

In the matter of Taipan Resources NL (No. 08)
[2001] ATP 3**Catchwords:**

Fully paid and partly paid shares in target - whether same class - effect of minimum bid price- issue subject to application to ASIC for exemption - unacceptable circumstances from anticipated facts - whether agreement to purchase and purchase occurred within four months of bid - abridgement of time for dispatch of bidder's statement - directors consented to allow rival bids to be open together - purpose of statutory period between service on target and dispatch to shareholders

Corporations Law (Cth), sections 621(3), 633(1) item 6

These are the reasons for our decision to refuse the application of Troy Resources NL under section 657C of the Corporations Law received on 5 February 2001 for interim orders under section 657E and a declaration of unacceptable circumstances under section 657A in relation to a takeover bid by St Barbara Mines Limited for Taipan Resources NL.

INTRODUCTION

1. The Panel in this matter is constituted by Professor Ian Ramsay (sitting President), Denis Byrne (sitting Deputy President) and Michael Burgess.
2. These are the reasons for our decision to refuse to make interim orders under section 657E of the Corporations Law (the *Law*) and a declaration of unacceptable circumstances under section 657A in relation to a takeover bid by St Barbara Mines Limited (*St Barbara*) for Taipan Resources NL (*Taipan*). The decision was announced on 14 February 2001 in response to an application by Troy Resources NL (*Troy*) under section 657C dated 5 February 2001.¹

BACKGROUND*October acquisition*

3. Under an agreement dated 12 October 2000, Tricom Nominees Pty Ltd (*Tricom*) acquired 5 million fully paid Taipan shares from Central Exchange Limited (*Central Exchange*) for 9.25 cents each. Settlement of the acquisition occurred on 12 October.

¹ Statutory references are to provisions of the Corporations Law, as in force at 13 February 2001. Findings of fact are based on submissions by the parties and ASX announcements.

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4. On 16 October, St Barbara lodged a notice under section 671B which showed that it had acquired 4 million fully paid Taipan shares on 12 October for 9.25 cents each (the *12 October Acquisition*). St Barbara also lodged an identical notice under section 671B on 26 October which annexed a contract note written by Tricom dated 24 October relating to the acquisition of the 4 million shares.

Troy's bid

5. Troy has made an unconditional cash bid for Taipan. At the time of our decision, the terms of Troy's bid were:
 - (a) 8.3 cents per fully paid Taipan share; and
 - (b) 0.65 cents per partly paid Taipan share.²

St Barbara's bid

6. On 21 December 2000, St Barbara announced that it would make a takeover bid for Taipan conditional on no prescribed occurrences or material adverse change occurring in relation to Taipan.³ St Barbara announced that the terms of the bid would be:
 - (a) 1 fully paid St Barbara share plus 7.5 cents cash for every 3 fully paid Taipan shares; and
 - (b) 1 option to subscribe for a St Barbara fully paid share for 30 cents at any time prior to 29 February 2004 for every 4 partly paid Taipan shares.
7. On 9 January 2001, St Barbara announced that it would also offer a cash alternative to its proposed takeover bid of 8.2 cents per Taipan fully paid share.⁴ No cash alternative was announced in respect of the Taipan partly paid shares. In this announcement, St Barbara also stated that it intended to dispatch its bidder's statement to Taipan shareholders on 14 February 2001.
8. On 10 January, St Barbara announced that it would increase its cash alternative to 8.8 cents per Taipan fully paid share.⁵
9. On 18 January 2001, St Barbara stated in its half-yearly report in respect of the period from 1 July to 31 December 2000 that:

² On 13 February 2001, Troy varied its offers to increase the consideration to 8.8 cents and 0.7 cents respectively for the fully and partly paid shares.

³ ASX Release, *St Barbara To Bid for Taipan*, 21 December 2000.

⁴ ASX Release, *Alternative 8.2 cent cash offer for Taipan fully paid shares*, 9 January 2001.

⁵ ASX Release, *Increase – Taipan Bid Cash Alternative to 8.8 cents per fully paid share*, 10 January 2001. On 14 February, St Barbara announced that it would offer 9 cents for the fully paid shares.

