

**In the matter of Taipan Resources NL (No. 09)
[2001] ATP 4**

Catchwords:

Whether share acquisitions contravened 20% threshold - circumstances occurred more than two months before application - whether Panel should allow proceedings - effect of overlap with court proceedings - whether contravention of 20% threshold was unacceptable in circumstances - orders to rectify breach by vesting shares in ASIC and requiring sale - unfair prejudice - disposal of bid class securities during bid.

*Corporations Law (Cth), sections 606(1), 608(3), 657A(3), 657D
Australian Securities and Investments Commission Regulations r16(1)(b)*

Taipan Resources NL (No. 2) [2000] ATP 13

These are the reasons for our decision in relation to the application of Troy Resources NL under section 657C of the Corporations Law received on 13 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 Trevor Rowe.
2. These are the reasons for our decision to make a declaration of unacceptable circumstances under section 657A of the Corporations Law (the *Law*) and orders under section 657D of the Law in relation to an application by Troy Resources NL (*Troy*) dated 13 February 2001. The application was for interim orders and a declaration of unacceptable circumstances in relation to a takeover bid by St Barbara Mines Limited (*St Barbara*) for Taipan Resources NL (*Taipan*).¹ The decision to make a declaration was announced on 9 March 2001 and the orders were made on 14 March 2001.

¹ Statutory references are to provisions of the Corporations Law, as in force at 9 March 2001. Findings of fact are based on submissions by the parties and ASX announcements.

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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 purchase occurred on 12 October.
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. St Barbara lodged an identical notice under section 671B on 26 October which also related to the 4 million shares, but annexed a contract note written by Tricom dated 24 October.
5. Strata Mining Corporation NL (*Strata*) lodged a notice under section 671B on 16 October which indicated that it had acquired a relevant interest in the 4 million shares acquired by St Barbara on 12 October. Strata had a relevant interest in these shares because at all relevant times its voting power in St Barbara was greater than 20% and therefore it was deemed under subsection 608(3) to have the same relevant interests as St Barbara.² The notice also discloses that as a result of this acquisition Strata's voting power in Taipan increased from 19.42% to 21.28%.
6. The remaining 1 million Taipan shares acquired by Tricom on 12 October were acquired on behalf of, or later transferred to, Spinite Pty Limited (*Spinite*) and Swanmode Holdings Pty Limited (*Swanmode*) as follows:
 - (a) 500,000 shares to Spinite; and
 - (b) 500,000 shares to Swanmode.³
7. Between 6 and 8 November, Spinite sold 200,000 of the Taipan shares acquired on 12 October at 7.7 cents per share and 100,000 shares at 7.73 cents per share and Swanmode sold 299,000 of the shares at 7.7 cents per share.

The Put Option Agreement

8. On 12 October 2000, the same day that Tricom acquired the 5 million Taipan shares, Tricom also entered into a put option agreement with

² Subsection 608(3) relevantly provides that a person has relevant interests in any securities that a body corporate in which the person's voting power is above 20% has.

³ Spinite is a company associated with Tricom and is the holding company of Tricom Equities Limited. Lance Rosenberg and Julie Rosenberg are the sole shareholders of both Spinite and Tricom. The directors of Swanmode are Alan King and Teik Peng Oh. On the information provided to the Panel, there is no obvious relationship between Swanmode and any other party, including St Barbara.

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Central Exchange under which Tricom granted Central Exchange the option to put 1,991,534 fully paid Taipan shares (the remainder of Central Exchange's holding) to Tricom on 19 December 2000 for 10 cents per share (the *Put Option Agreement*). Central Exchange exercised the option on 19 December. The shares were acquired by Tricom on behalf of Spinite as to 75% and Swanmode as to 25%.

