

IN THE MATTER OF TAIPAN RESOURCES NL (No 2)

These are our reasons for our decision to refuse the application under section 657C of the Corporations Law by Troy Resources NL for a declaration of unacceptable circumstances under section 657A and orders under section 657D in relation to the affairs of Taipan Resources NL.

REASONS FOR DECISION

INTRODUCTION

1. The Panel in this matter is constituted by Simon McKeon (President), Professor Ian Ramsay (sitting Deputy President) and Denis Byrne.
2. These are our reasons for our decision under regulation 20 of the *Australian Securities and Investments Commission Regulations* (the *ASIC Regulations*) to refuse to conduct proceedings in relation to the application made on 23 October under section 657C of the *Corporations Law* ¹ (the *Law*) by Troy Resources NL (*Troy*). The application was for a declaration of unacceptable circumstances under section 657A and orders under section 657D in relation to the affairs of Taipan Resources NL (*Taipan*). ² This decision was announced on 16 November 2000.

BACKGROUND

3. This application concerns a proposed takeover offer for Taipan by Troy and a proposed merger between Taipan and St Barbara Mines Limited (*St Barbara*).

The merger proposal

4. The proposed merger between Taipan and St Barbara by way of scheme of arrangement was announced to the ASX on 13 June 2000. 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.

5. Three court-ordered meetings of St Barbara's share and optionholders regarding the merger took 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*). The resolutions put to the St Barbara Meetings to approve the merger were passed by the members of St Barbara.

6. In order to effect the merger, the ASX Listing Rules required that Taipan must pass an ordinary resolution approving the merger (the *Merger Approval Resolution*). This is because, under ASX's interpretation of its Listing Rules, Taipan would be acquiring a substantial asset from Strata Mining NL (*Strata*), namely a 22.51% interest in the shares of 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. The Merger Approval Resolution was passed as an ordinary resolution at a general meeting of Taipan which took place on 12 October 2000 (the *Taipan Meeting*).

Troy's takeover bid

7. 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."*³

Oppression application

8. On 24 October, Troy made an application to the Supreme Court of Western Australia (the *Court*) pursuant to sections 232 and 233 of the Law concerning the affairs of Taipan and its conduct in relation to the proposed merger with St Barbara (the *Oppression Application*). In the Oppression Application, Troy alleged that the following conduct of Taipan was oppressive conduct within the meaning of section 232:

(a) the decision on 28 June to postpone a call made on partly-paid shares in Taipan contrary to the ASX Listing Rules;

(b) the issue of a convertible note facility to St Barbara on 31 July (the *Convertible Note Facility*);

(c) the drawdown of the Convertible Note Facility;

(d) the conversion of the Convertible Note Facility;

(e) allowing St Barbara to vote on the Merger Approval Resolution passed at the Taipan Meeting notwithstanding that:

- (i) St Barbara was an associate of Strata;
- (ii) the acquisition by St Barbara of shares in Taipan was a breach of section 606;
- (iii) Taipan had not allowed Troy to vote all of the Taipan shares which it held at the date of the Taipan Meeting despite not having specified any snapshot date for determining which shareholders were eligible to vote at the meeting; and
- (iv) Taipan allowed Central Exchange Limited to vote 4 million Taipan shares after it had sold those shares.

9. In the Oppression Application, Troy has sought orders:

- (a) requiring Taipan to convene an extraordinary general meeting to consider the resolution again and to disregard any vote cast by St Barbara or Strata and its associates;
- (b) that until the meeting is held, Taipan oppose any proceedings brought by St Barbara seeking approval of the scheme of arrangement;
- (c) alternatively, declaring the Merger Approval Resolution lost on the basis that the votes cast by St Barbara at the Taipan Meeting are not counted.

Scheme proceedings

10. The proceedings under Part 5.1 of the Law for approval of the St Barbara scheme of arrangement (the ***Scheme Proceedings***) are currently before the Court. At a directions hearing in relation to the Scheme Proceedings and the Oppression Application held on 30 October, Justice Owen decided to adjourn the directions hearing until 14 November and ordered the parties to confer and return to the Court ready for argument on a number of issues including:

- (a) whether there should be a trial of any preliminary issue;
- (b) whether the hearing of any preliminary issue should encompass the issue of Taipan shares to St Barbara under the Convertible Note Facility;
- (c) questions of standing and jurisdiction; and
- (d) whether the Oppression Application and the Scheme Proceedings should be heard together.

11. At the directions hearing, Justice Owen stated that the Court is seized of jurisdiction in relation to the Scheme Proceedings and the Oppression Application until such time as the Court orders otherwise. St Barbara has indicated that it intends to raise the issue of whether the Court has jurisdiction over various matters raised in the Scheme Proceedings and the Oppression Application or whether these matters are within the jurisdiction of the Panel.

12. The Court has since further adjourned the directions hearing until 21 November. The parties have not agreed on the length of the hearing required or whether December or January would be a more appropriate date for the hearing.

