CSP

The Takeovers Panel

Reasons for Decision
Taipan Resources NL (No.11)

In the matter of Taipan Resources NL (No. 11)
[2001] ATP 16

Catchwords

Review of Panel decision – 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 – misinformed market – 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 – written submissions – testing evidence – costs undertakings

Corporations Law (Cth), sections 611 item 2, 619(2), 620(2), 625(3)(c), 631(1), 631(2)(b), 636(1) and 670A(2)

Pinnacle VRB Ltd (No. 4) *[2001] ATP 7*
Pinnacle VRB Ltd (No. 6) *[2001] ATP 11*
Namakwa Diamond Company NL (No. 2) *[2001] ATP 9*

These are the reasons for our decision to dismiss an application by Troy Resources NL under section 657EA of the Corporations Law for review of decisions made by the Taipan 10 Panel. These decisions were made on an application dated 27 February by Troy Resources NL for a declaration of unacceptable circumstances and orders in relation to a takeover bid by St Barbara Mines Limited for Taipan Resources NL. The Taipan 10 Panel made a declaration of unacceptable circumstances in relation to one aspect of the application and declined to make a declaration or orders in relation to the other aspects of the application.

INTRODUCTION

1. This is a statement of the reasons for our decision in relation to the application by Troy Resources NL (***Troy***) under section 657EA of the *Corporations Law* (the ***Law***) dated 30 March and 3 April 2001. Troy applied for the review of a number of decisions made by the sitting Panel on an application by Troy dated 27 February 2001 (***Taipan 10***). The Taipan 10 application was for a declaration of unacceptable circumstances and orders in relation to the takeover bid by St Barbara Mines Limited (***St Barbara***) for Taipan Resources NL (***Taipan***).[1] This decision was announced on 5 June 2001.

[1] 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.

2. The Panel in this matter was constituted by Dr Annabelle Bennett SC (sitting President), Peter Cameron (sitting Deputy President) and Professor Ian Ramsay.

PROCEDURAL

3. We decided under regulation 20 of the *Australian Securities and Investments Commission Regulations* to conduct proceedings in relation to Troy's application. However, with the consent of the parties, we decided to limit our inquiries in these proceedings to those matters identified in Troy's submissions dated 20 April in response to the Panel's brief.

4. Troy objected to the involvement of certain members of the Panel's executive in this review, on the basis that their previous involvement in the Taipan 10 proceedings may give rise to a reasonable apprehension of bias. The decision in these proceedings is the decision of the Panel members, not the Panel's executive. The role of the executive is to brief the sitting Panel and provide advice when requested by the Panel members. Despite being invited to do so, Troy did not provide any convincing argument that there was a reasonable apprehension that the members of the executive were biased or any specific basis for the allegation that there was a reasonable apprehension of bias. We rejected Troy's objection as being without foundation.

5. We retained an independent expert to advise the Panel in relation to financial issues arising in these proceedings, should such a need arise. The Panel did not require the assistance of the expert in relation to any of the material issues in these proceedings. While the expert made a number of minor contributions in the Panel's deliberations, the Panel did not rely on any opinion of the expert in coming to its decision.

DECISIONS

Further evidence

6. Troy stated that one of the purposes of this review was to have the review Panel conduct a thorough and critical review of the evidence by seeking and testing the evidence, rather than relying on the truth of submissions. Troy noted that the Taipan 10 Panel relied on a number of St Barbara's submissions in making its decision without requiring St Barbara to adduce further evidence to confirm the veracity of those submissions. Troy requested the review Panel to obtain further evidence to verify St Barbara's submissions in the Taipan 10 proceedings.

7. We asked Troy why the Panel should not rely on a party's submissions in view of the operation of section 199 of the *Australian Securities and Investments Commission Act* (the ***ASIC Law***) which provides that it is an offence to make submissions to the Panel which are false or misleading in a material particular.

8. Troy responded by pointing out that St Barbara's submissions in Taipan 10 had already been proved wrong in one particular. We requested an explanation from St Barbara for this error. St Barbara provided an explanation and we were satisfied with that explanation.[2]

9. We requested that a representative of St Barbara provide the Panel with a signed written statement under section 199 of the ASIC Law attesting to the veracity of St Barbara's submissions in the Taipan 10 proceedings and these proceedings (except for the error already identified). St Barbara subsequently provided such a written statement from Mr Stephen Miller, the chairman of St Barbara, which stated that St Barbara's submissions of fact were, to the best of his knowledge, true and correct in all material particulars, based on his own belief and advice that he had received from other directors, officers and legal and other professional advisers of St Barbara.

10. We were satisfied with Mr Miller's statement and, on this basis, decided not to insist on further evidence to support the submissions of fact. Written submissions are an integral part of Panel proceedings. There will often be situations in Panel proceedings where the Panel will rely on the submissions of a party in determining factual matters without requiring the production of further evidence. The Panel is fully entitled to do so. Parties or their representatives making false or misleading submissions face significant penalties under provisions of the ASIC Law and, should it subsequently come to light that a party's submissions were false or misleading in a material particular, the Panel will not hesitate to enforce those provisions.

11. We did, however, decide to obtain some additional information from Macquarie Bank Limited (***Macquarie***) and Tricom Equities Limited (***Tricom***) to test the veracity of a statement made by St Barbara in its submissions to the Taipan 10 Panel on 12 March 2001 that:

    Debt funding facilities have been arranged with Macquarie Bank Limited and Tricom Equities Limited and letters evidencing the funding facilities will be provided on request.

