b), pt IV div 3A.

For the purposes of the amended takeover provisions, a 'relevant interest' involved the power to control the exercise of voting power attached to shares or the disposal of shares.[56] In determining whether offers to acquire shares required disclosure, there was a 15% threshold that was calculated using a formula that took into account the relevant interests of both the person and their associates.[57] As previously, the exception for money lending applied to transactions 'in the ordinary course of business' of money lending where it was part of the person's 'ordinary business', with only the highlighted minor amendments to the circumstances in which the person's powers could be exercised under the exception:

> [I]f the ordinary business of the person who has the relevant interest includes the lending of money and he *has authority to exercise his powers* as the holder of the relevant interest *only by reason of a security given* for the purposes of a transaction entered into in the ordinary course of business in connection with the lending of money.[58]

B Companies (Acquisition of Shares) Act 1980 *(Cth)*

The legislative framework implemented by *CASA* introduced many of the key features of the current takeover provisions. One of the more significant changes was the introduction of the takeover prohibition preventing certain acquisitions above a 20% threshold.[59] As in the case of the preceding NSW legislation, the percentage threshold was determined taking into account the relevant interests of the person and their associates.[60] The first money lending exception in *CASA* relating to the definition of relevant interests replicated the wording of the exception set out in the immediately preceding quote, with the following exclusion added at the end: '*not being a transaction entered into with a person*

[56] Ibid s 6A(1)(c).

[57] Ibid ss 180A(5), 180C(2)(a), 180D(1). An 'associate' of a person was defined to include related corporations, persons accustomed to act in accordance with the person's instructions (or vice versa) in relation to a company's shares, or persons with whom they had an arrangement relating to the exercise of voting power or a proposed acquisition in those shares: see at ss 180A(6)–(7). See also above n 48 and accompanying text.

[58] *Companies Act* (n 38) s 6A(7)(a)(i) (emphasis added).

[59] *CASA* (n 1) ss 11(1)–(2), (7). As is currently the case, this prohibition did not apply once the 90% threshold was reached, given the ability to compulsorily acquire the remaining shares at said threshold: see, eg, *Corporations Act* (n 4) s 661A(1)(b)(i).

[60] *CASA* (n 1) s 9(8).

associated with the [money lender]'.[61] This introduced the concept that the money lending exception should only apply to arm's length transactions.

CASA also inserted a new exception for money lenders to enable enforcement of their security without breaching the new takeover prohibition. Unlike the first exception applying to relevant interests, this second exception did not remove the need for substantial holding disclosure.[62] However, it replicated the key elements in the first exception discussed in the preceding paragraph, with only the highlighted differences for the purposes of the second exception applying to

> an acquisition of shares by a person whose ordinary business includes the lending of money where *the acquisition results from the exercise by that person of a power in relation to the shares conferred on or vested in him pursuant to, by reason of or in connection with a transaction in connection with the lending of money* entered into by him in the ordinary course of that business, not being a transaction entered into with a person associated with the first-mentioned person.[63]

C Corporations Law

Minimal changes were made to the takeover provisions that were introduced into the *Corporations Law*. This was consistent with that legislation's priority to implement a national regulatory regime.[64] Accordingly, the two money lending exceptions only contained minor differences in grammar compared to the *CASA* provisions analysed in the previous section.[65] However, the exceptions were subsequently amended in light of a recommendation by the Legal

[61] Ibid s 9(8)(a) (emphasis added). See above n 58 and accompanying text.

[62] See, eg, *Companies (New South Wales) Code* (NSW) s 8(8)(a)(i), pt IV div 4 ('*Companies Code*'); *CASA* (n 1) s 12(l).

[63] *CASA* (n 1) s 12(l) (emphasis added).

[64] Commonwealth, *Parliamentary Debates*, House of Representatives, 25 May 1988, 2993 (Lionel Bowen). However, the *Corporations Law* (n 44) was based on a cooperative scheme similar to that underpinning *CASA* (n 1) after an earlier attempt to implement national legislation was struck down as unconstitutional: see *New South Wales v Commonwealth* (1990) 169 CLR 482, 495, 503 (Mason CJ, Brennan, Dawson, Toohey, Gaudron and McHugh JJ) ('*The Incorporation Case*'); Bernard Mees and Ian Ramsay, 'Corporate Regulators in Australia (1961–2000): From Companies' Registrars to ASIC' (2008) 22(3) *Australian Journal of Corporate Law* 212, 242.

[65] The most substantial of these changes involved substituting 'because of' for 'by reason of', and simplifying the exclusions at the end of the exceptions to refer to 'an associate of the person' rather than 'a person associated with the first-mentioned person': see *Corporations Law* (n 44) ss 38, 630.

Committee of the Companies and Securities Advisory Committee ('CASAC Legal Committee') that the scope of the exceptions be expanded.[66]

The CASAC Legal Committee recommended that the money lending exceptions apply to the 'provision of financial accommodation by any means',[67] in light of concerns that the term 'lending money' did not encompass commonly used financing arrangements such as facilities for bills of exchange or letters of credit.[68] In its submission to the committee, the Australian Securities Commission ('ASC'), ASIC's predecessor, questioned whether the use of 'financial accommodation' would be 'sufficiently clear', and instead proposed that the exception refer to 'the obligation to pay or repay money owing (but not restricted to obligations arising under a loan agreement)'.[69] Concerned that ASC's proposed wording could be 'interpreted too narrowly', the CASAC Legal Committee concluded that referring to '"financial accommodation" would have the advantage of simplicity and would permit the courts to give a commercially realistic interpretation'.[70] Although the committee's recommendation was accepted,[71] the term 'financial accommodation' was only included in the heading of the redrafted exception for relevant interests that was inserted into the *Corporations Law* by sch 1 of the *Corporate Law Economic Reform Program Act 1999* (Cth):

> Money lending and financial accommodation
>
> (1) A person does not have a relevant interest in securities merely because of a mortgage, charge or other *security taken for the purpose of a transaction* entered into by the person if:
>
> (a) the mortgage, charge or security is taken or acquired in the ordinary course of the person's business of providing financial services and on ordinary commercial terms; and
>
> (b) the person whose property is subject to the mortgage, charge or security is not an associate of the person.[72]

[66] See *CASAC Report* (n 2) 10.

[67] See ibid; *Corporations Law* (n 44) ss 38, 630.

[68] See Finch (n 36) 308; Hartnell (n 36) 182; Legal Committee, Companies and Securities Advisory Committee, *Anomalies in the Takeovers Provisions of the Corporations Law* (Discussion Paper, January 1993) 5.

[69] *CASAC Report* (n 2) 9.

[70] Ibid 9–10.

[71] See Simplification Task Force, Attorney-General's Department (Cth), *Takeovers: Proposal for Simplification* (Proposal, January 1996) AR7.

[72] *Corporations Law* (n 44) s 609(1).

