

## IN THE MATTER OF TAIPAN RESOURCES NL

**These are our reasons for our decision to refuse the application under sections 657C and 657E of the Corporations Law by Troy Resources NL for an interim order that Taipan Resources NL be restrained from proceeding with the extraordinary meeting of its members to be held on 12 October 2000**

### REASONS FOR DECISION

#### INTRODUCTION

1. The Panel in this matter is constituted by Simon McKeon (President), Ian Ramsay (sitting Deputy President) and Denis Byrne.
2. These are our reasons for our decision to refuse the application made under section 657C of the Corporations Law<sup>1</sup> (the **Law**) by Troy Resources NL (**Troy**) for an interim order under section 657E of the Law, that Taipan Resources NL (**Taipan**) be restrained from proceeding with the extraordinary meeting of its members to be held on 12 October 2000.<sup>2</sup>

#### Panel's Function

3. The Panel's main function is to ascertain whether unacceptable circumstances exist in relation to a bid and, if they do, to take action by way of declaration and orders to remove those unacceptable circumstances (subsections 657A(1) and 657D(1) and (2)). Unacceptable circumstances are states of affairs which tend to defeat the achievement of the policies of Chapter 6, as set out in section 602 and reflected in the other provisions of the Chapter. They may arise from a contravention of Chapter 6 (paragraph 657A(2)(b)), but they can arise without a contravention (subsection 657A(1)).

#### Interim Orders

4. The Panel also has a function of making interim orders under section 657E, even in the absence of a declaration that unacceptable circumstances exist. The objective of such an order must be to remove or forestall unacceptable circumstances.
5. In making an interim order, the Panel needs to consider whether unacceptable circumstances exist or would develop if the order was not made, and weigh the burden of the interim order against the mischief which would occur if the order was not made. In weighing those factors, the Panel must bear in mind that it has the power, and will have the opportunity, to make orders designed to rectify unacceptable

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<sup>1</sup> Statutory references are to provisions of the Corporations Law, as in force at 13 October 2000.

<sup>2</sup> Findings of fact in these reasons are based on submissions and materials provided by the parties.

circumstances after a full consideration of the facts and issues. Not every mischief, however, can be overcome after it has arisen.

6. At the interim stage, the Panel generally needs to take at face value credible submissions made by the applicant for interim relief.

## **BACKGROUND**

### **The parties**

7. Troy's principal activity is gold and base metal exploration and gold production through its 49% interest in the Cornishman Project.
8. Taipan is predominantly involved in exploration for gold and base metals. Its principal asset is its 100% interest in the Ashburton Gold Projects.

### **The scheme of arrangement proposal**

9. On 13 June 2000, St Barbara Mines Limited (*St Barbara*) and Taipan announced their intention to merge to the Australian Stock Exchange (*ASX*). If approved the merger will result in:
  - (a) each St Barbara shareholder (other than Taipan) receiving three Taipan shares for each St Barbara share held;
  - (b) each St Barbara optionholder receiving three Taipan options for each St Barbara option held;
  - (c) the cancellation of all St Barbara shares and options (other than a parcel of 100 St Barbara shares held by Taipan); and
  - (d) St Barbara becoming a 100% subsidiary of Taipan and the subsequent delisting of St Barbara from the ASX.
10. Three Court-ordered meetings of St Barbara's share and optionholders regarding the merger are scheduled to take place on 13 October 2000, namely, a scheme meeting for all St Barbara shareholders, a concurrent scheme meeting for all classes of St Barbara optionholders and an extraordinary meeting of St Barbara shareholders (the *St Barbara Meetings*).
11. In order to effect the merger, the ASX considered that Taipan must pass an ordinary resolution approving the merger. This is because under the merger, Taipan was deemed by ASX to be acquiring a substantial asset from Strata Mining NL (*Strata*), namely a 22.51% interest in the shares of St Barbara, in that Taipan's economic interest in St Barbara would be increased by Taipan obtaining a greater percentage of shares in St Barbara through the cancellation of Strata's shareholding in St Barbara. The consideration for this would be the issue by Taipan of Taipan shares

to Strata. ASX Listing Rule 10.1 requires, *inter alia*, that an entity must not acquire a substantial asset from a substantial holder without the approval of holders of the entity's ordinary securities. Strata is a substantial holder of Taipan shares. Accordingly, a general meeting of Taipan (the **Taipan Meeting**) was scheduled for the day prior to the St Barbara Meetings in order to pass this resolution, and a number of others.

