

### In the matter of Taipan Resources NL (No. 10) [2001] ATP 5

#### Catchwords

*Bidder's financing arrangements - whether arrangements firm - whether disclosure adequate - funding from sale of surplus assets - form of supplementary disclosure - adequacy of disclosure concerning bidder - compliance with JORC Code - profit forecast by bidder - bidder's intentions concerning compulsory acquisition - bidder's intentions regarding call payment schedule for partly paid shares - sufficiency of consideration offered for partly paid shares - whether broker handling fee was collateral benefit - whether statutory condition on quotation meant bid was conditional - valuation of security offered as consideration*

*Corporations Law (Cth), sections 611 item 2, 620(2), 625(3)(c), 631(1), 631(2)(b), 636(1)(f), 670A(2)*

*Pancontinental Mining Ltd v Goldfields Ltd (1996) 19 ACSR 238 considered  
Solomon Pacific Resources NL v Acacia Resources Ltd (1995) 15 ACSR 463 considered*

**These are the reasons for our decision to make a declaration of unacceptable circumstances on the application by Troy Resources NL under section 657C of the Corporations Law dated 27 February 2001 for a declaration of unacceptable circumstances and orders in relation to a takeover bid by St Barbara Mines Limited for Taipan Resources NL.**

## INTRODUCTION

1. This is a statement of the reasons for our decision in relation to the application by Troy Resources NL (*Troy*) dated 27 February 2001 for 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 a takeover bid by St Barbara Mines Limited (*St Barbara*) for Taipan Resources NL (*Taipan*).<sup>1</sup>
2. The Panel in this matter was constituted by Denis Byrne (sitting President), Trevor Rowe (sitting Deputy President) and Michael Burgess.

## DECISIONS

### Funding

## DECLARATION

3. On 16 March we made a declaration of unacceptable circumstances under section 657A of the Law in relation to the disclosure in St Barbara's bidder's statement of St Barbara's arrangements with Credit

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<sup>1</sup> Statutory references are to provisions of the Corporations Law. Findings of fact are based on submissions by the parties and ASX announcements and documents provided to the Panel by ASIC under section 127 of the Australian Securities and Investments Commission Act.

Suisse First Boston International (*CSFB*). The arrangements between CSFB and St Barbara related to the sale of shares in Goldfields Limited (*Goldfields*) held by St Barbara.

4. On 15 February 2001, St Barbara lodged its Bidder's Statement, which was dispatched to shareholders on 21 February 2001. In section 9.6 of its bidder's statement, St Barbara stated that:

*St Barbara has established arrangements with Credit Suisse First Boston International for the sale of the full interest in Goldfields Limited. The final proceeds of the sale will be determined by future events but will be linked to the market price of the shares which at the date of this statement was approximately \$1.70. The terms of the arrangement are such that the directors believe that St Barbara will have sufficient cash to meet all acceptances under the Offer within the time frame in which St Barbara has stated it will make payment of acceptances.*

5. On 8 March 2001, St Barbara made the following announcement:

*St Barbara wishes to advise that it has decided not to execute with CS First Boston the funding arrangements referred to in 9.6 of the offer document. Furthermore, St Barbara is currently finalising additional facilities to replace the arrangement with CS First Boston and it is the company's intention to issue supplementary information in respect of these arrangements as soon as practical.*

6. In its submissions, Troy raised a number of concerns in respect of the disclosure in St Barbara's bidder's statement and the announcement by St Barbara on 8 March 2001. Troy urged the Panel to make interim orders suspending St Barbara's bid and to require St Barbara to make further disclosures regarding its arrangements with CSFB.
7. The Australian Securities and Investments Commission (*ASIC*) provided us with copies of the correspondence between St Barbara and CSFB relating to these arrangements. After reviewing that correspondence, we were not satisfied that St Barbara had in fact made firm arrangements with CSFB for the sale of the securities. St Barbara and CSFB had agreed to use best endeavours to implement a proposal for the sale of the shares, but the price and the terms were still being negotiated and there was no obligation to proceed. The proposal was abandoned on 2 March, after CSFB were unable to sell the Goldfields shares for a price acceptable to St Barbara.<sup>2</sup>
8. St Barbara did not explain the indefinite nature of the arrangement with CSFB and materially overstated the extent to which it had ensured that

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<sup>2</sup> On 1 March, St Barbara instructed CSFB to commence a bookbuild of Goldfields shares according to an agreed divestment structure at a minimum price of \$1.55 per share. On 2 March, CSFB attempted to carry out the bookbuild but was unable to obtain sufficient investor demand at the target price. Following this, St Barbara and CSFB agreed to terminate all arrangements for the proposed sale of Goldfields shares.

funds from the sale of the Goldfields shares would be available to pay for acceptances for its bid for Taipan.

9. Accordingly, we considered that the publication of the representation regarding the arrangements with CSFB and St Barbara's failure to provide further details of the proposed sale of the securities:
  - (a) detracted from an efficient, competitive and informed market in shares in Taipan;
  - (b) had the effect that Taipan shareholders did not have enough information to enable them to assess the merits of St Barbara's offers; or
  - (c) contravened paragraph 636(1)(f) of the Law
10. The appropriate remedy following the declaration of unacceptable circumstances would have been for St Barbara to make adequate supplementary disclosure in relation to the nature of its arrangements with CSFB. However, as noted above, these arrangements were abandoned on 2 March. Therefore, at the time of our decision, it was not appropriate to order St Barbara to make further disclosure in relation to the arrangements with CSFB.

#### *Orders*

11. On 14 March, we notified the parties that the Panel proposed to make interim orders under section 657E of the Law on 15 March requiring St Barbara not to purchase any further Taipan shares on-market or process any further acceptances under its takeover bid until:
  - (a) it provided evidence to the Panel that it had entered into funding arrangements to enable it to satisfy its obligations to pay for the remaining Taipan shares under its takeover bid; and
  - (b) it disclosed these arrangements in a supplementary bidder's statement.
12. We declined to make these orders as St Barbara provided evidence on 15 March of an increase and extension of \$4.5 million to its current loan facility with Macquarie Bank Limited (*Macquarie Facility*) and a \$5 million stand-by finance facility with Tricom Equities Limited (*Tricom Facility*) which, when combined with other available funds, appeared to provide St Barbara with adequate funds to satisfy its obligations under the bid. St Barbara also lodged a supplementary bidder's statement on 15 March including information in relation to its new financial arrangements.
13. In its supplementary bidder's statement dated 15 March, St Barbara disclosed that the maximum cash amount required to fund the acquisition of the remaining shares was \$14.8 million. This would rise to