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“In December, the Company announced its intention to make an unconditional bid for Taipan...”

Application to the Commission

10. On 2 February 2001, St Barbara applied to the Australian Securities and Investments Commission (the *Commission*) for a modification under section 655A to allow it to offer different forms of consideration for fully and partly paid Taipan shares. At the time of Troy’s application to the Panel, the Commission had not yet made a decision in relation to St Barbara’s application for a modification.

THE APPLICATION

11. The application by Troy raises the following three matters as the bases for a declaration of unacceptable circumstances and interim orders:
 - (a) whether the fully and partly paid shares in Taipan belong to the same class and whether the takeover bid announced by St Barbara was, or would result in, a breach of sections 605, 618, 619 and 650A(2) because it did not include the same form of consideration for fully and partly paid Taipan shares (the *first issue*);
 - (b) whether St Barbara was required by section 621(3) to offer a minimum of 9.25 cents per Taipan fully paid share as a result of the 12 October Acquisition and whether the announcement by St Barbara of a takeover bid at a lower value amounted to unacceptable circumstances (the *second issue*); and
 - (c) whether it would be unacceptable for the Taipan directors to consent to an abridgement of the time between service and dispatch of St Barbara’s bidder’s statement under item 6 of section 633(1) (the *third issue*).
12. In addition to the issues raised by Troy, we also called for submissions in relation to the status of conditions attached to St Barbara’s bid and whether St Barbara should be required to proceed with an unconditional bid following the public statement contained in its December half-yearly report.
13. Troy’s application requested that the Panel make the following interim orders until the Panel had determined the substantive issues raised by the application:
 - (a) an order that St Barbara be restrained from dispatching its bidder’s statement to Taipan shareholders;

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- (b) an order that St Barbara be restrained from purchasing Taipan shares on-market pursuant to item 2 of section 611 of the Law; and
- (c) an order restraining the Taipan directors from agreeing to an abridgement of the 14 day period referred to in Item 6 of section 633(1) of the Law.

INTERIM ORDER

14. It was not necessary for the Panel to consider whether the interim orders requested by Troy should be made, as St Barbara provided an undertaking to the Panel on 8 February not to dispatch its bidder's statement, or purchase Taipan shares on-market pursuant to item 2 of section 611, until 14 February 2001. We were hopeful of being able to resolve the substantive issues raised by the application before that date.

PRELIMINARY ISSUES

15. We decided to conduct proceedings under Regulation 20 of the Australian Securities and Investments Commission Regulations (the *ASIC Regulations*) in relation to the second and third issues raised in Troy's application. However, we decided not to conduct proceedings in relation to the first issue on the basis that this issue was at that date the subject of an application to the Commission by St Barbara for a modification under section 655A of the Law. The Panel was of the view that it was more appropriate in this case for the Commission to make a decision in relation to St Barbara's application regarding the consideration to be offered for the fully and partly paid Taipan shares. In the interests of avoiding duplication with the Commission, we considered that in this case the Panel should not commence proceedings in relation to this issue while the Commission was considering the same issue. Once the Commission had made a decision, any party adversely affected would be able to seek a Panel review of the decision under section 656A.
16. Troy's application submitted that unacceptable circumstances existed because, at the time of Troy's application, St Barbara had announced, but not yet made, a bid which would not, on the announced terms, comply with the Law. This raises the issue of whether unacceptable circumstances actually existed as St Barbara had not yet made a bid that breached the relevant sections of the Law.