Significantly, the redrafted exception added the requirement that the security be taken 'on ordinary commercial terms' and in the ordinary course of the person's 'business of providing financial services'.[73] Neither of these terms was defined either in the legislation at that time or in the accompanying explanatory material when it was introduced into Parliament.[74] However, ASIC policy guidance accompanying subsequent *Class Order 01/1542* indicated that 'financial services' in this context meant 'money lending and other financial accommodation, that is, financing arrangements including for example the grant of bill facilities'.[75] Similar terminology was used in the redrafting of the corresponding exception to the takeover prohibition, which was also amended to reflect the CASAC Legal Committee's recommendation that the exception be extended to make it clear that it applies to 'a receiver appointed by a money-lender or any other person acting in a similar capacity'.[76] Accordingly, the following item was included in the operative table setting out the exceptions to the takeover prohibition in the *Corporations Law*:

> *An acquisition that results from the exercise by a person of a power, or appointment as a receiver, or receiver and manager*, under a mortgage, charge or other security if:
>
> (a) the person's ordinary business includes providing financial services; and
>
> (b) the person took or acquired the security in the ordinary course of their business of providing financial services and on ordinary commercial terms.[77]

The CASAC Legal Committee noted two significant policy issues relating to the money lending exceptions that were raised in submissions but were not addressed in its report.[78] First, the committee highlighted a submission arguing that the exceptions could be used by lenders to obtain control of a company without making a takeover bid.[79] Secondly, the same submission suggested that

[73] Ibid.

[74] *Corporate Law Economic Reform Program Act 1999* (Cth) ('*CLERP Act*'); Explanatory Memorandum, Corporate Law Economic Reform Program Bill 1998 (Cth).

[75] Australian Securities and Investments Commission, *Anomalies and Issues in the Takeover Provisions* (Regulatory Guide No 171, 13 December 2001) [RG 171.16] ('*Regulatory Guide 171*'). ASIC noted in an accompanying footnote that the CASAC Legal Committee had suggested that 'financial accommodation' was a broader concept than money lending: see at [RG 171.16] n 2; *CASAC Report* (n 2) 9–10.

[76] *CASAC Report* (n 2) 10.

[77] *Corporations Law* (n 44) s 611 item 6 (emphasis added).

[78] This was due to the committee's remit, which was limited to addressing anomalies in the takeover provisions: see *CASAC Report* (n 2) ii, 59.

[79] Ibid 59 n 224.

it may be appropriate for a money lender's interests to be counted as a relevant interest only for the purposes of disclosure in substantial holding notices.[80] The Committee noted in response that the corporate regulator had previously released a policy statement indicating that there was

> no policy reason why a person … having a relevant interest in shares that is disregarded but having an entitlement to those shares in the same circumstances under s 609 … should be subject to …

the takeover prohibition and substantial holding disclosure.[81] Although the committee raised the possibility of examining these issues further,[82] they were not pursued in subsequent reform proposals.

D Corporations Act 2001 *(Cth)*

There were no substantive policy changes to the legislative provisions with the implementation of the *Corporations Act*,[83] as its focus was to create the first national regulatory regime for corporate and securities law in Australia.[84] However, ASIC modified the operation of the money lending exceptions in the Act later that year in *Class Order 01/1542*.[85] First, both exceptions were extended to apply to persons who hold a security on trust for a financier who satisfied the legislative requirements at that time, namely taking the security on ordinary commercial terms in the ordinary course of their business of providing

[80] Ibid 59 n 225.

[81] See ibid (emphasis added), quoting Australian Securities Commission, *Entitlement where Relevant Interest Disregarded* (Policy Statement No 69, 1 November 1993) [PS 69.5]. See *Corporations Law* (n 44) ss 615, 709–11. The policy statement set out the regulator's approach to modifying the *Corporations Law* (n 44) to avoid the situation where exceptions disregarding a person's relevant interest (including in relation to money lending) were negated by a provision relating to their entitlement to shares: Australian Securities Commission (n 81) [PS 69.1]–[PS 69.2]; *Corporations Law* (n 44) ss 38–43, 609(2).

[82] See *CASAC Report* (n 2) 59.

[83] See Explanatory Memorandum, Corporations Bill 2001 (Cth) 5 [3.1]; Explanatory Memorandum, Australian Securities and Investments Commission Bill 2001 (Cth) 5 [3.1].

[84] This was enabled by the states referring to the Commonwealth the power to enact and amend the *Corporations Act* (n 4) and the *Australian Securities and Investments Commission Act 2001* (Cth), in light of High Court decisions that had undermined the constitutional foundations of the *Corporations Law* (n 44) scheme: see Explanatory Memorandum, Corporations Bill 2001 (Cth) (n 83) 7–8 [4.5]–[4.10].

[85] Australian Securities and Investments Commission, *ASIC Class Order — Relevant Interests, Voting Power and Exceptions to the Main Takeover Prohibition* (CO 01/1542, 11 December 2001) ('*Class Order 01/1542*').

financial services.[86] This recognised the common practice of financiers appointing security trustees in structured lending arrangements, and was designed to ensure that a relevant interest did not arise from participation in 'common commercial "arm's length" mortgage structures and transactions'.[87] Secondly, both exceptions were extended to apply to negative pledges to remove uncertainty as to whether they satisfied the requirements of a security, given that they involve contractual promises not to encumber assets rather than creating interests in the borrower's assets.[88] Thirdly, the 'relevant interest' exception was modified to make it clear that it covered situations where a person subsequently acquired the security, in order to facilitate trading of secured debt.[89] Finally, the takeover prohibition was modified to ensure that it applied to acquisitions that result from a receiver's appointment.[90]

The legislative exceptions for money lending were amended in 2002 to utilise the broad term of 'financial accommodation' as recommended by the CASAC Legal Committee, in light of the introduction of the revised regime for financial services and markets in ch 7 of the *Corporations Act*.[91] To avoid confusion with the newly created definitions of 'financial service' and 'financial services business' (which were not intended to apply in the context of the takeover provisions), the references to 'providing financial services' in both exceptions were replaced with the term 'the provision of financial accommodation by any means'.[92] ASIC also varied its modifications in *Class Order 01/1542* to make

[86] See ibid [2(b)]–[2(d)], [6(b)]; *Regulatory Guide 171* (n 75) [RG 171.12], [RG 171.16], [RG 171.18]–[RG 171.19].

[87] See Australian Securities and Investments Commission, *Relevant Interests and Substantial Holding Notices* (Regulatory Guide No 5, August 2020) 23–4 [RG 5.71]–[RG 5.72] ('*Regulatory Guide 5*'); *Regulatory Guide 171* (n 75) [RG 171.15]. See also at [RG 171.12], [RG 171.18]. The Companies and Securities Advisory Committee had similarly referred to

> genuine 'arm's length' transactions, involving … transactions entered into by a company in the course of its ordinary business and on ordinary commercial terms, and loans by banks … on similar commercial terms …

Companies and Securities Advisory Committee, *Reform of the Law Governing Corporate Financial Transactions* (Report, July 1991) 9.

[88] See *Class Order 01/1542* (n 85) [2(e)], [6(c)]; *Regulatory Guide 171* (n 75) [RG 171.22]; *Regulatory Guide 5* (n 87) 23–4 [RG 5.72]; Hartnell (n 36) 181–2.

[89] See *Class Order 01/1542* (n 85) [2(a)]; *Regulatory Guide 171* (n 75) [RG 171.21]; *Regulatory Guide 5* (n 87) 23–4 [RG 5.72].

[90] See *Class Order 01/1542* (n 85) [6(a)]; *Regulatory Guide 5* (n 87) 24–5 [RG 5.73]–[5.75].

[91] See especially *Financial Services Reform Act 2001* (Cth) sch 1 pt 2 items 363, 369.

