



Australian Government

Takeovers Panel

# MEDIA RELEASE

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No: TP19/31

Tuesday, 7 May 2019

## **Donaco International Limited – Declaration of Unacceptable Circumstances and Orders**

The Panel has made a declaration of unacceptable circumstances (Annexure A) and final orders (Annexure B) after consideration of an application dated 8 April 2019 by shareholders<sup>1</sup> in Donaco International Limited (DNA) in relation to the affairs of DNA (see [TP19/25](#)).

### **Background**

The following facts are in summary form (see the declaration for more background).

On 5 May 2017, OL Master (Singapore Fund 1) Pte. Limited (**OCP**) entered into a bond instrument with a number of parties (including a security trustee), pursuant to which Total Alpha Investments Limited (**Alpha**) issued senior secured bonds in an aggregate principal amount of US\$34,285,000 to OCP. The principal shareholder and sole director of Alpha is Mr Joey Lim, the former CEO and current non-executive director of DNA. OCP also entered into an option deed with Alpha pursuant to which Alpha granted options over DNA shares to OCP. Liabilities under the bonds and the options were secured over DNA shares.

On 5 November 2018, Alpha failed to make an interest payment on the bonds which constituted an event of default. On 3 December 2018, the security trustee requested that Alpha provide top-up shares to maintain the required share collateral under the agreements (which Alpha failed to do).

Between 7 and 31 December 2018, OCP acquired 80,000,000 DNA shares (9.71%) on market at prices between A\$0.0487 and A\$0.0931 while also seeking to liaise with Alpha in respect of a potential restructure of the terms of the bonds given its outstanding defaults. On 12 December 2018, OCP disposed of the option deed and all the options under the option deed (which gave the holder a right to acquire DNA shares from Alpha representing 4.4% of DNA for a minimum exercise price per DNA

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<sup>1</sup> Gerald Tan, Total Alpha Investments Limited, Slim Twinkle Limited, Convent Fine Limited, Max Union Corporate Development Limited and Lim Keong Yew (Joey Lim). Some or all of the applicants are parties to the debt arrangements the subject of the application

share of A\$0.23). OCP lodged a Notice of initial substantial holder in respect of a 7.16% shareholding on 17 December 2018.

On 27 February 2019, a receiver appointed by the security trustee enforced the security interest. As a result, OCP<sup>2</sup> obtained a relevant interest in the secured shares comprising 27.25% of DNA (with OCP having in total a 37% relevant interest in DNA shares). OCP lodged a Notice of change of interests of substantial holder to this effect on 1 March 2019.

## **Declaration**

The Panel considered that the circumstances were unacceptable because the acquisitions by OCP between 7 and 31 December 2018 of 9.71% in DNA occurred in circumstances where:

- the market was not aware that OCP had a security interest in 27.25% of DNA shares
- the market was not aware that the grantors of the securities were in default and the security trustee had the right to declare all sums owing under the bond instrument and the bonds immediately due and payable
- while the events of default were continuing, the security trustee had the right to exercise voting powers of the 27.25% of DNA shares and
- the transfer of the option deed and the options by OCP before it acquired a substantial interest in DNA had the effect of avoiding disclosure of the option deed and in turn the related lending and security arrangements.

The Panel did not consider it against the public interest to make the declaration, and in making it had regard to the matters in s657A(3).

## **Orders**

The Panel has made orders vesting the 9.71% shares in DNA acquired by OCP between 7 and 31 December 2018.

The sitting Panel was Shirley In't Veld, Robert McKenzie and John O'Sullivan (sitting President).

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<sup>2</sup> As well as the receivers and the security trustee

The Panel will publish its reasons for the decision in due course on its website  
[www.takeovers.gov.au](http://www.takeovers.gov.au).

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**Australian Government**

**Takeovers Panel**

**ANNEXURE A**

**CORPORATIONS ACT  
SECTION 657A**

**DECLARATION OF UNACCEPTABLE CIRCUMSTANCES**

**DONACO INTERNATIONAL LIMITED**

**CIRCUMSTANCES**

1. On 5 May 2017, OL Master (Singapore Fund 1) Pte. Limited, a Singapore company (**OCP**) entered into (among other related documents):
  - (a) a Bond Instrument (the **Bond Instrument**) with Total Alpha Investments Limited, a BVI company (**Alpha**) and Madison Pacific Trust Limited, a Hong Kong company (the **Security Trustee**) pursuant to which Alpha issued senior secured bonds in an aggregate principal amount of US\$34,285,000 (the **Bonds**) to OCP and
  - (b) an Option Deed (the **Option Deed**) with Alpha pursuant to which Alpha granted options over a certain number<sup>1</sup> of its shares in Donaco International Limited (**Donaco**) to OCP in consideration of the subscription for the Bonds by OCP.
2. On the same day, the Security Trustee (acting as security trustee for and on behalf of OCP) entered into (among other related documents) a Specific Security Deed (the **Specific Security Deed**) with Alpha and others<sup>2</sup> (the **Grantors**) pursuant to which the Grantors granted security in shares of Donaco held by the Grantors (the **Secured Shares**) to the Security Trustee for the purpose of securing the liabilities of the Grantors to OCP under the Bonds, the Option Deed and related documents.
3. The principal shareholder and sole director of Alpha is Mr Joey Lim. Mr Joey Lim is a director and the former managing director and chief executive officer of Donaco.

