# TAKEOVER FINANCING

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## 1. INTRODUCTION

Although activity in the takeover financing field is not as frenzied as it was in 1986/87, when banks were prepared on little notice to commit billions of dollars to the funding of acquisitions of elephantine proportions, post-crash rationalisations and bear-market bargain hunting (Witness Kerry Packer's recent bid for ANI) have kept the attention of many finance lawyers focused on a number of the issues addressed in this paper. The litigious approach of many takeover lawyers has meant that the law on a number of the more controversial aspects of the relevant legislation has been explored, if not always elucidated, in a growing body of Australian cases.

In this paper I will attempt to concentrate on a number of points which seem to be peculiarly important in takeover financings; aspects relevant only to takeovers, or only to financing generally, are not covered. First I will consider certain regulatory aspects of takeovers which are particularly relevant to the position of financiers, and then I will review a number of problems in taking security which seem to arise most commonly in takeover financings. I will generally confine myself to these aspects insofar as they relate to the acquisition of companies listed on an Australian Stock Exchange.

## 2. REGULATORY ASPECTS

### (a) Sources of funds

The first formal involvement of a financier in a takeover will generally arise from the requirement in paragraph 3(b) of Part A or C (as appropriate) of the Schedule to the Companies (Acquisition of Shares) Act 1981 (or the relevant State Code, "CASA") that, where the consideration for the relevant acquisition includes cash and the offeror is not to provide the cash from its own funds, the statement should set out:

> "particulars sufficient to identify the other person who is, or each of the other persons who are, to provide, whether directly or indirectly, some or all of the cash from his or their own funds and particulars of the arrangements by which

that cash will be provided by that other person on those other persons."[1]

Although this would not seem directly to involve the financier (except by disclosing its identity and "particulars" of the financing), the practice of the National Companies and Securities Commission ("NCSC") is to require the provision of a copy of the relevant loan agreement or if, as is commonly the case (unlike the English position), the loan agreement has not yet been signed, the provision of a letter from the financier confirming the commitment of funds and outlining the relevant terms of the facility.

The latter approach involves real dangers, for many such letters presented to financiers are very short and alarmingly unconditional, notwithstanding that the facility is subject to significant conditions. Where reference to material and unusual conditions precedent is omitted, the financier risks liability under s.52 (as amplified by s.51A) of the Trade Practices Act 1974 for engaging in misleading conduct in providing the letters and, arguably, may be "involved in" (see s.75B of the Trade Practices Act) the contravention of s.52 constituted by the distribution of the Part A or C Statement which omits reference to the material conditions precedent to the provision of the financing.

What level of disclosure is required? In the NCSC Policy Statement: Release 108 the NCSC indicated, consistently with the relevant case law,[2] that the purpose of the disclosure in para 3(b) is to enable the shareholders of the target to satisfy themselves that the offeror will be in a position to pay for any shares acquired by it under the relevant offer. This basic requirement has been elucidated by the NCSC, and by the courts, as follows.

(i) Conditions precedent other than "usual" conditions precedent must be disclosed unless, it seems from ICAL Ltd v. County NatWest Securities Aust Ltd (1988) 13 ACLR 129 at 138-140, the offeror is in a position readily to satisfy them or they are unimportant. In the ICAL case it had not been disclosed that one facility was due for "full clearance" by a date which preceded the expiry of the offer period. This was seen as a "striking omission" and was a fatal defect. On the other hand, Bryson J. held that the non-disclosure of a large number of other conditions (some not insignificant, for example, requiring as a pre-condition the repayment of an existing facility) and details was not material. These conditions were either obvious, readily complied with (or withdrawn by the financiers) or unimportant.

(ii) It is not necessary to disclose fees, interest rates, maturities (subject to paragraph (i) above), facility limits (as long as the facility is confirmed to exceed the maximum amount that could be required under the offer) or even "normal" conditions precedent and security arrangements such as the requirement for furnishing of the shares acquired as security and the non-occurrence of events of default - see Release 108 and ICAL. As Rowland J. stated in Peters (WA) Ltd v. NCSC (1986) 4 ACLR 507 at 510, "I cannot think that the details of the credit facility would be of much interest to [a shareholder]".

(iii) The arrangements need not be formally committed - brief particulars of a broad understanding, subject to such documentation as the financiers may require, are sufficient - Target Petroleum NL v. Petroz NL (1987) 12 ACLR 11 at 21.

Two conclusions can be drawn:

(1) the level of disclosure required is minimal, and is limited to that of unusual, material conditions precedent which cannot readily be satisfied or waived and other material and unusual conditions going to whether or not sufficient funds are actually committed for the full offer period; and

(2) nevertheless, financiers would be prudent in any "letters of commitment" provided to the NCSC or its delegates either to refer to all but the most common conditions (and to note the existence of the "usual" terms[3] or that the commitment is "subject to documentation") or to enclose a copy of the (draft) loan agreement or facility letter, blanking out confidential matters such as fees and margins.

The rather relaxed Australian approach can be contrasted dramatically with that of City Code on Take-overs and Mergers, described by Brian Dale (Sydney Morning Herald, 25/4/89) as "archaic and paternalistic", which governs the English approach. There the requirement that the financial adviser satisfy itself that adequate finance is and will remain available is taken very seriously indeed; to the extent that all documentation must be signed up, and virtually all conditions precedent must be satisfied, before the bid is launched (see General Principle 3 and Rule 24.7 - in "exceptional circumstances" the provisions of cash may be subject to approved conditions).

(b) Deficiencies in "moneylending" exemptions

It would be unnecessary (and inappropriate) to adumbrate the obviously broad scope of the definitions of "associates", "relevant interests" and "interests in shares" in CASE, the Companies Act 1981 (the "Companies Code") and the Foreign Takeovers Act 1975. They have been explored elsewhere.[4] Suffice it to say that it would be the rare takeover financier who would (unless falling within the "moneylending" exceptions referred to below) avoid their reach. Note, for example, that "control" for the purposes of these provisions includes negative control; that is, the power to restrict or prevent disposal such as is commonly conferred by a negative pledge.[5] A similar concept of control is used in the definition of "subsidiaries" etc. in s.7 of the Companies Code. The result of this could be quite serious (in particular, by giving rise to breaches of s.11 of CASA)if the financier or any of its "associates" already had a relevant interest in shares in the target; for example by way of portfolio investment, by virtue of other holdings by way of "security" but not falling within the moneylenders exceptions or through funds management holdings. The financier would also be required to give substantial shareholder notices.

Accordingly, the moneylenders exceptions[6] should probably be given more critical attention than they generally get. The following basic elements must be satisfied to fall within the exclusion (using s.9(8)(a) of CASA as a model).