[92] See ibid; *Corporations Act* (n 4) ss 9 (definitions of 'financial service', 'financial services business'), 609(1), 611 item 6, 761A (definitions of 'financial service', 'financial services business'); Revised Explanatory Memorandum, Financial Services Reform Bill 2001 (Cth) 198–9 [20.46].

similar amendments.[93] The meaning of the term 'financial accommodation' was considered by the High Court in 2012 in the context of the ch 7 regime relating to financial services.[94] The joint judgment of French CJ, Gummow, Crennan and Bell JJ found that the expression had 'considerable width of denotation'.[95] Justice Heydon elaborated that '[i]n ordinary usage, "accommodation" means anything which supplies a want', which was satisfied in that case as one party had 'a want of money' and the other party 'supplied that want by paying' that money to another person.[96]

ASIC issued the current modifications to the money lending exceptions in *Class Order 13/520*.[97] This took into account legislative amendments inserting the term 'security interest' in place of the phrase 'mortgage, charge or other security', in order to harmonise the *Corporations Act* with the approach adopted in personal property securities legislation.[98] In addition to specifically including charges, liens and pledges, the *Corporations Act* definition incorporates the purposive definition in that legislation to cover any personal property interest arising from

> a transaction that, in substance, secures payment or performance of an obligation (without regard to the form of the transaction or the identity of the person who has title to the property).[99]

In the consultation paper preceding *Class Order 13/520*, ASIC requested feedback on its proposal to 'retain and update' the modifications in light of the new

[93] See Australian Securities and Investments Commission, *ASIC Class Order* (CO 02/0268, 4 March 2002) [1], [3].

[94] This decision examined the use of this term in the *Corporations Regulations 2001* (Cth) reg 7.1.06(3)(b)(i) to determine whether credit facilities were excluded from the meaning of a 'financial product' and consequently whether the appellant was providing financial services without the required licence: see *International Litigation Partners Pte Ltd v Chameleon Mining NL* (2012) 246 CLR 455, 463–4 [24]–[26] (French CJ, Gummow, Crennan and Bell JJ) ('*International Litigation Partners*'); *Corporations Act* (n 4) ss 761A (definitions of 'financial service', 'financial services business'), 765A(1)(h)(i), 766A(1)(b), 911A, 925A. The complexity of these provisions reinforces the benefit of the money lending exceptions instead relying on the concept of 'financial accommodation'.

[95] See *International Litigation Partners* (n 94) 464 [28]. Their Honours gave as examples bills of exchange, guaranteeing obligations of the creditor and the provision of an overdraft facility.

[96] Ibid 467 [43]–[44].

[97] *Class Order 13/520* (n 25) [6(a)], [6(g)]. The money lending exceptions were not affected by recent amendments to the Class Order: see Australian Securities and Investments Commission, *ASIC Corporations (Amendment) Instrument 2020/721* (27 August 2020).

[98] See *Personal Property Securities (Corporations and Other Amendments) Act 2010* (Cth) sch 1 pt 6 items 121–4; Explanatory Memorandum, Personal Property Securities (Corporations and Other Amendments) Bill 2010 (Cth) 6 [4.1]–[4.3].

[99] See *Personal Property Securities Act* 2009 (Cth) s 12(1); *Corporations Act* (n 4) ss 51–51A.

definition of 'security interest' and sought submissions on whether there should be any restrictions to the relief applying to secondary market purchasers of such interests.[100] ASIC reported that submissions had supported the continuation of the relief in *Class Order 01/1542* and noted that it could deal with any abuse of the legislative provision or its relief through an application to the Panel for a declaration of unacceptable circumstances and orders where appropriate.[101]

As a result, the current ASIC relief in *Class Order 13/520* modifies the 'relevant interest' exception in s 609(1) so that it provides:

> A person does not have a relevant interest in securities merely because of a security interest taken or acquired by the person if:
>
> (a) the security interest is taken or acquired:
>
> (i) in the ordinary course of the person's business of the provision of financial accommodation by any means; or
>
> (ii) for the benefit of one or more other persons in relation to financial accommodation provided by the other persons in the ordinary course of the other persons' business of the provision of financial accommodation by any means; and
>
> on ordinary commercial terms; and
>
> (b) the person whose property is subject to the security interest is not an associate of any other person mentioned in this subsection.
>
> For the purposes of this subsection a security interest includes a negative pledge.[102]

Similarly, the *Class Order 13/520* modifications to the exception to the takeover prohibition in s 611 item 6 apply to

> [a]n acquisition that results from the exercise by a person of a power, or the appointment of a receiver, or receiver and manager, under an instrument or agreement creating or giving rise to a security interest if:
>
> (a) the ordinary business of:

[100] Australian Securities and Investments Commission, *Takeovers, Compulsory Acquisitions and Substantial Holdings: Update to ASIC Guidance* (Consultation Paper No 193, November 2012) 12.

[101] Australian Securities and Investments Commission, *Response to Submissions on CP 193 Takeovers, Compulsory Acquisitions and Substantial Holdings* (Report No 350, June 2013) 7 [12].

[102] *Class Order 13/520* (n 25) [6(a)].

(i) the person; or

(ii) a person or persons for the benefit of whom the person took or acquired the security interest;

includes the provision of financial accommodation by any means; and

(b) the person took or acquired the security interest:

(i) in the ordinary course of their business of the provision of financial accommodation by any means; or

(ii) for the benefit of one or more other persons in relation to financial accommodation provided by the other persons in the ordinary course of the other persons' business of the provision of financial accommodation by any means; and

on ordinary commercial terms.

For the purposes of this item a security interest includes a negative pledge.[103]

III Current Scope of the Money Lending Exceptions

There were two significant legal and policy questions affecting the operation of the money lending exceptions raised in the *Donaco* decision. Although the *Donaco* Panel only recommended that ASIC review *Class Order 13/520* in light of the issues arising from its decision,[104] both issues are also relevant to the application of the legislative provisions without the modifications in the Class Order. The first issue relates to the time at which the financier must not be an associate of the person granting the security interest in order for the s 609(1) exception to apply so that the financier does not have a 'relevant interest' for the purposes of the legislation and Class Order.[105] The second issue raises fundamental questions concerning the operation of both money lending exceptions in circumstances where the financier obtains an equity interest in the company's shares under or in addition to the secured lending arrangements.

A *Exclusion for Associates*

The question concerning the time at which the exclusion for associates applies to the money lending exception for relevant interests was first raised in *Resource*

[103] Ibid [6(g)].

[104] *Donaco* (n 3) [97] (President O'Sullivan, Members In't Veld and McKenzie).

[105] See *Corporations Act* (n 4) s 609(1)(b); *Class Order 13/520* (n 25) [6(a)].

Generation Ltd ('*Resource Generation*').[106] In that decision, ASIC argued that the exception for relevant interests in s 609(1) would cease to apply if the Panel found that the financier and grantor were associates at a later time.[107] The contrary view was put forward by a party that contended that the availability of the s 609(1) exception was not affected by subsequent events.[108] This issue did not need to be decided by the *Resource Generation* Panel.[109] However, the following statement by the *Donaco* Panel suggests that it did not agree with ASIC's argument in the *Resource Generation* decision:

> We do not accept the proposition that '*consequent conduct*' as submitted by the Applicants can affect the application of section 609(1) which on a reading of the provision is measured at the time the security interest '*is taken or acquired*'.[110]

This statement by the *Donaco* Panel is both consistent with a literal interpretation of the s 609(1) exception and appropriate from a policy perspective. Other statements in *Donaco* suggested a contrary approach, namely that ASIC had agreed that the application of s 609(1) '*generally* should not fall away' and where the *Donaco* Panel considered concluding that s 609(1) did not apply due to circumstances including those surrounding the lender's subsequent acquisition of the 9.71% parcel.[111] However, it is unnecessary to adopt this contrary approach to applying s 609(1) to maintain the purposes underpinning the takeover provisions. This is because the Panel can determine that there are unacceptable circumstances even if an exception applies.[112] For example, the Panel may conclude based on subsequent evidence that the financier and grantor have become associates after the security is taken or acquired, which would combine their interests for the purposes of the takeover prohibition and substantial holding disclosure.[113] This would allow the Panel to make a declaration of unacceptable circumstances and orders in light of the policy purposes underpinning the takeover provisions.[114]

[106] *Resource Generation* (n 29).

