

IN THE MATTER OF TAIPAN RESOURCES NL (No 4)

These are the reasons for our decision to refuse the application of Troy Resources NL under section 657C of the Corporations Law dated 29 November 2000 for an interim order under section 657E and a declaration of unacceptable circumstances and final orders under sections 657A and 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 the reasons for our decision to refuse to make an interim order under section 657E of the Corporations Law (the **Law**) and a declaration of unacceptable circumstances under section 657A in relation to a proposed placement of up to 25 million shares by Taipan Resources NL (**Taipan**). The decision was made on 13 December 2000 in response to an application by Troy Resources NL (**Troy**) under section 657C dated 29 November 2000.¹

BACKGROUND

Troy's takeover bid

3. This application relates to a takeover bid for Taipan by Troy. 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. Troy lodged its bidder's statement on 2 November and dispatched offers under the bid on 17 November. Troy's takeover bid was scheduled to close on 19 December.
4. Troy's takeover offer was subject to a non-waivable defeating condition that a proposed merger by scheme of arrangement between Taipan and St Barbara Mines Limited (**St Barbara**) is not approved by the Supreme Court of Western Australia. St Barbara's share and option holders approved the merger on 13 October 2000. A resolution approving the merger was also passed at a meeting of Taipan shareholders held on 12 October 2000.

¹ Statutory references are to provisions of the Corporations Law, as in force at 13 December 2000. Findings of fact are based on submissions by the parties and announcements to Australian Stock Exchange Limited.

5. At the date of this decision, the scheme of arrangement was awaiting final approval by the Supreme Court of Western Australia.² Objections to the scheme were scheduled to be heard by the Court on 15 January 2001.³

St Barbara convertible note

6. On 31 July, Taipan entered into a convertible note facility with St Barbara (the ***St Barbara Convertible Note***). The facility was for \$750,000 with a maturity date of 31 August 2001 and an interest rate of 10% per annum. St Barbara was able to convert the note to fully paid ordinary shares in Taipan at an issue price of 6.5 cents per share.
7. On 5 October, Taipan announced to the ASX that it had fully drawn down the St Barbara Convertible Note. On 6 October, St Barbara issued to Taipan a notice of conversion pursuant to the St Barbara Convertible Note and Taipan issued 11,538,462 fully paid ordinary shares in Taipan to St Barbara.
8. The notice of meeting for the Taipan annual general meeting held on 30 November 2000 (the ***Taipan AGM***) contained an ordinary resolution to ratify the issue of shares to St Barbara in accordance with the terms of the St Barbara Convertible Note for the purposes of ASX Listing Rule 7.4. At the Taipan AGM, a resolution was passed to adjourn the consideration of the resolution to 31 January 2001.

Proposed share placement

9. The notice of meeting for the Taipan AGM also contained the following resolution (the ***Resolution***):

“That for the purposes of Listing Rules 7.1 and 7.9 of the Listing Rules of Australian Stock Exchange Limited and for all other purposes, approval is given to the allotment and issue of up to 25,000,000 securities in the Company at an issue price equivalent to at least 80% of the average market price for securities in that class calculated over the last five days on which sales were recorded before the date on which the issue is made.”⁴

10. As at 13 December 2000, there were 200,925,636 fully paid Taipan shares on issue and an additional 189,387,174 partly paid Taipan shares on issue. If all of the 25 million shares were issued, this would represent approximately 11% of the fully paid issued capital of Taipan.

² Further background information on the scheme of arrangement and previous applications to the Panel in relation to the scheme of arrangement and Troy’s takeover bid may be found in the Panel’s reasons in *Re St Barbara Mines Ltd (11 October 2000)*, *Re Taipan Resources NL (No. 1) (20 October 2000)* and *Re Taipan Resources NL (No. 2) (16 November 2000)*.

³ This date was subsequently vacated by the Court on application by St Barbara. On 10 January, Taipan announced to the ASX that St Barbara had elected to terminate the merger implementation agreement between Taipan and St Barbara and, therefore, the scheme of arrangement would not proceed.

⁴ Taipan Resources NL, Notice of Annual General Meeting, 25 October 2000, 1.

11. The explanatory memorandum for the Taipan AGM stated in relation to the Resolution that:
 - (a) the Taipan shares would be issued at the discretion of the directors within 3 months of the date of the meeting;
 - (b) the identities of the allottees were unknown;
 - (c) the shares would not be issued to the directors of Taipan or their associates;
 - (d) the shares would be offered to parties in accordance with section 708⁵ and Taipan would therefore not be required to prepare a prospectus or other offer document; and
 - (e) the funds raised from the issue would be used for working capital, the retirement of debt and for exploration.
12. The resolution was passed at the Taipan AGM on 30 November with 73,108,194 votes for and 66,156,872 votes against.
13. On or about 12 December, Taipan agreed to issue 15 million shares to two stockbroking firms who had agreed to place the shares with their private clients. Taipan informed the Panel that it had no knowledge of the identity of the private clients.