    Troy submitted that the statement that a facility had been arranged with Macquarie was misleading, as Macquarie's credit committee had yet to approve the facility and some conditions remained to be satisfied.

12. In its letter, however, St Barbara continued:

    With respect to Macquarie, the Panel should be aware that Macquarie has been a provider of finance to St Barbara under a finance agreement since 14 April

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[2] St Barbara had represented in its submissions in the Taipan 10 proceedings that its funding facility with Tricom Equities Limited had received the approval of ASIC. ASIC denied that it had given its approval and St Barbara apologised for the error. We requested an explanation from St Barbara who responded by saying that there had been a misunderstanding between certain representatives of St Barbara. We accept St Barbara's explanation and, in any event, do not consider that this issue is material.

2000 to which there have been two variations granting extensions to the facilities. Accordingly the appropriate security and loan documentation is already in place. St Barbara has sought an extension of the current facilities which, together with the Tricom funding arrangements and St Barbara's current cash reserves, enable St Barbara to meet its financing requirements under the bid.

13. Tricom advised the Panel that on 12 March 2001, Tricom provided a term sheet for the standby finance facility to St Barbara, which was agreed to by Mr Stephen Miller of St Barbara on that day. Tricom provided to the Panel a copy of the letter and term sheet sent to St Barbara on 12 March together with a facsimile confirmation report confirming that it had been sent on that date. Tricom also informed the Panel that it was Tricom's view that St Barbara and Tricom had an in-principle agreement in accordance with the term sheet.

14. Macquarie advised the Panel that it had arranged an internal credit review meeting to approve the terms of the proposed increase and extension to St Barbara's debt funding facilities on 12 March 2001. Macquarie informed St Barbara that this meeting was to take place on 12 March. The meeting was later postponed until 14 March due to the unavailability of one of the required signatories.

15. It is evident that, as at 12 March, Macquarie and St Barbara had settled the final terms of the proposed increase and extension, and that the agreement was subject to Macquarie obtaining internal credit committee approval. A representative of Macquarie also advised St Barbara on 12 March that the Metals & Mining Division of Macquarie was of the opinion that approval would be received at the meeting of the credit committee. It is also evident that Tricom and St Barbara had settled the terms of the proposed standby finance facility as at 12 March and that St Barbara and Tricom were under the impression that a firm in-principle agreement existed between them as to those terms.

16. In these circumstances, we are not satisfied that St Barbara's statement on 12 March that debt funding facilities had been arranged with Macquarie and Tricom was materially false or misleading. St Barbara's statement should be taken in context and not quoted selectively as Troy has done. In its submissions on 12 March, St Barbara described its funding facilities with Macquarie and explained that it had sought an extension to those facilities.

17. While it may have been more accurate for St Barbara to say that the terms of those facilities had been arranged but the facilities themselves were not yet finalised, we do not consider that this was a material inaccuracy, having regard to the context of St Barbara's statement in the letter of 12 March, the acts which needed to be done to formalise the arrangements and the fact that St Barbara had been informed by

representatives of Macquarie that internal credit committee approval would most likely be obtained.

18. Finally, we note that St Barbara also stated on 12 March that letters evidencing the funding facilities would be provided on request. Clearly, these letters did not exist on 12 March. However, St Barbara did not state that the letters existed on 12 March, merely that they would be provided on request. On 14 March, the Taipan 10 Panel did request such evidence and letters from Macquarie and Tricom were duly provided by St Barbara on 15 March.

Funding

Issues

19. The Taipan 10 Panel found that St Barbara materially overstated in its bidder's statement the certainty of the arrangement between St Barbara and Credit Suisse First Boston International (***CSFB***) for the sale of shares in Goldfields Limited (***Goldfields***). No sale of shares had actually been agreed with CSFB. Instead, the Taipan 10 Panel found that the arrangement with CSFB was merely to use best endeavours to sell the shares according to a pre-agreed divestment structure. Essentially, the Taipan 10 Panel found that St Barbara should have provided more information to clarify the exact nature of the arrangement with CSFB so as not to mislead shareholders into thinking that the sale of the shares had already been agreed and the proceeds of the sale had been secured for payment of the consideration. We make no comments in relation to this decision as this was not a decision under review in these proceedings.

20. In its submissions to the Review Panel, Troy stated that the Taipan 10 Panel did not consider whether the following further circumstances were unacceptable:

    (a) St Barbara not disclosing to the market on 2 March that the funding arrangements between St Barbara and CSFB had been abandoned;

    (b) St Barbara waiting until 8 March before disclosing this to the market;

    (c) St Barbara not disclosing alternative funding arrangements until 15 March;

    (d) St Barbara not actually having the alternative funding arrangements in place until (at the earliest) 16 March, for the increase and extension of the facility with Macquarie (the ***Macquarie Facility***), and 22 March, for the standby finance facility with Tricom (the ***Tricom Facility***); and

    (e) St Barbara continuing to purchase Taipan shares on-market throughout this period.

21. In the period between 2 March and 8 March, the market was not informed that the arrangements between CSFB and St Barbara had been abandoned on 2 March. St Barbara argued that it could not disclose this matter because it was still considering its position in relation to the termination of the CSFB arrangements. We do not accept this explanation. It is clear from correspondence between CSFB and St Barbara that the parties had terminated the arrangement by 2 March. St Barbara should have disclosed this to the market as soon as practicable. At the least, it could have informed the market that it was considering its position in relation to those arrangements and was looking at putting in place alternative funding arrangements.