12. The Taipan and St Barbara Meetings were initially scheduled to take place on 21 and 22 September respectively. They were later adjourned to 12 and 13 October respectively.

### **The bid and the intervention of Messrs Catto and Ryan**

13. Troy announced a proposal to make a cash offer of 7.6 cents per share for all fully paid ordinary shares in Taipan on 19 September 2000. In its announcement to the ASX Troy stated that:

*“This offer will only be made if the following pre-condition is met:*

*\* the merger proposal between Taipan and St Barbara Mines Limited being put before Taipan shareholders at a general meeting of Taipan to be held on 21 September 2000 (or any adjournment thereof) is not approved by Taipan shareholders or otherwise does not proceed.”<sup>3</sup>*

14. On 21 September, Troy announced that it was extending an offer of 0.65 cents per partly paid share to the holders of partly paid shares in Taipan, subject to the same pre-condition and other conditions set out in Troy's announcement of 19 September.
15. On 25 September, two Taipan shareholders, Mr Robert Catto and Mr Chris Ryan, wrote to Taipan shareholders encouraging them to vote against the proposal that Taipan merge with St Barbara, for, *inter alia*, the following reasons:

- (a) the independent experts' conclusions in:
  - (i) Stanton Partners Corporate Pty Ltd's (**Stanton**) report for Taipan's shareholders; and
  - (ii) KPMG Corporate Finance (Aust) Pty Ltd's (**KPMG**) report for St Barbara's shareholders,

are based on excessive valuations of St Barbara's shares which are not supported by the price at which St Barbara's shares are or were trading in the market; and

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<sup>3</sup> ASX Release, *Troy Resources NL conditionally proposes a cash offer*, 19 September 2000, 1.

- (b) the Stanton report “appears to suggest that the [Taipan] partly paid shares would have negligible value following the proposed merger” and the report does not provide a recommendation with respect to the merger to the holders of the partly paid shares.
16. Taipan responded on 28 September, by sending a letter to its shareholders which addressed the statements made by Messrs Catto and Ryan, and urged shareholders to ignore the allegations made by them.
17. On 27 September, St Barbara made an announcement to the ASX regarding a claim (the **Westgold claim**) made against it for \$7,581,767.70 by Westgold Resources NL (**Westgold**). Westgold alleges that St Barbara did not report to the ASX certain price sensitive information alleged to be contained in a management report to the St Barbara board on 23 April 1997. Taipan wrote to its shareholders alerting them to this claim on 29 September.
18. On 4 October, Taipan’s directors announced to the ASX that it had considered the Westgold claim and had concluded that they remained “fully supportive of the merger” with St Barbara. The letter Taipan sent to the ASX also included a table that the Taipan directors claim:
- “demonstrates that even with a full provision for the Claim the consideration to be paid by Taipan (issue of shares for the cancellation of St Barbara shares under the SBM scheme of arrangement) is consistent with the 3:1 exchange ratio proposed by the merger.”*
19. On 5 October, Taipan sent another letter to its shareholders which included the following statement:

*“A condition of the Troy offer is that Taipan’s proposed merger with [St Barbara] does not proceed. However, it is always open for Troy to waive this self-imposed condition at any time, and thus Taipan shareholders should not necessarily regard the Troy bid as an alternative to the merger. Moreover, if anything, the prospects of a fully priced bid for Taipan (from Troy or another bidder) are likely to be enhanced through successful implementation of the merger.”*

### **Application to Court**

20. On 6 October, Troy filed an application in the Supreme Court of Western Australia seeking an interlocutory injunction to prevent the Taipan Meeting scheduled for 12 October. The application was listed for hearing on 10 October. Troy alleged that Taipan contravened section 995 of the Law, by engaging in conduct that is misleading or deceptive or is likely to mislead or deceive in:
- (a) suggesting in a letter to its shareholders on 5 October 2000 Troy might waive the condition that Troy’s proposed bid will not be

made if the merger with St Barbara is approved (the **Condition Issue**);<sup>4</sup>

- (b) failing to properly disclose in the notice for the meeting the impact of the Westgold claim on the accounts of St Barbara (the **Westgold Issue**); and
- (c) making statements in the Chairman's letter in the Information Memorandum for the Taipan Meeting (**Meeting Memorandum**) which contradict statements by the independent experts in the same document concerning the forecast gold production of St Barbara (the **Gold Production Issue**).