Share placement

9. On 20 December 2000, Taipan announced that it had issued 5 million fully paid shares to Tricom at 6.1 cents per share pursuant to a resolution passed at the Annual General Meeting of Taipan on 30 November 2000.⁴ Of these 5 million shares, Tricom disclosed that it acquired 675,000 on behalf of Spinite and 675,000 on behalf of Swanmode.

Takeover bids by St Barbara and Troy

10. On 21 December 2000, St Barbara announced that it would make a takeover bid for Taipan on the following terms:⁵
 - (a) 1 St Barbara fully paid ordinary 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 ordinary share for 30 cents at any time prior to 29 February 2004 for every 4 partly paid Taipan shares.
11. 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 fully paid Taipan share.⁶ On 10 January, St Barbara announced that it would increase its cash alternative to 8.8 cents per fully paid Taipan share.⁷ On 14 February, St Barbara announced that it would increase its cash alternative to 9.0 cents per fully paid Taipan share.⁸
12. St Barbara lodged its bidder's statement with the Australian Securities and Investments Commission (the *Commission*) on 15 February 2000 and dispatched unconditional offers under its takeover bid to shareholders on 21 February. The terms of the offers were:

⁴ ASX Release, *New Issue of Shares*, 20 December 2000. The ASX Release also notes that Taipan issued 10 million fully paid shares at 6.1 cents per share to clients of Hartley Poynton Limited.

⁵ ASX Release, *St Barbara To Bid for Taipan*, 21 December 2000.

⁶ ASX Release, *Alternative 8.2 cent cash offer for Taipan fully paid shares*, 9 January 2001.

⁷ ASX Release, *Increase – Taipan Bid Cash Alternative to 8.8 cents per fully paid share*, 10 January 2001.

⁸ ASX Release, *Increase of Taipan Bid Cash Alternative to 9 cents*, 14 February 2001.

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- (a) 9.0 cents cash for each fully paid Taipan share or, alternatively, 1 St Barbara ordinary share plus 7.5 cents cash for every 3 fully paid Taipan shares; and
 - (b) 0.7 cents cash for each partly paid Taipan share or, alternatively, 1 St Barbara ordinary share plus 2.5 cents cash for every 20 partly paid Taipan shares.
13. On 2 January, Troy made an off-market takeover bid for all of the shares in Taipan on the following terms:
 - (a) 7.6 cents cash for each fully paid Taipan share; and
 - (b) 0.65 cents cash for each partly paid Taipan share.
14. On 10 January, Troy announced that it had increased the consideration offered for fully paid Taipan shares to 8.3 cents cash and had waived all of the conditions under its takeover bid.⁹ On 13 February, Troy announced that it had increased its offers under its full bid for Taipan to:
 - (a) 8.8 cents cash for each fully paid Taipan share; and
 - (b) 0.7 cents cash for each partly paid Taipan share.¹⁰
15. On 27 February, Troy made a proportional off-market takeover bid to acquire 60% of the ordinary shares in Taipan. At the time of our decision, the consideration offered under Troy's proportional bid was the same as the consideration offered under its full bid.¹¹

On-market acquisitions

16. In or around the period from 19 January to 6 February 2001, Tricom acquired a number of parcels of fully paid Taipan shares (approximately 1.9 million shares in total) on-market at 8.4 and 8.5 cents per share. At the time, this was below the bid price announced by St Barbara, but was above the price offered under Troy's bid. Immediately prior to these acquisitions, Tricom disposed of approximately 600,000 Taipan shares in a number of separate on-market transactions.

⁹ ASX Release, *Troy declares bid unconditional/increases offer/shortens time for payment*, 10 January 2001.

¹⁰ ASX Release, *Troy Increases Offer for Taipan – Closing Date Extended*, 13 February 2001.

¹¹ On 15 March, Troy announced that it had increased the cash consideration offered for fully paid Taipan shares under both its full and proportional takeover bids to 9.1 cents. ASX Release, *Troy Increases Taipan Bid Offer and Extends Closing Date*, 15 March 2001.

