IN THE MATTER OF ST BARBARA MINES LIMITED AND TAIPAN RESOURCES NL

An application under sections 657A, 657D and 657E of the Corporations Law by Janice Irene Franke, Wordtown Pty Ltd and Gail Ann Oats (*Applicants*) for a declaration of unacceptable circumstances, and interim and final orders concerning a proposed merger between St Barbara Mines Limited (*St Barbara*) and Taipan Resources NL (*Taipan*)

REASONS FOR DECISION

INTRODUCTION

1. The Panel in this matter comprises Simon McKeon (sitting President), Ian Ramsay (sitting Deputy President) and Denis Byrne.

2. The matter concerns a proposed merger of St Barbara and Taipan by way of a scheme of arrangement for shareholders and optionholders. An Explanatory Statement was lodged with the Australian Securities and Investments Commission (***ASIC***) on 15 August 2000 for review under s 411(17)(b) of the Corporations Law (the ***Law***) and served on the shareholders and optionholders of both companies on 15 August 2000 (***Explanatory Statement***).

BACKGROUND

The parties

St Barbara Mines Limited

3. St Barbara's principal asset is its 100% interest in the Meekatharra Gold Projects, which comprises a group of exploration and mining tenements between Meekatharra and Tuckanarra in Western Australia. St Barbara also holds investments in a number of companies listed on the Australian Stock Exchange (***ASX***).

4. The two largest shareholders in St Barbara are Strata Mining Corporation (***Strata***) which holds approximately 13.2% and Larue Investments Inc (***Larue***) which holds approximately 9.5%.

Taipan Resources NL

5. Taipan is predominantly involved in exploration for gold and base metals. Its principal asset is its 100% interest in the Ashburton Gold Projects, which are located approximately 1500km north of Perth in the Ashburton region of Western Australia.

6. Strata holds approximately 13.7% of Taipan.

The merger proposal

7. St Barbara and Taipan announced their intention to merge to the ASX on 13 June 2000. If approved the merger will result in:

   (a) each St Barbara shareholder (other than Taipan) receiving three Taipan shares for each St Barbara share held;

   (b) each St Barbara optionholder receiving three Taipan options for each St Barbara option held;

   (c) the cancellation of all St Barbara shares and options (other than a parcel of 100 St Barbara shares held by Taipan); and

   (d) St Barbara becoming a 100% subsidiary of Taipan and the subsequent delisting of St Barbara from the ASX.

8. Three Court-ordered meetings of St Barbara's shareholders regarding the merger are scheduled to take place on 13 October 2000, namely, a scheme meeting for all St Barbara shareholders, a concurrent scheme meeting for all classes of St Barbara optionholders and an extraordinary meeting of St Barbara shareholders.

9. In order for the merger to proceed, the resolution must:

   (a) be passed by a majority in number of the St Barbara shareholders and of each class of optionholders who vote at the scheme meetings; and

   (b) be passed by 75% of the votes cast on the resolution; and

   (c) be approved by order of the Court.

RELIEF SOUGHT

10. The Applicants allege that certain aspects of the structure of the proposed merger do not comply with the Law, namely subsections 606(1), 606(2) and 621(3), and that the disclosure in the Explanatory Statement is inadequate in that it does not comply with sections 670A, 710 and 995. The Applicants applied to the Panel seeking the following declarations and orders. The declarations and orders set out below have been excerpted more or less verbatim (except for defined terms) from the Applicant's application:

Interim and final orders

   (a) An order restraining Larue and Strata and all of Strata's directors [together the ***Strata Interests***] from exercising any voting or other

rights attaching to their securities in either St Barbara or Taipan at any of the meetings to be held on Friday 22 September 2000.[1]

(b) An order restraining the Strata Interests from acquiring any securities in St Barbara or Taipan.

(c) An order directing the Strata Interests to dispose (to unrelated third parties) of such securities as reduces their joint interest in St Barbara securities to 19% forthwith.

(d) An order directing the Strata Interests to pay all profits on such sales to St Barbara or alternatively ASIC

(e) Alternatively, a vesting order of such securities in ASIC.