ASX Listing Rules

14. Listing Rule 7.1 provides a limit on the number of shares that a company may issue or agree to issue in any 12 month period. In general, this limit will be equivalent to 15% of the capital of the company. Issues of shares that are approved or ratified by shareholders in general meeting are not included for the purposes of calculating the maximum number of shares that a company may issue under the rule.
15. Listing Rule 7.9 relevantly provides that:

“An entity must not issue or agree to issue equity securities, without the approval of holders of ordinary securities, for 3 months after it is told in writing that a person is making, or proposes to make, a takeover for securities in it.”
16. There are a number of exceptions to Listing Rule 7.9, none of which are relevant to the proposed issue by Taipan. These exceptions include a pro-rata issue to holders of ordinary shares and an issue made on exercise of rights of conversion.

⁵ Section 708 provides that certain offers of securities are exempt from the disclosure requirements set out in Part 6D.2 of the Law.

Effect on Troy's takeover bid

17. Troy's takeover bid extended only to those Taipan shares that were on issue at the date of the announcement of Troy's bid and any new shares issued as a result of conversion of the St Barbara Convertible Note. Troy's bid did not extend to any shares issued by Taipan pursuant to the Resolution.
18. If Taipan issued, or agreed to issue, shares pursuant to the Resolution during the bid period, this would trigger the defeating condition contained in paragraph 2.7(a)(i)(D) of Troy's bidder's statement.⁶ In this situation, Troy would be entitled to allow its bid to lapse and all acceptances would become void at the end of the offer period: section 650G.

Court application

19. On 17 November, Troy applied to the Supreme Court of Western Australia under section 1324 for an injunction restraining Taipan from putting the resolutions in relation to the St Barbara Convertible Note and the proposed share placement to the Taipan AGM (COR 312 of 2000) (the ***Injunction Application***).
20. In the Injunction Application, Troy claimed that the notice of meeting and explanatory memorandum for the Taipan AGM were misleading and therefore constituted a breach of section 995⁷ for essentially the following reasons:
 - (a) they did not disclose the existence of another Court action commenced by Troy in which Troy had raised issues concerning the St Barbara Convertible Note; and
 - (b) they did not disclose the reason for the proposed issue of shares and the fact that this would trigger a defeating condition attached to Troy's takeover bid.
21. On 24 November, the Court refused to grant the Injunction Application on the grounds that there would not be, at the time of the Taipan AGM, any deficiency or misleading quality in the information available to Taipan shareholders that would justify the grant of an injunction.⁸ In making its decision, the Court had regard to all of the information

⁶ Paragraph 2.7(a)(i)(D) of Troy's bidder's statement provides that Troy's bid is subject to the condition that, during the bid period, Taipan, or a subsidiary of Taipan, does not issue shares (other than properly issued Taipan partly paid shares in accordance with Taipan's announcement of 4 July 2000 or Taipan shares issued on conversion of a convertible note held by Rothschild) or grant an option over its shares, or agree to make such an issue or grant such an option.

⁷ Section 995 provides that a person must not engage in conduct that is misleading or deceptive, or is likely to mislead or deceive, in or in connection with any dealing in securities.

⁸ *Troy Resources NL v Taipan Resources NL [2000] WASC 298*, 24 November 2000, Steytler J.

available to Taipan shareholders including information that had been subsequently sent to shareholders by Taipan and Troy.⁹

Troy's alternative funding offer

22. At the Taipan AGM on 30 November, representatives of Troy orally indicated to the directors of Taipan that Troy would be willing to assist in the underwriting of a rights issue by Taipan, and stated that Troy would confirm the terms in writing to Taipan. On 11 December, Westchester Financial Services (**WFS**) provided a written offer to Taipan to underwrite a rights issue of up to \$1.5 million with bridging finance of up to \$1 million. The offer was sub-underwritten by Troy and was subject to a number of conditions.

THE APPLICATION

23. On 29 November, Troy applied to the Panel for an interim order and a declaration of unacceptable circumstances and final orders in relation to the proposed issue of up to 25 million shares by Taipan. Troy sought an interim order that Taipan be restrained from issuing any shares pursuant to the Resolution and a declaration that the proposed placement by Taipan constituted unacceptable circumstances.
24. Troy submitted that the proposed placement would give rise to unacceptable circumstances because, unless Taipan could demonstrate that it had an immediate need for additional working capital, the only reason for Taipan to make the proposed placement was to attempt to impede Troy's takeover offer and potentially prevent Taipan shareholders from having the opportunity to accept that offer. Troy argued that the circumstances surrounding the proposed placement supported this view in that:
- (a) Taipan had not disclosed any immediate need for funding;
 - (b) Taipan had not properly investigated or considered the alternatives available to it to secure the necessary funds;
 - (c) Taipan had not disclosed the price at which it intended to issue the shares and the Resolution authorised the board to issue the shares at 80% of market value which was significantly below the offer price of 7.6 cents under Troy's takeover bid; and
 - (d) Taipan had not disclosed the identities of the persons to whom the shares would be issued.