13. On 1 November, S & O Nominees Pty Ltd, R & B Investments Pty Ltd and Batoka Pty Ltd (the *Objecting Shareholders*) filed points of claim in relation to preliminary issues in the Scheme Proceedings. The points of claim outline the submissions of the shareholders in relation to the operation of clause 4.3 of Taipan's constitution. This clause provides that a director or any person associated with a director (for the purposes of the Law) may only participate (directly or indirectly) in an issue of equity securities in Taipan in certain circumstances. One of these circumstances is where the issue of the equity securities is approved by a special resolution passed at a general meeting of Taipan.

14. The Objecting Shareholders claim that Strata is associated with a director of Taipan, Mr Stephen Miller, and therefore the proposed merger between Taipan and St Barbara would result in the issue to Strata of shares in Taipan in breach of clause 4.3 of Taipan's constitution. The Objecting Shareholders also claim that St Barbara is associated with Mr Miller and therefore the issue of Taipan shares under the Convertible Note Facility was also in breach of clause 4.3 of Taipan's constitution. Mr Miller is a director of both Strata and St Barbara. The Objecting Shareholders claim that clause 4.3 of Taipan's constitution would require these issues of Taipan shares to be approved by a special resolution of Taipan shareholders.

RELIEF SOUGHT

Declaration

15. Troy has sought a declaration of unacceptable circumstances under section 657A in relation to the circumstances surrounding the vote of St Barbara on the Merger Approval Resolution at the Taipan Meeting. In this respect, Troy alleges that the following circumstances in relation to the conduct of the affairs of Taipan amount to unacceptable circumstances:

(a) the drawdown against the Convertible Note Facility by Taipan;

(b) the conversion of the Convertible Note Facility and the resultant issue of ordinary fully paid Taipan shares to St Barbara;

(c) the acquisition by St Barbara of shares in Taipan prior to the Taipan Meeting in breach of section 606; and

(d) the fact that the directors of Taipan allowed St Barbara to vote on the Merger Approval Resolution thereby attempting to satisfy the precondition for the merger and trigger the defeating precondition attached to Troy's takeover bid.

Orders

16. Troy has sought final orders from the Panel under section 657D(2):

(a) declaring the Merger Approval Resolution to be lost;

(b) alternatively, requiring Taipan to convene an extraordinary general meeting to consider and, if thought fit, to pass a resolution in the same terms as the Merger Approval Resolution and directing Taipan in the conduct of such meeting to disregard any vote cast by St Barbara or Strata or its associates;

(c) such further or other order as to the Panel may seem just or appropriate.

PRELIMINARY ISSUES

17. In its application to the Panel, Troy has submitted that, for the relevant purpose of considering the voting exclusion statements required by ASX Listing Rules 10.10.1 and 14.11, St Barbara was precluded from voting on the Merger Approval Resolution on the basis that:

(a) St Barbara was a party to the transaction; or

(b) St Barbara was an associate of Strata.

18. Pursuant to ASX Listing Rule 19.3, "associate" has the meaning given to it by the Law. In that regard, Troy submits that St Barbara and Strata are associates under sections 12 and 15 of the Law because:

(a) Strata can influence the conduct of the affairs of St Barbara through its nominees, Stephen Miller, who is the chairman of St Barbara and Strata, and Peter McIntyre, who is a director and chief executive officer of St Barbara; or

(b) St Barbara and Strata are acting in concert for the purpose of the proposed merger with Taipan.

19. If the Panel decided to conduct proceedings in relation to Troy's application, the substantive issues which the Panel would need to determine before deciding whether or not unacceptable circumstances exist would include:

(a) whether St Barbara was prohibited from voting on the Merger Approval Resolution because Strata and St Barbara were associates within the meaning of sections 12 and 15 of the Law or, alternatively, because St Barbara was a party to the transaction;

(b) whether the acquisition by St Barbara of additional Taipan shares prior to the Taipan meeting was a breach of section 606 because Strata had a relevant interest under section 608(3) in Taipan shares held by St Barbara; and

(c) any issues in dispute in relation to the drawdown and conversion of the Convertible Note Facility.

20. In considering these issues the Panel would most likely need to call evidence from directors of Taipan, St Barbara and Strata including Stephen Miller and Peter McIntyre. It may also be necessary for the Panel to require the parties to produce documents relating to any relevant agreement between Strata and St Barbara in relation to the proposed merger, the acquisition of Taipan shares by St Barbara prior to the Taipan Meeting and the drawdown and conversion of the Convertible Note Facility.

21. Having decided the relevant questions of fact and law in relation to these issues, the Panel would then need to apply the test contained in section 657A to determine whether the circumstances arising as a result of these findings constituted unacceptable circumstances.

