



**In the matter of Selwyn Mines Limited  
[2003] ATP 33**

**Catchwords:**

*Continuous disclosure – efficient market – failure to disclose to the market – sale of assets by receivers – whether frustrating action – order sought to obtain information to assist target directors – whether application premature – whether bidder has reasonable grounds not to proceed with bid*

*Corporations Act 2001 (Cth) sections 420A, 423, 602, 631, 657A, 657D, 670F  
ASX Listing Rule 3.1*

**These are our reasons for declining to commence proceedings in relation to an application by Hillgrove Gold Limited, an announced joint bidder, seeking disclosure of information to the market and the directors of Selwyn Mines Limited (Receivers and Managers Appointed) with respect to the sale of the assets of Selwyn Mines Limited (Receivers and Managers Appointed).**

## **THE APPLICATION**

1. These reasons relate to an application (the **Application**) to us from Hillgrove Gold Limited (**HGO**) on 9 September 2003 in relation to the affairs of Selwyn Mines Limited (Receivers and Managers Appointed) (**SLN**). The receivers and managers of SLN are Garry Trevor and Peter Geroff of Ferrier Hodgson (the **Receivers**).
2. HGO sought a declaration of unacceptable circumstances and orders that the Receivers provide information (**Relevant Information**) to the directors of SLN to enable them, ASX and the market to consider the relative merits of the sale of SLN's assets to a third party purchaser and the proposed takeover bid by HGO and Grange Resources Limited (**GRR**).

## **THE PANEL & PROCESS**

3. The President of the Panel appointed Ian Ramsay (sitting President), Michael Ashforth (sitting Deputy President) and Celia Searle as the sitting Panel (the **Panel**) for the Application.
4. We decided not to conduct proceedings in relation to the Application and made no declaration or interim or final order in relation to it.

## **DISCUSSION**

### **Factual background – chronology of events leading up to the Application**

5. The following is a brief description of the facts underlying the Application, which has been taken from information released to ASX and documents lodged with ASIC, the Application and submissions from the parties.

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#### *HGO and GRR*

6. HGO is a company incorporated in Australia. Its principal activities are gold and antimony mining operations, mineral exploration and investments in mineral exploration and mining companies. HGO is, and at all relevant times was, listed on ASX. Its shares have not been subject to any suspension or trading halt at any relevant time.
7. GRR is also a company incorporated in Australia. Its principal activities are mineral exploration and development. GRR is, and at all relevant times was, listed on ASX. Its shares have not been subject to any suspension or trading halt at any relevant time.

#### *SLN*

8. SLN is a company incorporated in Australia. Its principal activities are the exploration for and evaluation of potential gold and copper ore resources; and the mining, processing and sale of copper/gold concentrate. In particular, SLN used to operate a copper and gold mine about 150 km from Mount Isa in North-West Queensland. SLN has been at all relevant times listed on ASX. The securities of SLN were the subject of a trading halt commencing on 20 December 2002 and have been suspended from trading since 24 December 2002.

#### *Appointment of Receivers*

9. On 7 June 2000, SLN granted a fixed and floating charge (the **Charge**) over all of its present and future undertakings, assets and rights including, but not limited to, all real and personal property, choses in action, goodwill, uncalled and called but unpaid nominal or premium capital in favour of Bank of Western Australia Ltd (**BankWest**).
10. On 30 December 2002, BankWest announced that it had appointed the Receivers as receivers and managers of SLN pursuant to the Charge. BankWest's announcement stated:

*"BankWest has a net lending exposure to [SLN] of \$11.5 million and outstanding bank guarantees and performance bonds of about \$6.5 million. BankWest also provides 220,000 ounces of gold hedging which has a current mark to market exposure of about \$25 million.*

*The Receiver will continue to operate the mine and deliver into the gold hedging contracts while considering all available options."*

11. On 20 February 2003, BankWest announced that it had raised a provision of \$10 million in relation to its exposure to SLN. BankWest's announcement stated:  
*"The decision was made today after BankWest considered a report from Garry Trevor and Peter Geroff, of Ferrier Hodgson, who the bank appointed Receivers and Managers on 30 December 2002.*

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*The Receivers' report has raised questions over the level of reserves, which may also impact on [SLN]'s ability to deliver into its gold hedging facility. Further evaluation of reserves is being undertaken."*

12. Subsequently, the Receivers invited non-binding offers from interested purchasers of the assets of SLN the subject of the Charge (the **Assets**) including the mining tenements included in the Assets (the **Tenements**).