22. The Taipan 10 Panel did not make a declaration of unacceptable circumstances in relation to this matter. It is arguable that unacceptable circumstances existed during the period from 2 March to 8 March. However, we do not think that a declaration of unacceptable circumstances in relation to this matter is warranted for the following reasons:

    (a) St Barbara remedied the inadequate disclosure by informing the market in its announcement on 8 March that it had abandoned the CSFB arrangements and was in the process of finalising alternative funding arrangements; and

    (b) shareholders who accepted between 2 May and 8 May were not materially mislead because there were always reasonable grounds to expect that St Barbara would have the ability to pay for acceptances under its bid, either by selling some of its assets (including the Goldfields shares) or by borrowing the necessary funds.

23. In relation to the other circumstances referred to by Troy, we find as follows:

    (a) the market was not materially misinformed between 8 March and 15 March because St Barbara had announced on 8 March that the CSFB arrangements had been abandoned;

    (b) St Barbara could not reasonably have been expected to disclose the existence and terms of the Macquarie and Tricom Facilities until it received the letters of offer on 15 March;

    (c) St Barbara had offers from Macquarie and Tricom on 15 March that were capable of immediate acceptance; and

    (d) those shareholders who sold their shares to St Barbara on-market throughout this period willingly accepted the benefits and risks of doing so. In any event, these shareholders were not at risk over St Barbara's funding as St Barbara's broker had the primary obligation to pay for the shares.

24. Troy has also argued that the Taipan 10 Panel erred in its findings of fact that, on 15 March, St Barbara had firm funding arrangements in place. Troy submitted that the funding arrangements disclosed by St Barbara on 15 March were merely offers and that the final facilities had not yet been formally documented and were subject to a number of conditions precedent. The Taipan 10 Panel declined to make interim orders stopping St Barbara from processing acceptances and purchasing on-market because St Barbara had disclosed these arrangements. Troy submits that the Taipan 10 Panel should have stopped St Barbara's bid because it did not have "firm" funding arrangements in place.

25. We do not accept Troy's submissions. It was clear that, as at 15 March, St Barbara had received offers from Macquarie and Tricom to provide the necessary funds subject to the fulfilment of a number of conditions precedent[3] and that these offers were capable of immediate acceptance by St Barbara. Therefore, in our view St Barbara did have alternative funding arrangements in place when the Taipan 10 Panel made its decision not to make interim orders on 15 March. It is immaterial whether these arrangements consisted of letters of offer capable of immediate acceptance or the formal facility documents themselves.

26. Furthermore, we do not consider that St Barbara's disclosure of these funding arrangements in its supplementary bidder's statement dated 15 March was inadequate. In our view, the supplementary bidder's statement described the essential terms of these arrangements in sufficient detail to enable offerees to understand whether the funds would be available for payment of the consideration. In this respect, we note that those conditions precedent which had not been satisfied as at 15 March were clearly set out in St Barbara's supplementary bidder's statement.

27. Troy further argued that the Taipan 10 Panel should have made orders requiring St Barbara to return all acceptances received under the bid in order to give shareholders a chance to reconsider their position after receiving proper disclosure from St Barbara. A possible alternative order would have been to require St Barbara to give all shareholders who had accepted the bid before St Barbara's announcement on 8 March an opportunity to withdraw their acceptances and have their shares returned.

28. Troy's submissions rely on the fact that shareholders were misled as to St Barbara's ability to pay. The assumptions underlying these submissions were not made out. In our view there was no real prospect that these shareholders would not be paid because St Barbara had sufficient resources available to pay. It would not have been in the

[3] These conditions precedent were mostly standard conditions and were either conditions within St Barbara's reasonable control or conditions that St Barbara could reasonably expect to be fulfilled within the required time frame.

interests of accepting shareholders to have their acceptances returned if St Barbara was capable of funding its bid. Nor do we consider that shareholders should have been given an opportunity to withdraw their acceptances.

Recklessness

29. Troy has argued that St Barbara's announcement of its cash bid was reckless and a contravention of subsection 631(2).[4] Troy has argued that a bidder should not be allowed to announce and make its bid without firm funding arrangements in place.

30. St Barbara was not required by subsection 631(2) to have all of its funding arrangements in place when it announced its bid. This section merely required St Barbara not to announce its bid if it was reckless as to whether it would be able to perform its obligations if a substantial proportion of its offers were accepted.

31. When St Barbara made its bid, it had arrangements in place with CSFB which it believed would enable the Goldfields shares to be sold and the proceeds made available to pay for acceptances. It subsequently appeared that CSFB could not raise sufficient investor demand to sell St Barbara's entire Goldfields shareholding at the price of $1.55 set by St Barbara. This did not mean that some of the Goldfields shares could not have been sold for that price or that all of the Goldfields shares could not have been sold at a lower price.

32. The Taipan 10 Panel was satisfied that St Barbara had the capacity to raise enough money through the sale of its Goldfields shares even if they were sold at a material discount to market. The Taipan 10 Panel referred to $1.25 as an example of a price at which the Goldfields shares could have been sold to raise sufficient funds. For most of the bid period, Goldfields shares traded well above this price. We therefore adopt the findings of the Taipan 10 Panel in this regard.

33. Troy also argued that subsection 631(2) requires a bidder to have turned its mind to how it was going to fund its bid and that it was not sufficient merely for a bidder to have assets which could be used to fund the bid. Without deciding whether this construction is correct, St Barbara did turn its mind to how it was going to fund its bid before it made its takeover announcement. Clearly, St Barbara intended to sell the Goldfields shares and the proceeds that it could reasonably have expected to obtain through the sale of those shares (after any necessary reduction of debt) was greater than the amount required to pay for acceptances under its bid.