\$16.6 million if Rothschild elected to convert the convertible note that it holds in Taipan.<sup>3</sup>

14. In its supplementary bidder's statement, St Barbara disclosed that it proposed to fund the offers as follows:

	<i>\$million</i>
Cash at bank (close of business 9 March 2001)	4.0
Add settlement proceeds due from the sale of approximately 2.5 million Goldfields shares between 9 March and 13 March 2001 net of borrowing repayment	2.0
Less payment due on Taipan Shares	<u>(0.5)</u>
Adjusted cash balance	5.5
Undrawn loan facility from Macquarie	4.5
Undrawn loan facility from Tricom	<u>5.0</u>
Funds immediately available to fund offers	15.0
Remaining listed shares in Goldfields available for sale (approximately 17.1 million shares at the traded price on 14 March 2001 of \$1.57)	26.8
Reversal of secured borrowings repayable on sell down	<u>(12.2)</u>
Total funds available to fund offers	<u>29.6</u>

15. We therefore declined to make the interim orders on the basis that St Barbara appeared to have adequate funds to satisfy its obligations under the bid. St Barbara had also lodged a supplementary bidder's statement on 15 March which appeared to contain adequate information in relation to its new financial arrangements.

#### *Recklessness*

16. Troy submitted that St Barbara was reckless under paragraph 631(2)(b)<sup>4</sup> by announcing its bid when it didn't have any firm arrangements in place to fund its takeover bid. In order to find that St Barbara contravened paragraph 631(2)(b), we would need to be satisfied that St Barbara was reckless as to whether it would have enough money available to pay for Taipan shares if a significant proportion of the offers were accepted.
17. Regardless of whether or not St Barbara had any firm arrangement in place for the sale of its Goldfields shares at the time of its announcement, it was clear from St Barbara's public financial statements and accounts that St Barbara had enough cash and liquid assets available to ensure

<sup>3</sup> The Rothschild convertible note has a face value of \$5 million. Until it matures in November 2002, it is convertible into 20 million Taipan fully paid shares at 25 cents each. We therefore considered it highly unlikely that Rothschild would elect to convert the note and accept St Barbara's cash alternative, thus incurring a loss of approximately \$3.2 million.

<sup>4</sup> Paragraph 631(2)(b) provides that a person must not publicly propose to make a takeover bid if the person is reckless as to whether they will be able to perform their obligations relating to the takeover bid if a substantial proportion of the offers under the bid are accepted.

that it would be able to obtain adequate funds to pay for acceptances under its bid. In particular, we considered that St Barbara was always likely to be able to raise enough funds, either through the sale of, or borrowings against, the Goldfields shares to satisfy its obligations under the bid. This was so even after taking into account St Barbara's obligations to pay down its debt and the fact that Goldfields shares had since traded at a significant discount to the price referred to by St Barbara in its bidder's statement. It therefore does not appear to us that St Barbara proposed its bid recklessly in breach of paragraph 631(2)(b).

*Adequacy of new funding arrangements*

18. On 19 March, Troy made further submissions in relation to St Barbara's new funding arrangements. These submissions alleged that unacceptable circumstances existed because:
  - (a) under the new funding arrangements St Barbara still would not have enough money to pay for acceptances under its bid; and
  - (b) the arrangements were not properly disclosed in St Barbara's supplementary bidder's statement dated 15 March.
19. On 20 March, St Barbara increased the cash alternative offered for fully paid shares under its bid to 9.2 cents.
20. In support of its further submissions, Troy provided letters from Ernst & Young Corporate Finance dated 16 March and 21 March which came to the conclusion that the maximum cash obligation under the cash alternative of St Barbara's bid was greater than the cash available from the following sources disclosed in St Barbara's supplementary bidder's statement dated 15 March:
  - (a) current cash balance of \$4 million;
  - (b) proceeds of \$2 million following the sale of 2.5 million Goldfields shares (after repayment of borrowings);
  - (c) the \$5 million Tricom Facility; and
  - (d) the \$4.5 million extension to the Macquarie Facility.
21. The above analysis does not take into account any additional funds that could be raised by St Barbara on the sale of its Goldfields shares. However, the Ernst & Young letter does note that the ability of St Barbara to sell its remaining Goldfields shares at \$1.57 each may be affected by the following factors:
  - (a) Goldfields shares had traded at \$1.49 on 20 March;
  - (b) Goldfields shares had traded in the range of \$1.36 to \$1.86 during the last six months;

- (c) the average number of Goldfields shares traded on a weekly basis was approximately 1.6 million compared to St Barbara's holding of 17.1 million; and
  - (d) St Barbara may be required to dispose of the shares in a short period of time.
22. St Barbara provided a letter from KPMG dated 23 March which showed that, as at 21 March 2001, the total maximum cash amount required to fund the remaining acquisitions of Taipan shares under St Barbara's bid was approximately \$14.6 million. If Rothschild elected to convert its convertible note and accept the cash offer, this amount would be increased to approximately \$16.5 million. Both of these amounts take into account the increase in St Barbara's cash offer to 9.2 cents and the fact that St Barbara would be required to top up the consideration of those offerees who had already accepted the cash alternative.

23. following sources of funds available to fund the acquisitions:

<b>Sources</b>	<b>\$'000</b>
<b>Cash, bullion and agreed debt facilities</b>	
Cash at bank	3,824
Gold bullion to be converted to cash on 23 March	2,408
Macquarie Facility available to draw	4,500
Tricom Facility available to draw	5,000
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Funds available to pay for shares	15,732
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<b>Other available funding</b>	
17,158,749 Goldfields shares at \$1.53 per share	\$26,253
Secured debt to be discharged against proceeds	(\$15,800)
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Additional funds available	10,453
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Total funds if Goldfields shares sold	26,185
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24. In our view, this clearly shows that St Barbara had sufficient funds available to pay the \$14.6 million required for the acquisitions of the remaining Taipan shares under its bid.
25. In the unlikely event that Rothschild elected to convert its convertible note and accepted the bid, St Barbara would have needed to raise a further \$800,000 to \$1,200,000 (over and above the \$15.7 million in available funds referred to in the table in paragraph 23 above). The letter from KPMG clearly showed that St Barbara had approximately \$11.5 million in surplus assets. We were satisfied that these assets were able to be sold and the proceeds obtained within the time frame required to pay for acceptances.
26. We have noted Ernst & Young's concerns about St Barbara's ability to sell the Goldfields shares at market value at short notice. However, even if St Barbara chose to sell the shares at a considerable discount to market value, it would still be able to raise sufficient funds from the sale of some or all of its Goldfields shares to cover any additional liability. If the Goldfields shares were sold for \$1.25 each, they would realise \$21.5 million, and the total funds would be in excess of \$21 million.
27. Finally, as a result of the increase in the cash alternative to 9.2 cents, St Barbara was required under subsection 650B(3) to offer persons who had elected to receive the scrip and cash alternative a fresh election to receive the increased cash alternative. This means that St Barbara may have needed to pay an additional \$1.5 million if all persons who had accepted the scrip and cash alternative had decided to take the cash alternative instead.<sup>5</sup>

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<sup>5</sup> At the date of this decision, the overwhelming majority of shares accepted into St Barbara's scrip and cash alternative were shares held by Strata Mining Corporation NL, which holds a substantial interest in St Barbara. At the date of our decision, Strata had not indicated any intention to change its acceptance to the cash alternative.

