IN THE MATTER OF TAIPAN RESOURCES NL (No 3)

These are the reasons for our decision to refuse the application under section 657C of the Corporations Law by Taipan Resources NL for an interim order under section 657E, a declaration of unacceptable circumstances under section 657A and final orders under section 657D in relation to the takeover bid by Troy 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 the application made on 16 November 2000 under section 657C of the *Corporations Law* (the ***Law***) by Taipan Resources NL (***Taipan***) for an interim order under section 657E, a declaration of unacceptable circumstances under section 657A and orders under section 657D in relation to a takeover bid by Troy Resources NL (***Troy***).[1] This decision was announced on 20 December 2000.

BACKGROUND

Troy's takeover bid

3. This application concerns 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. 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."*[2]

4. On 21 September 2000, Troy announced that it would also make an offer of 0.65 cents per share for all partly paid ordinary shares in Taipan and otherwise on the same terms as the offer for fully paid shares.

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[1] Statutory references are to provisions of the Corporations Law, as in force at 20 December 2000. Findings of fact in these reasons are based on submissions and materials provided by the parties and ASX Releases.

[2] ASX Release, *Troy Resources NL conditionally proposes a cash offer*, 19 September 2000, 1.

5. The proposed merger between Taipan and St Barbara Mines Limited (***St Barbara***) was by scheme of arrangement between St Barbara share and option holders. At the date of this decision, shareholders of St Barbara and Taipan had approved the merger and the scheme of arrangement was awaiting final approval by the Supreme Court of Western Australia.[3] Objections to the scheme were likely to be heard by the Court between 15 January and 19 January 2001.[4]

6. On 2 November 2000, ASIC granted Troy an exemption under section 655A from subsection 631(1) to allow Troy to drop the pre-condition to its bid.[5] ASIC granted the exemption on the condition that Troy include in its bid a non-waivable defeating condition to the effect that the Court does not approve the merger with St Barbara.

7. Troy lodged its bidder's statement with ASIC and served it on Taipan on 2 November 2000. Troy's bidder's statement included a non-waivable defeating condition in the terms required by the ASIC exemption (the ***Defeating Condition***).

Modification to "associate" definition

8. On 2 November 2000, Troy also obtained ASIC declarations under sections 655A, 669 and 673 modifying the definition of "associate" in the Law as it applies to Troy's takeover bid.[6] Under the ASIC declarations, sections 10 to 16 do not apply in relation to Troy's takeover bid and the following modified version of the section 9 definition of "associate" applies:

> ***"associate"***: *when used in relation to a person in Chapters 6, 6A and 6C means:*
>
> *(a) if the person is a body corporate:*
>
> *(i) a body corporate it controls; or*
>
> *(ii) a body corporate that controls it; or*
>
> *(iii) a body corporate that is controlled by an entity that controls it*

[3] 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).*

[4] These dates were 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.

[5] ASIC Declaration under subsection 655A(1), 2 November 2000, 1.

[6] ASIC Declarations under subsections 655A(1), 669(1) and 673(1), 2 November 2000, 1.

(b) *a person with whom the person has, or proposes to enter into, a relevant agreement for the purpose of controlling or influencing the composition of the body's board or the conduct of the body's affairs*

(c) *a person with whom the person is acting, or proposes to act, in concert in relation to the body's affairs.*

But the person is not an associate of another person merely because of one or more of the circumstances in paragraphs 16(1)(a) to (d).[7]

Shareholdings in Taipan

9. Batoka Pty Ltd (***Batoka***) is a company associated with Mr Robert Catto. It holds 459,200 fully paid shares and 1,561,000 partly paid shares in Taipan. Mr Catto holds 1,600,000 partly paid shares in Taipan.

10. S&O Nominees Pty Ltd (***S&O***) and R&B Investments Pty Ltd (***R&B***) are companies associated with Mr Christopher Ryan. S&O holds 1,000,000 fully paid shares and 4,397,000 partly paid shares in Taipan. On 28 August 2000, R&B acquired 445,000 fully paid Taipan shares. Both entities hold these Taipan shares in their capacity as trustee for Mr Ryan's superannuation fund. Mr Ryan does not hold any Taipan shares in his own name.

11. Mr Ryan is also a director of Westchester Financial Services Pty Ltd (***WFS***). Mr Ryan and WFS have acted as financial advisers to Troy in relation to its takeover bid for Taipan. WFS holds 145,801 fully paid Taipan shares on trust for Troy.

12. On 15 November, Troy lodged a notice of change of interests of substantial holder with ASX in which it disclosed that its voting power in Taipan increased to 19.99% on 14 November. The notice disclosed that Troy and its associates had a relevant interest in 42,985,000 fully paid shares and 200,000 partly paid Taipan shares.

