



**In the matter of St Barbara Mines Limited 02  
[2004] ATP 13**

**Catchwords:**

*Debt owing from company to shareholder – issue of shares to shareholder arising from debt for equity conversion – shareholder requisitioning general meeting – proposed resolutions to replace directors with nominees – allegation of inadequate disclosure of shareholder's intentions in notice of meeting – “control” – Panel declining to commence proceedings*

*Corporations Act 2001 (Cth), sections 249D, 602, item 7 section 611*

*Grand Hotel Group [2003] ATP 34*

**On 2 July 2004, the Panel issued a media release substantially to the following effect concerning an application by Strata Mining Corporation Limited in relation to the affairs of St Barbara Mines Limited dated 29 June 2004. The Panel will not be publishing additional reasons in relation to this matter.**

## **THE PROCEEDINGS**

1. The Panel has considered the application by Strata Mining Corporation Limited (**Strata**) dated 29 June 2004 (the **Application**) alleging unacceptable circumstances in relation to the affairs of St Barbara Mines Limited (**St Barbara**). The Panel has decided not to commence proceedings in relation to the Application.

## **THE APPLICATION**

### **Parties**

2. St Barbara is a listed Australian gold producer. It has been listed on the official list of the Australian Stock Exchange Limited since May 1969.
3. Strata is a substantial holder of St Barbara ordinary shares with voting power of 5.61%.
4. Resource Capital Fund II LP (**RCF**) is the largest shareholder of St Barbara with voting power of 22.6%. RCF's principal activity is the management of private equity funds which invest in development and growth stage mining companies.

### **RCF increasing shareholding**

5. RCF increased its shareholding in St Barbara from 7.68% to 22.6% following a general meeting of members of St Barbara on 25 November 2003, at which the members approved the issue on 28 November 2003 of 95,684,932 fully paid ordinary shares in St Barbara to RCF (the **St Barbara Shares**). The issue of shares arose from a share subscription agreement (the **Share Subscription Agreement**) entered into between RCF and St Barbara on or about 6 October 2003 to convert approximately \$7.6 million

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of debt owing by St Barbara to RCF under a financing facility into equity. The issue price of the St Barbara Shares was \$0.08.

#### RCF requisitioning General Meeting

6. On or about 24 May 2004 (about six months after the issue of the St Barbara Shares and about 9 months after the debt for equity swap was agreed to by RCF and St Barbara), RCF exercised its powers under section 249D of the *Corporations Act 2001* (Cth) (the **Act**) by serving a notice requiring St Barbara to call a general meeting to vote on resolutions to remove two directors of St Barbara and replace them with RCF nominees. The general meeting requisitioned by RCF is scheduled to be held on 20 July 2004.

#### Alleged unacceptable circumstances

7. In its Application, Strata alleged that unacceptable circumstances arose because:
  - the information provided to the St Barbara board and shareholders in the notice of meeting concerning the resolution at the 25 November 2003 general meeting to issue the St Barbara Shares to RCF was defective contrary to paragraph 602(b)(iii) and item 7 of section 611. In particular, Strata alleged that RCF did not notify the board of directors or shareholders of St Barbara that it would seek to use its position as an increased shareholder in St Barbara to seek to obtain control over the management of St Barbara; and
  - RCF's failure to disclose its intentions regarding the replacement of the two directors to control the St Barbara board and the subsequent issue of the St Barbara Shares to RCF disregarded the policies of Chapter 6 that the acquisition of control in voting shares in a listed company takes place in an efficient, competitive and informed market.

#### Orders sought by Strata

8. Strata sought a declaration of unacceptable circumstances and a final order that at the general meeting of St Barbara to be held on 20 July 2004 (as requisitioned by RCF), RCF be prohibited and estopped from exercising the voting rights of the St Barbara Shares in respect of the proposed resolutions to remove the two directors and replace them with RCF nominees, and that in respect of these resolutions, RCF's holding be taken to be as it was prior to the issue of the St Barbara Shares.

#### Discussion

9. It is important to note at the outset that the Panel is generally reluctant to intervene in general meeting matters as they are not typically the type of "control" issue which concerns the Panel. The Panel considered the decision in *Grand Hotel Group*<sup>1</sup> where the sitting Panel considered whether to commence proceedings in relation to a complaint of defective disclosure in a notice of meeting provided to members of

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<sup>1</sup> [2003] ATP 34

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Grand Hotel where it was proposed to replace the responsible entity of the Grand Hotel Trust. The sitting Panel in that matter stated:

*“51. The notice of meeting (and more generally the meeting to which it related) did not relate to a control transaction, as "control" is used to define the policy of Chapter 6 of the Act.*

*52. Chapter 6 is essentially concerned with situations in which control of the general meeting is changed, by acquiring relevant interests in securities or acquiring voting power by creating associations. Chapter 6 is not designed to prevent security holders from using their votes to replace the management of companies and trusts, unless they enter voting arrangements in relation to them which contravene section 606 (the 20% threshold) of the Act.”*

10. The Panel saw no reason to depart from the approach in *Grand Hotel*. The Panel did not think that the interests of an efficient, competitive and informed market were served by intervening in the efforts of a shareholder to change the management of a company, unless those efforts involved an acquisition of voting power in breach of the Act or otherwise created unacceptable circumstances.
11. In deciding whether to conduct proceedings on the Application, the Panel considered whether Strata made a case that unacceptable circumstances had arisen in connection with the acquisition of RCF's 22.6% shareholding. In particular, the Panel asked whether there was evidence in the Application to support a finding that at the time of the 25 November 2003 general meeting, RCF already intended to change the composition of the St Barbara board and that it had failed to disclose this to shareholders.
12. Although Strata is merely a shareholder in St Barbara, the Panel formed the view that the Application contained no persuasive evidence and notably no correspondence between the St Barbara directors and RCF evidencing RCF's intentions and the development of its intentions in relation to changing the composition of the St Barbara board since October 2003. The Panel noted that the Share Subscription Agreement did in fact contemplate the restructuring of St Barbara's board by the appointment of an independent non-executive chairman and that this was disclosed to St Barbara shareholders (although this was not in fact done).
13. Accordingly, the Panel was satisfied that none of the material before it gave any support to a view that either:
  - RCF had an intention as at either the date that the notice for the 25 November 2003 general meeting was finalised or the date of that meeting to replace the board of St Barbara;
  - the conduct of RCF in providing the information in the notice of meeting for the 25 November 2003 general meeting and subsequently requisitioning a general meeting proposing to replace certain directors,gave rise or could have given rise to unacceptable circumstances in relation to St Barbara in the sense used in Chapter 6 of the Act.

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## **Decision**

14. In consideration of the above, the Panel decided not to commence proceedings in relation to the Application under Regulation 20 of the ASIC Regulations.
15. The sitting Panel was Alice McCleary (sitting President), Byron Koster (deputy President) and Irene Lee.

**Alice McCleary**  
**President of the Sitting Panel**  
**Decision dated 2 July 2004**  
**Reasons published 7 July 2004**