[107] Ibid [116] (President Scheinkestel, Members Charles and Friedlander).

[108] Ibid [117].

[109] Ibid [118].

[110] *Donaco* (n 3) [57] (President O'Sullivan, Members In't Veld and McKenzie) (emphasis in original). The footnote to this text stated further that '[i]tem 6 of section 611 is also focused on when the lender "*took or acquired the security interest*"': at [57] n 17 (emphasis in original).

[111] See ibid [65], [91] (President O'Sullivan, Members In't Veld and McKenzie) (emphasis added).

[112] *Corporations Act* (n 4) s 657A(1); *Donaco* (n 3) [65]–[66].

[113] See *Corporations Act* (n 4) ss 9 (definition of 'substantial holding'), 606(1), 610, 671B(1).

[114] See ibid ss 602(c), 657A(2)(b), (3)(a)(i).

B *Lending Arrangements with Equity Component*

The second issue in the *Donaco* decision relating to the money lending exceptions raises a fundamental question concerning their scope. This question relates to whether the exceptions should apply where the lending arrangements include giving the financier an equity interest relating to the company. In *Donaco*, the financier was granted options over USD6 million of Donaco shares (representing a relevant interest in 4.4% of the company) in conjunction with it lending over USD34 million secured by Donaco shares.[115] The *Donaco* Panel was particularly concerned about the granting of the options to the financier and the impact that this equity component had on the applicability of the money lending exceptions as modified by *Class Order 13/520*.[116]

These concerns arose from the unanswered question as to whether the equity component of the lending arrangement meant that it was not 'on ordinary commercial terms' in the 'ordinary course' of the lender's business in providing financial accommodation.[117] In response to these concerns, the lender argued that it was 'commonplace' for non-bank lenders to take equity positions.[118] ASIC countered that this was

> contrary to the ordinary provision of financial accommodation where a lender is assumed to have no interest in the affairs of the issuer of the secured shares beyond those that impact its ability to liquidate the securities to obtain repayment of its debt.[119]

The *Donaco* Panel contemplated finding that the money lending exception for relevant interests in s 609(1) did not apply in light of the options and/or overall circumstances in this case.[120] However, the Panel declined to do this, particularly in light of the legal issues surrounding the scope of the money lending exceptions and the impact that this finding would have on the provision of non-traditional lending in Australia.[121]

115 *Donaco* (n 3) [5], [10] (President O'Sullivan, Members In't Veld and McKenzie).

116 See ibid [5]–[6], [96].

117 Ibid [81].

118 Ibid [87]. This view was supported by a chairman of a listed company who was also a Donaco shareholder: at [90], [90] n 30. In relation to equity participation by banks, see, eg, Nora L Scheinkestel, 'The Debt–Equity Conflict: Where Does Project Financing Fit?' (1997) 8(2) *Journal of Banking and Finance Law and Practice* 103, 118–20.

119 *Donaco* (n 3) [85] (President O'Sullivan, Members In't Veld and McKenzie).

120 Ibid [91].

121 Ibid [93], [95]. The Panel considered that the remaining concern, which related to the adverse impact on the control of Donaco given other significant holders, may have been able to be resolved in this case: see at [95].

The scope of the money lending exceptions depends on the interpretation of the combination of three key phrases that provide the cornerstone for the exceptions in the legislation and ASIC Class Order. These require that the 'security interest [be] taken or acquired in the ordinary course of the person's business' (with minor variations in wording that do not affect the meaning)[122] and 'on ordinary commercial terms',[123] where the business relates to 'the provision of financial accommodation by any means'.[124] As discussed in Part II(D) above, the expression 'financial accommodation' captures any means of providing finance in order to supply a want of money. Accordingly, this phrase does not place any limitation on the operation of the exceptions in this context.

The remaining two phrases require that the security interest arise 'in the ordinary course of business' and 'on ordinary commercial terms'. There have not been any court or Panel decisions in relation to the meaning of these terms in the context of the money lending exceptions, apart from the decision relating to the application of the *Corporations Law* exceptions to a receiver in *Haughton Properties Pty Ltd (rec and mgr apptd) v Sandridge City Development Company Pty Ltd* ('*Haughton*').[125] In that decision, the court found that a receiver was not in the business of lending money 'save in exceptional circumstances'.[126] This produced an anomalous result as a literal interpretation of the exceptions would have meant that the appointment of the receiver could breach the takeover prohibition, before the receiver obtained the benefit of the exception that was designed to apply in relation to the exercise of their powers.[127] In light of this, the court in *Haughton* adopted a purposive approach in its interpretation of the provisions, in order to disregard the interests of the receiver at the time of their appointment by a lender who was covered by the exception to the 'relevant

[122] *Corporations Act* (n 4) s 609(1)(a). The exception for the takeover prohibition uses the similar phrase 'took or acquired the security interest in the ordinary course of their business': at s 611 item 6(b). ASIC's Class Order includes the same wording in its modification of both provisions, except that it inserts sub-para (i) before the phrase 'in the ordinary course' in both cases: *Class Order 13/520* (n 25) [6(a)], [6(g)].

[123] *Corporations Act* (n 4) ss 609(1)(a), 611 item 6(b); *Class Order 13/520* (n 25) [6(a)], [6(g)].

[124] *Corporations Act* (n 4) ss 609(1)(a), 611 items 6(a)–(b); *Class Order 13/520* (n 25) [6(a)], [6(g)].

[125] (1995) 13 ACLC 1 ('*Haughton*').

[126] Ibid 6 (Hayne J).

[127] Ibid. The exception provided that the takeover prohibition did

> not apply in relation to an acquisition of shares by a person whose ordinary business includes the lending of money, which acquisition results from the exercise by that person of a power in relation to the shares in connection with the transaction in connection with the lending of money.

See also *Corporations Law* (n 44) s 630.

interest' provision.[128] This anomaly was rectified in the amendments to the *Corporations Law* exceptions following the CASAC Legal Committee's report.[129]

There is judicial guidance on the meaning of the terms 'in the ordinary course of business' and 'on ordinary commercial terms' in the context of different legislation. Both of these terms were used in an exception to the prohibition on loans to directors in the *Companies (New South Wales) Code* (NSW) ('*Companies Code*').[130] That exception applied to loans, guarantees or securities provided 'in the ordinary course of its ordinary business where … that business includes the lending of money', and 'made on ordinary commercial terms'.[131] In *Corumo Holdings Pty Ltd v C Itoh Ltd* ('*Corumo*'), it was found that a company that had a principal business as a contractor, project manager and consultant satisfied this requirement as it was also a financier that had made loans totalling around $100 million in Australia:

> It certainly borrowed money and then lent the money so borrowed. It follows, in my view, that it made loans in the ordinary course of its business. Nor does it appear that there was anything exceptional or extraordinary in the circumstances in which it made its loans.[132]

A similar approach was adopted in relation to the meaning of both 'in the ordinary course of business' and 'on ordinary commercial terms' in *Hunters Products Group Ltd (in liq) v Kindly Products Pty Ltd*.[133] That case was decided in the context of the *Companies Code* prohibition on a company giving financial assistance in relation to an acquisition of its shares.[134] The court found in that case that these terms did 'not extend to cover those transactions which are extraordinary', such as the transactions in that case that had been devised to facilitate

[128] *Haughton* (n 125) 7 (Hayne J). This meant that the receiver's interests were

> disregarded where the receiver is appointed by a person whose ordinary business includes lending money and the receiver is appointed … only because of the security given for the purposes of a transaction entered into in the ordinary course of business in connection with lending money and the transaction is not one entered into with an associate of the person concerned.