#### *Sale of Assets*

13. On 5 June 2003, the Receivers invited potential purchasers to submit non-binding offers to buy the Assets on or before 17 June 2003. That date was subsequently extended to 25 July 2003 and then to 4 August 2003.
14. Between 5 June and 4 August 2003, HGO and Mineral Securities Limited (**Minsec**) lodged competing bids for the purchase of the Assets.
15. Between 4 and 19 August 2003 the Receivers and HGO were involved in ongoing discussions with respect to the terms of the proposed asset transfer agreement.
16. On Monday 18 August 2003, Minsec and Ivanhoe Mines Limited (**Ivanhoe**) submitted a revised offer to the Receivers for the purchase of the Assets and on Wednesday 20 August 2003, paid a deposit.
17. On Friday 22 August 2003, the Receivers advised Minsec in writing that the offer by it and Ivanhoe of 18 August 2003 (as amended) was accepted and orally advised HGO that their offer was unsuccessful.
18. On Saturday 23 August 2003, HGO lodged a revised offer with the Receivers for the purchase of the Assets.
19. On Monday 25 August 2003, HGO was advised in writing by the Receivers that its revised offer for the purchase of the Assets had not been successful. Later an adviser to the Receivers told an adviser to HGO that an agreement had been executed with the Third Party, (identified during this proceeding by the Receivers as Minsec and Ivanhoe).
20. Although the Receivers' legal advice (see [26]) is that they made a binding agreement to sell the Tenements of SLN to the Third Party (later identified as Ivanhoe), the Receivers said things to HGO which, by not distinguishing between the situation affecting the Tenements and that applying to the other Assets, may have suggested that their agreement to sell the Tenements was incomplete. As we understand the evidence, the matters which were still subject to some uncertainty concerned the related but independent proposal that Minsec acquire the remaining Assets and the shell of SLN, which was then the subject of discussions between the Receivers and Minsec.
21. Further, on 8 September 2003, the Receivers orally advised advisers to HGO that the Receivers had a binding agreement with Minsec and Ivanhoe.

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#### *Announcement of takeover bid*

22. On Saturday 6 September 2003, HGO lodged with ASX an announcement declaring its intention to make an off-market scrip bid with GRR under Chapter 6 of the *Corporations Act 2001* (Cth) (**Act**) for all of the fully paid ordinary shares in SLN (the **Bid**). HGO and GRR had not released a bidder's statement at the time of making the Application or at the time we made our decision not to conduct a proceeding.
23. In summary, the bid is an offer of shares in HGO valued in total at \$0.5 million. It is conditional on 90% acceptances, an absence of regulatory intervention and there being no material adverse changes affecting SLN's business and finances. The bid is also conditional on the execution of deeds of company arrangement affecting SLN and its subsidiaries. Under these deeds, the SLN group's unsecured creditors would receive \$1 million (half in cash and half in HGO shares) and BankWest would receive \$8.5 million for the Tenements (retaining the ability to sell other Assets, principally mining equipment). HGO and GRR believe that these terms are more favourable to all of those parties than the sale by the receivers, which would return nothing to the shareholders and unsecured creditors, and an unknown amount to BankWest.
24. On 8 September 2003, the directors of SLN made an announcement to ASX in which they commented on the proposed Bid by HGO and GRR as follows:

*"The Directors believe that the Proposal will, if implemented, provide a significantly better return to BankWest, the unsecured creditors and the shareholders than any other proposal currently being negotiated by the [Receivers].*

*The Directors understand that the [Receivers] are currently negotiating to sell the [SLN] exploration and mining tenements to a third-party, however, no definitive documentation has been entered into. The Directors have requested the [Receivers] to confirm the legal status of their negotiations and requested copies of relevant documentation to obtain separate legal advice in the context of considering the Proposal.*

*Subject to clarification of this issue and a review of the bidder's statement, the directors are prepared to recommend acceptance of the proposal by shareholders."*
25. In addition to the request referred to in [24], on 9 September 2003, ASX requested that the Receivers to disclose to it certain information in relation to the status of the proposed sale of the Assets.
26. On 10 September 2003, the lawyers for the Receivers wrote to ASX on behalf of the Receivers stating, among other things:

*"A binding contract for the sale of the [SLN] mining tenements (a substantial part of the company's business) was concluded with a third party on 22 August 2003, following a competitive tender process. The [Receivers] are working towards completion of that sale, which we have advised they are under a legal obligation to effect.*

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*We have also advised the [Receivers] that [SLN] is **not** under an obligation to tell ASX about the sale under listing rule 3.1 because no reasonable person would expect the information to have a material effect on the price or value of [SLN]'s securities.*

*We have no objection to you releasing a copy of this letter to the market for the information of shareholders."*