(i) **The ordinary business of the person who has the relevant interest (the financier) must include <u>the lending of money.</u>**

The expression "the lending of money" has been narrowly construed in the cases, which have principally arisen under the old Moneylending Acts (see, for example, <u>Chow Yoong Hong</u> v. <u>Choong Fah Rubber Manufactory</u> [1962] AC 209 at 217). In <u>Re Securitibank Ltd (No 2)</u> [1978] 2 NZLR 136 at 166 the New Zealand Court of Appeal held that a facility under which one financier accepted bills and another discounted them was not in form or substance a loan: "... it is not sufficient to characterise the transaction as the raising of money. Financing may be raised in various ways, of which even the lending of money is only one ...".

The narrow construction of such penal legislation may not be as appropriate in the present context, but in the absence even of language such as "or transactions which effect, in substance, the lending of money" (which does appear in the Moneylending legislation) it would seem difficult to extend such a plain English expression to the exotic world of high finance in Australia where, thanks to capital adequacy requirements and withholding tax and stamp duty laws the straightforward lending of money has become a rarity.

Bill, letter of credit, guarantee, put option, underwriting (of debt instruments) and leasing facilities, to name a few, would all seem to miss the mark. Many a leasing company, and possibly even some merchant banks (or their securities underwriting subsidiaries) could well lack the benefit of the moneylenders exception on even this first ground.

(ii) **The financier has authority to exercise its powers as the holder of the relevant interest <u>only</u> by reason of a <u>security</u>.**

The term "security" is undefined. In this context it would seem to bear the meaning adopted by Sykes (<u>The Law of Securities</u>. 4th Ed., p.12), that is, "an interest vested in a person called 'the creditor' in certain property owned by another called 'the debtor' whereby certain rights are made available to the creditor over such property in order to satisfy an obligation personally owed or recognised as being owed to the creditor by the debtor or some other person." In other words, a mortgage, charge, pledge or similar security interest. See also <u>Singer</u> v. <u>Williams</u> [1921] AC 31 at 49. Against this are a number of stamp duty cases which suggest a broader meaning.[7]

On the former (in this context, conservative) approach an undertaking in favour of the financier not to deal with the relevant shares without the financier's consent (whether in the loan agreement, a guarantee or a separate negative pledge agreement) would confer on the financier a relevant interest which would not be protected by the moneylenders exceptions.

(iii) **The security was given for the purposes of a transaction entered into in the ordinary course of business <u>in connection with the lending of money</u>.**[8]

This aspect of the exception is ambiguous - is it "the giving of security, the "transaction" or "the ordinary course of business" which must be "in connection with the lending of money"? The conservative view would be that the expression qualifies the giving of security while a natural reading would be that it qualifies the transaction. Either of these views would dramatically narrow the scope of the exemption; that is, it would never apply to bill and other facilities which did not involve the traditional lending of money. On any view, given the narrow meaning of the "lending of money", this qualification represents a further weakness for the moneylending exceptions.

(iv) **Finally, the transaction must not be entered into <u>with a person associated with the financier</u>.**

This could be described as the "sting in the tail", given that there is no general "financiers" exception in the definitions of "associate". The initial difficulty is that the arrangements giving rise to the relevant interest will also often give rise to an "association" between the bidder and the financier. To make sense of this provision, and to avoid a hopeless circularity, one can presumably imply the inclusion of "otherwise" or "already" before "associated".

However, a major problem remains. The preliminary negotiations and commitments in relation to the financing of a takeover, particularly if the transaction is highly leveraged, might well already have made the financier an associate of the offeror by virtue of s.7(5)(b), (c) or (e) of CASA (taking CASA as a model). Again, I will refrain from expatiation on the self-evident width of the "associate" provisions; suffice it to say that the basis of even the preliminary understandings arrived at between the offeror and the financier would be that the financier would exercise some degree of control over the voting power attaching to shares in the target.

It seem unlikely that the exception in s.7(6)(a) of CASA, which is limited to the giving of advice to and the acting on behalf of the bidder, would save the financier here.

In conclusion, the moneylenders exceptions are alarmingly narrow and their inadequacy could result in innocent (and harmless) breaches of CASA (especially s.11), the Companies Code (for example, the substantial shareholders provisions) and the Foreign Takeovers Act. They could even mean that the target becomes a subsidiary of the financier![9] Given the serious consequences of such breaches it is to be regretted that the provisions remain substantially unchanged in the current draft Corporations Bill.

Of course, a contravention resulting from the technical inadequacies of the moneylenders exception might well be excused by the court under the second limb of s.48(1) of CASA (see <u>Re WM Haughton & Co Ltd</u> [1978] VR 233). However, if a financier is concerned that it might be caught by these provisions, all it can do is give the substantial shareholder notices and seek exemptions under CASA (ss.57 and 58).

**(c) Vesting orders and "unfair prejudice"**

In any financing the prudent financier will want to ensure that the funds provided by it are not being put to any illegal use. In the takeovers context this means not only that the financier must be satisfied that the offeror is not breaching s.11 or other provisions of CASA or the Companies Code, but also that the offeror is not engaging in "unacceptable conduct" or making an "unacceptable acquisition" within s.60 of CASA. Assessing this risk is a notoriously difficult exercise, particularly given the power of the NCSC to make unacceptable conduct or acquisition declarations (it has made at least 14 to date), even in relation to on-market below threshold acquisitions.[10]

Although this is not the place for a detailed analysis of ss.60 and 60A of CASA, it is instructive to note that the NCSC can make a declaration and a wide variety of orders (and the court can order the vesting of shares in the NCSC) if it is satisfied that an acquisition has occurred in any of the following circumstances or as result of conduct engaged in in relation to the shares of affairs of a company;

(i) the shareholders and directors did not know the identity of a person who proposed to acquire a substantial interest;

(ii) they did not have a reasonable time to consider such a proposal;

(iii) they were not supplied with sufficient information to assess the merits of such a proposal; or

(iv) the shareholders did not all have "reasonable and equal opportunities to participate in any benefits" accruing to any shareholder or any of its associates in respect of any such acquisition. (s.60, CASA).

Vesting orders can also be made by the court under ss.146(1)(ae) (for a breach of the substantial shareholder provisions) and 261A(2)(e) (for a breach of the beneficial owner tracing provisions) of the Companies Code.[11]

To what extent can vesting orders prejudice the position of a secured financier? The answer involves consideration of a number of questions.

(i) **Can a vesting order override a financier's security interest in the relevant shares?**

Taking s.60(4)(v) of CASA as a typical provision, the court has power to vest in the NCSC "shares, or any interest in shares". According to Pearce (Statutory Interpretation in Australia, 2nd edition) "legislation is presumed not to alienate vested proprietary interests without adequate compensation" (p.86). This presumption can, of course, be rebutted, at least in the case of State legislation (as to Commonwealth legislation, see below). The words seem plain; to "vest" is defined in the Concise Oxford Dictionary as to "confer formally on [a person] an immediate fixed right of present or future possession of" property. In no vesting case to date has it been suggested that this presumption applies, and it is difficult to see how it could in light of the express provisions for dealing with the proceeds of sale of the vested property in s.462 of the Companies Code.

