

CSP Reasons for Decision

The Takeovers Panel Taipan Resources NL 06

In the matter of Taipan Resources NL 06
[2000] ATP 15

Catchwords:

Review of ASIC decision - Panel approach to review - bidder announced pre-bid condition - ASIC required inclusion of equivalent defeating condition - truth in takeovers policy

Corporations Act 2001 (Cth) sections 602(a) and (b), 631(1), 655A, 656A, 995

Re Becker (1977) 1 ALD 158 considered

Taipan Resources NL [2000] ATP 11 referred to

These are the reasons for our decision, in relation to an application for review by Troy Resources NL under section 656A of the Corporations Law, to affirm the decisions of ASIC dated 2 November 2000 and 5 December 2000 under section 655A of the Corporations Law in relation to a takeover bid by Troy Resources NL for Taipan Resources NL.

REASONS FOR DECISION

1. The sitting Panel in this matter comprises Simon McKeon (President), Ian Ramsay (sitting Deputy President) and Denis Byrne.
2. These are our reasons for affirming on 12 December two decisions of the Australian Securities and Investments Commission under section 655A of the Corporations Law¹ concerning the waiver of a defeating condition in a takeover bid by Troy Resources NL (*Troy*) for shares in Taipan Resources NL (*Taipan*).² Troy applied to us on 8 December under section 656A for review of the ASIC decisions
3. Under section 656A, the Panel may review a decision of ASIC under section 655A and may affirm, vary or set aside the decision. For these purposes, we have the same discretions and obligations as ASIC. If in making the decision under review ASIC applied a consistent administrative policy, we should in general apply that same policy, but

¹ The decisions were made on 2 November and 5 December 2000. Troy applied for review of them on 8 December, 2000.

² Statutory references in these reasons are to the Corporations Law. Findings of fact are based on ASIC's statement of reasons, submissions by the parties and announcements to Australian Stock Exchange Limited.

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we must make our own assessment of the facts to which we apply it and of the preferable application of the policy to the facts.³

Troy's Announcement

4. On 12 June 2000, Taipan and St Barbara Mines Ltd (*St Barbara*) announced a merger to be effected by three schemes of arrangement between St Barbara and its members and option holders (the *St Barbara scheme*), under which the members and option holders would exchange their shares and options for Taipan securities.
5. On 19 September 2000, Troy announced a takeover bid for all of the fully paid ordinary shares in Taipan then on issue (or converted from existing partly paid shares). On 21 September, Troy announced that it would also bid for the partly paid shares in Taipan.⁴ Troy's first announcement included the following:

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

The merger proposal between Taipan and St Barbara Mines Ltd ... 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.

6. At a meeting on 12 October, members of Taipan passed an ordinary resolution approving the issue of shares by Taipan in connection with the St Barbara scheme. At meetings on 13 October, members and option holders in St Barbara approved the scheme. St Barbara has applied to the Supreme Court of Western Australia for approval of the scheme. That application, a challenge to the validity of the Taipan resolution and a number of related matters are likely to come before the Court in January 2001.

The First ASIC Decision

7. Under subsection 631(1), within 2 months of making its first announcement, Troy was required to make a bid on terms not substantially less favourable than those it had announced.⁵ By early November, it was already likely that the fate of the St Barbara scheme would not have been resolved when this period was due to expire on 19 November.

³ *Re Becker* (1977) 1 ALD 158.

⁴ This announcement was on the same conditions as the announced bid for the fully-paid shares. We have not distinguished between the two classes in these reasons.

⁵ Under section 670F, there is an exception if new, or newly discovered, circumstances make it unreasonable to require the bidder to make a bid.