(f) A declaration that the exercise of the voting rights in the entire securities of the Strata Interests in St Barbara and Strata be disregarded at the Meetings of Strata held on 29 November 1999 and 12 May 2000 and to be held on 15 September 2000.

(g) An order cancelling or alternatively declaring voidable the Merger Implementation Agreement made 12 June 2000 and the Scheme of Arrangement made 28 July 2000.

(h) An order directing the Strata Interests to give the names of the beneficial owners of all their securities in St Barbara and Strata.

(i) An order restraining St Barbara and Strata from issuing any securities to the Strata Interests.

(j) An order directing the registered holders of the Strata interests' securities to give written notice of all the above orders to any person whom the holder knows to be entitled to exercise a right to vote attached to the securities.

Procedural orders

(a) An order under section 194 of the Australian Securities and Investments Commission Act 1989 (Cth) (***ASIC Act***) granting leave to the Strata Interests to be legally represented in proceedings before the Panel, in order to cross-examine and make submissions.

(b) An order under section 192 of the ASIC Act and Rule 7.5 of the Panel Rules that Strata, Larue and their advisers be issued with summonses to produce all records in their possession that relate to

[1] The meetings were subsequently postponed until 13 October 2000.

the beneficial ownership of all securities in St Barbara held by Larue.

(c) An order under section 659A of the Law and Rule 9.10 of the Panel Rules that certain questions of law be referred to a Court for decision before the final hearing of the application before the Panel, namely whether the securities in St Barbara held by Larue are beneficially held or controlled by Strata or any associated party of Strata.

(d) Such further or other orders or directions as to the conduct of the proceedings relating to the application as the Panel sees fit.

Final Orders

(a) An order that Strata make a market bid at 18 cents per share for all the issued shares in St Barbara and at 18 cents per option for all the issued options in St Barbara that it or any associate of Stephen W Miller does not already control.

(b) Alternatively, an order that the proposed merger to be discussed at the Meetings on 22 September 2000 be conditional upon Stephen W Miller or alternatively Larue paying the shareholders and optionholders of St Barbara a cash sum by 29 September 2000 to be determined by the Panel if such sum cannot be agreed, such sum to represent 6 cents per share and 18 cents per option in St Barbara.

Declarations

(a) That the statement at page 2 of the Explanatory Statement that "we have seen St Barbara restored to financial health" is misleading;

(b) That the statement at page 13 of the Explanatory Statement that Strata will have a substantial shareholding of 18.16% [is misleading];

(c) That the statement at page 17 of the Explanatory Statement that total shareholders' equity in the merged entity will be $49,405,000 is misleading;

(d) That the statement at page 32 of the Explanatory Statement that "St Barbara has undertaken to provide a short term funding facility to Taipan of $750,000" is misleading; and

(e) That the statement at page 52 of the Explanatory Statement that Strata controls 13.2% of St Barbara is misleading.

SUBSTANTIVE ISSUES

Relationship between Strata and Larue

11. The Applicants alleged that Strata and Larue are associates in the sense that Larue holds its investment in St Barbara (which amounts to approximately 9.5% of the shares in St Barbara) for or on behalf of Strata. However, there was no evidence provided to suggest that Larue was in fact warehousing St Barbara shares for Strata, or was in any other way an associate.

12. On 28 September ASIC issued a media release which stated that Strata had been required to disclose to the ASX a number of agreements relating to Strata's interest in St Barbara.[2] Although Strata lodged substantial shareholding notices in relation to the acquisitions of shares in St Barbara, those notices may not have covered all of the relevant shares, and Strata did not lodge the agreements that contributed to its substantial shareholdings. The following background information was provided to us in ASIC's submission and is necessary in order to understand the circumstances leading up to the agreements which have only been recently disclosed.

13. On 9 February 2000:

(a) St George Bank Ltd sold 20,000,000 St Barbara shares to Strata for $2,400,000 in total or 12 cents for each St Barbara share.

(b) Strata sold 20,000,000 St Barbara shares to Larue for $2,400,000 in total or 12 cents for each St Barbara share.