⁹ This information included a letter from Taipan to Taipan shareholders dated 17 November and a letter from Troy to Taipan shareholders dated 18 November. The content of both of these letters was also included in announcements to the ASX.

PRELIMINARY ISSUE

25. As a preliminary issue, Taipan argued that the application by Troy did not disclose any basis for the Panel to conduct proceedings because the relevant circumstances that Troy alleged were unacceptable, being the placement of shares, had not yet occurred. The only event which had occurred was the approval by Taipan shareholders of the issue of up to 25 million shares over a period of three months.
26. At the time of Troy's application, Taipan had not even agreed to issue any shares pursuant to the Resolution. Taipan argued that the Panel should therefore decline to conduct proceedings on the basis that, even if an issue of shares could be considered to be unacceptable in certain circumstances, these circumstances did not yet exist.
27. While the Panel's power to declare circumstances unacceptable may require the relevant circumstances to have come into existence, the power can be exercised in relation to an acquisition of a substantial interest that is incomplete or merely proposed. If the Resolution would inevitably lead to events occurring which must be unacceptable, then the Resolution itself would be unacceptable. However, if the Resolution could lead to developments that are not unacceptable, then there is nothing inherently unacceptable about the Resolution. In this situation, it is appropriate for the Panel to consider whether an issue of shares pursuant to the Resolution would, *per se*, constitute unacceptable circumstances and, if so, to make a declaration on that basis.
28. The Panel also has the power to make interim orders under section 657E, which power is not dependent upon the existence of unacceptable circumstances. One of the legitimate purposes for which the Panel may exercise this power is to prevent unacceptable circumstances from developing. In this case, if the Panel found that an issue of shares by Taipan pursuant to the Resolution, *per se*, would constitute unacceptable circumstances in this particular situation, the Panel would be entitled to make an interim order preventing Taipan from issuing the shares.
29. We therefore decided under regulation 20 of the *Australian Securities and Investments Commission Regulations* (the **ASIC Regulations**) to conduct proceedings in relation to Troy's application to consider the interim order application and also to consider whether an issue of shares pursuant to the Resolution would constitute unacceptable circumstances.

INTERIM ORDER

30. On 30 November, we wrote to Taipan inviting Taipan to give the Panel an undertaking not to issue shares pursuant to the Resolution for a certain period or not to issue the shares without giving at least 2 business days notice of the proposed issue to the Panel.
31. On 1 December, Taipan informed the Panel that it had no intention of immediately issuing any shares pursuant to the Resolution. Taipan undertook not to make a placement of shares prior to 11 December except for the express purpose of paying its debts as and when they fall due. The Panel accepted the undertaking from Taipan.
32. On 13 December, Taipan announced that it did not intend to issue any shares pursuant to the Resolution until the Panel notified the parties of its decision in relation to this application.¹⁰
33. In view of Taipan's undertaking to the Panel and its subsequent announcement, we decided not to make an interim order restraining Taipan from issuing shares pursuant to the Resolution.

SUBSTANTIVE ISSUES

34. An issue of shares by a target company in order to attempt to defeat or impede a takeover bid could, depending on the particular circumstances, constitute unacceptable circumstances because it would have the potential to:
 - (a) detract from an efficient market; and
 - (b) deprive shareholders of an opportunity to participate in the benefits of the takeover bid.
35. However, while we accept that a defensive placement may give rise to unacceptable circumstances, a placement of shares by a target company during the bid period in accordance with the Law and the ASX Listing Rules for legitimate commercial reasons will not necessarily amount to unacceptable circumstances. In particular, we accept that a placement of shares during the bid period for the purposes of raising funds that are urgently required will generally not constitute unacceptable circumstances.
36. In this case, we accepted Taipan's submission that it had already spent most of the money raised through the St Barbara Convertible Note and that it urgently required further funding. We were satisfied that the

¹⁰ ASX Announcement, *Issue of shares during a takeover offer or takeover announcement* : Listing Rule 7.9, 13 December 2000, 1.

funds were required by Taipan to cover expenses relating to the proposed merger with St Barbara and the takeover bid by Troy as well as on-going operational and administrative expenses.