### **Referral from Court**

21. Justice Scott in the Supreme Court of Western Australia heard Troy's application for an interlocutory injunction on 10 October. Justice Scott decided that Troy did not have standing to make its application, and delivered brief oral reasons for his decision which were to the following effect:
  - (a) he had not had very long to consider these questions, and he had very little assistance in this regard other than the submissions made by Counsel (there apparently being no previous authorities on the interpretation or application of section 659B of the Law);
  - (b) a decision was required as a matter of urgency;
  - (c) looking at section 659B of the Law sensibly and overall, the proceedings initiated by Troy were "in relation to a takeover bid or proposed takeover bid" within the meaning of section 659B(1);
  - (d) the Panel has power to make orders of the type sought by Troy; and
  - (e) accordingly, Troy's application ought to be made to the Panel rather than the Court.<sup>5</sup>
22. Taipan requested an order for its costs in relation to Troy's application. Justice Scott referred the question of costs to the Panel but stated that the parties may bring this issue back to the Court if the Panel did not make a decision on the question of costs.

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<sup>4</sup> The full text of which is set out in paragraph 19 above.

<sup>5</sup> The Panel was not in Court to hear the oral reasons delivered by Justice Scott which are described in this paragraph or those which are discussed below in paragraphs 44 – 45 and relies on the reports given to them by their solicitors in Perth who were present in Court.

## **RELIEF SOUGHT**

23. The Panel received Troy's application on 11 October. Troy sought an interim order under section 657E of the Law to restrain the Taipan Meeting from proceeding on the same grounds put to the Court in the application for an interlocutory injunction, which are set out in paragraph 20 above.

## **REASONS FOR DECISION**

### **Preliminary matters - ambit of Troy's application to the Panel**

24. Taipan submitted that the ambit of Troy's application to the Panel was too widely expressed and that the Panel did not have jurisdiction to consider Troy's application in relation to the Westgold Issue and the Gold Production Issue for the following reasons:
- (a) The only issue argued before Justice Scott on 10 October 2000 (in Troy's application which was subsequently referred to the Panel) was whether the Panel or the Supreme Court of Western Australia had jurisdiction to hear Troy's argument in relation to the Condition Issue.
  - (b) Mr Martin Bennett, acting for Troy, submitted orally on 10 October 2000 that the Westgold Issue and the Gold Production Issue were "minor" points and relate to the contents of the Meeting Memorandum and supplementary disclosures by the directors of Taipan concerning the scheme which is within the jurisdiction of the Court, not the takeover which is within the jurisdiction of the Panel.
  - (c) ASIC made submissions to the Court on 10 October that the Panel has exclusive jurisdiction to hear the "central issue" in Troy's application, which relates to the Condition Issue which is set out in paragraph 20(a) above.
  - (d) The Supreme Court is the proper forum for the determination of matters the subject of the Westgold and Gold Production Issues, as the Panel has no jurisdiction to determine matters which relate to disclosure requirements in the Law and the ASX Listing Rules, and the Taipan shareholders meeting to consider and vote on the proposed merger. The Supreme Court does not have power to confer on the Panel its jurisdiction over the matters the subject of these issues.

25. The Panel does not accept these submissions. Troy based its application to the Panel on the same three grounds that formed the basis of its application to the Court and which are set out in paragraph 20 above. Pursuant to section 657A of the Law, the Panel has the jurisdiction to consider the effect of circumstances on the control, or potential control, of a company. Troy contended that if Taipan's shareholders were misled or deceived in the manner identified in paragraph 20 above, unacceptable circumstances would arise in relation to any change in control of the company which resulted from a vote in favour of the merger proposal with St Barbara.
26. Moreover, it is incorrect to state that the Panel has no jurisdiction to determine matters to which disclosure requirements in the Law and the ASX Listing Rules relate. If a lack of disclosure would lead to control of a company changing under unacceptable circumstances, then the Panel generally has power to intervene.<sup>6</sup> Accordingly these issues are within the ambit of the Panel's jurisdiction.

### **The Condition Issue**

27. Since announcing its bid on 19 September, Troy has maintained that it is a pre-condition of the Troy offer that Taipan's proposed merger with St Barbara does not proceed. On 5 October, Taipan sent a letter to its shareholders which suggested, *inter alia*, that Troy might waive the condition and that accordingly, Taipan shareholders should not regard the Troy bid as an alternative to the proposed merger with St Barbara.<sup>7</sup>
28. Troy claimed that this statement was misleading and deceptive, or likely to mislead or deceive. It applied for an interim order preventing the Taipan Meeting from proceeding, and a remedial order that Taipan issue a corrective statement to its shareholders.
29. Taipan claimed that the statement does not misrepresent the position of Troy because the shareholders of Taipan would not be faced with an "either/or" choice (ie the merger with St Barbara or Troy's proposed takeover) in the event that Troy later waived its condition.
30. We accept Taipan's submission that it is accurate to state that Troy may waive its self-imposed condition at any time. Troy's statement of the condition is a statement of its present intention and one which is capable of being changed. It is true that Taipan was in possession of a letter from Troy's solicitors dated 28 September in which it was stated (in

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<sup>6</sup> In general, the Panel would not need to decide whether provisions of the Law (other than in Chapter 6) or the Listing Rules had been complied with, however.