13. If S&O, R&B, Batoka Pty Ltd, Mr Catto, Mr Ryan and WFS (the ***Ryan and Catto parties***) were associates of Troy within the amended definition as it applies to Troy's takeover bid, the combined voting power of Troy in Taipan would be approximately 21.2%.

Rothschild Convertible Note

14. Taipan has issued a convertible note to Rothschild Australia Golden Arrow Investors Limited (***Rothschild***). The convertible note has an initial principal value of $5,000,000 and has been fully drawn down by Taipan. Under the terms of the note, Rothschild may convert the note

[7] The underlined text was added by the ASIC modification.

principal to Taipan fully paid shares at 25 cents per share at any time on or before the note maturity date of 30 November 2002.

15. Paragraph 2.1(c)(i) of Troy's bidder's statement extends the bid to Taipan fully paid ordinary shares that come into existence during the offer period as a result of the conversion of the Rothschild convertible note.

Funding

16. In section 6.1 of its bidder's statement, Troy sets out the consideration that will be payable under its takeover bid. The consideration payable by Troy under its takeover bid, excluding any amount that would be payable in respect of shares issued under the Rothschild convertible note, is $15,560,608. An additional $1,520,000 would be payable under its bid if Rothschild elects to convert the note and accept Troy's offer. The maximum consideration payable under Troy's takeover bid is therefore $17,080,608.

17. Troy discloses in its bidder's statement that all funds necessary to cover the consideration and all transaction costs associated with the takeover bid will be provided from:

    (a) existing cash reserves as at 2 November 2000 of $14.4 million and the realisation of marketable securities worth approximately $1.4 million; and

    (b) funds drawn down under the terms of Troy's existing working capital cash advance facility dated 29 March 2000 with Macquarie Bank Limited (***Macquarie***) as revised by an amendment agreement dated 26 October 2000 (the ***Macquarie Facility***).

Outcome of Troy's bid

18. On 17 November, Troy dispatched its offers to Taipan shareholders. The offer period was scheduled to close on 19 December 2000 unless extended by Troy.

19. On 13 December, Troy announced that it would allow its current bid for Taipan to lapse on 19 December.[8] Troy sent notices of withdrawal (with ASIC consent) to Taipan shareholders on 15 December. As the Defeating Condition attached to the bid remained unsatisfied at the end of the offer period, all acceptances received under the bid by Troy were void under section 650G.

[8] ASX Announcement, *Troy to make new offer for Taipan Resources NL*, 13 December 2000.

20. On 13 December, Troy also announced that it would make a new takeover bid for Taipan after the close of its current bid.[9] The new bid would be conditional only upon "prescribed occurrences" and would otherwise be on the same terms as its current bid.

THE APPLICATION

21. Taipan sought an interim order that Troy be restrained from dispatching its bidder's statement to Taipan shareholders on or after 17 November 2000 until full details were provided in respect of the following matters:

    (a) the financial capacity of Troy to fund the takeover bid; and

    (b) the intentions of Troy regarding the Rothschild convertible note.

22. Taipan also sought an enquiry into certain matters raised in its application. We have therefore decided to treat Taipan's application as an application for a declaration of unacceptable circumstances in relation to the following allegations made by Taipan:

    (a) the failure of Troy to disclose sufficient information in its bidder's statement regarding:

        (i) the financial capacity of Troy to fund the takeover bid; and

        (ii) the intentions of Troy or Rothschild regarding the Rothschild convertible note,

        in breach of section 670A[10];

    (b) the combined voting power in Taipan of the Ryan and Catto parties and Troy amounts to approximately 21.2% and has been obtained in breach of section 606;

    (c) the failure of Troy to disclose discussions between it and Rothschild regarding the Rothschild convertible note constitute unacceptable circumstances having regard to the effect of those circumstances on the proposed acquisition by Troy of Taipan shares.

23. In addition, we requested the parties to make submissions on whether the disclosure by Troy in its bidder's statement of its intentions in

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[9] Ibid. (This followed the Panel's decision in *Re Taipan Resources NL (No. 6)* on 12 December 2000.)
[10] Section 670A relevantly provides that a person must not make a misleading or deceptive statement in a bidder's statement or omit material that is required to be included in a bidder's statement by section 636.

relation to Taipan's residual assets (ie. excluding the Paulsens Deposit) was sufficient. [11]

24. Taipan's application sought such further or other order as the Panel deems fit. Taipan also sought leave to appear before the Panel by Counsel at any enquiry, an opportunity to cross-examine any witnesses called to give evidence at any enquiry and to inspect any documents produced to the Panel.