Further, the provisions are not expressed to be limited to the shares of, or the interest in the shares of, the wrong-doer ("any interest in shares"). Section 146(1)(ea) of the Companies Code is even more clear on this aspect, catching shares to which the substantial shareholder "is or has been entitled".

Little support can be gained from a consideration of s.463 of the Companies Code, which applies to the vesting of property in the NCSC by virtue of ss.146(12)(c) and 261A(15)(c) of the Companies Code and s.49(6)(c) of CASA. This masterpiece of drafting, preserved in all its glory in the so-called "plain English" Corporations Bill (s.578), provides as follows.

> "Property vested in the Commission is liable and subject to all charges, claims and liabilities imposed on or affecting that property by reason of any law as to rates, taxes, charges or any other matter or thing to which the property would have been liable or subject had the property continued in the possession, ownership or occupation of the company, but there shall not be imposed, on the Commission or the Crown, any duty, obligation or liability whatsoever to do or suffer any act or thing required by any such law to be done or suffered by the owner or occupier other than the satisfaction or payment of any such charges, claims or liabilities out of the property of the company so far as it is, in the opinion of the Commission, properly available for and applicable to such a payment."

Although it is arguable that the security interest of the financier is a "matter ... to which the property would have been ... subject", the language, and particularly the proviso ("but ..."), combined with the application of the ejusdem generis rules to "rates, taxes, charges or any other matters ...", indicate that the better view is that only statutory charges and the like are preserved. The expressio unius principle would then suggest that vesting orders can override other charges and claims.

This interpretation receives further support from the provisions of s.462(6) of the Companies Code which contemplate that any person may make a claim on the proceeds of sale of vested property, and the court may order such a payment to such a person "if satisfied that an amount should be paid to him". This process is quite separate from that for the payment of claims by the Commission under s.463.

Accordingly, the first question can probably be answered "yes", at least in relation to State legislation.

If the Australian Corporations Bill 1988 becomes law, one of the doubtless numerous constitutional challenges may well be to the vesting provisions (to be found, substantially unchanged for present purposes, in Chapter 6, Parts 6.9 and 6.10, ss.732-744) as involving the acquisition of property other than on just terms contrary to s.51(xxxi) of the Constitution. Resolution of this question will require reference, among other cases, to

Burton v. Honan (1952) 86 CLR 169, Attorney-General v. Schmidt (1961) 105 CLR 361 and Trade Practices Commission v. Tooth & Co Ltd (1979) 2 ATPR 40-127. The extremely wide variety of judicial views expressed in the last-mentioned case deters me from expressing a conclusive view, but the following passage from Dixon C.J.'s judgment in Burton v. Honan (where s.229 of the Customs Act 1901 provided for the forfeiture to the Crown of prohibited imports and this was held to apply notwithstanding that they had been acquired by an innocent third party) is compelling in the present context:

> "The short answer to this contention is that the whole matter lies outside the power given by Section 51(xxxi). It is not an acquisition of property for any purpose in respect of which parliament has power to make laws. It is nothing but forfeiture imposed on all persons in derogation of any rights such person might otherwise have in relation to the goods, a forfeiture imposed as part of the incidental power for the purpose of vindicating the Customs laws. It has no more to do with the acquisition of property for a purpose in respect of which the parliament has power to make laws within Section 51(xxxi) than has the imposition of taxation itself, or the forfeiture of goods in the hands of the actual offender."

Thus the vesting provisions seem likely to be upheld as incidental to the corporations power, assuming that it is sufficient to sustain the balance of the legislation.

(ii) **If so, in what circumstances would a court make such an order?**

All of the vesting and other orders are only made at the discretion of the court ("the court may make any of the following orders"). Such discretion must be exercised judicially, with a view to furthering the objects of the legislation. Further, in each case the court cannot make an order "if it is satisfied that the order would unfairly prejudice any person".[12] Until 1983 the provision required the court to satisfy itself that the order would not cause unfair prejudice, and this was interpreted to mean that the applicant bore the onus of satisfying the court (CAC v. Orlitt Holdings Ltd (1983) 1 ACLC at 1052). Under its revised formulation it has been held that it must now be "affirmatively established, on the balance of probabilities that the orders proposed will unfairly prejudice any person" (Re North Broken Hill Holdings Ltd (1986) 4 ACLC 131 at 145). In other words, the onus is on the financier.

What is "unfair prejudice?" In CAC v. Orlitt Holdings Ltd Millhouse J. noted that not all prejudice is unfair (for example, prejudice to the wrong-doer) but accepted that "if someone quite innocent is prejudiced by an order then that is probably 'unfair'" (at 1052). On that basis his Honour could not risk making an order which might prejudice purchasers for value and in good faith or might even "embarrass" a party to the litigation and prejudice its future dealings. A similarly sympathetic view was taken in Scott v. H.S. Lawrence & Sons Pty Ltd (1982) 1 ACLC 238 where an order in relation to a takeover offer which did not comply with CASA was seen as possible prejudicing "the offeror who had made his offer on the faith of the documents [the Part A statement with offer annexed!] so registered by the Commission" (at 249).

However, Bond Corp Holdings Ltd v. Grace Bros Holdings Ltd (1983) 1 ACLC 1009 at 1035-6 saw a hardening of attitudes, even under the old (softer) formulation of s.48(1) of CASA. Sheppard J. held that the proof of prejudice to an innocent party was not sufficient to preclude the making of an order; this was merely a factor to be taken into account in exercise of the court's discretion. In Re North Broken Hill Holdings Ltd (1986) 4 ACLC 131 Fullagar J., in ordering the vesting of the shares in the NCSC, their sale, and the payment of the net proceeds of sale to the Treasurer of the State of Victoria dismissed the claim of prejudice against Crosley on the ground "that IEL and its puppets went into this whole exercise with open eyes, well aware of the precise legislative provisions and of what the worst possible consequences would be if some breach of the sections occurred" (at 145). This language could be applied with alarming ease to the position of a financier, who will rarely be in a position to plead ignorance of the law, the offeror's plans, and the risks. It is to be hoped that this approach will be confined to its rather extreme facts.