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8. Troy applied to ASIC for a partial exemption from subsection 631(1) (the *first ASIC decision*), which was granted on 2 November. Troy was not exempted from bidding for Taipan, but was allowed to add to the terms it had announced on 19 September, a defeating condition (the *defeating condition*) corresponding with the pre-condition in its 19 September announcement i.e. that the St Barbara scheme not be approved by the Court.⁶
9. In effect, Troy abandoned its original position that it would not bid until its condition had been satisfied by the failure or abandonment of the merger between Taipan and St Barbara, but made the bid subject to a corresponding condition instead.
10. ASIC made it a condition of the relief that:

“The offers under the Takeover Bid:

- (a) do not include the pre-condition contained in the Public Proposal;
- (b) include the following defeating condition:

“The Court dismissing, or St Barbara discontinuing, St Barbara’s application (Supreme Court Matter COR 197 of 2000) to approve the Share Scheme and Option Scheme pursuant to s.411(4) of the Corporations Law.”; and

- (c) provide to the effect that the defeating condition set out in paragraph (b) above cannot be waived by the Bidder.”
11. Paragraph (c) of this condition was required by ASIC and acquiesced in by Troy. ASIC required the defeating condition to be non-waivable:

‘as Troy had engaged in conduct indicating an intention not to waive the condition (whether as a precondition or a defeating condition) in any circumstances’.

Troy’s Bid for Taipan

12. On 17 November, Troy made offers incorporating the defeating condition and the term required by ASIC to the effect that the condition could not be waived. The offers are due to close on 19 December. When we made our decision, that date could have been extended. If the condition is not satisfied when the bid closes, all contracts resulting from acceptances will be avoided: section 650G.

⁶ Troy was concerned that the addition of a defeating condition, which might well not be satisfied, meant that the terms of the bid were substantially less favourable than the terms it had announced.

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13. When we made our decision on 12 December, it was highly unlikely that the condition would be satisfied on 19 December: the Court will not consider St Barbara's application for approval of the St Barbara scheme until January 2001 and we have no indication that St Barbara will withdraw its application for that approval.

Troy's Public Statements

14. The first ASIC decision on 2 November was intended to ensure that the terms of Troy's bid were consistent with Troy's public statements from 19 September that its intention was that its bid would remain subject to the pre-condition. There were a number of such statements.

15. Troy's original announcement of 19 September included the following, in addition to setting out the pre-condition itself:

'We also believe that Taipan shareholders will appreciate an alternative to the [St Barbara] merger ...

If the merger does not proceed, the Troy offer will provide accepting Taipan shareholders with an opportunity to reinvest the consideration ...

Troy believes that the meeting of Taipan shareholders proposed for 21 September to consider the merger with [St Barbara] should be abandoned, or at the least, adjourned to allow Taipan shareholders sufficient time to re-consider how they wish to vote in the light of the option of a cash offer by Troy.'

16. On 5 October, Taipan wrote to its shareholders stating that:

'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 [with St Barbara].'

17. Troy took strong exception to this statement, initiating proceedings first in the Supreme Court and then in the Panel to have the Taipan meeting adjourned, in part because of the risk that Taipan shareholders would be misled by it. On 6 October, Troy made an announcement to ASX in relation to its Supreme Court action against Taipan which included the following:

'Troy intends to seek urgent interlocutory relief from the Supreme Court of Western Australia seeking an adjournment of the Taipan shareholders meeting as it apprehends that there is a real possibility that Taipan shareholders will be misled as to Troy's intentions.

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The Taipan letter suggests that if Taipan shareholders vote in favour of the merger, they may still receive a full bid for their shares from Troy.

Troy has previously advised the solicitors for Taipan that it intends to maintain as a pre-condition to any Troy bid, that the proposed Taipan St Barbara merger does not proceed and shareholders do not approve the merger proposal.'

18. On 28 November 2000, while ASIC was considering Troy's second application, Troy's Chairman told the company's annual general meeting, in a speech which was released to ASX, that the bid was:

'subject to a precondition that the proposed merger between Taipan and St Barbara Mines Ltd does not proceed'.

It was only on 29 November that Troy announced to ASX that it had applied to ASIC to waive the defeating condition.

19. Troy made a number of other statements consistent with these in Court papers, oral argument in Court, correspondence between solicitors and applications and submissions to the Panel. While these statements were to varying degrees private and did not affect the market as directly as the public statements, they supported Taipan's and ASIC's acceptance that the public announcements represented Troy's intentions.