28. As noted above, based on a Goldfields share price of \$1.53, St Barbara had approximately \$11.5 million in surplus assets that could have been realised at relatively short notice. St Barbara would, in our view, have been well able to raise the additional funds from the sale of its Goldfields shares if it had been required to do so, although it may have had to accept a lower price for the Goldfields shares.
29. In summary, we were left with no doubt that St Barbara would be able to pay for the acquisition of all remaining Taipan shares under its bid.

*Troy's further submissions*

30. Troy's submissions dated 19 March also argued that St Barbara's new funding arrangements were inadequate because:
  - (a) the 5 million Goldfields shares required as security for the Tricom Facility were part of the security granted to Macquarie and would not be released until Macquarie had approved the terms of the Tricom Facility and all documentation was complete;
  - (b) under the terms of the Tricom Facility, if the price of Goldfields shares dropped below \$1.50, a cash top up to 66.6% of the value of the security would be required;
  - (c) it was not clear whether the conditions precedent to the Macquarie and Tricom Facilities had been met or could be met in time;
  - (d) it appeared that St Barbara had undisclosed amounts owing to the Perth office of Tricom Securities Limited;
  - (e) Tricom may not have the financial capacity, or the ability under the terms of its dealer's licence, to lend \$5 million;
  - (f) the stated purpose of the Macquarie Facility is for working capital and general corporate purposes and the terms of the facility do not make it clear whether the purchase of Taipan shares is an approved purpose;
  - (g) St Barbara may need to use funds from the Macquarie Facility to pay outstanding creditors;
  - (h) under the terms of the Macquarie Facility, St Barbara was obliged to maintain cash of \$2 million or gold in metal account and undrawn loan facilities in excess of \$2 million at all times;
  - (i) the project life ratio under the Macquarie Facility may not be able to be met; and
  - (j) St Barbara may only be able to access the proceeds of further sales of Goldfields shares after it has sold enough Goldfields shares to repay its loan and performance bond facilities.
31. A number of these issues raised by Troy were without substance and based on speculation. We are not entitled to decide on the basis of

speculation. The Panel must have evidence on which it can arrive at a clear and confident view.

32. However, we will deal with each of Troy's submissions in turn:
- (a) St Barbara confirmed that Macquarie would release the security over the 5 million Goldfields shares when the remaining conditions precedent to the Macquarie facility were met. As at 23 March, the only conditions precedent remaining were the execution of final documentation, the provision of evidence of authorisation to execute documentation and the payment of the facility fee. All of these conditions precedent were capable of satisfaction within the time frame needed to pay for acceptances;
  - (b) the Tricom Facility would be reduced if Goldfields shares were to fall to prices below \$1.50 at a rate of \$83,000 for every cent. Goldfields shares consistently traded above \$1.50 from the announcement of a significant new discovery in September 2000 until March 2001. If the Goldfields share price fell to \$1.25, the Tricom Facility would be reduced by \$2 million. Even if the Tricom Facility was to be reduced by such an amount, we were satisfied that St Barbara would still be able to raise sufficient additional funds through the sale of its Goldfields shares to pay for acceptances;
  - (c) St Barbara confirmed that all conditions precedent had either been met or could be met within the time frame needed to pay for acceptances under its bid;
  - (d) St Barbara confirmed that it had no pre-existing debt owing to Tricom Securities Limited and that the request for the establishment fee to be paid to the Perth office was an internal Tricom funding matter;
  - (e) St Barbara confirmed that under the terms of the Tricom Facility, Tricom would borrow the securities as principal and would provide the \$5 million cash from its own funds. St Barbara also confirmed that the Tricom Facility had received the approval of the ASX;
  - (f) the context of the increase and extension of the Macquarie Facility clearly indicates that the use of the funds to pay for Taipan shares under the takeover bid is an intended purpose of the facility;
  - (g) St Barbara confirmed that it has maintained, and will continue to maintain, a consistent production level to ensure that the level of creditors remains constant and therefore St Barbara will not need to use funds from the Macquarie Facility to pay outstanding creditors;
  - (h) St Barbara provided a letter from Macquarie in which Macquarie agreed that St Barbara was not required to maintain \$2 million in cash, gold and undrawn facilities until 30 April 2001;

- (i) St Barbara confirmed that Macquarie was satisfied that St Barbara's future cashflow position would be sufficient to meet the project life ratio of the Macquarie Facility and was prepared to advance all of the funds on this basis;
- (j) St Barbara confirmed that Macquarie had previously required only 50% of the proceeds of sale of Goldfields shares to be applied to reduce debt and that Macquarie would consider any request for this to occur in the future on a case by case basis. Further, St Barbara also confirmed that under the terms of the Tricom Facility, St Barbara would be able to retain the proceeds of the sale of the 5 million Goldfields shares in excess of \$1.00 per share.<sup>6</sup>

*Disclosure issues*

33. Troy also submitted that St Barbara's disclosure of its new funding arrangements in its supplementary bidder's statement dated 15 March was inadequate because:
- (a) St Barbara should have republished its entire bidder's statement with the changes clearly marked;
  - (b) it did not disclose a number of the terms of the Macquarie Facility and the Tricom Facility;
  - (c) various statements by St Barbara that funds under the Macquarie and Tricom facilities were immediately available were misleading as not all conditions precedent had been met under the Macquarie and Tricom Facilities;
  - (d) the fact that the Macquarie Facility included security over the Taipan shares and a \$2 million security deposit (in cash, gold account or undrawn facilities) is not disclosed; and
  - (e) the conditions precedent to the Macquarie Facility were not adequately disclosed including the condition that St Barbara provide evidence to the satisfaction of Macquarie that demands made by Westgold Resources NL (*Westgold*) alleging loss and damage of \$7.6 million were unlikely to succeed and the condition that the amount outstanding under the current facility be reduced to \$2.7 million.
34. We will again deal with each of Troy's submissions in turn:
- (a) there is no requirement under Chapter 6 for a bidder to send a revised and marked up bidder's statement to shareholders following lodgment of a supplementary bidder's statement. While this may be desirable in some situations, we consider that the changes made by St Barbara in its supplementary bidder's