The key case to date on s.49(1) of CASA, and one of the first concerning that section in its current form, is Gjergja & Atco Controls Pty Ltd v. Cooper (1986) 4 ACLC 359. This was a majority decision on appeal by the Supreme Court of Victoria in relation to an inadvertent breach of s.11 of CASA by the acquisition of shares in an unlisted public company. Murray J., in dissent, held that s.49(1) in its amended form precluded any exercise of discretion if any person would be unfairly prejudiced; his Honour went on to hold that where the parties had not intended to break the law, the making of any order would be unfairly prejudicial to them. However, McGarvie J., in the majority, refused to follow the approach in CAC v. Orlitt Holdings Ltd to the effect that prejudice to the innocent was unfair prejudice. His Honour held that s.49(1) meant no more than that "an order which prejudices a person is only to be made if upon taking into account the various circumstances and considerations which it is proper to consider in the exercise of a discretion, the order is regarded by the Court as providing the fair and just solution". His Honour continued "Usually the exercise of a discretion prejudices someone. The governing consideration in the exercise of a discretion is what the justice of the case requires" (at 362). Here the main object of CASA was that "of ensuring that the acquisition of shares in companies takes place in an efficient, competitive and informed market" (at 364). It was inevitable that the cost of achieving this, particularly in multi-party transactions, would be occasional prejudice to the innocent.

Ormiston J. adopted a similar approach, stating "the fact that the contraventions were unwitting is no basis for asserting that the prejudice caused by the making of the orders is unfair" (at 373).[13]

Thus it seems that a vesting order may well be made, if justice and the achievement of the object of the legislation requires it, notwithstanding the existence of a security interest over the relevant shares in favour of a more or less innocent and unwitting financier.

(iii) If an order were made, would the security interest offer any residual protection?

The effect of an order will depend upon its terms; the order may only purport to deal with the offending offeror's interest (or equity of redemption) in the shares. Alternatively, the financier may persuade the court to direct (under s.462(6) of the Companies Code) that the net proceeds of sale of the shares by the NCSC be applied in satisfaction of its debt in priority to any "fine". Presumably the court will be sympathetic to the position of an innocent financier, and may well give full recognition to its security interest at this level (after payment of the costs of realisation and the statutory commission). It was suggested in Margolin v. E.A. Wright Pty Ltd [1959] VR 455 at 456 that s.277 (which is equivalent to s.462 of the Companies Code) of the Customs Act might operate in similar fashion to the benefit of an innocent purchaser or prohibited imports forfeited to the Crown under s.299 of that Act. The financier will already have been prejudiced by the forced sale - it would be "unfair" not to recognise its security interest at all. But this will all be a matter for the court in the exercise of its discretion in the circumstances of the case.

Certainly, if any proceeds were to find their way back to the offender, most well drafted charges would catch them.

All that a financier can do in advance to protect itself against the possibility of being prejudiced by a court order following conduct in breach of CASA, or an "unacceptable" acquisition, by its offeror would seem to be to conduct extensive enquiries in relation to, and subject to vigorous review, all material aspects of the takeover and its compliance with CASA and the Companies Code. Certainly it seems from Gjergja that turning a blind eye will achieve little; accordingly, a financier should be well advised to have its lawyers do some fairly careful second-guessing of the offeror's counsel.

One final word of warning on this topic is that one of the most fruitful sources of material for the conduct of litigation in the defence of a takeover target has been the relevant files of the offeror's financier. In conducting enquiries the officers of the financier should be careful not to record their impressions on matters which they think they know about but don't.

Trade Practices Act

A financier must also take care when financing an acquisition which may result in or strengthen market dominance within s.50 of the Trade Practices Act 1974. In addition to ordering divestiture of the relevant shares under s.81(1), the court may under s.81(1A) declare an acquisition to be void. In the latter case the court must be satisfied that the vendor "was involved in the contravention". but no explicit consideration is given to the position of a financier who has acquired a security interest in the shares. Presumably whether or not that security interest will prevail will simply be a factor for the court to weigh in its discretion, although given that the order cannot be made in respect of an "innocent" vendor the court may well only be prepared to prejudice a financier who has been knowingly involved.

It is encouraging that in TPC v. Australia Meat Holdings Pty Ltd (1988) ATPR 40-876 Wilcox J. was not prepared to make a declaration under s.81(1A) notwithstanding that his Honour found that the vendor was knowingly concerned in the contravention of s.50 (see pp.49,509-517).

(d) Section 255 of the Companies Code

The final "regulatory" aspect which I wish to address is one which is often overlooked. It is s.255A(1) of the Companies Code, which, among other things, requires that if a transferee lodges a transfer for registration in circumstances where the transferee will hold non-beneficially, the transfers must include a notice that, among other things, says that the shares will be held non-beneficially. This would, of course, apply to a financier taking a legal mortgage. A failure to comply constitutes an offence but does not affect the validity of the registration of the transfer (sub-s.(2)), The section does not apply to listed companies (sub-s.(8)), notification of dealings in whose shares are more extensively regulated under the substantial shareholder provisions (Division 4, Part IV).

## 3. SECURITY ASPECTS

### (a) Getting hold of the shares

In a typical share acquisition financing the security will usually include the shares the acquisition of which is being financed. Because the funds are almost invariably required before the offeror has acquired title to the shares, some difficult legal and logistical problems arise for the financier.

Nature of security

The form of security taken will vary according to a number of factors, the principal of which is usually a desire to minimise loan security or mortgage duty. The basic alternative are as follows.

(i) Legal mortgage

The best form of security in terms of protecting the financier's interest will almost always be a legal mortgage. Legal title, acquired for value without notice (actual or constructive) of prior equities will generally defeat any equitable claim. However, legal title is only achieved on registration of the transfer, which may take some time given that the offeror will usually not itself acquire title until some time after the funds are advanced. Further, a legal mortgage of shares is not registrable under the Companies Code (s.200(1)(g)(ii)), so no interim protection can be gained by registration.

Some protection can be gained in certain states (not New South Wales or Queensland) the Supreme Court Rules of which provide for a "notice in lieu of distringas", described by Sykes (<u>The Law of Securities</u>, 4th Ed., p.810) as "a somewhat anaemic cousin of the caveat". By serving such a notice on the company, the putative legal mortgagee ensures that it will have a brief opportunity to resist the registration of an inconsistent transfer. The notice does not, however, affect priorities (the rule in <u>Dearle</u> v. <u>Hall</u> does not apply to shares).

The stamp duty objections raised to legal mortgages are often overstated; certainly they do not (as is often claimed) involve the imposition of share transfer duty. For example, in New South Wales Clause (15) of the Second Schedule generally exempts from duty transfers by way of mortgage or discharge of mortgage if an instrument evidencing the mortgage has been stamped with loan security duty or is exempt from or not liable to loan security duty. Loan security duty itself can, of course, often be avoided or deferred, particularly by virtue of the fact that a share is generally situated where it is registered (s.178(3) of the Companies Code). This is no longer the case for stamp duty purposes in Queensland and Western Australia where incorporation in that State also provides a sufficient nexus.