INTERIM ORDER

25. On 17 November, we decided not to grant the interim order requested by Taipan in its application. On review of the application and the interim submissions of Troy, we decided that the balance of convenience did not favour the granting of an interim order restraining dispatch of Troy's bidder's statement. In making this decision, the Panel had regard to the following matters:

    (a) the fact that the application was received at 12.00pm (Eastern Summer Time) on 16 November 2000, the day before Troy intended to dispatch its bidder's statement to Taipan shareholders;

    (b) the level of seriousness of the concerns raised by Taipan in its application and the impact that these issues would have upon target shareholders;

    (c) the fact that the bid was subject to the Defeating Condition which depended on the outcome of the St Barbara scheme proceedings which were set down for hearing between 15 January and 19 January 2001;

    (d) the fact that Troy had completed printing of the bidder's statement in anticipation of dispatch; and

    (e) the fact that 17 November 2000 was the last day that Troy was able to dispatch its bidder's statement and still comply with the 2 month requirement in section 631(1).

26. We endorse the following statement made by the review Panel in the decision in *Re Email Limited (No. 2)*:

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[11] The Paulsens Deposit forms part of the Ashburton Project, which comprises a number of mineral tenements in the Ashburton Mining District of Western Australia. Taipan's residual assets include the Mt Clement Deposit (which also forms part of the Ashburton Project), a number of other minor mineral exploration tenements and a 7.6% interest in the capital of prospective nickel laterite and cobalt producer, Preston Resources Limited.

> *"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 any defects in the relevant bid or in the disclosure concerning it, after a full consideration of the facts and issues. Not every mischief, however, can be overcome after it has arisen."*[12]

27. In this case, the application by Taipan did not raise sufficiently clear and serious allegations to justify the restraint of dispatch of the bidder's statement. We were not satisfied, based on the interim submissions, that the bidder's statement would be materially misleading if Taipan's claims were correct. In this case, we were satisfied that the order making powers of the Panel under section 657D (including the power to order supplementary disclosure) would be adequate to deal with any circumstances that were subsequently found to be unacceptable by the Panel.

28. The Panel was particularly concerned about the lateness of the application in view of the fact that Taipan had received a copy of the bidder's statement on 2 November and did not choose to make its application until 16 November. Taipan did not give any compelling reasons as to why it did not approach the Panel several days earlier.

29. The relevant issues had been raised in a letter from Taipan's solicitors to Troy dated 9 November. However, the issues were raised in the context of information required by Taipan for the preparation of its target's statement. Taipan did not request Troy to amend its bidder's statement or foreshadow to Troy that it intended to make an application to the Panel in relation to those issues. The Panel has taken this into account in determining where the balance of convenience lay in relation to the interim order.

30. Nevertheless, Troy's dismissive response to Taipan's enquiries in the letter from Troy's solicitors dated 13 November was not a genuine attempt to resolve the issues and would have counted against Troy had the circumstances been different.

31. In future, the Panel would expect an application for an interim order to be made at least 5 calendar days before it is necessary for the Panel to make a decision on whether or not to grant the interim order, unless there is a serious reason for delay. The Panel understands that there will be circumstances where it is not possible for an applicant to come to the Panel within that timeframe. However, in general the policy of the Panel

[12] *Re Email Limited (No. 2)*, 22 June 2000, paragraph 6.

is that, the shorter the time available between an application and the need for a decision, the greater the threshold of alleged harm that an applicant must demonstrate.

32. The Panel also considered whether any other interim relief would be appropriate in the circumstances including orders aimed at preserving the *status quo* in relation to Troy's takeover bid. However, the Panel declined to make any other interim orders for the reasons set out above.

SUBSTANTIVE ISSUES

Funding arrangements for the bid

Issues raised by Taipan

33. Taipan submitted that there were serious doubts in relation to Troy's ability to fund its bid and that this was not clearly disclosed in the bidder's statement. Essentially, these doubts were:

    (a) whether funds from the $5 million Macquarie Facility would be available to be drawn down for the purpose of funding the takeover;

    (b) whether Troy would be able to fund the takeover in view of its obligations to pay the following amounts (the ***Additional Liabilities***):

        (i) $2 million dividend payable on 17 November 2000;

        (ii) $1.8 million in joint venture mining liabilities and operating costs to 30 June 2001;

        (iii) $0.5 million in estimated transaction costs for the takeover bid; and

        (iv) potential income tax liabilities in respect of the year ending 30 June 2000 of approximately $2 million and tax instalments for the year ending 30 June 2001.

34. There are two separate issues that are relevant to the matter of Troy's ability to fund its takeover bid for Taipan. The first issue is whether Troy has breached subsection 631(2) by proposing to make a takeover bid where it is reckless as to whether it will be able to perform its obligations under the bid if a substantial proportion of the offers are accepted. The second issue is whether Troy made adequate disclosure of the funding

arrangements in its bidder's statement having regard to the provisions of Chapter 6 of the Law and, in particular, paragraph 636(1)(f).[13]

Recklessness as to obligations under bid

35. In relation to the first issue, we were satisfied that Troy did not contravene section 631(2) when it proposed its bid. For the reasons set out below at paragraphs 43 to 45, we accept Troy's submission that the entire amount of the Macquarie Facility was available for immediate draw down by Troy for the purposes of funding its takeover bid.[14] We also accept that, as at 2 November 2000, Troy had cash reserves of $14.4 million and marketable securities with a realisable value of approximately $1.4 million which it had earmarked for payment of the consideration under the bid.