The Second ASIC Decision and the Review Application

20. On 27 November, Troy applied to ASIC for a variation of the first ASIC decision, to remove the requirement that the defeating condition be non-waivable. On 5 December, ASIC refused that application (the *second ASIC decision*). Its reasons were the reason it originally gave for requiring the defeating condition to be non-waivable and the additional ground that shareholders in Taipan and St Barbara might be prejudiced by Troy abandoning the position it had taken.
21. Troy applied to us on 8 December under section 656A for review of the first ASIC decision (to the extent that it required the defeating condition to be non-waivable) and of the second ASIC decision. Over the weekend of 9 and 10 December, ASIC provided a statement of reasons and other parties provided submissions. On 12 December, we upheld both ASIC decisions.

Truth in Takeovers

22. The principle underlying ASIC's decisions has been articulated by ASIC on various occasions, notably in releases entitled *Truth in Takeovers* (May 1999) and *Better Disclosure for Investors* (August 2000). It is that offerees and the market should be able to rely on statements of intention by

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participants in a takeover. It is one application of the general principle in section 995, which provides that:

‘A person shall not, in or in connection with:

- (a) any dealing in securities; or
- (b) without limiting the generality of paragraph (a):
 - (i) ...
 - (ii) ...
 - (iii) the making of, or the making of an evaluation of, or a recommendation in relation to, offers under a takeover bid;
 - (iv) ...

engage in conduct that is misleading or deceptive or is likely to mislead or deceive.’

- 23. The truth in takeovers policy can also be based on the legislative policy of section 631, that of paragraph 602(b) that offerees and directors of a target should have adequate information on which to make their decisions and a reasonable time in which to make them, and that of paragraph 602(a) that the acquisition of control over...the voting shares in a listed body ... takes place in an efficient, competitive and informed market.
- 24. For a bidder to press shareholders to make decisions on its bid with statements about its intentions and later to resile from those statements risks deceiving and coercing shareholders.
- 25. The mischief is that the bidder’s course of conduct as a whole may induce offerees and other persons in the market to make decisions based on an apprehension of material facts which the bidder’s own conduct later falsifies. When a bidder states an intention, but means to reserve the right to change its mind, it needs to avoid the risk of deceiving offerees by making it clear that they should not rely on its stated intentions, for instance by being quite explicit that it is stating only its present intention.
- 26. Palliatives such as offering accepting offerees an opportunity to withdraw their acceptances and offering compensation to other persons affected do not make coercive or deceptive conduct acceptable. Bidders should conduct themselves in ways which do not call for these remedies. It is entirely proper of ASIC to refuse relief to support conduct which is

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so wrong that the applicant must offer compensation to those affected by it.

27. Accordingly, we accept that ASIC's published policies include a general principle, which we regard as sound, that where a bidder makes a statement about its intention in relation to the conduct of a bid, shareholders and market participants can reasonably expect the bidder to act consistently with that stated intention.
28. This principle is not an absolute rule that the bidder must act out its stated intentions mechanically. What it is reasonable to expect depends also on the degree of precision of its statement, the presence or absence of clear qualifications to the statement, on the acts of other persons, on new circumstances, on later statements of the bidder itself and on how far it is reasonable to expect stated intentions to be pursued.

The Tenor of Troy's Announcements

29. The overall impression given by Troy's public statements from 19 September until 29 November (and supported by its private statements) was that the bid would remain conditional on the merger between Taipan and St Barbara not proceeding, so that Taipan shareholders had a choice between mutually exclusive alternatives.
30. Troy's position over that period was firm: indeed it became firmer when Troy took issue with Taipan's letter of 5 October and again when it made its bid, including a non-waivable defeating condition and without any reservation about waiving the defeating condition. If Troy had not taken issue with Taipan's letter in the way that it did, or if it had made an immediate and public protest over ASIC's condition that the defeating condition be made non-waivable and had quickly sought to set aside that condition, our conclusion might have been different.⁷
31. While Troy did not unequivocally rule out waiving the condition, it did not protest against or challenge the first ASIC decision until 27 November, when it applied to ASIC for relief allowing it to waive the defeating condition.

Truth in Takeovers and Troy's Announcements

⁷ In *Taipan Resources NL* [2000] ATP 11 at[30], on the 5 October Taipan letter, we said of the pre-condition in Troy's 19 September announcement that:

'We accept Taipan's submission that it is accurate to state that Troy may waive its self-imposed condition at any time'.