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<sup>6</sup> For example, if the 5 million shares were sold for \$1.50, St Barbara would raise an additional \$2,500,000.

statement of 15 March were clear and able to be easily cross-referenced with the original bidder's statement. We also note that St Barbara sent its supplementary bidder's statement to all Taipan shareholders who had not yet accepted offers under its bid, and did not merely lodge it with ASX;

- (b) a bidder is not required to disclose all of the terms of the arrangements under which it proposes to fund its bid. A bidder is only required to disclose the essential provisions of the arrangements in sufficient detail for an offeree to obtain a reasonable understanding of whether or not the funds are likely to be available to pay for acceptances under the bid and any terms likely to affect the interests of shareholders who retain their shares after successful completion of the bid. Accordingly, a bidder should disclose any restrictions on the availability of the funds, including any conditions precedent that are outside of the bidder's control or are unlikely to be met. Having regard to these principles, we consider that St Barbara made adequate disclosure of the terms of its funding arrangements;
- (c) having regard to the nature of the unsatisfied conditions precedent to the Macquarie Facility, we accept St Barbara's submission that the reference to funds being 'immediately available' means that the funds will be immediately available to pay for acceptances when they are received;
- (d) St Barbara was not required to maintain \$2 million in cash, gold and undrawn facilities until 30 April 2001; and
- (e) St Barbara confirmed that the conditions precedent to the Macquarie Facility regarding the Westgold claim and the reduction of the current facility had been met.

#### **Information in relation to St Barbara**

35. Troy raised a number of concerns in relation to the adequacy of the information about St Barbara in St Barbara's bidder's statement. These issues are able to be divided into the following two categories:
- (a) whether St Barbara's reporting of its mineral resources is misleading; and
  - (b) whether forecasts provided by St Barbara are inadequate.

### **MINERAL RESOURCES**

36. We considered the issue of whether the reporting of St Barbara's mineral resources in its bidder's statement was misleading. We also considered whether it was required to comply, and did comply, with the Australasian Code for Reporting of Mineral Resources and Ore Reserves (the *JORC Code*) in preparing its bidder's statement.

37. The JORC Code is an industry code, which requires compliance in annual reports and similar documents if they deal with disclosure of mineral resources. The JORC Code is issued by the Joint Ore Reserves Committee of The Australasian Institute of Mining and Metallurgy, the Australian Institute of Geoscientists and the Minerals Council of Australia, and is binding on members of those bodies. The Code has also been incorporated into the Listing Rules of the Australian Stock Exchange and the New Zealand Stock Exchange, and is widely used by mining companies, even outside Australia.
38. The JORC Code attempts to improve and standardise disclosures about mineral resources and ore reserves. The terms recommended by the JORC Code for the description of mineral resources and ore reserves have become standard usage in publications by listed companies, and material departures from them risk being misleading.
39. We consider that it is generally desirable that reporting of mineral resources in bidder's statements should, as far as practicable, comply with the JORC Code. However, a bidder's statement that does not strictly comply with the JORC Code will not necessarily give rise to unacceptable circumstances, provided that the bidder's statement is not materially misleading as a result.
40. In section 2.5 of its bidder's statement, we were satisfied that St Barbara provided a reasonable summary of material information regarding its mineral resources, which complies with the JORC Code where appropriate. This summary clearly shows St Barbara's reserves and resources and breaks down resources into the separate categories as required by the JORC Code.
41. St Barbara's bidder's statement also referred to St Barbara's 2000 Annual Report which provides more extensive reporting of St Barbara's mineral resources and appears to comply in all respects with the JORC Code. The reserves and resources referred to by St Barbara in section 2.5 of its bidder's statement have been extracted directly from St Barbara's 2000 Annual Report.
42. There is also quite extensive information available for Taipan shareholders in the independent mining experts report on St Barbara and Taipan which was provided to Taipan shareholders with Taipan's target's statement. This also appears to comply strictly with the JORC Code.
43. Accordingly, and in view of the other information available to Taipan shareholders, we do not consider that St Barbara's bidder's statement is deficient in this regard.
44. In any event, we do not consider that St Barbara's reporting of its mineral resources is misleading or deficient in any material respect. In our view, the matters raised by Troy in relation to the adequacy of this

information are not material to a Taipan shareholder's decision whether or not to accept the bid.

## FORECASTS

45. In its bidder's statement, St Barbara provided profit forecasts up to the end of the current financial year on 30 June 2001. Troy submitted that this was inadequate.
46. The parties' submissions referred the Panel to the cases of *Solomon Pacific Resources NL v Acacia Resources Ltd*<sup>7</sup> and *Pancontinental Mining Ltd v Goldfields Ltd*<sup>8</sup>.
47. In *Solomon Pacific*, Acacia Resources made a scrip bid for all of the shares in Solomon Pacific. Solomon Pacific sought to restrain the dispatch of the Part A statement alleging that the Part A did not provide information about Acacia Resources in the form of earnings forecasts or cash flow projections in order to enable Solomon Pacific's shareholders to access Acacia Resources' financial prospects.
48. In that case, the court held that no profit forecast or cash flow projections were required. No evidence was provided as to what earnings forecasts or cash flow projections might exist or how reliable they might be. The court said that:

*Forecasts are inherently speculative and subject to contingencies of varying degrees of probability and foreseeability. In some circumstances, it may be misleading to include such a prediction.*
49. In *Pancontinental*, Goldfields made a bid for Pancontinental. Goldfields was not listed on the ASX, but was a subsidiary of RGC (a large mining company with operations in Australia and Papua New Guinea). Pancontinental sought declarations that the Part A statement was invalid and orders restraining Goldfields from dispatching its offers.
50. In that case, the court said that forecasts of the future earnings and dividends of the bidder must be provided for at least 2 years, because such forecasts were commonly found and it was reasonably expected that such forecasts be provided. It is also relevant to note that in that case the bidder was a new entity, was not listed, had no trading history and the transaction was complex. The bidder also had earnings projections available to it and most of the information required to produce a forecast was contained in the various parts of the offer document.
51. In our view, neither of the cases provides clear and definitive authority for whether or not St Barbara should be required to provide forecasts beyond 30 June 2001 in this case. Each of the cases is capable of being

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<sup>7</sup> (1996) 19 ACSR 238.