See also *Corporations Law* (n 44) s 38.

[129] See above Part II(C).

[130] *Companies Code* (n 62) s 230(3)(f).

[131] Ibid.

[132] (1991) 24 NSWLR 370, 400–1 (Meagher JA, Kirby P agreeing at 374, Samuels JA agreeing at 389) ('*Corumo*').

[133] (1996) 20 ACSR 412 ('*Hunters Products*').

[134] See *Companies Code* (n 62) s 129(1). The corresponding exception for the current prohibition applies where 'the company's ordinary business includes providing finance' and 'the financial assistance is given in the ordinary course of that business and on ordinary commercial terms': *Corporations Act* (n 4) s 260C(2).

contravention of the provision.[135] This can be contrasted with the outcome in *Corumo*, where the court concluded that the loans were made 'on ordinary commercial terms' in circumstances where the rate of interest for the loans was 'slightly higher' than the rate at which the financier borrowed the money.[136] In coming to this conclusion, the court rejected the suggestion that it was

> commercially very rare for a lender who borrowed money and then lent the money so borrowed to an entity in which it had an equity interest to charge a margin for its services of lending.[137]

This is significant given that it recognises the practice of some financiers having equity interests in companies to which they lend money, which supports the lender's argument in *Donaco* that 'taking equity positions alongside its debt positions was in the ordinary course of its business of providing financial accommodation'.[138] The lender gave evidence to the *Donaco* Panel that approximately 80% of its global and 75% of its Australian debt positions involved it having 'some form of equity participation … either through direct holdings, options or warrants'.[139]

The above analysis demonstrates that secured lending arrangements involving the lender obtaining an equity interest relating to the company's shares could satisfy the three key legislative requirements in the money lending exceptions. First, the lender would be providing 'financial accommodation by any means' where their business borrowed and lent money to supply a want of money. Secondly, obtaining an equity interest alongside the debt interest would not in itself be exceptional, and so could be 'made on ordinary commercial terms', provided the terms themselves are not extraordinary. The final requirement that the lender take the security interest 'in the ordinary course' of their business could similarly be satisfied in relation to obtaining an equity interest where the terms of the transaction are not considered extraordinary.

IV Policy Considerations

Relying solely on the current wording of the money lending exceptions creates the potential for transactions to undermine the purposes of the takeover provisions. This is consistent with submissions raising the potential for abuse in

135 *Hunters Products* (n 133) 431 (Nathan J).

136 *Corumo* (n 132) 401 (Meagher JA, Kirby P agreeing at 374, Samuels JA agreeing at 389).

137 Ibid.

138 *Donaco* (n 3) [84] (President O'Sullivan, Members In't Veld and McKenzie). See also above n 118 and accompanying text.

139 *Donaco* (n 3) [84].

the context of the proposal by the CASAC Legal Committee to extend the operation of the exceptions.[140] The discussion in this Part analyses three key aspects of the policy implications of allowing lenders to acquire equity interests as part of or in addition to secured lending arrangements covered by the exception to the 'relevant interest' provisions. It starts by examining market transparency and fairness considerations, which reinforce the policy purposes underpinning the takeover provisions. The second and final sections focus on the development of the exceptions analysed in Part II above and analogous situations in relation to the takeover provisions respectively to support the reform suggestions set out in Part V.

A *Market Transparency and Fairness*

There are two key sets of purposes underpinning the takeover provisions in the *Corporations Act* — namely, to ensure control is acquired in an 'efficient, competitive and informed market' and to implement the Eggleston principles providing shareholder protection.[141] The Eggleston principles are designed to ensure that shareholders have sufficient information and time to consider, and a reasonable and equal opportunity to participate in, proposals involving an acquisition of a substantial interest in certain companies.[142] Both of these economic and shareholder protection purposes include the takeover policy imperative of ensuring that the market in which control is acquired and the persons from whom the shares are purchased are properly informed. The market referred to in this context is often referred to as the 'market for corporate control',[143] which performs the function of allowing control of a company to shift to those who can manage corporate assets most profitably.[144]

Where the shares being acquired are listed on the ASX, the extent to which the securities market generally is informed becomes crucial. The efficient operation of the securities market depends, to a significant extent, on the ability of relevant information to be incorporated into the market price of the

[140] See above Part II(C).

[141] *Corporations Act* (n 4) s 602.

[142] See ibid ss 602(b)–(c), 606(1)(a).

[143] Henry G Manne, 'Mergers and the Market for Corporate Control' (1965) 73(2) *Journal of Political Economy* 110, 113.

[144] See, eg, Daniel R Fischel, 'Efficient Capital Market Theory, the Market for Corporate Control, and the Regulation of Cash Tender Offers' (1978) 57(1) *Texas Law Review* 1, 5.

securities.[145] Accordingly, it has been observed in academic literature that transparency is a key goal in securities markets generally.[146] This is also reflected in international regulatory objectives.[147]

In addition to undermining transparency, a lack of disclosure also raises issues of fairness in the market. This is consistent with the approach adopted in the *Eggleston Report*, which noted that takeovers needed to be regulated 'to ensure fair treatment of shareholders'.[148] There is debate surrounding whether the investor confidence arising from market fairness improves efficiency in the securities market, which is argued to arise from increased market liquidity resulting from a greater willingness of investors to participate in the market.[149] In addition, there is significant divergence in relation to the extent to which the takeover regulatory regimes around the world provide shareholder protection in the form of equality of treatment based on fairness considerations.[150]

[145] See, eg, Eugene F Fama, 'Efficient Capital Markets: A Review of Theory and Empirical Work' (1970) 25(2) *Journal of Finance* 383, 383; Gill North and Ross P Buckley, 'A Fundamental Re-Examination of Efficiency in Capital Markets in Light of the Global Financial Crisis' (2010) 33(3) *University of New South Wales Law Journal* 714, 728.

[146] See, eg, Adam O Emmerich et al, 'Fair Markets and Fair Disclosure: Some Thoughts on the Law and Economics of Blockholder Disclosure, and the Use and Abuse of Shareholder Power' (2013) 3(1) *Harvard Business Law Review* 135, 136; Janis Sarra, 'Dancing the Derivative *Deux Pas*, the Financial Crisis and Lessons for Corporate Governance' (2009) 32(2) *University of New South Wales Law Journal* 447, 477.

[147] See, eg, International Organization of Securities Commissions, *Objectives and Principles of Securities Regulation* (Document, May 2017) 3 ('*IOSCO Principles*'); *Parliament and Council Directive EU/2004/25/EC of 21 April 2004 on Takeover Bids* [2004] OJ L 142/12, recitals 18, 27, arts 8(1), 9 ('*EU Takeover Directive*'); *Parliament and Council Directive EU/2004/109/EC of 15 December 2004 on the Harmonisation of Transparency Requirements in Relation to Information about Issuers Whose Securities Are Admitted to Trading on a Regulated Market and Amending Directive 2001/34/EC* [2004] OJ L 390/38, art 9.