36. This means that Troy had approximately $20.8 million immediately available to it to fund its obligations under the bid. In its submissions, Troy also notes that it expects to generate (at least) a further $8 to $12 million cash by 30 June 2001.

37. As noted in paragraph 16, the maximum amount required to fund the bid is approximately $17.1 million. This includes payment of approximately $1.5 million for the shares that would be issued to Rothschild on conversion of the Rothschild convertible note.

38. The Rothschild note is convertible at 25 cents per Taipan fully paid share. Troy's offer is for 7.6 cents per Taipan fully paid share. It therefore appears unlikely, on the information that has been provided to the Panel, that Rothschild would elect to convert the note and accept Troy's offer at such a substantial discount. If the Rothschild note is not converted, the maximum amount required to fund the bid is approximately $15.6 million.

39. We are therefore satisfied, on the information before us, that Troy has not recklessly proposed its bid in breach of subsection 631(2). Even if Troy was required to pay for the Additional Liabilities during the offer period, we were satisfied that Troy would still be likely to have adequate funds available to meet its obligations under the bid if a substantial proportion of the offers under the bid were accepted.

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[13] Paragraph 636(1)(f) provides that a bidder offering cash consideration under a takeover bid must disclose the cash amounts (if any) held by the bidder for payment of the consideration, the identity of any other person who is to provide, directly or indirectly, cash consideration from that person's own funds and any arrangements under which cash will be provided by any other person.

[14] Subject to the satisfaction of the condition precedent that Troy enter into a gold hedging arrangement with Macquarie.

Disclosure of funding arrangements

40. The second relevant issue is whether Troy's disclosure in relation to its funding arrangements was misleading or deficient in any material respect. In summary, Taipan alleges that Troy's disclosure is misleading or deficient for the following reasons:

    (a) Troy has not disclosed all of the restrictions on the availability of the funds to be provided under the Macquarie Facility.

    (b) Troy has not disclosed that it may not have sufficient funds available to meet its obligations under the bid and pay for the Additional Liabilities; and

    (c) in view of Troy's obligations to meet the Additional Liabilities, Troy has not disclosed that it may be required to use its future operating cash flow to meet its obligations under the bid.

41. The policy set out in subparagraph 602(b)(iii) provides that shareholders should be given enough information to assess the merits of the bid. Unacceptable circumstances may arise if Troy's disclosure of its funding arrangements was inadequate or likely to give Taipan shareholders a misleading view of Troy's ability to fund the takeover bid. Unacceptable circumstances might also arise if there was a material breach of the disclosure requirement in paragraph 636(1)(f).

42. The submissions of Troy and Taipan both refer to ASIC Practice Note 37. PN 37 refers to the requirements for disclosure under the old pre-CLERP section 750, which closely resembles the requirements of paragraph 636(1)(f). In summary, PN 37 provides that:

    (a) The disclosure requirements do not require a bidder to have all the funds necessary to pay for all of the shares under the bid. The focus is on disclosure. The bidder must disclose the material details of its financial arrangements so that target shareholders can decide whether the bidder will be able to meet its obligations. Section 631(2)(b) provides that a person must not make a takeover bid where that person is reckless as to whether they will be able to perform their obligations.

    (b) The bidder must:

        (i) disclose the total amount necessary to pay for the shares which are the subject of the bid;

        (ii) disclose whether the bidder holds or has access to sufficient funds to pay for the shares - (any shortfall between the funds necessary to pay for the shares and the funds available should be made explicit);

(iii) identify how much of the cash amounts will come from the bidder's own funds;

(iv) identify any other person who will provide funds and the material details of the arrangements for the funds to be provided;

(v) clearly disclose any restrictions on the availability of funds - eg. unusual events of default, conditions precedent beyond the bidder's control.

(c) The bidder is not required to provide particulars of cash amounts which are not set aside for the purpose of funding the bid.

(d) If the bidder does not have sufficient funds available, the bidder must indicate whether it expects to be able to pay for the shares.

Macquarie Facility

43. In section 6.1 of its bidder's statement, Troy sets out a number of the more important terms and conditions of the Macquarie Facility including the conditions precedent to the availability of the facility and unusual events of default. Apart from the conditions precedent noted by Troy, it is to be inferred from the bidder's statement that the funds under the Macquarie Facility are available for immediate draw down by Troy for the purposes of funding its takeover bid.

44. In its submissions, Troy confirmed that the entirety of the Macquarie Facility was available for immediate draw down by Troy for the purpose of funding the takeover bid. Further, Troy noted that the only condition precedent that had not yet been satisfied was for Troy to enter into the gold hedging arrangement with Macquarie, which requirement had been disclosed in the bidder's statement and was able to be satisfied immediately by Troy.