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THE APPLICATION

17. Troy's application for interim orders and a declaration of unacceptable circumstances primarily raises the following two substantive issues:
- (a) whether any of the following acquisitions breached section 606:
 - (i) the acquisition of 4 million Taipan shares by St Barbara on 12 October (the *Primary Acquisition*);
 - (ii) the acquisition of an additional 1 million Taipan shares by Tricom on 12 October;
 - (iii) the acquisition by Tricom on 12 October of a relevant interest in a further 1,991,534 Taipan shares under the Put Option Agreement;
 - (iv) the issue of 5 million Taipan shares to Tricom on 20 December; or
 - (v) the on-market acquisitions of approximately 1.9 million Taipan shares by Tricom in or around the period from 19 January to 6 February; and
 - (b) whether St Barbara is required to offer 10 cents per fully paid Taipan share under subsection 621(3) as a result of the acquisition of Taipan shares for 10 cents each under the Put Option Agreement because:
 - (i) either Swanmode or Spinite is an associate of St Barbara; or
 - (ii) Tricom is an associate of St Barbara and acquired the relevant shares as principal.
18. Troy also alleges that St Barbara has breached the following provisions of the Law:
- (a) section 995 – misleading or deceptive conduct in dealings with securities;
 - (b) section 999 – misleading statements to induce a sale or purchase of securities;
 - (c) section 631 – reckless announcements of takeover bids; and
 - (d) section 671B – requirements for substantial shareholder notices.

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19. Troy sought an interim order that St Barbara, Tricom, Spinite, Swanmode and any of their associates be restrained from purchasing Taipan shares on-market or acting as a broker in relation to the purchase of Taipan shares on-market until the Panel made its final decision on the application.

PRELIMINARY ISSUES

Primary Acquisition

20. Under regulation 20 of the Australian Securities and Investments Commission Regulations (the *ASIC Regulations*), we decided to conduct proceedings in relation to Troy's application.
21. Under regulation 16(1)(b) of the ASIC Regulations, we decided initially to consider only those issues arising out of the Primary Acquisition in these proceedings.
22. On the basis of the information set out in Troy's application, it appeared that St Barbara was involved in a prima facie contravention of section 606 as a result of the Primary Acquisition.¹² This matter had been the subject of enquiries by the Commission and a previous Panel application in *Re Taipan Resources NL (No 2)*. However, in relation to both the enquiries made by the Commission and the previous Panel application the issue was not satisfactorily resolved because of intervening circumstances.
23. In *Re Taipan Resources NL (No 2)* the Panel decided not to conduct proceedings because of the potential conflict with concurrent proceedings in the Supreme Court of Western Australia. Troy's application submitted that it was now appropriate for the Panel to consider this issue because the Court was no longer able to deal with it.¹³
24. Accordingly, we determined, under paragraph 657C(3)(b), to extend the time for the application to be made notwithstanding that more than two months had elapsed between the relevant acquisitions and Troy's application.
25. It was subsequently brought to our attention by St Barbara and Taipan that the matter of the Primary Acquisition had not been withdrawn from Troy's application under sections 232 and 233 to the Supreme Court of Western Australia (the *Oppression Proceedings*).¹⁴ We decided not to

¹² As a result of this acquisition by St Barbara, Strata's voting power in Taipan exceeded 20%.

¹³ Troy noted that the Court proceedings for approval of St Barbara's proposed scheme of arrangement (COR 197 of 2000) had been discontinued.

¹⁴ COR 276 of 2000

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give any further consideration to the issues relating to the Primary Acquisition unless and until Troy withdrew the matter from the Oppression Proceedings. This decision was consistent with the decision of the Panel in *Re Taipan Resources NL (No 2)* where the Panel noted that it was keen to discourage forum shopping in circumstances where the functions of the Court and the Panel overlap.