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17. St Barbara had merely made a takeover announcement and was therefore required to make a takeover bid, within 2 months, on terms which are the same or not substantially less favourable than the terms of the announcement.⁶ Similarly, Troy did not provide any evidence that the Taipan directors had consented to an abridgement of time pursuant to item 6 of section 633(1). Troy's application was made in anticipation of these events occurring.
18. Nevertheless, unacceptable circumstances may exist although no actual breach of the Law has yet occurred (and might never occur). It is against the public interest and the policy of seeking to increase certainty in takeovers to allow events to occur that are contrary to Chapter 6 of the Law and the policy behind Chapter 6, as set out in section 602. Announcements which tend to indicate that such events are likely to occur may constitute unacceptable circumstances. There will also be cases where public takeover announcements by themselves will give rise to unacceptable circumstances because they are misleading or reckless.
19. In some cases it will not be appropriate for the Panel to conduct proceedings in relation to applications that relate to anticipatory breaches of the Law or speculation as to whether unacceptable circumstances may arise. However, where it is clear that there is a significant risk that unacceptable circumstances may arise, it will be appropriate for the Panel to conduct proceedings and to consider whether interim orders would be appropriate to ensure that those circumstances do not arise.
20. In this case, we decided to conduct proceedings in relation to the second and third issues in Troy's application because, if Troy's allegations were substantiated, there was a significant risk that unacceptable circumstances had occurred or could occur in the future. However, we note that, while Troy had raised some doubt about whether circumstances surrounding St Barbara's proposed bid might be unacceptable, Troy's application was based largely on speculation about the 12 October Acquisition and St Barbara's proposed bid.

SUBSTANTIVE ISSUES

Application of section 621(3) to acquisition by St Barbara

21. Section 621(3) provides:

“The consideration offered for securities in the bid class under a takeover bid must equal or exceed the maximum consideration that the bidder or an

⁶ See section 631(1).

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associate provided, or agreed to provide, for a security in the bid class under any purchase or agreement during the 4 months before the date of the bid.”

22. Troy argued that the correct interpretation of section 621(3) was that it applied to both the entering into of an agreement for a purchase and the actual provision of the purchase price under that agreement. If this is correct and St Barbara had agreed to acquire the shares on 12 October, but had actually paid for them within the 4 month period before the date of the bid, then St Barbara would be required to offer 9.25 cents for the fully paid Taipan shares.
23. Troy alleged that there was some doubt about whether St Barbara had actually paid for the shares acquired under the 12 October Acquisition on 12 October. In this regard, Troy noted that the contract note written by Tricom in respect of the 12 October Acquisition was dated 24 October. Further, Troy argued that if St Barbara had not paid for the shares under the 12 October Acquisition until after 21 October, then it would be impossible for St Barbara to make a takeover bid which complies with section 621(3) within the 2 month period allowed by section 631(1).⁷ Troy submitted that, if this was the case, the Panel should find that St Barbara’s takeover announcement had been reckless and therefore constituted unacceptable circumstances.
24. In its submissions, St Barbara stated that both the agreement to provide, and the actual provision of, the consideration for the 12 October Acquisition took place on 12 October 2000. In support of this submission, St Barbara provided a copy of the following documents⁸:
 - (a) two bank cheques in favour of Central Exchange dated 11 October for a total of \$462,500 being equivalent to the purchase price of 5 million shares at 9.25 cents each;
 - (b) bank records indicating that the bank cheques were presented by the payee on 12 October;
 - (c) an agreement between Central Exchange and Tricom and a signed share transfer form in respect of the sale of 5 million Taipan fully paid shares, both dated 12 October; and
 - (d) a statement by Mr Lance Rosenberg, managing director of Tricom, that:

⁷ Section 631(1) provides that a person who publicly proposes to make a takeover bid must make a takeover bid within 2 months after the proposal.

⁸ St Barbara had also provided the Commission with similar information when the Commission had made similar enquiries at the instigation of Troy. The Commission had also previously advised Troy that it was satisfied with the information provided by St Barbara and therefore proposed to take no further action in relation to the matter.