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[4] 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.

34. The arrangements under which St Barbara proposed to sell the Goldfields shares were abandoned at a later stage. However, this does not mean that St Barbara must have been reckless in announcing its bid. St Barbara would also have known that, if it could not sell all of the shares at a price acceptable to it, it would be able to borrow the necessary funds using the shares as security.

35. We therefore come to the same conclusion as the Taipan 10 Panel that St Barbara did not propose its takeover bid recklessly in breach of subsection 631(2).

Policy

36. Since the Taipan 10 Panel handed down its decision, the Panel has also handed down its decision and reasons in *Re Pinnacle VRB Limited (No 4)*. In that matter, the Panel enunciated a policy, based on the principles set out in section 602, that:

> *…a bidder should have sufficient funding arrangements in place to ensure that the consideration offered under the bid can be provided. For funding arrangements to be sufficient, the bidder must have firm arrangements for access to enough funds to pay for all the acceptances which it may receive under its bid, whether directly or through firm arrangements with persons who have those funds.*[5]

37. This policy must be applied to the particular facts and circumstances of the case in order to determine whether funding arrangements are sufficient. We consider that there will be situations where it is clearly evident from public financial statements or other information available to the Panel and the market that a bidder has the capacity to pay for acceptances under its bid. In these situations it may not be necessary for a bidder to have "firm" arrangements in place at all relevant times, provided that there is a reasonable basis to believe that the bidder will be able to access sufficient funds from its own resources to pay for acceptances within the timeframe necessary. As noted above, we agree with the findings of the Taipan 10 Panel that there was always a reasonable basis to believe that St Barbara would be able to access sufficient funds to pay for its bid.

38. A bidder should be able to change its funding arrangements after it makes its bid, provided that it makes adequate disclosure of the altered funding arrangements and the new arrangements do not disadvantage offerees. In this case, once St Barbara had abandoned the arrangements with CSFB, it was under an obligation to put in place alternative arrangements as quickly as possible to ensure that it could access the necessary funds to pay for acceptances. It was then under an obligation to disclose the details of these new funding arrangements. This is exactly

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[5] See paragraph 31 of the Panel's reasons dated 4 May 2001 in *Pinnacle VRB Ltd (No. 4)* [2001] ATP 7. This statement of policy was endorsed by the Panel on review in *Pinnacle VRB Ltd (No. 6)* [2001] ATP 11.

what St Barbara did. St Barbara should, however, have disclosed that the CSFB arrangements had been abandoned as soon as practicable after these arrangements were terminated. We have already commented on this lack of disclosure in these reasons.

39. Troy also argued that the decision of the Taipan 10 Panel not to stop St Barbara's bid was inconsistent with the decision of the Panel in *Re Pinnacle VRB Limited (No 4)*, where the Panel made interim orders stopping the takeover bid because the bidder did not produce evidence that it had sufficient funding arrangements in place.

40. We are of the view that the Taipan 10 Panel's treatment of St Barbara's funding position was entirely consistent with the decision in *Re Pinnacle VRB Limited (No 4)*. In *Re Pinnacle VRB Limited (No 4)*, the Panel only stopped the bid after making a number of inquiries of the bidder about its apparent lack of funding arrangements. It was only after the bidder had repeatedly failed to provide the Panel with sufficient evidence of its ability to fund the bid that the Panel stopped the bid.

41. After the Taipan 10 Panel learned of the abandonment of St Barbara's arrangements with CSFB, it indicated that it would make orders suspending all processing of acceptances and on-market acquisitions unless St Barbara could provide evidence of new funding arrangements. St Barbara provided such evidence and disclosure and the Panel therefore allowed St Barbara to proceed with its bid. Indeed, in *Re Pinnacle VRB Limited (No 6)*, the review panel allowed the takeover bid to proceed after further evidence was supplied by the bidder which showed that it had access to sufficient funds.

42. Troy made additional and unsolicited submissions to the Panel on 22 May and 25 May. While we considered these submissions, they did not alter our determination of the issues. In particular, we do not consider it necessary in this case to conduct further inquiries as to the source of the funds under the Tricom Facility because:

    (a) Tricom is subject to the prudential regulatory requirements of the ASX;

    (b) the evidence produced by Troy consists of Tricom's accounts as at 30 June 2000;

    (c) St Barbara advised the Taipan 10 Panel that Tricom would provide the cash under the Tricom Facility from its own funds; and

    (d) There was no evidence that Tricom was unable to provide the funds.

43. Accordingly, we do not consider that St Barbara's funding arrangements during the bid period were contrary to the principles set out in section 602.

Conclusion

44. At the close of its bid, St Barbara had acquired 87% voting power in Taipan. St Barbara has confirmed that it has paid for all acquisitions under its bid within the time frame set out in its bidder's statement.[6] The total cash outlay in respect of acceptances and on-market acquisitions made by St Barbara was $15,976,840.86. St Barbara informed the Panel that these payments were funded as follows:

Facility drawdowns - *Macquarie* - *Tricom*	$4,500,000.00 $2,250,000.00
Cash (including proceeds from sale of Goldfields shares)	$9,226,840.86

45. Troy sought a declaration and orders either requiring St Barbara to unwind acquisitions or to divest shares because either:

    (a) some or all of the shares were acquired while St Barbara's disclosure to the market of its funding arrangements was misleading; or

    (b) the shares were acquired when St Barbara did not have adequate funding arrangements in place.