<sup>8</sup> (1995) 15 ACSR 463.

confined to its particular facts and circumstances. We note the comments of the court in *Pancontinental* that the materiality of forecast information is a matter “for judgment and assessment in the light of all the evidence, facts and circumstances” of the particular facts of a case.

52. In this case, we considered it appropriate to draw a distinction between a mining company whose production is predictable because its resources consist of large deposits that can be mined with a considerable degree of predictability, and a mining company whose operations are less predictable because its resources consist of a number of smaller deposits that are less predictable in the long term.
53. St Barbara appears to fall into the latter category. It is currently mining three deposits at Meekatharra and is undertaking project evaluations and mill studies in relation to at least 7 further deposits for inclusion in the 2001/2002 and 2002/2003 financial years. St Barbara notes that production beyond this is dependent on ongoing exploration success. St Barbara notes that this is a risk factor.
54. St Barbara’s operations therefore appear to involve mining out a series of small deposits, which is inherently less predictable than mining one large, reliable deposit. The 2000 Annual Report shows that these deposits have very diverse mineralogy and mining characteristics and that the costs and rewards of mining them have been correspondingly diverse. St Barbara has not yet completed its production budgets for the year ending 30 June 2002.
55. Added to this is the fact that St Barbara intends to develop the Paulsens deposit. St Barbara notes elsewhere in its bidder’s statement that, while some feasibility studies have been done by Taipan on Paulsens, St Barbara intends to undertake an extensive review of these studies over the next 6 months to bring it to bankable status. These studies would include resource delineation, metallurgical studies, plant design and mining method. Until St Barbara completes this review, we accept that it would be difficult for St Barbara to accurately forecast how much it will cost to develop Paulsens, when Paulsens will commence production, what the costs of production will be and how much gold Paulsens will produce. There is also considerable uncertainty at the present time in relation to the medium to long term value of the Australian dollar and of gold.
56. In view of these factors, forecasts beyond the end of this financial year would be likely to be speculative and therefore of little use to Taipan shareholders. Accordingly, we were satisfied that the level of forecast information disclosed by St Barbara was adequate, having regard to the nature of St Barbara’s and Taipan’s mining operations.
57. However, we also noted that, in the explanatory statement for the previously proposed St Barbara scheme of arrangement which was sent

to Taipan shareholders in or around September 2000, St Barbara made the following statement:

*Production at Meekatharra is projected to rise to approximately 175,000 ounces for the year ending 30 June 2002. It is also anticipated that production will commence at Paulsens during 2001/02 and that 100,000 ounces will be produced from that deposit per annum.*

58. St Barbara submitted that the statement in the explanatory statement was a ‘projection’ of production at Meekatharra and Paulsens and that this should be distinguished from ‘forecast’ information, which is of a higher quality. St Barbara also submitted that it should not be required to confirm or update the projection contained in the explanatory statement because of the progress it has made towards completion of forecast quality information and the possibility that the forecast may differ from the projection.
59. The Australian Auditing Standards define ‘projections’ as forward looking statements based wholly or partly on hypothetical assumptions that are not necessarily expected to take place and ‘forecasts’ as statements based solely on best estimate assumptions which are expected to take place.<sup>9</sup> In either case, the material assumptions should be clearly stated.
60. We accept that the projections contained in the explanatory statement may no longer be sufficiently reliable to be included in St Barbara’s bidder’s statement. We also accept St Barbara’s submission that it is in the process of preparing forecast information for the year ending 30 June 2002, but that this would not be complete until it finalises its production budgets and completes its review of the Paulsens deposit.
61. In the absence of any confirmation in St Barbara’s bidder’s statement as to the projected production for the year ending 30 June 2001, we do not consider that Taipan shareholders are entitled to rely on the statements made by St Barbara in the explanatory statement considering the change in circumstances since that document was prepared. However, if the projections contained in the explanatory statement are no longer likely to provide a reliable indication of St Barbara’s future production, St Barbara should disclose this fact. Therefore, we advised St Barbara that if the forecast information for the year ending 30 June 2002 is completed during the bid period, this should be disclosed by way of a supplementary bidder’s statement.

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<sup>9</sup> We note that both forecasts and projections are forward looking statements, and therefore a person making a forecast or projection in a bidder’s statement must have reasonable grounds for making that statement: subsection 670A(2).

**Intentions**

62. Troy raised the following issues in relation to St Barbara's disclosure of its intentions in its bidder's statement:
- (a) whether the disclosure of St Barbara's intentions regarding compulsory acquisition was misleading; and
  - (b) whether St Barbara should disclose its intentions regarding the call payment schedule for the partly paid Taipan shares.

*Compulsory Acquisition*

63. When disclosing its intentions regarding compulsory acquisition in paragraph 4.2 of its bidder's statement, St Barbara treated the fully paid and partly paid shares as separate classes of shares. In each case, St Barbara stated that it was its intention to move to compulsorily acquire the remaining shares if it became entitled to do so. This issue arose because St Barbara originally intended to make two separate bids for Taipan on the basis that the fully paid and partly paid shares were separate classes rather than part of the same class.
64. In its supplementary bidder's statement dated 15 March, St Barbara replaced paragraph 4.2 of its bidder's statement with the following:
- If St Barbara becomes entitled to proceed to compulsory acquisition in accordance with the Corporations Law, St Barbara intends to compulsorily acquire any outstanding Taipan Shares in accordance with the Corporations Law...*
65. This supplementary disclosure adequately addressed the issue of St Barbara's intentions regarding compulsory acquisition. In any event, we did not consider that any deficiency in St Barbara's original statement was material to a shareholder's decision whether to accept the bid.

**CALL PAYMENT SCHEDULE**

66. Troy submitted that St Barbara should disclose its intentions regarding the call payment schedule for the Taipan partly paid shares if St Barbara does not obtain 100% control of Taipan. The current payment schedule is 0.5 cents payable on 30 June 2001 and 18 cents payable on 30 June 2002.
67. St Barbara has said in its submissions that it does not have any intention to vary the call payment schedule and therefore it did not consider it necessary to disclose anything in its bidder's statement. St Barbara submits that, in this case, it would only be necessary for St Barbara to disclose its intentions if it intended to vary the payment schedule. We accept these submissions.

**Consideration offered for partly paid shares**

68. Under its takeover bid made on 21 February, St Barbara offered 0.7 cents for each partly paid Taipan share (the *cash alternative*) or 1 St Barbara

share and 2.5 cents cash for every 20 partly paid Taipan shares (the *scrip/cash alternative*).