[148] *Eggleston Report* (n 7) 7 [14]. See also Chris Maxwell, 'The New Takeover Code and the NCSC: Policy Objectives and Legislative Strategies for Business Regulation' (1982) 5(1) *University of New South Wales Law Journal* 93, 94–5.

[149] See, eg, Janet Austin, 'Protecting Market Integrity in an Era of Fragmentation and Cross-Border Trading' (2014) 46(1) *Ottawa Law Review* 25, 28; *CLERP 4* (n 10) 8–9, 11; Maxwell (n 148) 96–7. Cf Mannolini (n 5) 357; Sheehy (n 5) 222 n 20.

[150] See, eg, John Armour and David A Skeel Jr, 'Who Writes the Rules for Hostile Takeovers, and Why?: The Peculiar Divergence of US and UK Takeover Regulation' (2007) 95(6) *Georgetown Law Journal* 1727, 1751. This approach has generally been adopted in, for example, Australia, the European Union and the United Kingdom, with the United States instead relying on court enforcement of directors' duties: at 1730; *EU Takeover Directive* (n 147) art 3(1)(a); *Corporations Act* (n 4) ss 602(c), 606, pts 6.4–6.6. See especially at ss 618, 619(1). Adaptations of both the United Kingdom and United States approaches are found in key Asian jurisdictions: Umakanth Varottil and Wai Yee Wan, 'Hostile Takeover Regimes in Asia: A Comparative Approach' (2019) 15(2) *Berkeley Business Law Journal* 267, 269–70.

However, as in the case of transparency, the need for market fairness has been recognised in academic literature and international regulatory objectives, both in relation to takeover transactions[151] and the securities market generally.[152] This analysis reinforces the fundamental importance of the takeover policy purposes of ensuring that both the market and shareholders are properly informed of acquisitions of substantial interests.

B *Historical Approach*

As set out in Part II above, the money lending exceptions to the 'relevant interest' provisions from 1971 until 2000 applied where the shares were held, or powers were exercisable, by the lender 'only by reason of a security given' for the purposes of a transaction meeting the remaining requirements.[153] This wording supports the view that the money lending exception for a 'relevant interest' was drafted to apply to the control that a lender had over a company's shares only for the purposes of the security itself. Consequently, the original exception to the 'relevant interest' provision was not intended to cover any additional equity interests taken by the lender for other purposes, such as to improve the profitability of the lending arrangements. This is consistent with ASIC's argument in *Donaco* that the assumption underlying 'the ordinary provision of financial accommodation' is that 'a lender is assumed to have no interest in the affairs of the issuer of the secured shares beyond those that impact its ability to liquidate the securities to obtain repayment of its debt'.[154]

The versions of the 'relevant interest' exception following the implementation of the CASAC Legal Committee report in 2000 did not include the qualification 'only by reason of a security given'. Instead, these subsequent exceptions have provided that the lender 'does not have a relevant interest in securities *merely because of a … security* [or security interest] *taken for the purpose of a transaction*' if the '*security* [or security interest] *is taken or acquired in the ordinary course*' of the required business and 'on ordinary commercial terms'.[155] The

[151] See, eg, Sarra (n 146) 483; *EU Takeover Directive* (n 147) arts 3(1)(a), 15–16.

[152] See, eg, Austin (n 149) 27–8; Ian B Lee, 'Fairness and Insider Trading' [2002] (1) *Columbia Business Law Review* 119, 121, 142, 191–2; *IOSCO Principles* (n 147) 3. See generally Helen Anderson, 'Creditors' Rights of Recovery: Economic Theory, Corporate Jurisprudence and the Role of Fairness' (2006) 30(1) *Melbourne University Law Review* 1, 2, 26.

[153] See above nn 58, 61 and accompanying text. The earlier exception for the purposes of the definition of subsidiary used the similar phrase of 'by way of security only': *Companies Act* (n 38) s 6(3)(d).

[154] *Donaco* (n 3) [85] (President O'Sullivan, Members In't Veld and McKenzie).

[155] *Corporations Law* (n 44) s 609(1), as inserted by *Corporate Law Economic Reform Program Act 1999* (Cth) (n 74) sch 1; *Class Order 13/520* (n 25) [6(a)] (emphasis added).

new wording thus concentrates on the circumstances in which the security is acquired, instead of focusing on the reason why the lender has an interest in the company's shares. However, as under the earlier version of the exception applicable when the court in *Corumo* recognised that lenders acquired equity interests, such acquisitions would ordinarily need to be disclosed in relation to a listed company (unless they are covered by another exception to the 'relevant interest' definition or fall below the 5% threshold for substantial holding disclosure).[156]

On the other hand, the money lending exceptions to the takeover prohibition have included broader wording since they were first introduced in *CASA* in 1981. These exceptions have applied to acquisitions resulting from a person exercising a power under the security if the security arose in the ordinary course of the required business and on ordinary commercial terms.[157] However, it is important to recognise that the exception to the takeover prohibition at the 20% threshold applies at the point at which the security is being exercised, and that the substantial holding disclosure requirements would apply where the shares subject to the security are in a listed company.[158] This can be contrasted with the money lending exception for relevant interests, which shields secured lending arrangements that satisfy the requirements in the exception from both the takeover prohibition and the substantial holding provisions.[159]

C *Approach in Analogous Situations*

It is also important to consider the approach adopted in analogous situations in the context of the takeover provisions. There are four situations that are particularly relevant to an analysis of the operation of the money lending exceptions. The first two are the types of equity interests that the lender in *Donaco* advised that it frequently obtained in conjunction with its debt interests (apart from direct holdings), namely options and warrants.[160] Options over issued shares give the taker the right to either buy (in a 'call option') or sell (in a 'put option') those shares, with the writer agreeing to sell or buy them in the future at an

156 See *Companies Code* (n 62) s 230(3)(f). See also above nn 131–2, 136–7and accompanying text.

157 *CASA* (n 1) s 12(l); *Corporations Law* (n 44) s 611 item 6; *Class Order 13/520* (n 25) [6(g)].

158 See *Donaco* (n 3) [57] n 17 (President O'Sullivan, Members In't Veld and McKenzie); *Corporations Act* (n 4) ss 9 (definition of 'substantial holding'), 671B(1).

159 *Corporations Act* (n 4) s 609(1).

160 *Donaco* (n 3) [84] (President O'Sullivan, Members In't Veld and McKenzie).

agreed price and time.[161] Warrants also expose the holder to changes in the value of the underlying asset over time, with many warrants having similar features to options over issued shares (particularly the regular forms of 'call warrant' and 'put warrant').[162] The third situation is the treatment of equity derivatives, the value of which is similarly derived from fluctuations in the value of the underlying securities (in this case, shares in a listed company).[163] Finally, the Panel's approach to the exception for rights issues provides an example of the Panel applying additional policy constraints on the operation of an exception to the takeover prohibition, in the context of a company requiring funds for its business.[164]

The exception relating to options is particularly relevant to this analysis. This is because the *Donaco* Panel was especially concerned about whether the lender should have had the benefit of the money lending exceptions in circumstances where the secured lending arrangements involved the lender being issued options over the company's shares.[165] Focusing on a call option, the takeover provisions deem the holder to have a relevant interest in the shares that they have the right to buy at the time that the option is granted.[166] This recognises the control that the holder has over the shares that are the subject of the option, as it requires the writer of the option to have sufficient shares to fulfil the agreement if the option is exercised. Consequently, entering into the option agreement could trigger the substantial holding disclosure requirements, and also potentially breach the takeover prohibition, unless an exception applies.[167] Although there is an exception for options that are traded on the market (which would not have applied in the *Donaco* context), this exception only applies to the takeover prohibition.[168] This means that option agreements relating to shares in listed companies would ordinarily be subject to substantial holding disclosure, unless another exception applies.