46. For the reasons set out above, we do not believe that either of these remedies would be appropriate in these circumstances. We consider that St Barbara's funding arrangements come within the requirements of the law or the principles set out in section 602. We also do not consider that any inadequacies in St Barbara's disclosure of its funding arrangements were material to a shareholders decision whether to accept. While we agree that St Barbara should have disclosed the abandonment of the CSFB arrangements as soon as practicable after their termination on 2 March, we do not see sufficient reason to declare these circumstances unacceptable, particularly in view of the fact that there was at all times a reasonable basis to believe that St Barbara could arrange alternative funding quickly.

47. On the facts, we cannot justify a decision to order a successful bidder to divest shares acquired and paid for under its bid on the grounds that it was reckless as to its ability to pay for the shares (which it has since done) or that it misled shareholders into thinking that they would get paid (which they have been). We also note that the applicant is a former shareholder who accepted the bid and was paid in accordance with the bid terms.

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[6] Except for acceptances received by St Barbara on 4 April 2001 where payment was inadvertently dispatched one day late.

48. We came to the same decision as the Taipan 10 Panel in so far as we consider that the deficiencies in relation to the funding of St Barbara's bid did not justify a decision by the Panel to deprive shareholders of the benefit of that bid. In the end, the bidder which offered the highest price to shareholders was successful.

Forecasts

49. 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.

50. We requested St Barbara to advise the Panel:

    (a) whether at the time of sign-off of the bidder's statement, St Barbara had any financial or production forecast information available in relation to St Barbara or the merged St Barbara/Taipan entity for the period after 30 June 2001;

    (b) whether at the time of sign-off of the bidder's statement, St Barbara had any financial or production projections or other forward-looking information available in relation to St Barbara or the merged St Barbara/Taipan entity for the period after 30 June 2001; and

    (c) in relation to the information referred to in (a) and (b) (if any), why it was not appropriate for St Barbara to include this information in its bidder's statement or a supplementary bidder's statement.

51. St Barbara informed the Panel that the only forward looking information beyond 30 June 2001 that St Barbara had available at the relevant times was a production planning schedule for St Barbara's Meekatharra operations.

52. St Barbara explained that the production planning schedule was a planning tool rather than a specific projection and that it was used on a continuous basis to plan and arrange the sequencing of the range of ore bodies available to be mined (both ore reserves and resources) and direct the exploration efforts towards better definition where required. As new information on the ore bodies emerged from exploration and detailed mine planning, the production planning schedule was re-optimised. This re-optimisation took place every few weeks. At the date of sign-off of St Barbara's bidder's statement, St Barbara's production planning schedule spanned the period to September 2003.

53. St Barbara also explained that it maintains an annual one year budgeting cycle with the budget for a given financial year being developed and finalised during the preceding March to May period. Early in the development period St Barbara refines the production planning schedule and sets this as the basis for the budget. Specific and detailed cost forecasts are then built up by functional area on the basis of the

mine plan. In preparing the 2001/2002 budget this year, St Barbara finalised its production planning schedule on 24 April.

54. St Barbara submitted that the production planning schedule was by nature an internal dynamic planning tool, at least until it is finalised as the basis of St Barbara's annual budgeting process. St Barbara argued that, until the schedule is finalised, it is a fluid document and is not appropriate for disclosure in a bidder's statement or to the wider market. St Barbara noted that the production planning schedule had already been revised several times since the time of sign-off of the bidder's statement.

55. We accept St Barbara's submissions that this information was not appropriate for inclusion in the bidder's statement. Internal planning documents such as St Barbara's production planning schedule will often contain forward looking information that is not appropriate for release to the market because the information is incomplete or susceptible to change. Until the company finalises the document and commits itself to the projections contained in the document, a company cannot reasonably be expected to disclose those projections to the market.

56. We were, however, troubled by the fact that St Barbara had included a number of forward looking statements in the explanatory statement for the scheme of arrangement (later abandoned) which was sent to Taipan shareholders in or around September 2000. These statements included projections of production and total production cost for St Barbara's Meekatharra operations and Taipan's Paulsens deposit for the year ending 30 June 2002.

57. In its submissions to the Taipan 10 Panel, St Barbara argued that the forward looking statements contained in the explanatory statement were 'projections' 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 projections 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 projections.

58. We find this difficult to understand. At the very least, we consider that St Barbara should have disclaimed these projections and explained that they may no longer be reliable. We think it is sound policy that, where a bidder has recently issued forecasts or projections, the bidder should either disclaim or substantiate those forecasts or projections in its bidder's statement. St Barbara should also have explained why it was not appropriate to provide similar information in its bidder's statement.

59. In this case, we do not consider that the absence of any such disclaimer or explanation was a material factor in a Taipan shareholder's decision whether or not to accept St Barbara's bid and we were not provided with evidence that it was. We are therefore not inclined to make a declaration

of unacceptable circumstances. However, in many cases we consider as a general matter that the provision of such information will be of material benefit to shareholders.

60. Troy also argued that the Taipan 10 Panel applied an incorrect test for the level of forecast information that St Barbara should have provided. Troy argued that instead of asking what forecast information was available to St Barbara, the Taipan 10 Panel should have asked what information investors would reasonably require to make an informed assessment of the merits of the offer.

61. The disclosure test in section 713 requires that information must be provided to the extent which it is reasonable for investors and their professional advisers to expect to find that information. Even the broader general disclosure test in section 710 only requires the provision of information which it is reasonable for investors and their professional advisers to expect to find. It is therefore relevant to consider whether it was reasonable to require additional forecast information to be provided. In deciding this issue it is entirely appropriate that a Panel has regard to the level of forecast information available to the bidder. At the date of St Barbara's bid, reliable forecast information for the period beyond 30 June 2001 did not exist and would not be produced for a number of months.