That was said before Troy acquiesced in ASIC's requirement that the defeating condition be non-waivable and made offers on that basis and before Troy's chairman affirmed that position in the AGM.

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32. The truth in takeovers principle applies to the announcements which Troy made about its bid for Taipan, because they were apt to guide the conduct of Taipan shareholders, by offering them an alternative to the merger, if they voted it down or it failed for any other reason. Taipan shareholders may have been affected by them, in various ways which would need to be addressed in the terms of any relief allowing Troy to waive the defeating condition:
- (a) Taipan shares have traded on market at prices below Troy's bid price, no doubt partly because of a similar perception that the bid is unlikely to succeed. Shareholders who sold on market may have received lower prices than they might have done, had Troy not taken the position that it has.
 - (b) many of the acceptances received by Troy under its current bid were obtained while Troy maintained the public position we have just described. Taipan shareholders may, for instance, have accepted Troy's bid to hedge their bets: support the St Barbara merger, but accept the bid as their second preference, in case the merger fell through;
 - (c) Taipan shareholders may have decided not to accept, because they thought that the defeating condition was unlikely to be satisfied;
33. Accordingly, we agree with ASIC that in the interests of an informed market, Troy should not free its bid from the defeating condition.

A fresh bid

34. Both Taipan and St Barbara submitted that Troy should make a fresh bid without the defeating condition, rather than waive the defeating condition in the current bid.
35. We would not regard a fresh bid by Troy for Taipan as giving rise to unacceptable circumstances, merely because it did not contain the defeating condition. Taipan shareholders were entitled to expect Troy's bid to give effect to Troy's public announcements. That was done. They were also entitled to expect that the defeating condition would stand until the bid closed. That will happen, and when it has happened, Troy will have completed the course of conduct to which it committed in its public announcements. Taipan shareholders were not entitled to expect that the bid would succeed or that it would be extended.
36. However, nobody was entitled to expect that there would be no bid for Taipan which was free of the defeating condition, from Troy or any other person. Accordingly, once its obligations to the market and offerees under its first bid are completed, and given that in these

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circumstances a fresh bid will not disadvantage offerees, Troy is free to bid again for Taipan on [any] terms which comply with Chapter 6.

37. There are pragmatic reasons, as well as reasons of principle, for favouring a fresh bid over a waiver of the condition. Had we allowed Troy to waive the defeating condition, we would have required:
- (a) Troy to extend its current bid for a sufficient period of time to allow Taipan shareholders to assess the merits of the revised bid and to ensure that Taipan shareholders were not subjected to coercive time pressures in deciding whether or not to accept the bid;
 - (b) Taipan shareholders who had already accepted Troy's bid to have a reasonable time to withdraw their acceptances; and
 - (c) full and clear supplementary disclosure of Troy's intentions, including its intentions in relation to:
 - (i) representation on the Taipan board;
 - (ii) completion of the proposed merger between St Barbara and Taipan; and
 - (iii) the merged entity, if the merger proceeds.

Troy volunteered most of these things, although we did not discuss the details of timing and of disclosure with Troy.

38. Offerees would not be likely to receive supplementary bidder's and target's statements much before the holiday season.⁸ To give them a proper opportunity to accept or withdraw their acceptances in the light of the new information, we would have required the revised bid to have remained open until late January 2001. The lapse of the existing bid will lead to a return of acceptances. A fresh bid will not be much slower or more expensive for Troy to make than a variation which complies with all of our requirements. There would be fresh bidder's and target's statements and time to consider them extending into late January, and it would mark a break with the current bid.
39. To avoid causing confusion Troy should not serve a fresh bidder's statement before the current bid closes and any public statements concerning a new bid should make Troy's change of plan very clear.

Finally

⁸ Which effectively begins on Saturday 23 December.

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40. For the reasons set out above, we refuse Troy's application and affirm the first and second ASIC decisions.
41. We thank the parties for their prompt submissions, under a tight schedule. We have granted leave to the parties to be represented by their solicitors. There will be no order for costs.

Simon McKeon

President of the Sitting Panel

Decision dated 12 December 2000

Reasons published 29 December 2000