[161] See *Regulatory Guide 5* (n 87) 42 [RG 5.155]–[RG 5.157]. Options over issued shares are the most relevant given that the takeover prohibition applies to 'voting shares', which must be issued: see at 43 [RG 5.159]; *Corporations Act* (n 4) ss 9 (definition of 'voting share'), 606(1).

[162] See *Regulatory Guide 5* (n 87) 48–9 [RG 5.190]–[RG 5.192].

[163] See *Corporations Act* (n 4) s 761D; Takeovers Panel, *Equity Derivatives* (Guidance Note No 20, 4 October 2021) 2 [5] ('*Guidance Note 20*'); Alexandra Eggerking, 'The Disclosure of Equity Derivatives in Australia' (2014) 32(4) *Company and Securities Law Journal* 264, 264, 266.

[164] See *Corporations Act* (n 4) s 611 item 10; Takeovers Panel, *Rights Issues* (Guidance Note No 17, 27 June 2018) ('*Guidance Note 17*'). See especially at 2 [5].

[165] *Donaco* (n 3) [72], [96] (President O'Sullivan, Members In't Veld and McKenzie).

[166] *Corporations Act* (n 4) s 608(8). This assumes that the writer of the option has a relevant interest in the shares at the time the agreement is entered into: at s 608(8)(a).

[167] See ibid ss 9 (definition of 'substantial holding'), 606(1), 611, 671B.

[168] See ibid ss 9 (definition of 'substantial holding' para (a)(ii)), 609(6), 671B(7).

Warrants with comparable features to options over issued shares would similarly lead to the holder having a relevant interest at the time of entering into the agreement, due to the right to acquire the shares underlying the warrant.[169] As there is not a corresponding exception in the legislation for market-traded warrants to that applicable for options, ASIC has modified the application of the takeover provisions for quoted warrants.[170] However, this modification does not affect the relevant interest of the holder of the warrant in the context of the substantial holding provisions.[171] As a result, a warrant-holder would similarly need to comply with any applicable substantial holding disclosure unless they have the benefit of another exception.

Equity derivatives have caused difficulties for takeover regulation. The first judicial review applications relating to Panel decisions concerned declarations of unacceptable circumstances and orders arising from the use of equity derivatives.[172] Amendments were made to the *Corporations Act* following the quashing of these Panel decisions, including to allow the Panel to make declarations and orders based on the policy purposes underpinning the takeover provisions.[173] This was important as equity derivatives avoid triggering the takeover prohibition and substantial holding disclosure requirements in the legislation. The reason for this is set out in the following explanation of a 'cash settled equity swap' from the first judicial review decision:

> [A]n arrangement between an investor and a bank whereby the bank agrees to pay the investor an amount equal to the difference between the value of a given number of equity securities at the time of the closing out of the swap and the value of those equity securities at the time when the arrangement was entered into. Under such an arrangement the investor does not acquire any interest in any equity securities and the investor has no right to call for delivery of equity securities or to require the bank to undertake any action involving the acquisition, holding or disposal of equity securities. Closing out of, and settlement

169 See ibid s 608(8); *Regulatory Guide 5* (n 87) 50–1 [RG 5.198].

170 See *Regulatory Guide 5* (n 87) 51–2 [RG 5.198]; Australian Securities and Investments Commission *ASIC Class Order — Warrants: Relevant Interests and Associations* (CO 13/526, 10 November 2015) ('*Class Order 13/526*').

171 See *Regulatory Guide 5* (n 87) 51 [RG 5.198]; *Class Order 13/526* (n 170) [5(a)].

172 See *Glencore International AG v Takeovers Panel* (2005) 220 ALR 495, 497–8 [1]–[3] (Emmett J) ('*Glencore International AG [No 1]*'); *Glencore International AG v Takeovers Panel* (2006) 151 FCR 77, 79–80 [1]–[3] (Emmett J); Emma Armson, 'Certainty in Decision-Making: An Assessment of the Australian Takeovers Panel' (2016) 38(3) *Sydney Law Review* 369, 390–2.

173 See *Corporations Amendment (Takeovers) Act 2007* (Cth) sch 1 items 3–4; Explanatory Memorandum, Corporations Amendment (Takeovers) Bill 2007 (Cth) 1–2 [1.1]–[1.6], 5 [3.8].

> under, such a swap will, depending on the terms of the arrangement, be either at the option of one party or be automatic.[174]

In light of this, the Panel released a Guidance Note indicating that the failure to disclose equity derivatives in circumstances in which substantial holding disclosure would be required may give rise to unacceptable circumstances.[175] This policy was implemented in response to concerns that the writer of equity derivatives normally has an incentive to hedge its position, which usually involves their acquiring the underlying shares and then reversing this at the conclusion of the transaction.[176] Consequently, where the derivatives relate to a company's shares, they can affect the control of the company through their impact on the availability of the underlying shares in the market.[177] This is consistent with the view that interests arising from derivatives should be disclosed on the grounds of market fairness.[178]

The final situation relating to rights issues similarly involves the application of the substantial holding disclosure requirements for listed companies, as the rights issues exception only applies in relation to the takeover prohibition.[179] It is also significant in providing an example of where the Panel has set out guidance on when it considers that circumstances may be unacceptable, even where the legislative requirements for an exception to the takeover prohibition are satisfied.[180] *Guidance Note 17* focuses on the factors that the Panel takes into account in relation to this, including the company's reasons for seeking the funds and disclosure of the potential control effects of the transaction.[181] This reinforces the importance of ensuring that the exceptions to the takeover prohibition are not misused and that the market is adequately informed of transactions that have the potential to impact on the control of a company.

174 *Glencore International AG [No 1]* (n 172) 498 [3] (Emmett J).

175 *Guidance Note 20* (n 163) 3 [9].

176 See ibid 2 [6].

177 Ibid 2 [7].

178 Sarra (n 146) 486. For a discussion of the need for transparency in relation to such transactions, see, eg, Gill North and Ross Buckley, 'The *Dodd-Frank Wall Street Reform and Consumer Protection Act*: Unresolved Issues of Regulatory Culture and Mindset' (2011) 35(2) *Melbourne University Law Review* 479, 503.

179 See *Corporations Act* (n 4) s 611 item 10. See also at s 611 item 13.

180 See *Guidance Note 17* (n 164) 2 [4]–[5].

181 See ibid 2 [6(a)], 3–4 [6(c)], 6 [11]–[12], 9–10 [31].

V Reform Proposals

The discussion in Part III demonstrates that the practice of lenders acquiring equity interests is well recognised (particularly for non-bank lenders), with the analysis in Part IV establishing that such acquisitions should be subject to substantial holding disclosure where they occur as part of secured lending arrangements affecting shares in listed companies. As discussed in Part IV, this is consistent with: the drafting of the 'relevant interest' exception for money lending over time; the current position on the exceptions to the takeover prohibition for market-traded options and rights issues; ASIC relief relating to warrants; and the Panel's Guidance Note applying to equity derivatives. However, as substantial shareholding disclosure only applies to listed companies above the 5% threshold, there are remaining policy concerns arising from the ability of lenders to acquire equity positions where they hold security interests that have not been disclosed due to the operation of the money lending exceptions. This is due to the potential for the exceptions to be misused in order to obtain control over a company subject to the takeover provisions, similar to situations that can arise in relation to the use of the exceptions applying to rights issues.