62. The Taipan 10 Panel considered that it was not reasonable for St Barbara to provide additional forecast information in this case in view of the information that was available to St Barbara and the unpredictable nature of St Barbara's mining operations. We have come to the same decision for the same reasons as the Taipan 10 Panel in this regard, albeit with the reservations noted above in relation to the projections included by St Barbara in the explanatory statement for the abandoned scheme of arrangement.

63. Troy also submitted that there was no evidential basis for the Taipan 10 Panel to find (as it did) that St Barbara's mining operations were not predictable. We consider that this was a reasonable finding to make based on the description of St Barbara's mining operations in St Barbara's bidder's statement and a review of St Barbara's mining operations as disclosed in previous annual and half yearly reports.

Consideration for partly paid shares

64. Under its takeover bid, St Barbara offered:

    (a) 9.2 cents for each fully paid Taipan share and 0.7 cents for each partly paid Taipan share (the ***cash alternative***); or

    (b) 1 St Barbara share plus 7.5 cents cash for every 3 fully paid Taipan shares and 1 St Barbara share plus 2.5 cents cash for every 20 partly paid Taipan shares (the ***scrip/cash alternative***).

65. At the request of the Taipan 10 Panel, St Barbara offered 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***). St Barbara had announced that it would offer the option alternative to partly paid shareholders in its original takeover announcement on 21 December 2000. St Barbara later withdrew the option alternative.

66. Subsection 619(1) provides that:

> "All offers made under an off-market bid must be the same."

Paragraph 619(2)(c) provides that in applying subsection (1), we must disregard:

> "*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" (our emphasis).

It needs to be read with subsection 605(2), which provides that, for the purposes of Chapter 6:

> "securities are not to be taken to be in different classes merely because:
>
> (a) some of the securities are fully-paid and others are partly-paid; or
>
> (b) different amounts are paid up or remain unpaid on the securities."

67. Troy noted the following three differences between St Barbara's offers for partly paid and fully paid shares after the introduction of the option alternative:

(a) a difference in the amount of cash being offered as part of the cash alternative, and a difference in the amount of cash and scrip being offered as part of the scrip/cash alternative;

(b) partly paid shareholders were offered three alternative considerations whereas fully paid shareholders were offered only two alternatives; and

(c) partly paid shareholders were offered a different form of consideration to that being offered to the fully paid shareholders.

68. Troy argued that the differences in (b) and (c) were not attributable to the fact that the offers related to securities on which different amounts are paid or remain unpaid and therefore were not differences that were permitted by paragraph 619(2)(c). Troy submitted that as a result St Barbara should have been required to offer an options alternative to fully paid shareholders.

69. The reasons why the Taipan 10 Panel did not think that it was appropriate for options to be offered to fully paid shareholders are set out in the Taipan 10 statement of reasons at paragraphs 77-81. These reasons may be summarised as follows:

    (a) the fully paid and partly paid Taipan shares are securities with vastly different characteristics as a result of the different amounts that are paid up on them. 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. The commercial characteristics of the partly paid shares are therefore more those of options than those of shares;

    (b) the option alternative reflects the value and commercial characteristics of the partly paid Taipan shares and should be offered to the partly paid shareholders;

    (c) 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; and

    (d) section 619 does not require 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.

70. While we agree with the reasons of the Taipan 10 Panel, we also wish to make a number of additional observations.

71. On a plain reading of paragraph 619(2)(c), 'attributable' has its dictionary meaning: "caused by" or "correlated with". On this reading, paragraph 619(2)(c) provides that differences between offers are to be disregarded, if they correlate with differences in amounts paid up on the respective shares. A bidder may offer one consideration for a fully-paid share and a different consideration for a partly-paid share; but the consideration for the fully-paid share must be the same as for every other fully-paid share, and the consideration for the partly paid share must be the same as for every other share which is paid up to the same amount.

72. Chapter 6 provides a constraint on bidders offering prices which are inequitable as between fully paid and partly paid shares. The Panel has the power in any particular case to declare the circumstances of such a bid unacceptable, having regard to the policy of achieving reasonable and equal opportunities to participate in the benefits offered to bid class shareholders set out in section 602.

73. An alternative construction is that paragraph 619(2)(c) allows only a difference in consideration which is a reasonable approximation to the difference in value between the different shares. This is said to be because section 619 stands for a policy of equal treatment of different holders and because the use of the concept of a bid class imports notions from company law and implies that departures from equality are limited to what is required to treat equitably the holders of shares of different value.

74. While it is unnecessary to decide the issue for present purposes, it seems to us that this notion makes inadequate allowance for the breadth of paragraph 619(2)(c), particularly the words "any differences attributable". The wording of the section affords no reason to limit the differences which are to be disregarded to quantum.

75. On this construction, there is no basis for concluding that because the bidder must set appropriate differentials between the considerations for partly paid and fully paid shares in the bid class, it must offer the same kind of consideration (but may offer different amounts) for partly paid and fully paid shares. There is nothing to support a requirement that the consideration for partly paid shares to be of the same kind as the consideration for fully paid shares, but in proportion to the amounts paid up on the shares.

76. In this case, by treating the fully paid and partly paid Taipan shares as part of the same class, St Barbara adopted (under protest) the view of ASIC that subsection 605(2) should be given a wide interpretation.