(ii) **Equitable mortgage**

For a number of reasons, generally of convenience or confidentiality, the equitable mortgage or charge is the most common form of share security. Unless created in whole or in part by deposit of the share certificates, the mortgage or charge document will be registrable under the Companies Code (s.200(1)(g)), and such registration will confer a considerable degree of protection by virtue of the doctrine of constructive notice (see s.68C(2) of the Companies Code) and the priority provisions of the Companies Code.

Registration of the charge however, means running the gauntlet of the local commissioner of stamp duties, who does not always take the same (or correct) view as practitioners in the area. For this reason the equitable mortgage by way of deposit of share scrip has enjoyed a fair degree of popularity, although its effectiveness in avoiding stamp duty has been destroyed in New South Wales recently by the introduction of paragraph (e) to the definition of "loan security" in s.83(1) of the Stamp Duties Act 1920.[14] The dangers of this approach have been dealt with elsewhere, but its limitations are, in short:

(A) as an equitable security, it relies on consideration (the advance) being provided after the deposit;

(B) as a possessory security, it relies on possession, which in an acquisition financing is not always obtained at the time the funds are advanced and is often lost when the share certificates in the vendor's name have to be sent off to the share registry at a stage where the Mortgagor's title is only equitable;

(C) the shares are often registered in the name of a nominee of the offeror, giving rise to the usual "trustee mortgage" issues as to authority, constitution of the trust etc;

(D) the stamp duty scheme is often mucked up anyway - by the preparation of "blank" transfers which contain so many details that they cease to be inchoate and become dutiable and by the recital of the essential elements of the mortgage transaction in a covering letter accompanying the deposit of the share certificates or by the execution of "memoranda of deposit" which are, in fact, in each case, memoranda of the mortgage transaction and dutiable as such;

(E) rights issues and bonus issues may not be covered;

(F) blank transfers may be of limited effect in Queensland (see ss.31A and 53(11) of the Queensland Stamp Act); and

(G) any power of attorney taken to support the security which has a nexus with Queensland may be dutiable there as a mortgage (see paragraph (d) of the definition of "mortgage" in s.65(1) of the Queensland Stamp Act).

## Practical aspects

In the case of many acquisitions, it is uncertain when exactly the funds will be required. For this reason, a "blocked" account is often established, in the control of the Agent. The Agent in turn is instructed only to release funds against provision of scrip and transfers or contract notes with directions to brokers. The Agent will generally already hold directions to the share registrar to ensure that the new share certificates are forwarded to it. It is during this stage that a well documented equitable mortgage is the best form of security.

## Significance of different levels of holding

In assessing the security value of shares, a financier should be alive to the legal significance attaching to different levels of holding.

(i) **Up to 20%**

Below the takeover threshold a holding could be classified as a portfolio investment, but:

(A) too small a holding could be exposed to compulsory acquisition or de-listing; and

(B) even the acquisition of a "platform" level of holding can involve contraventions of CASA (through the operation of the "associates" provisions) or "unacceptable conduct".

For example, the NCSC made such a declaration in relation to Beid Pty Ltd's on-market acquisition of 4.4% of BHP (although that was overturned by Marks J. in Elders IXL v. NCSC (No 4) (1986) 10 ACLR 719).

(ii) **From 20% to around 40%**

This is the danger zone, where the financier risks financing a "locked in" minority shareholder. To reach this level, of course, a bid is usually required. Minimum acceptance conditions can help avoid such embarrassments where the offer is attached to a Part A Statement.

In all but the most widely held companies this level of holding will not confer effective control (basically, the ability to control the composition of the board).

(iii) **From around 40% to (and including) 50%**

Although the target will not yet normally be a "subsidiary", control is generally achieved at this level. However, s.129 of the Companies Code, directors duties and the oppression provisions will effectively prevent the directors from deploying the assets of the target to the best advantage of the financier. Listing Rule 3J(3) will also severely constrain the target's new board.

At this stage trading in shares in the target may start to become a little thin, or even subject to manipulation, and net tangible asset-backing may start to be a better indicator of the value of the shares.

(iv) **Over 50% but less than 75%**

The target becomes a subsidiary and the offeror is assured of passing ordinary resolutions; but the constraints identified in paragraph (iii) retain all their force. Breaches of directors duties can be absolved by a fully informed ordinary resolution, subject to the rules against oppression and to the rights of creditors.

(v) **75% or more**

Now special resolutions can be passed; in particular under s.129(10) of the Companies Code to permit financial assistance to be given and to permit reductions of capital (s.123), schemes of arrangement and even winding up. However, the last three also require the sanction of the court, and minority shareholders and creditors can object under the s.129(10) procedure. Directors duties and oppression remain a significant constraint.

(vi) **Over 90%**

Subject to some fairly complex rules in s.42 of CASA, an offeror will generally be able compulsorily to acquire the remaining shares at this level. The offeror can also bid for remaining shares free of constraints of s.11 of CASA. On the other hand, under s.43 of CASA the minority holders can require the offeror to buy them out. De-listing becomes an option at this stage, depending on the spread of remaining shareholders.[15]

(vii) **100%**

No more minority/oppression problem, but creditors can still object to s.129(10) proposals, reductions of capital and schemes of arrangement.

**Security top-up clauses**

Clauses requiring the "topping up" of security are a common feature of takeover financings. As ever, care needs to be taken in drafting them. Two of the main traps are as follows.

(i) An agreement to create a charge or mortgage is generally treated as a charge or mortgage in equity, and also for the purposes of the Companies Code (see the definition of "charge" in s.5(1)) and stamp duties legislation (eg. paragraph (d) of the definition of "mortgage" in s.83(1) of the Stamp Duties Act 1920 (NSW)). Accordingly, rather than have an undertaking, for example, to mortgage further shares, it is generally better to provide that it is an event of default unless the relevant additional security is provided.

(ii) In drafting the definition of the "Value" of the existing security, it is important to ensure both that the market price cannot easily be manipulated (thus rather than taking a closing price on a particular day it is better to use an average price over a number of days) and that the Value can be determined (preferably by the financier using its discretion) in circumstances where there are no trades on the particular day, trading in the shares is suspended, or the company is delisted (although the latter two will often be separate events of default).