69. The value of the scrip/cash alternative may be calculated alternatively as follows:
- (a) based on market value for St Barbara shares – approximately 0.85 cents per partly paid Taipan share; or
  - (b) based on the Stanton Partners Corporate (*SPC*) technical valuation of St Barbara – a preferred value of 1.47 cents per partly paid Taipan share.<sup>10</sup>
70. In its original announcement of its proposed takeover bid on 21 December 2000, St Barbara proposed to offer one option to subscribe for a St Barbara share for 30 cents by 29 February 2004 for every 4 Taipan partly paid shares (the *option alternative*). In Taipan’s target’s statement dated 15 February in relation to Troy’s bid, Taipan noted that the value of the option alternative was between 1 and 1.5 cents per partly paid Taipan share based on a Black and Scholes pricing model for valuing the options. If we take the mid-point as the preferred value, this would give the option alternative a value of 1.25 cents per Taipan partly paid share.
71. Subsection 631(1) of the Corporations Law provides that a person who publicly proposes to make a takeover bid must make a bid on terms that are the same as or not substantially less favourable than those in the public proposal.
72. In its application, Troy alleged that the value of the cash alternative and the scrip/cash alternative is substantially less than the value of the option alternative and therefore St Barbara has contravened subsection 631(1).
73. On review of Taipan’s submissions, we were satisfied that the Black and Scholes pricing model used by Taipan to value the option alternative was reasonable. Therefore, we accepted that the options offer valued the partly paid shares within a range of 1 to 1.5 cents with a preferred value of 1.25 cents. St Barbara also noted that Taipan’s assessment of the value of the options was broadly consistent with the assessment made by St Barbara.
74. We also considered that it was appropriate to compare the value of the scrip/cash alternative based on the market price of St Barbara shares, rather than the underlying value of St Barbara shares as assessed by SPC, with Taipan’s valuation of the option alternative. This is because

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<sup>10</sup> We note that the SPC independent expert’s report attached to the Taipan target’s statement gives an incorrect preferred value of 1.10 cents for the scrip/cash alternative based on market value. This is due to an error in the report where SPC has used 7.5 cents instead of 2.5 cents as the cash component of the scrip/cash alternative.

the Black and Scholes model of valuing the options is based on the historical traded price of St Barbara shares.

75. We were therefore satisfied that the offers for partly paid Taipan shares made by St Barbara on 21 February were substantially less favourable than the offers originally proposed by St Barbara in its announcement on 21 December, giving rise to a contravention of subsection 631(1) of the Law.
76. We considered that in the circumstances of this case, the most commercially appropriate remedy was for St Barbara to offer the option alternative for Taipan partly paid shares. This would mean that Taipan partly paid shareholders would not be disadvantaged as they would receive the offer that was originally proposed on 21 December. We also considered that St Barbara would not be unfairly prejudiced if it offered the option alternative.
77. Both ASIC and Troy noted that the offer of options to partly paid shareholders, but not to fully paid shareholders, may contravene subsection 619(2)<sup>11</sup>, because the difference in the offers would not be “attributable to the fact that the offers relate to securities on which different amounts are paid up or remain unpaid”.
78. St Barbara made its takeover bid for Taipan on the basis that the fully and partly paid shares in Taipan belong to the same class. If we accept for the sake of argument that the fully paid and partly paid shares belong to the same class of shares, they are nevertheless securities with vastly different characteristics as a result of the different amounts that are paid up on them.
79. The fully paid shares are securities with full voting and dividend rights that have traded in the range of 5.3 to 9.2 cents during the past 6 months. The partly paid shares are securities with proportional voting rights and full dividend rights that are paid up to 1.5 cents and are liable to calls of 18.5 cents or forfeiture. Particularly as the partly paid shares are out of the money, their commercial characteristics are more those of options than those of shares.
80. In our view, the option alternative reflects the value and commercial characteristics of the partly paid Taipan shares and should be offered to the partly paid shareholders. However, we do not consider it appropriate for St Barbara to offer options to the fully paid Taipan shareholders as St Barbara did not announce that it would offer options for the fully paid shares, and an offer of options would not reflect the commercial nature or value of the fully paid shares.

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<sup>11</sup> Section 619 relevantly provides that all offers made under an off-market bid must be the same except for any differences in the offers attributable to the fact that the offers relate to securities on which different amounts are paid up or remain unpaid.

81. Further, we do not consider that section 619 requires St Barbara to offer options for fully paid shares as the offer of the options to partly paid shareholders, but not to fully paid shareholders, is in this case a difference attributable to the fact that different amounts are paid up or remain unpaid on those shares.
82. On 30 March, we advised St Barbara of our intention to make a declaration of unacceptable circumstances and an order requiring St Barbara to offer Taipan partly paid shareholders the option alternative, unless St Barbara agreed to vary its offers to include the option alternative for partly paid shares.
83. On 3 April, St Barbara varied its offers to include the option alternative as an additional alternative form of consideration for the Taipan partly paid shares. In view of this, we declined to make a declaration or orders on the grounds that St Barbara had adequately remedied the contravention of subsection 631(1).
84. In declining to make the declaration and orders, we also took into account the extenuating circumstances surrounding the contravention by St Barbara. St Barbara had originally announced its bid for Taipan on the basis that the fully and partly paid shares were separate classes. Market practice and the law in this area is not settled following the introduction of the CLERP reforms. This was a view that it was reasonable for St Barbara to form on the basis of the Corporations Law, previous case law and ASIC's published policy.<sup>12</sup>
85. ASIC subsequently insisted that St Barbara make its bid on the basis that the fully paid and partly paid shares were of the same class. Following this, St Barbara restructured its bid, but contravened subsection 631(1) in doing so. While we accept that St Barbara should have consulted ASIC in relation to this issue before announcing its bid, we nevertheless believe that the circumstances surrounding the contravention should be taken into account when deciding whether or not to make a declaration.

#### **Collateral benefit**

86. St Barbara offered commission of 1.25% to brokers for each St Barbara share issued as consideration as a result of the brokers' controlled CHES holdings that elect to receive the scrip/cash alternative.
87. Troy submitted that the brokers' commission offered by St Barbara was unacceptable because it gave rise to a contravention of section 623 and it had the result that Taipan shareholders would have unequal access to benefits under the takeover bid contrary to the purposes of Chapter 6 as set out in section 602.

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<sup>12</sup> See in particular ASIC Practice Note 32 and Interim Policy Statement 159 and the judgment of Neasey J in *Clements Marshall Consolidated Ltd v ENT Ltd* (1988) 6 ACLC 389.