45. Taipan has not raised any serious doubts that Troy's ability to draw down the Macquarie Facility is less than that asserted by Troy. We therefore accept Troy's submissions in relation to this matter. Accordingly, we do not consider that the disclosure of Troy in relation to the availability of the funds under the Macquarie Facility is misleading or deficient in any material respect.

Additional Liabilities

46. Troy advises in its bidder's statement that it intends to fund the takeover from:

(a) existing cash reserves as at 2 November and realisation of marketable securities - $15.8 million; and

(b) funds drawn down under the Macquarie Facility.

47. In its application, Taipan has raised concerns about Troy's ability to meet its obligations under the takeover bid and also cover the Additional Liabilities. In our view, further disclosure by Troy would be required if there was a reasonable possibility that:

(a) Troy would not be able to meet its obligations under the bid and pay for the Additional Liabilities when they became due; or

(b) Troy would need to use some of its operating cash flow received after 2 November to fund its obligations under the bid.

48. Troy does not say in its bidder's statement that it will use cash generated after 2 November to fund its takeover obligations. Instead, it relies on its cash reserves of $14.4 million as at 2 November. If there was a reasonable possibility that Troy may need to use its operating cash flow generated after 2 November to fund its obligations under the takeover bid, then this should have been disclosed by Troy in its bidder's statement along with details of Troy's projected earnings and costs.

49. We accept that it is unlikely that Rothschild will elect to convert the convertible note and accept Troy's bid. However, Troy would still need to show that it was able to fund the maximum amount under its bid as set out in the bidder's statement, including the amount in respect of the Rothschild convertible note. If there was a reasonable possibility of any shortfall occurring in the unlikely event that Rothschild did convert the note and accept Troy's bid, then this should have been made clear in the bidder's statement.

50. In its submissions, Troy confirmed that it would have enough funds to cover its liabilities under the bid and the Additional Liabilities. Further, Troy said that there was no reasonable possibility that Troy would need to use its operating cash flow generated after 2 November to fund its obligations under the takeover bid.

51. However, in view of a number of the concerns raised by Taipan in relation to Troy's projected cash flow and liabilities, we requested Troy to provide further details about its obligations to pay for the Additional Liabilities in order to satisfy the Panel of the basis of Troy's submissions.

52. Troy requested that it be able to make confidential submissions, including information in relation to its projected tax liability, and that these submissions not be provided to the other parties to the application. We refused Troy's request.

53. In general, it is the Panel's policy not to accept submissions on the basis that they not be provided to the other parties other than in exceptional circumstances. The Panel is concerned to ensure procedural fairness between the parties to an application. If the Panel accepts confidential submissions and relies on those submissions in making its decision without allowing them to be seen or challenged by the other parties, this may open the Panel's decision to challenge on procedural fairness grounds.

54. Therefore, we gave Troy a choice to either provide all of the information requested by the Panel in submissions which could be viewed by the other parties or, alternatively, to provide the Panel with a report from Troy's financial advisers, Deloitte Touche Tohmatsu (***Deloitte***), which included:

    (a) an estimated cash flow statement for Troy for the year ending 30 June 2001;

    (b) a statement that Deloitte believes, on the basis of information currently before it, that Troy's cash flow will be sufficient to meet all Troy's projected liabilities up to the end of 30 June 2001 including the Additional Liabilities; and

    (c) a statement that Deloitte believes, on the basis of information currently before it, that Troy will not have any cash flow problems on a month by month basis in meeting the liabilities referred to in (b) above.

55. On 7 December, Troy provided the report from Deloitte including the information and statements requested by the Panel. Deloitte also confirmed that, subject to the risks associated with forecasting gold production and the potential effect on the forecast cash flow, nothing has come to their attention to indicate that Troy will not have the sources of funds available to cover the maximum amount required for its takeover bid.

56. On 12 December, Taipan provided submissions in rebuttal to Troy's submissions and the Deloitte report in which Taipan raised a number of issues and disputed the bases of Troy's forecasts for gold production.

57. On 13 December, Troy announced that it would allow its bid to close on 19 December without the Defeating Condition having been satisfied. Troy's bid would therefore lapse and all acceptances received by Troy under the bid would be void. In view of the status of Troy's takeover bid, we decided not to continue our enquiries into Troy's ability to fund its bid.

58. We therefore did not make a final decision as to whether Troy had made adequate disclosure in relation to the financing of its bid. In general, the Panel's view is that, where it appears that a bidder is making an acquisition that approaches the limit of its financial capacity, more detailed disclosure of the bidder's financial resources may be required. In this case, we would have been minded to seek further clarification from Troy in relation to its financial position and forecast gold production before making a final decision.