26. While the Oppression Proceedings were inactive as a result of the abandonment of the scheme of arrangement by St Barbara, we were nevertheless disappointed that Troy did not choose to withdraw this matter from the Oppression Proceedings before it made a further application to the Panel. We were also disappointed that Troy did not make it clear in its application to the Panel that the Oppression Proceedings were still on foot.
27. On 6 March 2001, Troy notified the Panel that it would immediately take steps to withdraw the matter of the Primary Acquisition from the Oppression Proceedings. On the basis of this information, we decided to recommence our consideration of the relevant issues in these proceedings.¹⁵

Residual Allegations

28. We decided not to consider in these proceedings any of the other issues (ie. other than those issues arising out of the Primary Acquisition) raised by Troy in its application (the *Residual Allegations*).
29. The Residual Allegations were based on inconclusive circumstantial evidence regarding various alleged associations between St Barbara, Strata and various other parties. In this set of circumstances, we did not consider it appropriate to conduct an extensive investigation into allegations that were not substantiated to some material extent by the application itself.
30. We were advised that Troy had already requested the Commission to investigate a number of the Residual Allegations before Troy made its application to the Panel. The Commission has broad powers to gather information and make enquiries in a variety of circumstances. Indeed, it is one of the Commission's functions to conduct enquiries into allegations such as these if it has reason to believe that a contravention of the Law or unacceptable circumstances have or may have occurred.¹⁶

¹⁵ On 14 March, Troy advised the Panel that it had filed an application in the Supreme Court of Western Australia seeking leave to discontinue the Oppression Proceedings.

¹⁶ See in particular section 13 and divisions 2 and 3 of part 3 of the Australian Securities and Investments Commission Act.

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31. The Commission has extensive experience in this area and is able to conduct enquiries in the most efficient manner and with the appropriate allocation of resources. In this case, the nature of Panel proceedings would be likely to involve a more significant allocation of the resources and time of both the Panel and the parties involved. We therefore considered that it was most appropriate and convenient for the Commission to conduct an investigation or make other suitable enquiries to obtain further information in relation to the Residual Allegations.
32. We invited the Commission to make further enquiries into the Residual Allegations and requested the Commission to advise the Panel of any further evidence that it uncovered relevant to those allegations. We decided that, if the evidence uncovered by the Commission indicated that there was reasonable substance to the Residual Allegations, the Panel would then consider the Residual Allegations and prepare a supplementary brief. However, we decided not to consider the Residual Allegations in these proceedings unless such evidence was forthcoming.
33. On 12 March 2001, the Commission notified the Panel that it had sought and received documents from all relevant parties, and had interviewed certain individuals, in relation to the Residual Allegations. The Commission advised that, after reviewing the Residual Allegations, the Panel's request and the further information gathered, it had formed the view that there was insufficient evidence to warrant further investigation. On the basis of this advice, we confirmed our decision not to consider the Residual Allegations.

INTERIM ORDER

34. We decided not to make the interim order requested by Troy. We did not consider that this was an appropriate case for the Panel to grant interim orders. Any necessary relief could have been granted by the Panel in the form of final orders after proper consideration of the substantive issues.

SUBSTANTIVE ISSUES

35. Subsection 606(1) provides that:

A person must not acquire a relevant interest in issued voting shares in a company if:

- (a) *the company is:*

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(i) a listed company;

...

(b) the person acquiring the interest does so through a transaction in relation to securities entered into by or on behalf of the person; and

(c) because of the transaction, that person's or someone else's voting power in the company increases:

(i) from 20% or below to more than 20%;

...

However, the person may acquire the relevant interest under one of the exceptions set out in section 611 without contravening this subsection.