**(b) Getting hold of the assets (section 129 of the Companies Code**

The greatest bugbear for financiers of takeovers is undoubtedly s.129(1)(a) of the Companies Code, the prohibition on a company giving financial assistance for the purpose of or in connection with the acquisition of shares in itself or in its holding company. Its scope is so broad (by virtue of the wide, and inclusive, definition of "financial assistance" and the use of "directly or indirectly" and "in connection with") that, in my experience, once the s.129 genie is let out of the bottle, it is almost impossible for a prudent financier to satisfy itself that it has been safely put back in. No matter how many steps, companies and trusts (wherever situated) are interposed between the financial assistance and the share acquisition, you always end up with an unease feeling that the security or other financial assistance may well be voidable at the option of the company giving it. Needless to say, the main effect of the prohibition in this context is to prevent the financiers of a takeover getting hold of the assets of the target; it keeps the financiers in a subordinated position.

**The exceptions**

The exclusions in s.129(8) almost never apply, and although s.129(10) is very popular and relatively convenient for proprietary company acquisition financings, it is singularly useless when applied to the listed public company takeovers context.

(i) First, it is slow. It takes at least 21 days, and to this may be added a couple of weeks if the offer lacks the numbers to waive notice of the special resolution. Further, the offeror cannot do anything about it until it controls the board and is confident of being able to pass a special resolution.

(ii) Secondly, it is uncertain. Even if the offeror has 75% of the company, the minority shareholders or creditors can object to the proposal in court (witness the John Fairfax Limited imbroglio), and the court may refuse to sanction the financial assistance. Even if the offeror has 100% of the company, it may have to pay out all the major creditors as well.

(iii) Thirdly, it is public. Notices have to be published in newspapers and details of the financial assistance and its effect of the company have to be provided to shareholders.

(iv) Fourthly, it is all of the above, many times over, if the company giving the assistance is (or has just become) a subsidiary of a listed company (which must also approve the financial assistance by special resolution).

Grey areas[16]

Although the broad thrust of s.129(1)(a) is fairly clear, there are a number of grey areas, and these are discussed below.

(i) "Nimble" dividends

One of the most controversial issues arises in circumstances where, say, the target has undervalued assets and liquid funds or the ability to raise funds quickly and easily. Can the financier, in its facility agreement with the offeror, require the offeror, upon gaining control, to "create" a distributable profit by, for example, revaluing the assets and then to distribute the case by way of dividend (known as a "nimble" dividend)?

There is no clear answer to this question, but the following points are relevant.

(A) Section 129(8)(a) provides an exemption for the payment of a dividend "in good faith and in the ordinary course of commercial dealing". Many would say that a dividend falling within this example could never breach s.129 in the first place, and s.128(8)(j) tends, rather shamefacedly, to admit as much.[17] Section 129 is founded on the principle in Trevor v. Whitworth against authorised reductions of capital, but clearly this principle does not preclude the proper declaration of profits. What the exception does indicate is that there can be dividends which are not declared in "good faith" or "in the ordinary course of commercial dealing". Surely, if any, the "nimble" dividend falls in the latter category.

(B) In Re Wellington Publishing Co Ltd [1973] 1 NZLR 133 Quilliam J. held that a large dividend to be declared and paid to a bidder after a successful acquisition would not constitute financial assistance and accordingly would not contravene s.62 of the Companies Act 1955 (NZ), which is in similar terms to the old s.67 of the Companies Act 1961 (NSW). However, it should be noted that:

(1) there were no minority shareholders;

(2) although the dividend was to be funded largely by the raising of a loan, therefore would still be a large surplus of assets over liabilities in the company - the payment of the dividend would not jeopardise the solvency of the company or prejudice its creditors;

(3) the dividend was "properly" declared out of revenue reserves; and

(4) Quilliam J. was only prepared to hold that the payment of a dividend would not ordinarily breach the section.

(C) Rossfield Group Operations Pty Ltd v. Austral Group Ltd (1980) 5 ACLR 290 related to a takeover in which the bid vehicle would clearly rely on an unusually high flow of dividends from the target in order to service and repay the debt incurred in acquiring the shares in the target. The boards of the target and the bid vehicle were well aware of this. The target also met the costs of the formation of the bid vehicle. The action was brought by minority shareholders in the target, alleging a breach of s.67 of the Companies Act 1961 (Qld). It failed.

Connolly J. had "great difficulty in regarding the declaration of a dividend as the giving of financial assistance .... Giving financial assistance ... means making a provision in money or money's worth to which the shareholder is not already entitled in his capacity of a shareholder" (at 296). Again the dividends were to be paid out of revenue reserves, and it was acknowledged by the chairman of the boards of both companies that neither the asset revaluation reserve nor the share premium reserve ought to be used for this purpose (at 297). In addition, the company was in a buoyant trading position so presumably the creditors were not prejudiced.

His Honour found that the payment of the formation costs of the bid vehicle lacked a sufficient connection with the acquisition of shares in the company for the expenditure to be "for the purposes of or in connection with" the share purchase. It is suggested that at least this aspect of his Honour's judgment is unsustainable.

(D) The Jenkins Committee's 1962 report, as was quoted in Rossfield at 297, specifically approved of the use of dividends to repay acquisition finance. "The payment of a dividend properly declared is no more than the discharge of a liability .... Such a payment cannot prejudice the rights of the creditors, while minority shareholders will directly benefit from it." Again one is left to speculate as to the meaning of "properly declared".

(E) Ryan v. Independent Steels Pty Ltd (1988) 13 ACLR 379 was a sale of business case, where the company which was to be acquired was, in effect, to provide part of the purchase price by means of an agreement to pay the vendor a share of future turnover above a certain level. Despite the fact that Nathan J. acknowledged that increased turnover could be consistent with increasing losses, his Honour nevertheless saw an analogy with the Wellington Publishing case:

"If the provision of a dividend cannot be regarded as providing financial assistance, then the provision of a payment out of an expected but uncertain increase in turnover is also not financial assistance" (at 383). It is respectfully suggested that this analogy is neither apposite nor logical.

One could venture the conclusion from the above that although a dividend "properly" declared and paid out of revenue reserves will not breach s.129, a "nimble" dividend declared out of an asset revaluation reserve and paid with borrowed funds may well breach the section.

(ii) Post-acquisition refinancing

In what circumstances can the offeror use the target's assets to assist it to refinance the acquisition debt? Can financial assistance given in connection with a past acquisition breach the section? Such financial assistance can hardly be given for the purpose of the acquisition unless the postponement is part of a pre-ordained scheme (see Juniper Pty Ltd v. Grauson (1984) 8 ACLR 212). However, where the refinancing is not "premeditated", that is, the directors of neither the bidder nor the target had communicated their intentions in relation to the refinancing to any relevant party (eg. each other, or the financier of the bid), the transaction would seem to be fairly safe, at least on the "purpose" limb.