Intentions re Rothschild convertible note

59. Taipan claims that Troy has not disclosed the outcome or substance of discussions held between Troy and Rothschild in relation to the Rothschild convertible note. In its submissions, Taipan says that Rothschild confirmed by letter dated 8 November 2000 that it had discussions with Troy in relation to the convertible note. It is true that Troy and Rothschild had discussions in relation to the acquisition by Troy of a number of Taipan shares held by Rothschild.[15] However, in its letter of 8 November, Rothschild merely said that it would be inappropriate to discuss with Taipan the substance of any discussions that it had with Troy and did not expressly confirm or deny that those discussions had included matters concerning the convertible note. Rothschild also stated that no arrangement, formal or informal, had been reached with Troy regarding the convertible note.

60. In Troy's submissions, Troy states that it has not had any material discussions with Rothschild regarding the convertible note. In the bidder's statement Troy says that it has not determined its intentions in relation to the Rothschild convertible note. Troy then notes that it is considering either making a takeover bid for the note, acquiring the note by agreement or offering to acquire the note.

61. In its submissions, Troy also states that it requested a copy of the convertible note from Rothschild. Rothschild indicated to Troy that it would only provide Troy with a copy of the convertible note if Troy signed a confidentiality agreement. Troy refused to do so. In the absence of any evidence to the contrary, there appears to be no reason to doubt Troy's assertion that nothing material ensued from these discussions and no formal or informal arrangement was reached regarding the convertible note.

62. We accept that, in the absence of any formal or informal arrangement between Troy and Rothschild in relation to the convertible note, the substance of the discussions between Troy and Rothschild would not be material to Taipan shareholders. We also accept Troy's submission that

[15] Rothschild sold approximately 21 million Taipan fully paid shares to Troy on 14 November 2000.

it had not yet determined its intentions regarding the convertible note beyond what is disclosed in the bidder's statement.

63. Taipan submits that, if Troy has not decided its intentions in relation to the Rothschild convertible note, Troy should disclose the reasons why it has not made a decision with respect to the convertible note in accordance with the requirements in ASIC Practice Note 35. PN 35 provides, *inter alia*, that, if a bidder is considering alternative courses of action but has not made up its mind, the bidder must give reasons why it has not made up its mind.

64. PN 35 relates to the disclosure of a bidder's intentions that was required under the old pre-CLERP section 750. Section 750 included an express requirement that the bidder set out the alternative courses of action being considered and the reasons why no decision had been made. Under CLERP this section was replaced by paragraph 636(1)(f) which does not contain a similar requirement.

65. However, a bidder may still be required to state the reasons why no decision has been made regarding its intentions in relation to the target if this is likely to be material to target shareholders. In this case, it is unlikely that the reasons why Troy has not made a decision regarding the convertible note would be material to Taipan shareholders in deciding whether or not to accept the bid.

Troy's intention re Taipan's residual assets

66. We also asked for submissions in relation to the adequacy of Troy's disclosure in paragraph 4.2(f) of the bidder's statement in relation to its intentions regarding Taipan's residual assets. Troy's intentions regarding the Paulsens Deposit are set out in paragraphs 4.2(e) and 4.3(d) of the bidder's statement. The Paulsens Deposit is Taipan's principal asset.

67. In relation to the residual assets, Troy states that it will:

> *conduct a strategic review of all Taipan's other investments, mineral exploration interests and assets to identify and consider their opportunities and strategic relevance to Troy. Troy does not intend to make a decision whether to dispose or change any of these assets until completion of its strategic review.*[16]

68. In response to the Panel's brief, Taipan submits that Troy's disclosure in paragraph 4.2(f) is inadequate because it is vague and indeterminate and because it does not set out the reasons why no decision has been made. In support of its submissions, Taipan refers to ASIC PN 35.

[16] *Bidder's Statement*, Troy Resources NL, 2 November 2000, paragraph 4.2(f).

69. Troy submits that Taipan's residual assets are of only marginal value to Troy and Taipan shareholders when compared to the Paulsens Deposit and therefore its intentions in respect of these assets are of little materiality to Taipan shareholders in any event. In support of this, Troy notes that Stanton Corporate has valued these assets at $3 million compared to $20.7 million for the Paulsens Deposit. Troy also notes that virtually no resource estimates, feasibility studies or development work has been undertaken in relation to Taipan's residual assets and therefore it is difficult for Troy to be more definitive about its intentions.

70. We accept Troy's submissions that the statements in paragraph 4.2(f) accurately reflect the current intentions of Troy with respect to Taipan's residual assets.

71. Troy should have included a statement explaining why it had not made a decision in relation to Taipan's residual assets. However, we accept that the reasons why Troy had not formulated any intentions in respect of Taipan's residual assets is not of any real materiality to Taipan shareholders because of the relatively small value of the assets. Therefore we consider that this issue alone is not sufficient to form the basis for a declaration of unacceptable circumstances and orders for supplementary disclosure. In this case, it is more important that Taipan shareholders had sufficient information about Troy's intentions regarding the Paulsens Deposit.