36. Taipan is a listed company. The Primary Acquisition was a transaction entered into by or on behalf of St Barbara, in which St Barbara acquired a relevant interest in 4 million Taipan fully paid ordinary shares. As a result of the Primary Acquisition, Strata's voting power in Taipan increased from 19.42% to 21.28%. We were not provided with any submissions which argued that any of the exceptions set out in section 611 applied to the Primary Acquisition. Therefore, we find that, in making the Primary Acquisition, St Barbara contravened subsection 606(1).
37. Under section 657A, the Panel has the power to declare circumstances in relation to the affairs of a company to be unacceptable circumstances if it appears to the Panel that the circumstances are unacceptable because they constitute or give rise to a contravention of a provision of Chapter 6. In exercising its powers under section 657A, the Panel must have regard to the purposes of Chapter 6 set out in section 602 and the other provisions of Chapter 6.¹⁷ Under subsection 657C(2), the Panel must also have regard to whether making, or declining to make, a declaration would be against the public interest.
38. Section 606 is one of the cornerstone provisions of Chapter 6 of the Law. It provides that, except in certain circumstances, a person must not acquire interests in a listed company if that person's interests, aggregated with those interests of associated persons, would exceed 20% of the listed company. It is critical that this prohibition is complied with in order for the acquisition of control over a listed company to take place in an efficient, competitive and informed market in accordance with the

¹⁷ Subsection 657A(3). The Panel must also have regard to the rules made by the Panel under section 658C and the matters specified in the regulations made for the purposes of paragraph 195(3)(c) of the Australian Securities and Investments Commission Act. No such rules or regulations existed at the date of this decision.

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other provisions of Chapter 6. A contravention of section 606 will therefore, by its very nature, generally be contrary to the principles set out in section 602.

39. St Barbara submitted that any contravention of section 606 by St Barbara as a result of the Primary Acquisition was a technical breach and would not have amounted to unacceptable circumstances because:
- (a) the circumstances would not be unacceptable having regard to the control, or potential control, of Taipan;
 - (b) the acquisition did not cause Strata to acquire a more substantial interest in Taipan;
 - (c) the contravention would not have offended the policy objectives of Chapter 6 of the Law set out in section 602; and
 - (d) the contravention would be technical, minor and resulted in no legal or commercial mischief, and in any event St Barbara has now made an off-market takeover bid for all the shares in Taipan.
40. We do not agree with St Barbara’s submissions for the following reasons:
- (a) the circumstances are unacceptable having regard to the acquisition, or proposed acquisition, of a substantial interest in Taipan because St Barbara acquired voting shares in Taipan in breach of the Law;
 - (b) under subsection 608(3), Strata had a larger substantial interest in Taipan as a result of the Primary Acquisition;
 - (c) for the reasons set out above at paragraph 38, the contravention was contrary to the policy objectives set out in section 602;
 - (d) the fact that a contravention may be of a technical nature does not mean that it ought to be excused – section 606 is a technical provision and parties will often be deemed to have interests in shares that are held by other parties;
 - (e) we do not consider that a contravention involving 1.28% of the voting power of Taipan can be characterised as “minor” in this case when the control of Taipan is being closely contested;
 - (f) the fact that St Barbara has subsequently made a takeover bid for Taipan does not adequately remedy the breach of section 606 where control of Taipan is being contested; and