As in the case of rights issues, the concerns relating to the misuse of the money lending exceptions depend on the circumstances in a particular case. This means that it would not be feasible for *Class Order 13/520* to respond effectively to these concerns, given that it applies generally in relation to the operation of the money lending exceptions. Given ASIC's submissions before the Panel in *Donaco*, it would be open to ASIC to narrow the scope of its Class Order in the context of the review suggested by the *Donaco* Panel.[182] This could lead to the Class Order not applying where a lender acquires an equity position in addition to having a security interest that is covered by the money lending exceptions. However, such an amendment would be inconsistent with the current scope of the exceptions as analysed in Part III(B) above.

Given this, the most appropriate response would be for the Panel to clarify its position in relation to the operation of the money lending exceptions, either by amending its guidance on unacceptable circumstances or by issuing a new Guidance Note on this topic.[183] First, it would be helpful for the Panel to provide guidance on its position on when the requirement in s 609(1)(b) of the *Corporations Act* that the person granting the security interest not be an associate of the financier applies. As discussed in Part III(A) above, this should be at the time at which the security interest is taken. Secondly, the Panel should

[182] *Donaco* (n 3) [97] (President O'Sullivan, Members In't Veld and McKenzie).

[183] Takeovers Panel, *Unacceptable Circumstances* (Guidance Note No 1, 11 July 2018) ('*Guidance Note 1*').

set out its expectation that information relating to equity participation by a lender covered by the money lending exception should be disclosed to the market under the substantial holding requirements. Finally, it should be emphasised that the money lending exceptions should not be used to obtain control over companies and that the Panel will exercise its powers to declare unacceptable circumstances and/or make orders where this occurs even if the legislative requirements for the exceptions are satisfied.

In particular, it would be desirable for the Panel to set out circumstances that are likely to be unacceptable where a lender is relying on the money lending exceptions. There are two circumstances that would clearly be unacceptable, consistent with the *Donaco* decision. The first is where the lender and the person granting the security become associated after the security interest is taken or acquired.[184] The second situation aligns with that in *Donaco*, being where an equity interest is acquired or exercised at a time that there is a default under the security interest that has not yet been disclosed to the market.[185] In relation to the latter situation, this should apply as a 'blackout period' preventing the lender obtaining or exercising equity interests throughout the period that the market is not aware that its security can be enforced. The Panel's guidance should apply to equity participation involving shares, options, warrants and equity derivatives.

The Panel should also provide guidance in relation to other circumstances where a lender obtains an equity position in addition to relying on the money lending exceptions. As identified in the *Donaco* decision, this is particularly concerning where the lender's security interest relates to shares representing a controlling stake in a company to which the takeover provisions apply.[186] Accordingly, the Panel should indicate that it is likely to find there to be unacceptable circumstances where a lender relying on the money lending exceptions has a security interest equalling or exceeding the 20% threshold for the takeover prohibition and takes an equity position representing more than 3% of the voting power in the company. This would, in effect, restrict a lender in such circumstances to equity positions corresponding to a single use of the 3% creep exception during the time that, in reliance on the money lending exceptions, the security interest is not disclosed.[187] Such an approach would be appropriate, given that the operation of the 3% creep exception is based on the premise that

[184] See above Part III(A).

[185] This is also consistent with the insider trading prohibition: see *Corporations Act* (n 4) pt 7.10 div 3; *Guidance Note 1* (n 183) 11 [32(b)].

[186] *Donaco* (n 3) [96] (President O'Sullivan, Members In't Veld and McKenzie).

[187] Cf *Corporations Act* (n 4) s 611 item 9.

the market is aware of the gradual increase in a person's control over the company's shares.[188]

VI Conclusion

The scope of the money lending exceptions in the takeover provisions has expanded through amendments since the initial exception was introduced into corporate takeover regulation. The first exception in s 609(1) of the *Corporations Act* disregards a financier's power over shares for the purposes of the 'relevant interest' provisions, so that they can take their security without being subject to the takeover prohibition or substantial holding disclosure requirements in the Act. In contrast, the second exception, in s 611 item 6, applies only in relation to the takeover prohibition where the powers under the security are exercised. This means that enforcement of the security would be subject to substantial holding disclosure where the affected shares are in a listed company.

Of the key requirements in the money lending exceptions, only the need for the security to arise in 'the ordinary course of business' of the lender has remained constant throughout the history of the exceptions. This was later supplemented by the requirement for the security to be acquired or taken 'on ordinary commercial terms'.[189] However, the circumstances in which these requirements apply have changed over time and were extended to include where the lender provides 'financial accommodation by any means' in 2002.[190] Each of these requirements could be satisfied where the lender has equity participation in addition to the secured lending arrangements covered by the exceptions, in light of the case analysis in this article. This is consistent with acceptance of the practice of lenders taking equity positions in the course of their business.[191]

Although the money lending exceptions allow lenders to also obtain equity positions, this can give rise to significant policy concerns. This is because the exceptions can be misused to acquire control of a company contrary to the market transparency and fairness principles that underpin securities regulation and the economic and shareholder protection purposes underlying the takeover provisions, which are designed to ensure that market participants are properly informed. These concerns underlie ASIC's argument in *Donaco* that the 'ordinary provision of financial accommodation' assumes that the lender's interest

188 See Mayanja (n 18) 322, 323, 331.

189 See above n 73 and accompanying text.

190 See above n 92 and accompanying text.

191 See above Part III(B); *Donaco* (n 3) [87], [90] (President O'Sullivan, Members In't Veld and McKenzie).

in the secured shares is limited to achieving repayment of the debt.[192] However, a review of ASIC's *Class Order 13/520* as recommended by the *Donaco* Panel is unlikely to achieve the most appropriate outcome.[193] This is because it is not feasible to respond to specific circumstances involving misuse in a Class Order applicable to all lenders, and preventing all lenders using the money lending exceptions from taking equity positions would be contrary to the current scope of the exceptions as analysed in this article.

These concerns should instead be addressed by the Panel releasing guidance in relation to its approach to the money lending exceptions. First, the Panel should clarify its position on the time at which the person granting the security should not be an associate under s 609(1)(b) of the *Corporations Act*. The Panel should also set out its expectation that information relating to equity participation by a lender covered by the money lending exceptions should be disclosed to the market under the substantial holding requirements. Finally, the Panel should indicate the circumstances where it is likely to be unacceptable for lenders using the money lending exceptions to obtain equity positions in companies when they hold security interests over the company's shares. In addition to the circumstances arising from the *Donaco* decision, it should be made clear that it is unacceptable for a lender to obtain equity positions at any time that its security interest can be enforced and this is not yet disclosed to the market. It should also be generally unacceptable for a lender with a security interest relating to shares representing at least 20% of the voting power in a company to take an equity position exceeding a further 3% while relying on the money lending exceptions. These measures will ensure that the market is better informed, and will facilitate the role of ASIC and the Panel in responding to misuse of the money lending exceptions.

[192] *Donaco* (n 3) [85] (President O'Sullivan, Members In't Veld and McKenzie).

[193] Ibid [97].