Association issues

72. In its application, Taipan submits that Troy and the Ryan and Catto parties are acting in concert and therefore are associates within the meaning of section 9 as amended by the ASIC declarations dated 2 November 2000.[17] As a result of this association, Taipan alleges that Troy's voting power in Taipan has exceeded 20% in breach of section 606. It appears from the facts that the alleged breach of section 606 would have occurred as a result of the acquisitions of Taipan shares made by Troy on 14 November 2000.

73. Taipan's allegations are based on a number of facts including the following:

    (a) the fact that both Troy and the Ryan and Catto parties are opposing the merger between St Barbara and Taipan and the coincidental timing of various applications made by Troy and the Ryan and Catto parties to the Supreme Court of Western Australia;

[17] Taipan's application submitted that the parties were associates within the meaning of section 15. Under the ASIC declarations under subsections 655A(1), 669(1) and 673(1) dated 2 November 2000, section 15 did not apply in relation to Troy's takeover bid.

(b) the fact that Mr Ryan and WFS were acting as corporate adviser to Troy;

(c) the fact that some of the Ryan and Catto parties commenced proceedings in the Western Australian Supreme Court seeking an adjournment of the Taipan shareholders meeting on the same day that Troy announced its intention to make a takeover bid for Taipan; and

(d) the fact that, in proceedings commenced by Mr Catto on 9 October 2000, Mr Catto filed affidavits which contained annexures that came directly from affidavits filed by Troy in proceedings commenced in the Western Australian Supreme Court on 6 October 2000.

74. The submissions of Troy and the Ryan and Catto parties do not dispute the facts put forward by Taipan, but they deny that Troy and the Ryan and Catto parties are associated. They submit that the facts that Taipan has put forward do not constitute sufficient evidence for the Panel to find that Troy and the Ryan and Catto parties are acting in concert.

75. We agree with these submissions. In order to find that persons are acting in concert with each other, it is necessary that there at least be an understanding between them as to a common purpose or object. A mere coincidence of separate acts is insufficient.[18]

76. Apart from the interaction between Troy and WFS and Mr Ryan, Taipan has not produced any evidence to show that Troy had a relevant understanding, or had any material communications, with any of the Ryan and Catto parties in relation to opposing the St Barbara scheme of arrangement or supporting Troy's takeover bid. Indeed, based on the information provided to the Panel, we consider that it is likely that the Ryan and Catto parties have merely acted in their own perceived self-interest in opposing the St Barbara scheme of arrangement. Further, we were not provided with any evidence to show that the Ryan and Catto parties have committed themselves to supporting Troy's bid.

77. In relation to the role of Mr Ryan and WFS as corporate advisers to Troy, Troy notes that the amended definition of associate in the ASIC declarations dated 2 November applies the exclusion contained in paragraph 16(1)(a) of the Law. Paragraph 16(1)(a) provides that a person is not an associate of another person merely because that person gives advice to the other person in the performance of the functions attaching to a professional capacity or a business relationship.

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[18] *Adsteam Building Industries Pty Ltd & Anor v The Queensland Cement & Lime Co Ltd & Ors (No 4)* (1984) 2 ACLC 829.

78. WFS and Mr Ryan have acted as corporate advisers to Troy in relation to its takeover bid for Taipan. This role has included the identification of Taipan as a potential target, providing advice and receiving instructions on a day to day basis in relation to Troy's takeover bid and the associated litigation commenced by Troy. WFS has also purchased 145,801 fully paid Taipan shares on behalf of Troy through its account with JB Were. We accept that any advice given to Troy by WFS or Mr Ryan in this role has been given in the performance of their respective functions as corporate advisers and therefore that neither Mr Ryan nor WFS are associates of Troy merely because of that fact.

79. Accordingly, we do not consider that Taipan has produced sufficient evidence in this case to prove, or for us to infer, that Troy and any of the Ryan and Catto parties have acted in concert. Therefore, there is insufficient evidence to substantiate Taipan's allegations of association and the consequent breach of section 606.

80. We note that, in proceedings where there is insufficient evidence to make a finding, the Panel has the power to summon witnesses and require the production of further documents.[19] However, in this case, we do not consider that the allegations of association are sufficiently clear and serious to warrant further investigation by the Panel.

81. Nevertheless, we were concerned at the closeness of the relationship between Mr Ryan, WFS and Troy. Regardless of the exclusion in paragraph 16(1)(a), there will be situations where a corporate adviser may be found to be acting in concert with a client because they have an understanding or arrangement in relation to the affairs of the relevant body.

82. A further matter raised by Taipan was the issue of whether Troy had included in its substantial shareholder notices its relevant interest in the parcel of 145,801 fully paid Taipan shares purchased by WFS on trust for Troy. Taipan submits that these shares were not included in Troy's substantial shareholder notices. If this is correct, Troy's voting power in Taipan would be approximately 20.006% and accordingly Troy would have breached section 606.