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<sup>1</sup> Calculated by dividing a fixed U.S. dollar amount by the option exercise price which was in Australian dollars

<sup>2</sup> Slim Twinkle Limited, Convent Fine Limited and Max Union Corporate Development Limited, each a BVI company, and Mr Joey Lim (Keong Yew Lim)

4. At the time of entry, OCP did not disclose its lending and security arrangements (including the Option Deed and options) with the Grantors.<sup>3</sup> None of the Grantors, including Mr Joey Lim, disclosed the lending and security arrangements (including the Option Deed and options).
5. On 5 November 2018, Alpha failed to make an interest payment on the Bonds which constituted an event of default under the Bond Instrument.
6. Following a fall in the Donaco share price in late November 2018, OCP decided to acquire up to 10% of the shares in Donaco. Prior to purchasing, OCP considered its disclosure obligations including that, once its holding exceeded 5%, it would need to disclose the Option Deed and this would reveal the related lending and security arrangements with the Grantors.
7. On 3 December 2018, the Security Trustee requested that Alpha provide top-up shares to maintain the required share collateral value under the Specific Security Deed. Alpha did not do so within the time specified in the Specific Security Deed.
8. On 7 December 2018, OCP acquired 4,000,000 shares in Donaco on-market (representing less than 0.5% of Donaco).
9. On 12 December 2018, OCP transferred the Option Deed and all options under the Option Deed to an entity<sup>4</sup> for US\$1.00. Immediately prior to the transfer, the options gave OCP a relevant interest in 4.4% of Donaco.
10. Between 13 and 31 December 2018, OCP acquired a further 76,000,000 shares in Donaco on-market taking its relevant interest in Donaco to 9.71%.
11. On 31 December 2018, Alpha was required, but failed, to redeem 10% of the aggregate initial principal amount of the Bonds and all amounts accrued and unpaid under the Bonds.
12. On 16 January 2019, OCP notified Alpha that certain events of default had occurred in relation to the Bond Instrument and Specific Security Deed, citing specifically the events described in paragraphs 5, 7 and 11.
13. While an event of default is continuing, the rights of the Grantors to exercise voting powers in respect of the Secured Shares cease and the Security Trustee is entitled to exercise voting powers in respect of the Secured Shares.
14. On 18 January 2019, on the instruction of OCP, the Security Trustee issued a letter of demand on Alpha.

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<sup>3</sup> Relying on section 609(1). All statutory references are to the *Corporations Act 2001* (Cth), and all terms used in Chapters 6 to 6C have the meaning given in the relevant Chapter (as modified by ASIC)

<sup>4</sup> The shareholders of the entity work for the same firm as one of the Receivers

15. On 26 February 2019, on the instruction of OCP, the Security Trustee appointed Mr Vincent Pirina as receiver and manager of the secured property. On 27 February 2019, Mr Pirina notified the Grantors of his appointment and the enforcement of the security interest. On 1 March 2019, the Security Trustee appointed Mr Mitchell Mansfield as a joint and several receiver with Mr Pirina (the **Receivers**) and notified the Grantors of the same.
16. As a result of the enforcement of the security, OCP, the Security Trustee and the Receivers obtained a relevant interest in the Secured Shares which represented 27.25% of Donaco.
17. On 1 March 2019, OCP<sup>5</sup> lodged a Form 604 (Notice of change of interests of substantial holder) disclosing for the first time its security interest and an increase in its relevant interest in Donaco to 37%.
18. The Receivers have a broad range of powers under the Specific Security Deed, other related documents and their deed of appointment with respect to the Secured Shares. The Receivers have been mandated to sell the Secured Shares, however, OCP considers that it remains entitled to instruct the Receivers to transfer the Secured Shares to it.

## EFFECT

19. At no time between 5 May 2017 and 1 March 2019, was Donaco or any of its directors (other than Mr Joey Lim and his brother), or the market generally, aware of the security or lending arrangements (including the Option Deed and options).
20. OCP's acquisitions between 7 and 31 December 2018 of 9.71% in Donaco occurred in circumstances where:
  - (a) the market was not aware that OCP had a security interest in 27.25% of Donaco shares held by the Grantors
  - (b) the market was not aware that the Grantors were in default under the Bond Instrument and the Specific Security Deed and the Security Trustee had the right to declare all sums owing under the Bond Instrument and the Bonds immediately due and payable
  - (c) while the events of default were continuing, the Security Trustee had the right to exercise voting powers of the Secured Shares and

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<sup>5</sup> In this paragraph, OCP refers to OCP Asia (Singapore) Pte. Limited and all its related bodies corporate and associates as investment manager of OL Master Limited and OL Master (Singapore Fund 1) Pte. Limited

- (d) the transfer of the Option Deed and the options by OCP before it acquired a substantial interest in Donaco had the effect of avoiding disclosure of the Option Deed and in turn the related lending and security arrangements.
21. The security and lending arrangements (including the Options Deed and options) and the acquisitions, in the circumstances in which they occurred and in light of the size of the stake in Donaco over which OCP has a security interest, had or were likely to have, an effect on control or potential control of Donaco and the acquisitions did not take place in an efficient, competitive and informed market.