<sup>7</sup> The full text of this statement is set out in paragraph 19 above.

reply to a question from Taipan's solicitors) that Troy intended to maintain the pre-condition.

31. It would have been preferable for the directors of Taipan, in the letter to its shareholders dated 5 October, to state that Troy had indicated to Taipan that its current intention was to maintain the pre-condition. The typical Taipan shareholder would, however, appreciate that Troy was entitled to maintain the pre-condition, and the possible consequences if it did maintain the condition. In addition, a relevant factor for the Panel to consider is that considerable inconvenience and perhaps prejudice would be caused if the Taipan meeting were to be prevented from proceeding with less than one day's notice.

### **Westgold and Gold Production Issues**

32. These two items are discussed together as the arguments they raise are both dealt with in the same manner.
33. Troy alleged that the potential consequences of the claim by Westgold against St Barbara had not been sufficiently disclosed in the documents accompanying the notice of meeting.
34. The Westgold claim was announced on 29 September, and on 4 October, Taipan announced to the market that although its independent expert (Stanton) had advised Taipan that the Westgold claim should be treated as a contingent liability, it had not revised the conclusion of its report. In addition, the directors of Taipan stated that St Barbara's solicitors had advised them that the allegations giving rise to the claim appeared to be "misguided and that any proceedings ... would be vigorously defended" by St Barbara.
35. Troy contended that Taipan's announcement failed to take into account:
  - (a) whether St Barbara will face potential exposure to all shareholders who dealt in St Barbara shares at the time that Westgold alleges its claim arose, in the event that the Westgold claim is successful; and
  - (b) whether Stanton have considered the implication of a wider damages claim,

and accordingly, is misleading and deceptive, or likely to mislead or deceive shareholders of Taipan because it suggests that the full extent of the damages that can be incurred by St Barbara is \$7,581,767.70 and that the underlying liability (if there is one) has no further implication on the accounts of St Barbara and does not impact on the terms of the proposed merger.



36. The issue is clearly one of contention between the parties. We are satisfied that the existence of the claim has been clearly raised by Taipan, in the letter to shareholders dated 5 October. In addition, the issue was raised for St Barbara and Taipan shareholders' attention in announcements to ASX dated 28 September by St Barbara (and similarly by Taipan the next day), and by Taipan on 4 and 5 October.
37. The eventual outcome of the Westgold claim is highly uncertain. At present, we consider that it was reasonable for Taipan directors to raise the issue, to provide St Barbara's lawyers' initial advice, and to provide Stanton's view on the effect of the face value of the claim on the proposal. To do more would likely be unreasonably speculative and certainly might require postponing the meeting for a substantial period.
38. Troy made a similar argument in respect of the complaint concerning the Gold Production Issue as it did in relation to the Westgold Issue. In a letter which accompanied the Meeting Memorandum concerning the Taipan Meeting, the Executive Chairman of Taipan made the following statement:
- "The benefits of the merger with St Barbara are as follows:*
- Strong cash flows from St Barbara's Meekatharra operations which for the 2000/01 year are forecast to produce approximately 150,000 oz of gold. This is projected to increase to 175,000 oz of gold for the 2001/02 year."*
39. However, the report of Australian Mining Consultants Pty Ltd (AMC) in the same Meeting Memorandum states that the forecast for the 2000/01 year is either 131,198 oz of gold or 141,324 oz of gold, and the forecast for the 2001/02 year is 55,828 oz of gold or 128,787 oz of gold.<sup>8</sup>
40. Taipan responded that the higher forecast production levels mentioned in the Meeting Memorandum are consistent with projected levels of gold production which St Barbara had published to the ASX on at least two previous occasions. Taipan further responded that the independent expert, Stanton, had based its opinion of fairness and reasonableness on the lower, AMC projections.
41. We accept that the statement of the Chairman of Taipan is consistent with statements made by St Barbara itself concerning its projected gold production and that the Meeting Memorandum notes on its inside cover that information concerning St Barbara was sourced from St Barbara and its directors. However, we consider that Taipan could have, and should have, drawn shareholders' attention to the difference between St

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<sup>8</sup> Meeting Memorandum, page 126. The report sets out two different cases which may apply hence the differing figures.