88. Section 623 provides that a bidder, or an associate, must not give, or offer or agree to give, a benefit to a person:
- (a) if the benefit is likely to induce the person or an associate to accept an offer under the bid; and
  - (b) the benefit is not offered to all shareholders under the bid.
89. It is possible that the offer of a brokers' commission by a bidder could potentially breach section 623 or amount to unacceptable circumstances if the broker or an associate of the broker is also a shareholder in Taipan, or if the commission is passed through to the shareholder by the broker.
90. However, in this case, we do not consider that the offer of the brokers' commission amounts to a breach of section 623 or unacceptable circumstances, because it is not significant enough to be likely to induce a shareholder to accept St Barbara's scrip/cash alternative after taking into account:
- (a) the value of the cash alternative; and
  - (b) the margin of doubt in the value of the scrip component of the cash/scrip alternative.

**Other disclosure issues**

91. The other issues considered by the Panel in these proceedings may be summarised as follows:
- (a) whether it was misleading for St Barbara to call its bid "unconditional" if it is subject to the condition set out in paragraph 625(3)(c) of the Law;
  - (b) whether St Barbara's valuation of the scrip/cash alternative was misleading;
  - (c) whether statements made by St Barbara regarding the time for payment of the consideration under the bid were inconsistent;
  - (d) whether the financial information in section 2.9 of St Barbara's bidder's statement was misleading or inadequate; and
  - (e) whether St Barbara should have disclosed the existence of the Taipan 9 application to the Panel in its bidder's statement; and
  - (f) a number of additional complaints made by Troy in relation to St Barbara's supplementary bidder's statement of 15 March.

**PARAGRAPH 625(3)(C) CONDITION**

92. Paragraph 625(3)(c) provides that if a bidder offers scrip and the bidder's statement states or implies that the scrip will be quoted then the offer is subject to a condition that:
- (a) application for quotation will be made within 7 days after the start of the bid period; and

- (b) permission for admission to quotation will be granted no later than 7 days after the end of the bid period.

It was common ground that paragraph 625(3)(c) applied to St Barbara's bid.

93. The relevant issues for the Panel are whether:
- (a) it was misleading for St Barbara to describe its bid as "unconditional"; and
  - (b) St Barbara was entitled to acquire Taipan shares on-market under the exception set out in item 2 of section 611.
94. In relation to the first issue St Barbara submitted that it was not misleading for it to describe its bid as "unconditional". St Barbara noted that ASX has accepted St Barbara's application for the listing of the maximum number of St Barbara shares offered as consideration under the bid and is currently accepting applications for progressive listing of shares issued by St Barbara.
95. The primary considerations for a shareholder in deciding whether to accept a conditional bid are:
- (a) the possibility that the conditions will not be fulfilled and the shares accepted into the bid will be returned; and
  - (b) the statutory obligation of the bidder to pay for the shares does not arise until after the bid becomes unconditional or all defeating conditions are fulfilled.
96. In this case, there was no material risk that the condition would not be fulfilled. St Barbara shares are continuously quoted securities on the ASX and St Barbara confirmed that ASX was accepting applications for the progressive listing of St Barbara shares as acceptances were received.
97. St Barbara also promised payment of consideration to shareholders within 5 business days after acceptances were received, in advance of the statutory time limits in subsection 620(2). Therefore, it would not appear to be misleading Taipan shareholders in any material respect for St Barbara to describe its offers as unconditional.
98. In relation to the second issue, St Barbara noted that it obtained relief from ASIC on 15 February to allow it to acquire shares on-market under item 2 of section 611 while its offers were subject to the condition under paragraph 625(3)(c).

## **VALUATION OF SCRIP/CASH ALTERNATIVE**

99. On page 4 of St Barbara's bidder's statement, St Barbara states that:
- (a) St Barbara shares have increased in value since the scheme of arrangement was proposed in July last year because of an increase in the value of Goldfields shares held by St Barbara from \$1.35

- (July 2000) to \$1.80 (February 2001) which represents around 2 cents per St Barbara share;
- (b) the value of the scrip/cash alternative for partly paid Taipan shares is 0.9 cents based on St Barbara's share price of 15.5 cents as at the time of its bid; and
  - (c) Taipan shareholders who accept the scrip/cash alternative will have full exposure to the future development of the Paulsens deposit.
100. Troy submitted that these statements were misleading for a number of reasons, including:
- (a) the market price of Goldfields shares dropped from \$1.80 to \$1.70 at the date of the bidder's statement and had since dropped below \$1.60;
  - (b) the market price of St Barbara shares has not increased since July 2000;
  - (c) the closing price for St Barbara shares at 15 February (ie. the date of the bidder's statement) was 14.5 cents, not 15.5 cents (which was the price on 8 February); and
  - (d) Taipan shareholders will not retain the same level of exposure to the Paulsens deposit because their interest is diluted in proportion with the cash component of the scrip/cash alternative.
101. St Barbara submitted that it was not misleading to say that the value of the St Barbara shares had increased since July 2000. In support of this St Barbara referred to the SPC report attached to Taipan's target's statement which gives an increased underlying value for St Barbara shares. This report was based on a preferred value of \$1.60 for Goldfields shares.
102. Based on the underlying value of St Barbara shares, St Barbara appeared to have a reasonable basis for saying that its shares had increased in value since July 2000. This increase was slightly overstated by reference to a share price of \$1.80 for Goldfields shares in February 2001. These shares were trading at \$1.70 at the date of the bidder's statement.
103. In its bidder's statement, St Barbara stated that the market value of its shares at the time of the bid was 15.5 cents. This was the market price at 8 February, not at the time of its bid on 21 February. On 21 February, the market was around 14 to 14.5 cents. It is therefore not correct for St Barbara to say that its shares were valued at 15.5 cents at the date of its bid.
104. In relation to valuing scrip for the purposes of the minimum bid price rule under subsection 621(3), the Panel's (and ASIC's) policy is that a bidder should use a weighted average of market prices over two full trading days ending up to five business days before the offers are