83. The notice of change of interests lodged by Troy with ASX dated 2 November discloses that, on 31 October, Troy acquired a relevant interest in a parcel of 145,801 fully paid Taipan shares. In its response to the Panel's request for additional information, Troy confirms that the parcel of shares held by WFS on trust for Troy is the same parcel that was included in the notice of change of interests dated 2 November.

[19] Section 192, *Australian Securities and Investments Commission Act.*

84. Accordingly, we accept that Troy has disclosed its relevant interest in the 145,801 Taipan shares held by WFS and, therefore, these shares have been included in Troy's calculation of its voting power of 19.99% as disclosed on 15 November.

OVERLAP WITH SUPREME COURT PROCEEDINGS

85. At the date of our decision, the application for approval of the St Barbara scheme of arrangement was before the Supreme Court of Western Australia (COR 197 of 2000) (the ***Scheme Proceedings***). In the Scheme Proceedings, Troy filed points of contention objecting to the proposed scheme.

86. Troy also made an application to the Supreme Court of Western Australia pursuant to sections 232 and 233 concerning conduct of Taipan directors in relation to the proposed merger with St Barbara (COR 276 of 2000) (the ***Oppression Application***).

87. Taipan filed pleadings in the Scheme Proceedings and the Oppression Application claiming that the Oppression Application and Troy's objections to the Scheme Proceedings are an abuse of process because:

> *…[they are] not made by Troy to vindicate a legal right but are made for the collateral purpose of advancing and promoting Troy's takeover bid for Taipan. Further, Troy is acting in concert with other parties for the purposes of frustrating or delaying the approval of the merger between St Barbara and Taipan.*[20]

88. We are not aware of any additional evidence provided by Taipan to the Court in support of these claims over and above the evidence which has been provided to the Panel in support of this application. However, discovery of relevant documents in these court proceedings was incomplete at the date of our decision.

89. Troy argued that the overlap between the issues raised by Taipan in the Scheme Proceedings and the Oppression Application was sufficient for the Panel to decide not to conduct proceedings. In its submissions, Troy referred to the decision of the Panel in *Re Taipan Resources NL (No 2)* where the Panel said:

> *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*

[20] COR 197 of 2000, *Points of Reply to Points of Defence of Troy Resources NL by Taipan Resources NL*, 17 November 2000, paragraph 35; COR 276 of 2000, *Points of Defence on behalf of First Defendant*, 13 November 2000, paragraph 34.

discourage forum shopping in circumstances where the functions of the Court and the Panel overlap.[21]

90. Taipan submitted that there was insufficient overlap to cause the Panel not to consider its application. Taipan goes on to say that the issue before the Court is a different issue and the Court will not be asked to decide the association issue that Taipan has raised in its application to the Panel.

91. We decided to conduct proceedings in relation to Taipan's application because, in any event, Taipan's application raised a number of clearly distinct issues that had not been raised in any of the Court proceedings. We also accepted Taipan's submission that the issue before the Court in relation to whether there had been an abuse of process by Troy was a different issue to that which the Panel had been asked to determine in these proceedings.

92. However, we acknowledged that there was still some potential for overlap in the issues and evidence to be considered by the Court and the Panel in determining whether Troy and the Ryan and Catto parties were acting in concert. In this case, we did not consider that the potential for conflict was substantial or serious enough to prevent the Panel from considering the issues raised in the application. We therefore decided to consider the association issues raised by Taipan on the basis that, if we subsequently discovered that the issues or evidence materially overlapped with the issues before the Court, we would take appropriate action at that time.

DECISION

93. Under regulation 20 of the *Australian Securities and Investments Commission Regulations*, we decided to conduct proceedings in this matter.

94. We refused to grant the interim order requested by Taipan restraining dispatch of Taipan's bidder's statement.

95. On 14 December, we decided not to continue to conduct proceedings in relation to Taipan's application. We made this decision on the basis that Troy's bid would lapse on 19 December and, in this event, any orders that the Panel could make regarding supplementary disclosure in relation to Troy's funding arrangements for its takeover bid would be of no practical effect.

[21] *Re Taipan Resources NL (No 2)*, 16 November 2000, paragraph 26.

96. We decided to suspend the application until after Troy's bid lapsed on 19 December, at which time the Panel would make a final decision to dismiss the application unless new circumstances arose in relation to Troy's bid. On 20 December, we confirmed our decision not to grant any declaration or orders in relation to the application.

97. We noted in our decision that, having had the benefit of Taipan's submissions and the Panel's enquiries in this application, the issues of disclosure raised in these proceedings should be addressed in the bidder's statement for the new bid by Troy announced on 13 December.

98. Proceedings are therefore dismissed. We granted all parties leave to be represented by their solicitors. There will be no order for costs. We thank all parties who made submissions.

Simon McKeon
5 February 2001