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- (g) St Barbara did not sell down its interest in Taipan or otherwise seek to remedy the breach.
41. In deciding to make a declaration of unacceptable circumstances in relation to St Barbara's contravention of subsection 606(1), we also had regard to the following matters that we considered relevant:
- (a) by notice dated 11 August 2000, Strata informed St Barbara that its voting power in St Barbara had increased from 19.51% to 22.51% and therefore St Barbara should have been aware that Strata's voting power in Taipan would increase as a result of the Primary Acquisition by virtue of the operation of subsection 608(3);
 - (b) the shares acquired by St Barbara in the Primary Acquisition were voted at St Barbara's direction in favour of a resolution to approve a merger between Taipan and St Barbara at the meeting of Taipan shareholders held on 12 October 2000;
 - (c) St Barbara made the Primary Acquisition at a time when control of Taipan was being contested between Troy and St Barbara;
 - (d) as a result of the Primary Acquisition, St Barbara gained an unfair tactical advantage over Troy in so far as it acquired more Taipan shares than it was permitted to do under the Law; and
 - (e) the shares were acquired for 9.25 cents each, which was higher than the price offered under St Barbara's takeover bid at the time of our decision.
42. We also note that Strata's voting power in Taipan was diluted to less than 20% after the Primary Acquisition as a result of an issue of 15 million fully paid shares by Taipan on 13 December 2000. However, this does not affect our decision that unacceptable circumstances existed because of St Barbara's contravention of section 606 on 12 October 2000.
43. It will often be appropriate for the Panel to make a declaration in cases such as this even if the voting power of the relevant party has subsequently decreased to less than 20%. This is because the contravention by itself constitutes unacceptable circumstances having regard to the policy objectives set out in section 602. However, it may be relevant in these circumstances for the Panel to take any subsequent decrease in voting power into account in determining appropriate orders to make under section 657D.
44. Having regard to the matters set out above, we consider that it would be against the public interest for the Panel to decline to make a declaration in this case.

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45. St Barbara submitted that it would be against the public interest for the Panel to make a declaration of unacceptable circumstances because St Barbara has made a takeover bid for all of the shares in Taipan. We do not agree with this submission. In this case, St Barbara did not make its takeover bid for Taipan until more than four months after the Primary Acquisition occurred and the cash consideration offered under its takeover bid was less than the price paid for the Taipan shares that it acquired through the Primary Acquisition.
46. We therefore decided on 9 March to make a declaration of unacceptable circumstances under section 657A in relation to the Primary Acquisition by St Barbara.

FINAL ORDERS

47. On 14 March, we made the following orders under section 657D:
 - 1 *An order that 2,751,462¹⁸ fully paid ordinary shares in Taipan (the Shares) held by St Barbara at the date of this order vest in the Commission to be held by the Commission on a trust for sale.*
 - 2 *An order requiring the Commission to sell the Shares on the following terms:*
 - (a) *the Commission must retain a broker to sell the Shares off-market by tender sale to the highest bidder or bidders;*
 - (b) *the Commission must not retain Tricom Equities Limited or Hartley Poynton Limited as the broker referred to in paragraph (a);*
 - (c) *the Commission must make an announcement to Australian Stock Exchange Limited calling for tenders for the Shares to be submitted before a time specified by the Commission;*
 - (d) *the Shares must be sold no later than 5.00pm on the date prior to the close of St Barbara's takeover bid, currently 20 March 2001;*
 - (e) *the Commission must account to St Barbara for the proceeds of the sale of the Shares less the Commission's reasonable costs and expenses including brokerage;*
 - (f) *before disposing of the Shares to the highest bidder, the Commission must obtain a statutory declaration from the bidder*

¹⁸ This was the number of shares by which Strata's voting power exceeded 20% as a result of the Primary Acquisition.

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declaring that the bidder is not, and is not acquiring the Shares on behalf of:

- (i) St Barbara or Strata;*
 - (ii) a director of St Barbara or Strata; and*
 - (iii) an associate of any person referred to in paragraph (i) or (ii) for the purposes of the Law; and*
- (g) if Taipan offers to buy back and cancel the Shares at a price equal to or greater than the highest bid received for the Shares, the Commission may sell the Shares to Taipan.*
- 3 *An order that St Barbara provide all assistance reasonably required by the Commission in relation to the sale of the Shares in accordance with the order in paragraph 2, including the execution of all documents necessary to transfer ownership of the Shares.*
48. We considered that it was appropriate to make these orders to protect the interests of Troy and other Taipan shareholders and to ensure that St Barbara's takeover bid for Taipan proceeded, as far as possible, in a way that it would have proceeded if the unacceptable circumstances had not occurred.
49. We have noted earlier that on 13 December 2000 Strata's voting power was diluted to less than 20%. St Barbara would therefore have been able to acquire an equivalent number of shares to that acquired through the Primary Acquisition after 13 December 2000 without contravening section 606. However, we do not consider that the dilution of Strata's holding adequately remedied the unacceptable circumstances because:
- (a) St Barbara retained the Taipan shares that it acquired in breach of section 606;
 - (b) Troy was denied any opportunity to bid for the shares;
 - (c) St Barbara may not have been able to acquire the shares after 13 December; and
 - (d) if St Barbara had acquired the shares for 9.25 cents after 13 December, St Barbara would have been required to make offers under its takeover bid at 9.25 cents per fully paid Taipan share under subsection 621(3).¹⁹