77. Paragraph 619(2)(c) allows differences between offers for shares in a class which are *attributable to* differences in the amounts paid up or unpaid on the shares in the class. We accept that it is unclear exactly what differences in consideration this allows. We also make no finding in relation to whether or not the fully paid and partly paid Taipan shares are part of the same class. However, if in this case we accept that subsection 605(2) deems that the fully paid and partly paid Taipan shares are not to be taken to be in different classes, although they are very different securities, then we must also accept that paragraph 619(2)(c), which uses similar language to subsection 605(2), applies equally broadly to allow differences in consideration which are commensurate with the differences between the fully and partly paid shares.

78. Therefore, we consider that the differences in consideration offered to fully paid and partly paid shareholders under St Barbara's bid are differences permitted by paragraph 619(2)(c).

79. In determining issues relating to differences in consideration being offered for different shares within the same class, the Panel should also have regard to the principle set out in subsection 602(c) that:

… as far as practicable, the holders of the relevant class of voting shares or interests all have a reasonable and equal opportunity to participate in any benefits accruing to the holders through any proposal under which a person would acquire a substantial interest in the company…

80. In this case, having regard to the different nature of the fully and partly paid shares, the value of the consideration offered by St Barbara for each type of share and the provisions of Chapter 6, we consider that the holders of both fully and partly paid shares were given appropriate opportunities to participate in the benefits of St Barbara's bid. Equitable treatment of offerees does not require that considerations for different shares be proportionate to the amounts paid up on them.

Other disclosure issues

81. Troy submitted that the Taipan 10 Panel erred in that it did not consider whether all of the disclosure issues raised by Troy when considered together constituted unacceptable circumstances. Troy did not raise any new matters in addition to those considered by the Taipan 10 Panel.

82. We accept that a combination of circumstances when considered together may constitute unacceptable circumstances, even if taken separately they do not. However, we do not consider that the additional disclosure issues raised by Troy in the Taipan 10 proceedings, considered either by themselves or together, were sufficiently material to constitute unacceptable circumstances.

83. We also note that a number of the errors in St Barbara's bidder's statement pointed out by Troy were corrected by St Barbara in its supplementary bidder's statement on 15 March. As St Barbara had agreed to correct these errors, the Taipan 10 Panel did not consider that it was appropriate for it to make a declaration of unacceptable circumstances in relation to those matters. We have come to the same conclusion as the Taipan 10 Panel in this regard.

Reporting of Mineral Resources – Compliance with the JORC Code

84. Troy claimed that certain statements made in St Barbara's bidder's statement:

    (a) did not provide a break down of the resources delineated from Paulsens into the separate categories of resources as required by the Australasian Code for Reporting of Mineral Resources and Ore Reserves (the ***JORC Code***);

    (b) added together reserves and resources in a way which is prohibited by the JORC Code; and

    (c) described some deposits as 'resources' which, in Troy's view, were uneconomic and therefore not within the meaning of that term as defined in the JORC Code.

85. The Taipan 10 Panel took the view that it was desirable that a bidder should comply with the JORC Code as far as practicable in preparing its bidder's statement. The fact that a bidder's statement does not strictly comply with the JORC Code in all respects does not necessarily give rise to unacceptable circumstances, provided that the departure from the JORC Code was not materially misleading. We agree with this approach.

86. We note that, since the Taipan 10 Panel made its decision, the Panel has handed down its decision and reasons in *Re Namakwa Diamond Company NL (No 2)*. In *Re Namakwa Diamond Company NL (No 2)*, the bidder used a term in its bidder's statement which was inconsistent with the terminology used by the JORC Code. In its decision, the Panel found that the use of this term was misleading and the bidder should instead use terms that were consistent with the JORC Code.[7]

87. In this case, we were satisfied that St Barbara's description of its mineral resources was not materially misleading. St Barbara did not use terms that were inconsistent with the terminology used by the JORC Code. St Barbara extracted a fair summary of its mineral resources out of its 2000 Annual Report in section 2.5 of the bidder's statement. This summary clearly shows St Barbara's reserves and resources and breaks down resources into the separate categories as required by the JORC Code. The numbers used by St Barbara were taken directly out of the 2000 Annual Report which appears to comply with the JORC Code. These resource estimates were provided by a "competent person" as defined in the JORC Code.

88. If Troy disagreed with these resource estimates then Troy was entitled to obtain an expert's opinion which contradicted St Barbara's description of its mineral resources. Indeed, Taipan shareholders were provided with an independent mining expert's report prepared by Australian Mining Consultants with the target's statement. This report sets out in detail the opinion of Australian Mining Consultants in relation to the resources of both St Barbara and Taipan.

89. Troy also argued that St Barbara should not be allowed to incorporate its 2000 Annual Report by reference. This raises the issue of whether a bidder can rely on section 712 to allow it to incorporate documents into its bidder's statement. The Taipan 10 Panel did not decide this issue.

90. Section 712 provides that, instead of setting out information that is contained in a document that has been lodged with ASIC, a prospectus may simply refer to the document. The reference must:

    (a) identify the document or the part of the document that contains the information;

    (b) inform people of their right to obtain a copy of the document; and

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[7] "See *Namakwa Diamond Company NL (No. 2)* [2001] ATP 9".

(c) unless the contents of the document are primarily of interest to professional analysts or advisers or investors with similar specialist information needs, include sufficient information about the contents of the document to allow an offeree to decide whether to obtain a copy.

91. Paragraph 636(1)(g) provides that, if any securities in the bidder or an entity controlled by the bidder are offered as consideration under a bid, the bidder must include in its bidder's statement all information required for a prospectus under sections 710 to 713.