## CONCLUSION

22. It appears to the Panel that the circumstances are unacceptable circumstances:
- (a) having regard to the effect that the Panel is satisfied they have had, are having, will have or are likely to have on:
    - (i) the control, or potential control, of Donaco or
    - (ii) the acquisition, or proposed acquisition, by a person of a substantial interest in Donaco
  - (b) in the alternative, having regard to the purposes of Chapter 6 set out in section 602.
23. The Panel considers that it is not against the public interest to make a declaration of unacceptable circumstances. It has had regard to the matters in section 657A(3).

## DECLARATION

The Panel declares that the circumstances constitute unacceptable circumstances in relation to the affairs of Donaco.

**Tania Mattei**  
**Counsel**  
**with authority of John O'Sullivan**  
**President of the sitting Panel**  
**Dated 6 May 2019**



**Australian Government**

**Takeovers Panel**

**ANNEXURE B**

**CORPORATIONS ACT  
SECTION 657D  
ORDERS**

**DONACO INTERNATIONAL LIMITED**

The Panel made a declaration of unacceptable circumstances on 6 May 2019.

**THE PANEL ORDERS**

1. The Sale Shares are vested in the Commonwealth on trust for OCP.
2. ASIC must:
  - (a) sell the Sale Shares in accordance with these orders
  - (b) account to OCP for the proceeds of sale, net of the costs, fees and expenses of the sale and any costs, fees and expenses incurred by ASIC and the Commonwealth (if any).
3. ASIC must:
  - (a) retain an Appointed Seller to conduct the sale and
  - (b) instruct the Appointed Seller:
    - (i) to use the most appropriate sale method to secure the best available sale price for the Sale Shares that is reasonably available at that time in the context of complying with these orders, including the stipulated timeframe for the sale and the requirement that none of OCP or its associates may acquire, directly or indirectly, any of the Sale Shares and
    - (ii) to provide to ASIC a statutory declaration that, having made proper inquiries, the Appointed Seller is not aware of any interest, past, present, or prospective which could conflict with the proper performance of the Appointed Seller's functions in relation to the disposal of the Sale Shares
    - (iii) unless the Appointed Seller sells Sale Shares on market, that it obtain from any prospective purchaser of Sale Shares, a statutory declaration that the prospective purchaser is not associated with OCP or its associates and



- (iv) to dispose of all of the Sale Shares within 6 months from the date of its engagement.
4. Donaco and OCP must do all things necessary to give effect to these orders, including:
    - (a) doing whatever is necessary to ensure that the Commonwealth is registered with title to the Sale Shares in the form approved by ASIC and
    - (b) until the Commonwealth is registered, complying with any request by ASIC in relation to the Sale Shares.
  5. None of OCP or its associates may, directly or indirectly, acquire any of the Sale Shares.
  6. OCP and its associates must not otherwise dispose of, transfer, charge or vote any Sale Shares.
  7. None of OCP or its associates may:
    - (a) take into account any relevant interest or voting power that any of them had, or have had, in the Sale Shares when calculating the voting power referred to in Item 9(b) of s611 of the *Corporations Act 2001* (Cth), of a person six months before an acquisition exempted under Item 9 of s611 or
    - (b) rely on Item 9 of s611 earlier than six months after these orders come into effect.
  8. Nothing in these orders obliges ASIC or the Commonwealth to invest, or ensure interest accrues on, any money held in trust under these orders or exercise any rights (including voting rights) attaching to, or arising as a result of holding, the Sale Shares.
  9. Orders 1, 2, 3 and 4 come into effect three business days after the date of these orders. All other orders come into effect immediately.
  10. The parties to these proceedings and ASIC have the liberty to apply for further orders in relation to these orders.

### **Interpretation**

11. In these orders the following terms apply.

<b>Appointed Seller</b>	an investment bank or stock broker
<b>ASIC</b>	Australian Securities and Investments Commission, as agent of the Commonwealth
<b>Donaco</b>	Donaco International Limited
<b>OCP</b>	OL Master (Singapore Fund 1) Pte. Limited

<b>on market</b>	in the ordinary course of trading on Australian Securities Exchange and not by crossing or special crossing
<b>Sale Shares</b>	80,000,000 ordinary shares in the issued capital of Donaco held by OCP

**Tania Mattei**  
**Counsel**  
**with authority of John O'Sullivan**  
**President of the sitting Panel**  
**Dated 6 May 2019**