- dispatched. The Panel's policy notes that a bidder should not use market prices earlier than reasonably necessary for printing or related purposes.
105. It is generally desirable that a bidder value shares in the same way when attributing a market value to the scrip offered under its bid. However, it is not unacceptable for a bidder to use another value provided that the value used is not materially misleading.
106. The issue is whether St Barbara's valuation of its scrip/cash alternative was a material overstatement of the value of that alternative. St Barbara attributed a value of 0.9 cents per partly paid Taipan share to the scrip cash alternative based on a share price for St Barbara shares of 15.5 cents. Based on 14.5 cents, the value would be 0.85 cents per partly paid Taipan share which is a difference of only 0.05 cents or about 6%. This is not a material difference in a fluctuating market.
107. St Barbara's share price has dropped further since it made its bid and has been trading as low as 10.5 cents. This raises the issue of whether supplementary disclosure should be made by a bidder if its share price drops during the offer period. It is unreasonable to require a bidder to disclose every fluctuation in its share price to target shareholders. Under section 643, if the target is listed, a bidder is only required to provide a supplementary statement to ASX and the target and not to target shareholders. It therefore appears to us that the Law assumes that a target shareholder will have access to market information, including variations in ASX market prices.
108. However, if a bidder has included in its bidder's statement a valuation of its scrip consideration based on market value and this value is subsequently rendered materially misleading, then it may be open for the Panel to order that a supplementary statement must be sent to target shareholders. In this case however, we do not consider that supplementary disclosure should be required, as the basis for the calculation was made clear, it was reasonable when made and the market may fluctuate up as well as down. The Panel is also satisfied that there is sufficient public information available to investors about the share prices of St Barbara and Goldfields for investors to assess the value of the scrip/cash alternative.
109. The final issue is whether Taipan shareholders will have "full" exposure to the Paulsens deposit. In our view, this is not a materially misleading statement because:
- (a) it appears to be mere puffery;
  - (b) Taipan shareholders who accept the scrip/cash alternative will have exposure to the Paulsens deposit;
  - (c) it is obvious that there will be some dilution in Taipan shareholders interests in the Paulsens deposit because of the facts that there is a cash component in the scrip/cash alternative and Taipan

shareholders would be sharing their interest in the Paulsens deposit with St Barbara shareholders.

110. Accordingly, we were satisfied that unacceptable circumstances did not exist in relation to the valuation of the scrip/cash alternative in St Barbara's bidder's statement.

## **TIME FOR PAYMENT OF CONSIDERATION**

111. Troy noted that St Barbara's bidder's statement contained inconsistent statements as to when St Barbara would pay cash and issue shares to Taipan shareholders who accept the bid. St Barbara's bidder's statement indicated that accepting shareholders would be paid within 5 business days after acceptances were received. However, elsewhere in the bidder's statement, St Barbara stated that payment would be made within 5 business days of the offer closing.
112. In its supplementary bidder's statement dated 15 March, St Barbara made it clear that it would pay for all acceptances, including issuing shares to Taipan shareholders, within 5 business days after receipt of acceptances. This disclosure adequately remedied any confusion that may have existed as to when shareholders would receive payment if they accept St Barbara's bid.
113. In any event, while the inconsistency in St Barbara's bidder's statement may have caused some confusion, it was not materially misleading because, at worst, a Taipan shareholder would have been misled into believing that it would be paid later rather than earlier.

## **SECTION 2.9 – FINANCIAL INFORMATION**

114. Troy raised the following issues in relation to the adequacy of the information disclosed in section 2.9 of St Barbara's bidder's statement:
- (a) whether St Barbara should have disclosed the source of the deferred consideration listed under current assets in its pro forma balance sheet;
  - (b) whether the value of \$1.75 attributed to Goldfields shares in the pro forma balance sheet is misleading;
  - (c) whether St Barbara should disclose that it may not be able to shield income from Paulsens against tax unless Taipan was a 100% owned subsidiary of St Barbara;
  - (d) whether the operational costs of Taipan used by St Barbara in its pro forma balance sheet (\$650,000) is inconsistent with the KPMG report (\$300,000); and
  - (e) whether it is misleading for St Barbara to assume an issue price of 19.5 cents for St Barbara shares issued as consideration under the bid.

115. We do not consider that any of the defects alleged by Troy are material to a Taipan shareholder's decision whether to accept St Barbara's offer.
116. St Barbara has clearly disclosed in its bidder's statement that it has assumed a price of \$1.75 for Goldfields shares and an issue price of 19.5 cents for St Barbara shares. Taipan shareholders should therefore be aware that the pro forma balance sheets have been prepared on this basis. Furthermore, we note that:
- (a) the Goldfields share price is readily available market information;
  - (b) it was reasonable at the time for St Barbara to use a value of \$1.75 in its unaudited pro-forma balance sheets; and
  - (c) in determining the value of the scrip/cash alternative, Taipan shareholders may be guided by the market price of the St Barbara scrip, or the underlying value of the St Barbara scrip as assessed by the independent expert.
117. We also note that, while St Barbara did not disclose that it may not be able to shield income from Paulsens against tax unless Taipan was a 100% owned subsidiary of St Barbara, it never made any representation that it could.

## **TAIPAN 9 PROCEEDINGS**

118. Troy submitted that St Barbara's bidder's statement was deficient in that it did not mention the existence of the Taipan 9 Panel proceedings.
119. We accept that St Barbara should have disclosed the existence of the Taipan 9 proceedings in its bidder's statement. St Barbara has since issued a supplementary bidder's statement on 15 March which includes a section outlining the Panel's proceedings in Taipan 9 and 10. This section refers to the Panel's declaration of unacceptable circumstances and vesting order in Taipan 9.
120. The supplementary disclosure by St Barbara has adequately remedied the non-disclosure by St Barbara.

## **SUPPLEMENTARY BIDDER'S STATEMENT**

121. In its submissions to the Panel dated 19 March, Troy made a number of additional complaints in relation to St Barbara's supplementary bidder's statement dated 15 March.
122. We did not consider that any of these complaints were of a material nature likely to affect a shareholders' decision whether or not to accept St Barbara's bid.

## **CONCLUSION**

123. On 16 March, we made a declaration of unacceptable circumstances in relation to the inadequacy of the disclosure in St Barbara's bidder's

statement regarding funding arrangements with CSFB. We did not make any orders.

124. On 30 March, we advised St Barbara that the Panel would require St Barbara to offer the St Barbara options to Taipan partly paid shareholders. St Barbara subsequently offered the option alternative to partly paid shareholders.
125. While Troy's application raised a number of issues that merited further investigation by the Panel, these proceedings were hindered by the large number of minor, immaterial issues raised by Troy. In our view, an application which contains a large number of issues that could not give rise to unacceptable circumstances even if they were substantiated tends to detract from the overall credibility of the application.
126. However, we acknowledge that Troy had initially made some attempt to resolve some of these issues with St Barbara prior to making its application to the Panel. The fact that St Barbara did not respond to Troy's attempt is typical of the lack of cooperation between the parties which has been characteristic of these matters. Many of these issues were capable of being resolved by the parties without recourse to the Panel.
127. We decided not to make any orders for costs. We granted all parties leave to be represented by their solicitors.

**Denis Byrne**

**President of the Sitting Panel**

**Decision dated 16 March 2001**

**Reasons published 23 May 2001**