37. It is also relevant to consider whether Troy will be unfairly disadvantaged by the placement in the context of its takeover bid. If Taipan issues shares, or agrees to do so, this will trigger a defeating condition attached to Troy's bid which is set out in paragraph 2.7(a)(i)(D) of Troy's bidder's statement. Troy would be entitled to rely on this condition and allow its bid to lapse.
38. However, Troy could elect to waive the defeating condition, in which case Troy's bid would not extend to any shares issued by Taipan pursuant to the Resolution. If Troy wished to make offers for those shares, Troy is entitled to apply to ASIC for a modification under section 655A to permit it to do so. The decision whether or not to grant such a modification would be at the discretion of ASIC and is reviewable by the Panel.
39. If all of the 25 million shares were issued, this would represent approximately 11% of the fully paid issued capital of Taipan. Based on the bid price under Troy's takeover bid, the shares would be valued at \$1,900,000. This is a relatively small amount in relation to the total consideration which would be payable under Troy's bid for Taipan.
40. Accordingly, we do not consider that Troy is unfairly disadvantaged by the proposed placement. In the circumstances, Troy will have a choice whether or not to proceed with its bid for Taipan and, if it elects to proceed, whether it will bid for the shares issued pursuant to the Resolution.
41. Therefore, in these circumstances, we consider that a placement of 25 million shares by Taipan during the bid period in accordance with the Law and the ASX Listing Rules does not amount to unacceptable circumstances merely because Taipan is the target of a takeover bid.
42. However, as noted above, unacceptable circumstances may arise in certain situations if, in issuing the shares, one of the objectives of a target company is to attempt to defeat or impede the takeover bid. An example of this would be where a target company issues shares to persons that are likely to oppose the takeover bid.
43. In this case, if Taipan issued all, or a significant proportion, of the shares to parties involved in the St Barbara merger or their associates, we would be willing to consider a further application for a declaration in relation to those circumstances.

44. However, as the issue of shares pursuant to the Resolution, *per se*, will not result in unacceptable circumstances, it would not be appropriate for the Panel to make a declaration or orders at this stage. A declaration and orders prior to the issue of shares by Taipan would only be appropriate if the issue of shares would by its nature inevitably result in unacceptable circumstances arising.
45. In making our decision, we have also taken into account the alternative funding offered by WFS in its letter to Taipan dated 11 December 2000. However, it does not follow that a proposed share placement by a target company must be defensive merely because of the availability of an alternative source of funding. Therefore unacceptable circumstances will not necessarily arise if a target company chooses to make a share placement on reasonable commercial terms where it has other funding options available. In this case, the decision whether or not to accept the WFS offer in preference to a placement of shares is a business judgment by Taipan directors and is not a matter in which we consider it appropriate to intervene based on the information provided to the Panel.

OVERLAP WITH COURT PROCEEDINGS

46. The issue was raised as to whether there was any material overlap between this application and the Injunction Application made by Troy in the Supreme Court of Western Australia.
47. The Panel has previously said 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 have already been brought before the Court.¹¹ The Panel is keen to avoid duplicative proceedings and to discourage forum shopping where the functions of the Court and the Panel overlap.
48. However, in this case, we do not consider that the issues before the Panel materially overlap with the issues determined by the Court in the Injunction Application.
49. The issues before the Court in the Injunction Application were whether the information before shareholders prior to the Taipan AGM was misleading in any material respect in breach of section 995. By contrast, the primary issue with which the Panel is concerned is whether an issue of shares pursuant to the Resolution will amount unacceptable circumstances under section 657A.
50. The adequacy of information available to shareholders prior to the Resolution being passed is only one factor which the Panel may take into

¹¹ *Re Taipan Resources NL (No 2)*, 16 November 2000, 7.

account in deciding whether or not unacceptable circumstances exist. In this case, this was not a factor that was material to the Panel's decision.

DECISION

51. Under regulation 20 of the ASIC Regulations, we decided to conduct proceedings in this matter.
52. We have decided to refuse the application by Troy for an interim order and a declaration of unacceptable circumstances in relation to the proposed placement by Taipan.
53. We considered whether it would be appropriate to suspend proceedings until after the shares were issued by Taipan in order to determine whether the actual allotment to identified persons was unacceptable. However, the Panel will generally be reluctant to engage in a supervisory role unless the circumstances necessitate such action. Therefore, we decided to dismiss proceedings outright on the basis that the Panel would be willing to consider a further application at a later date if there was evidence to suggest that any subsequent allotments were unacceptable.
54. We also advised Taipan on 13 December that we would be concerned if the placement of Taipan shares by stockbroking firms on behalf of Taipan resulted in the placement of shares to persons to whom Taipan would be concerned or reluctant to be seen placing the shares directly.
55. The application is therefore dismissed. We granted all parties leave to be represented by their solicitors. There will be no order for costs.

Simon McKeon
29 January 2001