#### **The Application**

27. The Application submitted that unacceptable circumstances existed for the following reasons:
  - (a) unless and until the Receivers provide the Relevant Information requested by the directors of SLN, the directors of SLN or any other relevant party will not be able to determine whether or not the Receivers have taken all reasonable care in accordance with the provisions of section 420A of the Act and acted in the manner consistent with their duties under section 423 of the Act;
  - (b) the failure by the Receivers to provide the Relevant Information may mean that the market may be trading in shares in HGO and GRR on an uninformed basis;
  - (c) without the Relevant Information, the directors of SLN are unable to evaluate the relative merits of the Bid and the proposed sale of the Assets to the Third Party and are unable to make any meaningful recommendation to shareholders in SLN as to which proposal is preferable; and
  - (d) shareholders in SLN may be being deprived of an opportunity to share in the benefits of a control transaction.
28. HGO sought the following final orders under section 657D of the Act:
  - (a) that the Receivers provide the Relevant Information to the directors of SLN to enable them, ASX and the market to consider the relative merits of the sale of the Assets to the Third Party and the Bid; and
  - (b) that the Receivers be prevented from further negotiating or entering into a binding agreement with the Third Party until such time as the SLN directors are able to assess and obtain independent legal advice on the legal status of any agreement with the Third Party.

#### **Panel's request for information**

29. On 18 September 2003, we provided a letter to all parties setting out some of the issues that we believed required consideration by us to determine whether to conduct a proceeding. We received and considered responses to this letter from all parties on 22 September 2003.

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#### Provision of relevant information to the directors of SLN

30. The Application sought a final order, that:

*“the Receivers provide the Relevant Information to the directors of SLN to enable them, the ASX and the market to consider the relative merits of the Third Party Proposal and the [Bid]”*

31. We considered that with no bidder’s statement lodged by HGO and GRR at the time of the Application and thus no target’s statement due for some weeks, it would have been premature to declare that unacceptable circumstances existed at the time of our decision because information which may have been required to be included in the target’s statement some weeks later was not made available to the directors of SLN by the Receivers at the earlier time.

32. When and if the directors of SLN have a present need for information regarding the status of the sale of the Assets by the Receivers in order to prepare a target’s statement and make their formal recommendation to the shareholders of SLN concerning the actual bid, the situation may be different.

#### Prevention from entry into binding agreement

33. The Application also sought a final order that:

*“the Receivers be prevented from further negotiating or entering into any binding agreement with the Third Party until such time as the directors of SLN are able to assess and obtain independent legal advice on the legal status of any agreement with the Third Party.”*

34. With respect to this request, we decided that no basis had been, or could be, established to restrain the sale of the Assets due to the possibility of the Bid being made, because the sale was in the ordinary course of a receivership of which HGO and GRR were aware when they announced their Bid and it was not frustrating action to forestall the Bid.

35. In forming this view, we did not reach any conclusions as to whether any binding contracts existed in relation to the disposal of any or all of the assets of SLN and its subsidiaries, although we note the clear advice provided to the ASX by the lawyers for the Receivers concerning the arrangements negotiated by the Receivers concerning the Tenements.

#### Withdrawal of bid

35. We note that pursuant to section 670F of the Act, a person who makes an announcement to which section 631 applies (a “ **proposed bidder**”) will not be in contravention of section 631(1) or (2) of the Act if there is a change in circumstances which is not caused, directly or indirectly by the proposed bidder which renders it unreasonable for the proposed bidder to be required to make a bid in the terms announced. In these circumstances, a proposed bidder will be lawfully entitled not to proceed with its bid. The Panel notes that unacceptable

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circumstances may exist if the proposed target or one of its officers<sup>1</sup> withholds information needed by the proposed bidder to form a view as to whether it would be unreasonable to require it to make the proposed bid.

#### Subsequent developments

36. On 30 September 2003, Ivanhoe announced that a newly formed subsidiary of Ivanhoe Australia had purchased all of the SLN copper-gold project's mining and exploration leases in Australia (**Ivanhoe Announcement**). Further, that an Asset Purchase Agreement had been signed, with the closing subject to the finalisation of various Government formalities in connection with the transfer of the mining tenements and environmental permits.
37. On 10 October 2003, the advisors for HGO provided to the Panel a copy of a joint announcement from HGO and Grange to ASX advising that HGO and Grange would not be proceeding with the Bid for SLN in light of the Ivanhoe Announcement. In their announcement HGO and Grange submit that as a result of Ivanhoe's Announcement, it is no longer reasonable to expect HGO and Grange to proceed with the Bid as conditions of the Bid could not be satisfied.

## DECISION

#### No proceeding or final orders

38. Based on the information before us, we decided that HGO would be unable to establish a case for relief and accordingly we decided not to conduct a proceeding.

**Ian Ramsay**

**President of the Sitting Panel**

**Decision dated 25 September 2003**

**Reasons published 24 October 2003**

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<sup>1</sup> Officer has the meaning as defined in section 9 of the Act and includes a receiver.