¹⁹ Subsection 621(3) provides that the consideration offered under a takeover bid must equal or exceed the maximum consideration that the bidder or an 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.

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50. Accordingly, we consider that it is appropriate that St Barbara be ordered to divest the shares so that it does not retain a benefit that was obtained in breach of the Law and so that its takeover bid proceeds as it would have most likely proceeded had the breach not occurred. Such an order also protects the interests of Troy as a competitor of St Barbara for the control of Taipan. It also protects the interests of other Taipan shareholders by helping to ensure that the contest for control of their shares takes place in an efficient, competitive and informed market.
51. Section 657D also requires the Panel to be satisfied that an order would not unfairly prejudice any person. The only person who would be affected by the order is St Barbara. We have considered whether the sale of the shares, and the potential loss that may be incurred by St Barbara on the sale, would unfairly prejudice St Barbara.
52. In this case, we were satisfied that the orders would not unfairly prejudice St Barbara because the amount of the loss that St Barbara was likely to incur on the sale was relatively small.²⁰
53. We also considered the legislative policy behind section 654A, which provides that a bidder must not dispose of bid class securities during the bid period unless:
 - (a) a rival bidder makes an offer, or improves the consideration offered, under a takeover bid for bid class securities after the bidder's statement is given to the target; and
 - (b) the bidder disposes of the securities after the offer is made or the consideration is improved.
54. It is the Panel's understanding that the legislative policy behind section 654A is to prevent market manipulation. A bidder should not be allowed to sell bid class securities during the bid period because:
 - (a) this may allow a bidder to depress the market for bid class securities in order to keep the market price below the bid price; and
 - (b) a bidder may be able to take advantage of an increase in market prices after it has made its takeover bid by selling shares that it acquired at a lower price and then relying on conditions to withdraw from its bid.

²⁰ The market price for fully paid Taipan shares as at 14 March 2001 was approximately 9 cents. The loss that would be incurred by St Barbara on the sale of 2,751,462 fully paid Taipan shares at 9 cents each was approximately \$6,900 (plus the reasonable costs and expenses of the Commission).

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55. We therefore considered that the order requiring St Barbara to divest the shares would not offend the policy behind section 654A in this case, provided that the market was clearly informed of why the shares were being divested. The concurrent rival takeover bids by Troy would also have the effect of supporting the market price of Taipan shares and St Barbara would not have been able to rely on conditions to withdraw from its bid as its bid was unconditional.²¹

DECISION

56. On 9 March 2001, we decided to make a declaration of unacceptable circumstances in relation to the Primary Acquisition. On 14 March, we ordered that 2,751,462 Taipan fully-paid ordinary shares held by St Barbara vest in the Commission, to be held by the Commission on a trust for sale.
57. We decided not to consider the other matters raised by Troy in its application on the ground that there was insufficient evidence to justify the Panel conducting proceedings in relation to those matters.
58. We decided not to make any orders for costs. We granted all parties leave to be represented by their solicitors.

Ian Ramsay
President of the Sitting Panel
Decision dated 9 March 2001
Reasons dated 17 April 2001

²¹ In any event, we note that St Barbara may have been able to dispose of Taipan shares without contravening section 654A as Troy had made offers for Taipan shares under its proportional bid after St Barbara gave its bidder's statement to Taipan.