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- (i) Tricom acquired 5 million shares on 12 October on instructions from the chairman of St Barbara, Mr Stephen Miller;
 - (ii) from 12 October, Tricom held 4 million of those shares on behalf of St Barbara; and
 - (iii) St Barbara provided the purchase price for the shares.
- 25. St Barbara's submissions also explained that the contract note dated 24 October written by Tricom was an internal document, the purpose of which was to evidence the relevant transaction, and did not reflect the actual date of the transaction.
- 26. Accordingly, we were satisfied from the evidence provided to us by St Barbara that on 12 October:
 - (a) St Barbara had agreed to purchase at least 4 million fully paid Taipan shares from Tricom; and
 - (b) the purchase price was provided by, or on behalf of, St Barbara.
- 27. It was therefore unnecessary for us to decide on the correct interpretation of section 621(3). Nor was it necessary for us to decide whether the announcement of a takeover bid that could not be made within 2 months and comply with section 621(3) would be reckless or would constitute unacceptable circumstances.
- 28. It was also not relevant to our consideration of the application of section 621(3) in the present circumstances whether the other 1 million shares acquired from Central Exchange by Tricom on 12 October were acquired on behalf of St Barbara, by Tricom as principal, or on behalf of a third party.
- 29. We do note, however, that in relation to this issue, and a number of other issues, Troy made enquiries of St Barbara on 19 January 2001. Troy notes in its application that it received no response to these enquiries from St Barbara. While not wanting to single out St Barbara, this is symptomatic of the lack of communication and cooperation between the rival parties in this matter that has so far led to eight applications being made to the Panel. In a number of these disputes, a genuine attempt at communication and resolution of the issues beforehand would most likely have disposed of the need for an application to the Panel in the first place.

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Agreement to abridge time by Taipan directors

30. Item 6 of section 633(1) provides that the bidder must send the bidder's statement and offers to target shareholders within the period of 14 to 28 days after the bidder's statement is served on the target. However, item 6 also provides that:
- "The directors of the target may agree that the offers and accompanying documents be sent earlier."*
31. In its 9 January announcement to ASX, St Barbara stated that it intended to dispatch its bidder's statement to Taipan shareholders on 14 February 2001. Troy applied to the Panel on 5 February on the basis that, if it was still St Barbara's intention to dispatch on 14 February, it would require the consent of Taipan's directors to an abridgement of the 14 day period.
32. Troy submitted that consent by Taipan directors to such an abridgement would constitute unacceptable circumstances because:
- (a) Troy had raised serious issues with St Barbara and in this Panel application in relation to whether St Barbara's bid will comply with the Law, including section 621(3), and had not received any response from St Barbara;
 - (b) Troy has a rival bid which the independent directors of Taipan recommended that shareholders reject;
 - (c) St Barbara and Taipan are closely related companies that have been pursuing a "friendly" merger and have the same chairman, Mr Stephen Miller;
 - (d) if the Taipan directors consented to an abridgement of the full 14 day period, St Barbara could lodge and dispatch its bidder's statement on the same day and, if St Barbara's bid is unconditional, commence acquiring shares on-market;
 - (e) it was unacceptable for Taipan directors to consent to abridging time for dispatch of St Barbara's bidder's statement before they had actually seen a copy of the final bidder's statement; and
 - (f) the Panel's policy is that applications to restrain dispatch of bidder's statements should generally be made at least 5 days before they are capable of dispatch.
33. On 1 February 2000, the independent directors of Taipan signed a memorandum of consent under which they agreed with St Barbara that Taipan would consent to an abridgement of the period between service and dispatch of St Barbara's bidder's statement to allow St Barbara to

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dispatch its bidder's statement on 14 February 2001. This consent was conditional on St Barbara serving its bidder's statement on Taipan by midday on 6 February. On 5 February, the independent directors of Taipan agreed to extend the time by which St Barbara had to serve its bidder's statement to 5.00pm on 7 February.⁹