In such circumstances, would the financial assistance nevertheless be "in connection with" the acquisition? There is, of course, a connection, in the broadest sense; but is it relevant? Section 129(4)(b) is of some assistance, for it provides that financial assistance shall be taken to have the relevant connection if the company is aware at the time of giving the assistance that it will financially assist the payment of amounts unpaid on those shares. Although this provision has been held,[18] rightly it is suggested, not to be exhaustive, the concept of "awareness" may be helpful in drawing the line in extreme cases. For example, what if the target becomes but a small part of the offeror's empire, and several years later the target is required, along with other subsidiaries, to guarantee a new facility for the offeror which, among other things, refinances the acquisition debt. Surely the connection is too remote. Kirby P. in Norbrick has suggested that the "connection" requirement "allows the court to apply a common sense approach" (p.69). Thus it is suggested that the subsequent giving of financial assistance in connection with the financing or re-financing of the acquisition will only contravene the section if it was in the contemplation of the future controllers of the company at the time of the acquisition and, it would seem, an agreement, arrangement or understanding was in place with the financier or some other relevant party.

It must be accepted, however, that except in the clearest case the prudent course would be to sanction the assistance under s.129(10).

(iii) Limitations of the "impoverishment theory"

This theory would have it that the broad words of s.129 (or at least the words "or otherwise" at the end of the sub-section (2) definition of "financial assistance") should be read down to apply only to transactions which "impoverish" the company. This approach denies the "prophylactic" operation which many (including the Jenkins Committee) would see the section as having. It suggests that, consistent with the original purpose of the section, a transaction will only constitute financial assistance if it involves some diminution of the present or future financial resources of the company - see Burton v. Palmer [1980] 2 NSWLR 878, per Hutley J.A. at 881: has the company diminished its financial resources, including its future resources ...?"

A number of recent cases have indicated that this theory suffers from significant limitations.

(A) In Burton v. Palmer itself the alleged financial assistance comprised no more than undertakings that lacked any real content (ie. that the company was readily in a position to keep without diminishing its resources).

(B) The theory is hard to reconcile with Belmont Finance Corp v. Williams Furniture Ltd (No 2) [1980] 1 All ER 393 in which the purchase by the target of assets from the bidder at what the parties considered at the time to be a fair value was held to contravene the English equivalent of s.129. The fact that the transaction put the bidder in funds was enough; whether or not the target's resources had been diminished was irrelevant. This approach was also taken in Charterhouse Investment Trust Ltd v. Tempest Diesels Ltd [1986] BCLC 1. Hoffman J. pointed out that "It does not matter that the company's balance sheet is undisturbed in the sense that the cash paid out is replaced by an asset of equivalent value. In the case of a loan by a company to a creditworthy purchaser of its shares, the balance sheet is equally undisturbed but the loan plainly constitutes giving financial assistance" (at 10).

(C) In Re Myer Retail Investments Pty Ltd (1983) 1 ACLC 990 Sheppard J. cited the relevant passage from Burton v. Palmer with approval. However, his Honour accepted that there was a conflict between that approach and the English "enablement" approach and that the plaintiff had made out a prima facie case for the argument that the latter approach was correct; at least in cases where "the financial assistance has been provided to those acquiring the shares rather than to other parties" (997).

(D) In Darvall v. North Sydney Brick & Tile Co Ltd both Hodgson J. at first instance and Kirby P. on appeal (the other appellate judges did not express a view on the s.129 issue) found that Norbrick had "diminished

> its resources" merely by agreeing to contribute certain land to, and participate in, a joint venture for the development of that land.

Thus it seems that, even if the impoverishment theory is accepted as correct, a fairly narrow view of what constitutes a diminution of the company's financial resources is likely to prevail.

**(c) Put options**

An increasingly common form of "security" taken by financiers in share acquisition facilities is a put option granted by a third party (sometimes related to the offeror) over the shares which are, or are to be, mortgaged in favour of the financier. Put options raise, in this context, a whole host of issues, two of which I would like to touch on briefly.

**(i) Relevant interests**

Where the grantor of the option is unrelated to the offeror, care will need to be taken to ensure that neither the grant nor the exercise of the option will contravene s.11 of CASA. Without entering into the "standing controversy" (per Dixon C.J. in Braham v. Walker (1961) 104 CLR 366 at 376) as to the true nature of an option (that is, is it an offer to sell/purchase coupled with a contract not to revoke the offer or a conditional contract for sale/purchase), it seems fairly well established that the mere grant of a put option will confer upon the grantor a relevant interest (as defined in s.9(6) of CASA) in the shares the subject of the option: see Nicholas v. Wade (1982) 1 ACLC 459 at 465-7 per Marks J.; Re Adelaide Holdings Ltd (1982) 1 ACLC 543 at 546-9 per Helsham C.J. in Eq; Yarramin Pty Ltd v. Augold NL (1982) 11 ACLR 439 at 442 per de Jersey J. and NCSC Release No 335, pp.9-12. Thus although a put option is probably not an option under paragraph (c) of s.9(6), it has been held to constitute an agreement under paragraph (a) on the performance of which a relevant interest in respect of the relevant shares would be acquired, notwithstanding that the grantor generally has no control over whether or not the option is exercised.

What remains to be tested is whether a "put option" deliberately structured as no more than a unilateral offer coupled with an agreement for consideration not to revoke the offer would confer a relevant interest upon the offeror. In all of the cases referred to above, and in virtually all of the cases referred to in those cases, the put option was drafted in such a way as to facilitate the "conditional contract" analysis. If the only agreement between the parties related to the revocation of the offer, not to the shares the subject of the offer, and if the contract specifically provided that a breach of the agreement not to revoke would only sound in damages (supported by a suitably drafted indemnity to ensure that a demand for a liquidated sum could be made), it is suggested that the "grantor" would not have any equitable interest in the subject shares, and there would be no agreement between the parties on the performance of which the "grantor" would acquire a relevant interest. The performance of the agreement would only constitute the non-revocation of the offer; there would be no agreement in relation to the shares until acceptance of the offer by the financier.

(ii) Mortgagee's duty of care

Another perennial question is the extent of, and the extent that one can contract out of, the mortgagee's duty of care upon exercise of a power of sale. The Australian authorities tend to support the view that the mortgagee's duty is to act without fraud and not wilfully or recklessly to sacrifice the interests of the mortgagor.[19] The English authorities on the other hand support a duty akin to that arising in negligence.[20]

It has been suggested recently in State Bank of Victoria v. Parry (1989) 7 ACLC 226 and Bishop v. Bonham [1988] 1 WLR 742 that whatever the duty, it can be varied by the mortgage contract. However, until the High Court opines conclusively on these controversies, it would be prudent to proceed on the assumption that the mortgagee must take some care not to sacrifice the mortgagor's equity of redemption on exercise of its power of sale, notwithstanding any purported exclusion of that duty in the mortgage.