Barbara's projections and the figures used by AMC. Taipan should also have explained its view of the reasons for the differences in the figures.

42. We note that in its letter of 28 September, in commenting on the letter from Messrs Catto and Ryan, Taipan drew the attention of those of its shareholders who had lodged proxies for the meeting to their right to withdraw or amend their proxy forms. This was clearly proper for Taipan to do, and materially reduced our concern that the proxy votes from those shareholders may have been cast on information that had been overtaken by events.

### *Court Proceedings*

43. Although Troy did not have an opportunity to raise either of these matters in Court before Justice Scott in its application for interlocutory relief, both the Westgold and Gold Production Issues were subsequently raised in another application by Messrs Catto and Ryan, in the same Court, before the same Judge the following day, 11 October.
44. Justice Scott concluded that this was not an appropriate case for the grant of an interlocutory injunction.
45. His Honour gave brief oral reasons to the effect that:
  - (a) he had to make a decision on the application immediately because the Taipan Meeting was imminent;
  - (b) there may be matters in the affidavits and arguments concerning these issues which could lead him to find a serious issue to be tried as to whether there had been a breach of section 995 of the Law (but he would put it no more strongly than that);
  - (c) while parts of the Meeting Memorandum may have been misleading or deceptive there was corrective material before Taipan's shareholders, in particular the letter that had been sent by Messrs Catto and Ryan; and
  - (d) he considered that the balance of convenience was squarely in favour of the Taipan Meeting proceeding, particularly in light of the fact that it was imminent and given the cost and effort involved in adjourning that meeting.

### *Conclusion*

46. Postponing the meeting would cause some material cost and inconvenience for Taipan and its shareholders. In addition, the Heads of Agreement between St Barbara and Taipan are expressed to have force only until 16 October 2000. We have no evidence that Taipan's

shareholders would not be disadvantaged by having to seek to extend the term of the Heads of Agreement.

47. The Panel agrees with the Court's finding in relation to the statements concerning the Westgold Issue and the Gold Production Issue. In addition, while both the Court and the Panel have had the benefit of the parties' written submissions, the Court has had the additional benefit of a hearing. This was not available to the Panel given that the Panel received Troy's application on 11 October, the Taipan Meeting was on 12 October, and the parties were scheduled to appear in Court in relation to the application of Messrs Catto and Ryan on 11 October.

### **Issue of costs**

48. On 10 October, when Justice Scott referred Troy's application to the Panel, he also referred to the Panel Taipan's application for costs in respect of Troy's unsuccessful Court application.
49. The Panel's power to award costs is set out in subsections 657D(1) and (2) of the Law. Subsection 657D(2) specifically empowers the Panel to make any order to "determine who is to bear the costs of the parties to the proceedings before the Panel" and "any ancillary or consequential orders that it thinks appropriate." However, subsection 657D(1) provides:

*"The Panel may make an order under subsection (2) if it has declared circumstances to be unacceptable under section 657A. It must not make an order if it is satisfied that the order would unfairly prejudice any person. Before making the order, the Panel must give:*

- (a) each person to whom a proposed order relates; and*
- (b) each party to the proceedings; and*
- (c) ASIC;*

*an opportunity to make submissions to the Panel about the matter."*

[Emphasis added]

50. Accordingly, the Panel does not appear to have the power to award costs unless it has declared circumstances to be unacceptable. This is an issue that the Panel may raise with the Government in due course.
51. When dismissing Troy's application for interlocutory relief, Justice Scott noted that if the Panel did not make a decision regarding the costs of hearing Troy's application then the parties could bring the issue back to Court. The Panel declines to make such a decision. The Panel appears not to have power to award costs in relation to Court proceedings. If Taipan wishes to pursue this point then it must take up Justice Scott's invitation to revert to Court.

## **DECISION**

52. Troy's application for an interim order in this matter is refused for the reasons set out above.
53. There will be no order for costs.

## **CONCLUSION**

54. The parties should note that the fact that the Taipan Meeting will proceed as scheduled on 12 October does not mean that the meeting will not be scrutinised by the Panel. We thank all parties for submissions made in a very short space of time.

**Simon McKeon**  
**20 October 2000**