34. St Barbara did not serve its bidder's statement on Taipan by 5.00pm on 7 February. On 7 February, Taipan indicated to St Barbara that, should St Barbara seek any further consent to an abridgement from Taipan's directors:
- (a) the Taipan directors would be unlikely to consent to abridge the time to any period less than 7 days; and
 - (b) any consent (if given) would not have any effect if at the time of receipt of the bidder's statement either:
 - (i) Troy's bid had lapsed; or
 - (ii) Troy's bid had a period of greater than 21 days left before it was due to expire.
35. On 8 February, following discussions with the Panel, Taipan notified St Barbara that any consent to abridgement would also have no effect if, *within 2 business days* after receipt of the bidder's statement by Taipan, Troy's bid had a period of greater than 21 days left before it was due to expire. Troy's offer period was scheduled to close at 7.00pm on 8 February 2001. On 8 February, Troy announced that it had extended its offer to close at 7.00pm on 14 February.¹⁰
36. The Taipan independent directors indicated to the Panel through their legal adviser that the primary consideration for them in consenting to St Barbara dispatching its bidder's statement early was so that the offers of both Troy and St Barbara were open together for a reasonable period of time. This would be in the best interests of Taipan shareholders as it would allow them to choose between the offers of the rival bidders.
37. The Panel understands that one of the reasons why a discretion of target directors was included in item 6 of section 633(1) was to allow the early dispatch of bidder's statements in situations where a rival bid existed, in order to maximise the chances that the two rival bids would be open at the same time.¹¹ We also note that the Taipan directors have been considering proposals for a merger with St Barbara for some months.

⁹ References to times are to Western Standard Time.

¹⁰ ASX Release, *Troy extends Taipan offer to 14/2/2001*, 8 February 2001.

¹¹ Prior to the enactment of this provision, it was the practice of the Commission to grant a modification to allow early dispatch of offer documents in these circumstances.

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Accordingly, we consider that the consent given by the independent directors of Taipan, as communicated to St Barbara on 7 and 8 February, was a legitimate exercise of the discretion to abridge time and therefore does not constitute unacceptable circumstances.

38. We do not accept Troy's submissions that any of the issues referred to at paragraph 32 above are reasons why such an abridgement would be inappropriate in this case. The 14 day period between service and dispatch is there primarily to allow the target time to scrutinise the bidder's statement and offers and to raise any material deficiencies before it is dispatched to shareholders. In this case, the Taipan directors already have a good knowledge of St Barbara, having recently proposed to merge with St Barbara by scheme of arrangement. If anything, the fact that relations between Taipan and St Barbara are "friendly" means that it is likely that Taipan has a greater understanding of St Barbara's proposed bid than would otherwise be the case.
39. The terms of the consent proposed by Taipan at the time of our decision also meant that Troy, by extending its bid, could ensure that the full 14 day period would elapse between service and dispatch of St Barbara's bidder's statement. While we made note of this fact in our deliberations, this factor was not fundamental to our decision. Even without this aspect of the consent, we were satisfied on the basis of the information before us that the Taipan directors' consent to abridgement in this case was not unacceptable.¹²

Conditions of St Barbara's proposed bid

40. It was unclear from public statements made by St Barbara whether its proposed takeover bid for Taipan would be unconditional. However, in its submissions, St Barbara confirmed that its bid would be unconditional. It was therefore unnecessary for us to make any decision in relation to this matter. However, we note that St Barbara should have made an announcement to clarify the status of the conditions attached to its proposed bid as its previous announcements had the potential to cause some confusion.¹³

DECISION

41. Under regulation 20 of the ASIC Regulations, we decided to conduct proceedings in relation to the second and third issues raised by Troy's application.

¹² Taipan subsequently altered the terms of its consent and St Barbara dispatched its bidder's statement on 21 February after it was served on Taipan on 15 February.

¹³ St Barbara subsequently made an announcement to the ASX on 14 February confirming that its offers would be unconditional.

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42. We have decided to refuse the application by Troy for interim orders and a declaration of unacceptable circumstances in relation to the takeover bid by St Barbara.
43. The Panel has already expressed concern about the serial and adversarial nature of the matters which have been brought before it by Troy and Taipan in relation to these transactions. The excessively adversarial conduct of the parties has not advanced the interests of Taipan shareholders. This was the eighth application made to the Panel in relation to various transactions associated with control of Taipan.
44. In relation to the second issue raised by Troy's application, we are particularly disappointed that Troy chose to raise this with the Panel after the matter had been investigated by the Commission and the Commission had notified Troy that it was satisfied with St Barbara's response.
45. The application is therefore dismissed. We granted all parties leave to be represented by their solicitors. There will be no order for costs.

Ian Ramsay
President of the Sitting Panel
Decision dated 14 February 2001
Reasons published 20 March 2001