Accordingly, a financier holding a put option should be reminded that, on default, it will not simply be a matter of exercising the put option; except in the clearest case the financier will need to seek expert valuations of the shares and, if those valuations exceed the put option price, a sale on the open market will be necessary. It is only after good faith efforts in this regard have failed that the mortgagee could safely exercise the put option. For this reason it is vital to ensure that the put option does not lapse for at least, say, one month after the termination date of the financing.

## 4. CONCLUSION

As can be seen, takeover financing is beset with a number of traps and pitfalls, with the risk of falling into them considerably magnified by the speed and urgency which usually attends the whole process of structuring and documenting the facilities. In this area, at least, the financiers (not to mention their lawyers) would seem to earn their fees.

FOOTNOTES

1. This provision is substantially unchanged in the draft Corporations Bill 1988 (see s.750).

2. Peters (WA) Ltd v. National Companies and Securities Commission (1986) 4 ACLC 507 at 510 and TNT Australia Pty Ltd v. Normandy Resources NL (Jacobs J., 13/3/89).

3. "The terms of para 3(b) of Part C seem to mean that even if the arrangements are the usual arrangements there ought to be an express statement [to this effect] but this I would think is what the ordinary and reasonable reader would assume if not told otherwise." (ICAL (1988) 13 ACLR 129 at 138).

4. See, for example, A.G. Hartnell's "Relevant Interests - 'Control' in the Eighties", (1988) 6 CSLJ 169.

5. See Re Kornblums Furnishings Ltd [1982] VR 123; North Sydney Brick & Tile Co Ltd v. Darvall (1986) 4 ACLC 539.

6. Sections 9(8)(a) (relevant interests) and 12(1) (permitted acquisitions) of CASA; ss.7(3)(c) and (d) (subsidiaries) and 8(8)(a)(i) (relevant interests) of the Companies Code; and ss.5(1) (definitions of "agreement" and "moneylending agreement"), 5(4)(a), 10(2)(c) and (d) (subsidiaries) and 11(5)(a) (interests in shares) of the Foreign Takeovers Act. It should also be noted that the moneylenders exception in s.8(8)(a)(i) of the Companies Code does not apply to s.261 of the Companies Code.

   The CASA and Companies Code provisions are substantially unchanged in the draft Companies Bill 1988 (see Chapter 1, Divisions 2, 5, and 6). The Foreign Takeovers Amendment Bill 1988 excludes from its operation the acquisition of an "interest in Australian urban land" solely to hold as security, or by way of enforcement of a security, for the purposes of a moneylending agreement (proposed new s.12A(5)). The proposed s.12B(4) provides a moneylenders exception from the "interests in trust estates" provisions in similar terms to the existing s.11(5)(a) in relation to shares.

7. In Glenepping v. Commissioner of Stamp Duties [1985] ATC 4,818 it was held that a loan agreement is a security for the purposes of the Stamp Duties Act. See also I.R. Commissioners v. Henry Ansbacher & Co [1963] AC 191. However, these cases (and those on which they rely) may well be confined to their particular legislative (stamp duty) context. Further, it is one thing to hold that the undertaking to repay in a loan agreement is a "security" for the loan in the sense that it "secures" its repayment; it is another to hold that an unsecured collateral undertaking such as a negative pledge is also such a security.

8. This requirement is not included in the Foreign Takeovers Act.

9. Say the financier provides a bill facility to finance the successful acquisition of more than 50% of the target, and extracts from the offeror (whether or not it takes a mortgage of the shares) either or both of the following undertakings:

   (a) not to appoint or remove directors of the target without its consent (s.7(1)(a)(i) of the Companies Code); or

   (b) not to vote those shares except in accordance with the financier's directions (s.7(1)(a)(ii) of Companies Code);

   or, taking the conservative view under paragraph (iii), the financier simply takes a legal mortgage of the shares. The financier would seem to be caught by s.7(1) and would probably not have the benefit of s.7(3)(d) (the moneylenders exception).

10. See, for example, Elders IXL Ltd v. NCSC (1986) 4 ACLC 457 and Intercapital Holdings Ltd v. NCSC (1987) 12 ACLR 684. It should, however, be noted that, as in the two cases cited, the declarations have, more often than not, been overturned.

11. Although there is no vesting power conferred under the Foreign Takeovers Act or the Trade Practices Act, there are wide divestiture powers (s.35, Foreign Takeovers Act and s.81, Trade Practices Act) and similar issues arise.

    The orders under the proposed new s.35(4A) of the Foreign Takeovers and Acquisition Act include (para (b)) "an order prohibiting or deferring the payment of any sums due to the offender in respect of any such interest held by the offender". The potential application of this provision to the hapless financier who strays outside the moneylenders exception is of considerable concern.

12. Section 49(1) of CASA and ss.146(6) and 261A(8) of the Companies Code. In CAC v. Orlitt Holdings Ltd (1983) 1 ACLC 1038 at 1051 Millhouse J. described the array of orders and remedies attaching to the substantial shareholder provisions (which are not dissimilar to the other orders and remedies under consideration) as "so wide as to be tyrannical". However, his Honour noted that the effect "is softened by sec.146(6)".

13. See also Parry Corporation Ltd v. Boans Ltd (1984) 2 ACLC 249; Adsteam Building Industries Pty Ltd v. QCL (1984) 2 ACLC 517 at 522; Darvall v. Lanceley (1986) 10 ACLR 893 and

ICAL v. County NatWest (1988) 12 ACLR 129 at 164 (where the approach of the majority in Gjergja was approved and it was noted that an order of disposal (or vesting) need not necessarily be limited to the shares acquired in contravention of CASA).

14. "(e) An instrument executed (whether or not in New South Wales) after 1 January 1989 which, on the deposit of documents of title over property in New South Wales or instruments creating a charge on property in New South Wales, evidences the terms of a mortgage or becomes a mortgage."

15. ASX Listing Rules 1(3)(b) and (c) require, broadly, at least 300 shareholders and that at least 15% of each class of shares is held by members of the public.

16. For excellent treatments of this topic see Professor R.P. Austin's chapter on "The 'Financial Assistance' Prohibition" in Austin & Vann's The Law of Public Company Finance and Peter Cameron's paper "Post Acquisition Re-financing" for the 1988 Commercial Law Lecture Series presented by the University of Sydney Committee for Post-Graduate Studies in the Department of Law.

17. Under s.129(8)(j) nothing in s.129(8) "shall be construed as implying that a particular act of a company would, but for this sub-section, be prohibited by sub-section (1)."

18. Darvall v. North Sydney Brick & Tile Co Ltd (1987) 12 ACLR 537 at 561 per Hodgson J. and, on appeal (23 March 1989) per Kirby P. at pp.66-70.

19. Forsyth v. Blundell (1972) 129 CLR 477 at 493.

20. Cuckmere Brick Co Ltd v. Mutual Finance Ltd [1971] Ch 949.