22. In this case, the substantive issues which the Panel would need to determine before making a declaration of unacceptable circumstances are almost identical to many of the issues which would need to be determined by the Court in the Oppression Application. In deciding whether or not the alleged conduct of Taipan constitutes oppressive conduct under section 232, Troy's application to the Court submits that the Court should consider a number of substantive issues including:

(a) whether St Barbara was prohibited from voting on the Merger Approval Resolution because Strata and St Barbara were associates within the meaning of the Law;

(b) whether, by reason of the acquisition of Taipan shares by St Barbara prior to the Taipan Meeting, Strata or St Barbara acquired voting power in Taipan shares contrary to the prohibition in section 606; and

(c) any issues in dispute in relation to the drawdown and conversion of the Convertible Note Facility.

23. The Oppression Application also raises a number of other issues which are not raised in Troy's application to the Panel. The Court is able to deal with all of these issues and any further issues which the parties wish to raise in the Oppression Application or the Scheme Proceedings. In determining these issues, it is likely that the Court would wish to examine the same witnesses and evidence that the Panel would wish to examine if it decided to conduct proceedings in relation to Troy's application. The remedies requested in Troy's application to the Panel are also similar to the remedies requested in the Oppression Application and, in any case, are remedies that are available to the Court should it decide to grant such relief.

24. There are some differences between the issues which the Court would need to decide and the issues that the Panel would need to decide. The Panel must consider whether the circumstances are unacceptable as set out in section 657A while the Court must decide whether the circumstances amount to oppressive conduct under section 232. The tests which apply in each case are different. However, there are substantive questions of fact and law which both the Panel and the Court must consider before these tests are applied. Almost

all of the substantive issues raised in Troy's application to the Panel have also been raised in the Oppression Application.

25. There is also the possibility that evidence and witnesses that are relevant to Panel proceedings would also be relevant to the issue raised by the Objecting Shareholders in the Scheme Proceedings in relation to clause 4.3 of Taipan's constitution. In determining this issue, the Court must decide complex questions of fact and law in relation to the alleged associations between Stephen Miller and Strata and Stephen Miller and St Barbara. These issues arise out of the same factual matrix as the issues which would be relevant to the Panel proceedings.

DECISION

26. It is our view that it will generally be inappropriate for the Panel to conduct proceedings in relation to an application where the evidence and the issues to be considered by the Panel are already before the court. The Panel is keen to avoid duplicative proceedings and discourage forum shopping in circumstances where the functions of the Court and the Panel overlap.

27. The issues raised by Troy's application substantially overlap with the issues raised by the Oppression Application and the Scheme Proceedings before the Court. We consider that, if the Panel conducts proceedings in relation to this application, it would inevitably involve the Panel examining witnesses and evidence and determining questions of fact and law which are central to the Court's deliberations in the Oppression Application. There is also the potential for some overlap between the Panel proceedings and the Scheme Proceedings.

28. In this case the overlap between the Panel application and the Court proceedings is so significant that it would be impossible to effectively separate any issues from Troy's application which could be considered by the Panel. The Court has a broader jurisdiction than the Panel and is able to consider a wider range of issues in the Oppression Application and the Scheme Proceedings than the Panel is able to consider in this application.

29. For these reasons, the Panel considers that it would be inappropriate to conduct proceedings in relation to this application because of the substantial overlap between this application and the Oppression Application and Scheme Proceedings. The Panel is aware of the potential for duplication in cases such as this and is concerned to ensure certainty by not interfering where court proceedings have been validly commenced and the court has decided that it has jurisdiction. Aside from this, there is also the possibility that any interference with evidence or witnesses by the Panel may be viewed as a contempt of court.

30. If the Court declined to consider any of the substantive issues raised in Troy's application to the Panel then Troy would be able to make a further application to the Panel at a time when those issues were not being considered by the Court. Indeed, the Court may decide that certain issues raised in the Oppression Application or the Scheme Proceedings are better dealt with by an

application to the Panel because they fall within the Panel's jurisdiction. To the extent that such an application was made more than two months after the relevant circumstances had occurred, the Panel has the power under section 657C(3) to extend the time for making an application in an appropriate case.

31. Alternatively, if the Court decides the substantive issues raised by Troy's application to the Panel in the Oppression Application or the Scheme Proceedings, it may be open for Troy to make a further application to the Panel based on the questions of fact and law decided by the Court after those issues have been determined by the Court. For example, if the Court decided that section 606 has been breached but that this did not amount to oppressive conduct within the meaning of section 232, Troy may be able to make an application to the Panel for a declaration of unacceptable circumstances based on the Court's findings of fact and law.

32. Under Regulation 20 of the ASIC Regulations we therefore decline to conduct proceedings in this matter.

CONCLUSION

33. We thank all parties who made preliminary submissions.

34. We intend to provide to the Court considering the Oppression Application and Scheme Proceedings a copy of this decision and reasons.

Simon McKeon
16 November 2000

1 Statutory references are to provisions of the Corporations Law, as in force at 16 November 2000.

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

3 ASX Release, Troy Resources NL conditionally proposes a cash offer, 19 September 2000, 1.