92. Troy argued that paragraph 636(1)(g) is merely a disclosure requirement which sets out the type of information that must be included in a bidder's statement, but does not provide for the incorporation of documents by reference under section 712. We do not accept this submission. We consider that section 712 applies to bidder's statements by virtue of the operation of paragraph 636(1)(g). In our view, this was clearly the intention of the legislature otherwise section 712 would not have been referred to in paragraph 636(1)(g). Accordingly, a bidder is entitled to incorporate documents into the bidder's statement as permitted by that section.[8]

93. St Barbara's bidder's statement incorporates the 2000 Annual Report and informs shareholders of their right to obtain (free of charge) a copy of that document. It notes that the information contained in the Annual Report is customarily of interest to shareholders and prospective shareholders and notes that St Barbara's most recently compiled ore reserve statement and mineral resource estimate as at 30 June 2000 were included in the 2000 Annual Report. Accordingly, we consider that St Barbara has complied with the requirements of section 712 and, therefore, the information contained in the 2000 Annual Report concerning St Barbara's ore reserves and mineral resources was deemed to be included in its bidder's statement.

94. Troy also submitted that the ASX Listing Rules required compliance with the JORC Code in bidder's statements. This was disputed by St Barbara. However, even if we accept Troy's argument, a breach of the Listing Rules is primarily a matter for ASX and does not necessarily give rise to unacceptable circumstances. In our view, it is more appropriate to ask whether, with reference to the requirements of the JORC Code, the reporting by St Barbara in its bidder's statement was misleading in any material respect. As noted above, we have formed the same view as the Taipan 10 Panel that St Barbara's disclosure was not materially misleading.

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[8] There may be cases where the incorporation of documents by reference would not satisfy the policy of section 602, but we do not think that this is such a case.

Effect of Misstatements on Value of St Barbara

95. Troy submitted that the Taipan 10 Panel ignored the interaction between the disclosure of St Barbara's funding arrangements and the value of St Barbara. This related to the fact that St Barbara used a value of $1.75 for Goldfields shares in its pro-forma balance sheet. Troy argued that this materially overstated the value of St Barbara.

96. When St Barbara originally prepared its unaudited pro-forma balance sheet, the share price of Goldfields shares was around $1.75. During the bid period, the Goldfields share price fluctuated and at one stage was below $1.50. St Barbara subsequently changed its funding arrangements to debt facilities but still maintained a value of $1.75 for Goldields shares in its pro-forma balance sheet.

97. We considered that this was not material because:

    (a) the Goldfields share price is readily available market information;

    (b) the fact that St Barbara's financial statements assumed a value of $1.75 per Goldfields share was clearly disclosed;

    (c) at the time it was reasonable for St Barbara to use a value of $1.75 in its pro-forma balance sheet;

    (d) in determining the value of the scrip/cash alternative, Taipan shareholders could 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; and

    (e) the sensitivity of the value of St Barbara shares to movements in the Goldfields share price is relatively low.[9]

COSTS

98. Troy provided the Review Panel with an undertaking under section 201A of the ASIC Law to pay the reasonable costs and expenses of the other parties to the review proceedings arising out of, or connected with, those proceedings as directed by the review Panel if the review Panel does not make a declaration of unacceptable circumstances as a result of Troy's review application.

99. This undertaking was requested by the President of the Taipan 10 sitting Panel prior to granting consent to the review application under subsection 657EA(2). We accepted Troy's undertaking.

100. The Panel's general policy in relation to costs is that there is no automatic rule that costs follow the event. The Panel will generally only award costs against a party in a particular matter if it concludes that the

[9] For example, a ten cent movement in the price of Goldfields shares implies a 0.8 cent change in the value of a St Barbara share.

party has caused other parties to incur unnecessary costs by for example its:

(a) time wasting or delay; or

(b) hindering or obstructing proceedings.

We have decided to extend this policy to seeking an unmeritorious review.

101. The Panel has not enunciated a specific policy which relates to costs associated with review proceedings. In this case, we consider that Troy should pay the reasonable costs of the other parties to the review application, for the following reasons:

(a) Troy has failed to overturn the decision of the Taipan 10 Panel or to establish that any of the findings of that Panel were incorrect;

(b) Many of Troy's submissions in support of its review application were unduly broad;

(c) Many of Troy's allegations were made without any underlying basis; and

(d) Troy hindered the review proceedings by selectively quoting St Barbara's submissions of 12 March and repeatedly lodging unsolicited submissions to the Panel, that did not advance new matters of fact or law.

102. We note as a result of the request of the President of the Taipan 10 Panel for Troy to give an undertaking as to costs, Troy was on notice and would have understood that it might be required in these proceedings to pay the costs of the other parties if its review application failed

103. We therefore directed Troy, in accordance with the terms of the undertaking:

(a) to pay the reasonable costs and expenses of St Barbara, Taipan and ASIC arising out of, or connected with, these review proceedings as agreed between Troy and those other parties; or

(b) failing such agreement, to pay the party-party costs of the other parties in relation to these proceedings, using the Federal Court scale.

CONCLUSION

104. We decided not to make a declaration of unacceptable circumstances or orders as a consequence of Troy's review application. Our decisions were in substance the same as the decisions under review made by the sitting Panel in the Taipan 10 proceedings. Troy's application for review is therefore dismissed.

105. We granted all parties leave to be represented by their solicitors.

Annabelle Bennett

President of the Sitting Panel

Decision dated 5 June 2001

Reasons published 26 June 2001