(c) Strata then granted a put option to Larue in respect of 13,333,000 of the 20,000,000 St Barbara shares at 15 cents each. In other words Larue could require Strata to buy the shares at 15 cents each.

(d) Strata's relevant interest in St Barbara went from 13.15% to 19.51% as a result of these transactions.[3]

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[2] ASIC, *Strata Mining Lodges Substantial Shareholding Documents*, Media Release, 28 September 2000.

[3] There is some question as to whether Strata's relevant interest exceeded the 20% threshold prescribed by section 606 of the Law. However, we make no finding as to whether or not Strata exceeded the threshold.

(e) Container Handlers Pty Ltd (***Container***) granted a put option to Larue in respect of 6,667,000 St Barbara shares, being the balance of the 20,000,000 St Barbara shares (the exercise price was $1,000,000 in total or 15 cents for each St Barbara share and was payable in advance by Container to be held in trust by Freehills until Larue decided whether or not to exercise the put option).

(f) Container and Strata then entered into an agreement under which Strata essentially agreed to step into Container's shoes under the put option with Larue. Strata's obligation to work towards Container's release of its obligations under the put option with Larue did not commence until after 8 April 2000. Strata's obligations included reimbursement to Container of the $1,000,000 up front payment (after 8 April).

14. On 3 August 2000, the agreement entered into by Container and Strata was amended by further agreement so that Strata's time to perform was extended from 8 April 2000 to 18 August 2000. It was also amended to reduce the number of St Barbara shares the subject of the agreement from 6,667,000 to 6,290,000.

15. On 11 August, Strata lodged a change of substantial shareholding notice in relation to the 3 August amending agreement, which increased its voting power under the Law from 19.51% to 22.51%.

16. It is arguable that the 9 February purchase from St George took Strata's voting power for the purposes of the Law from 13.15% to 22.69%. If so, Strata contravened section 615 of the Law[4] by that purchase, irrespective of the subsequent sale to Larue, and it should have lodged substantial shareholder notices in relation to all of the shares purchased from St George, within two business days after 9 February. In addition, it is possible that Strata had a continuing relevant interest in the shares subject to the agreement with Container, which should have been disclosed in substantial shareholder notices.

17. However, it appears that Strata was entitled to increase its voting power in St Barbara to 22.51% by mid August 2000.[5] Accordingly, it appears that Strata's present voting power in St Barbara does not depend on a breach in February and that its most recent substantial shareholding notices are accurate, though arguably some of its previous ones were not.[6]

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[4] Since repealed and replaced by section 606.
[5] Pursuant to item 11 of section 611 of the Law. See also ASIC submission, p5.
[6] ASIC submission, p5.

18. Moreover it appears that the substantial shareholding notices which Strata has now lodged include virtually all the shares to which Larue is entitled, namely those the subject of put options to both Container and Strata. Larue disclosed its entitlement to 20,000,000 shares in St Barbara when it arose, although not the agreement from which it arose.

19. ASIC has made a preliminary submission to the Panel in response to the application. That submission notes that ASIC has made inquiries in relation to Strata's affairs in connection with Strata's failure to lodge certain relevant agreements with its substantial shareholding notices, and that Strata has since lodged those agreements. However, ASIC's inquiries have not revealed any information to suggest that Strata and Larue are associates.

20. Accordingly, we are not satisfied that we ought to commence proceedings to investigate whether unacceptable circumstances exist in relation to the affairs of St Barbara because of a contravention of Chapter 6 or 6A arising out of the 9 February transactions. Without deciding that unacceptable circumstances existed in February, we note that an application must be brought within 2 months of the occurrence of unacceptable circumstances, unless the Panel extends time.[7] There would be no point in our extending time to bring this application, however, because of the nature of the present transaction, to which we now turn.

The role of the Court in schemes of arrangement

21. The Panel is empowered to declare that unacceptable circumstances exist in relation to the affairs of a company, because of their effect on the control of that company.[8] There is no express exclusion of a change of control resulting from a members' scheme of arrangement under Part 5.1 of the Law. Nonetheless, in our view, it would generally be inappropriate for the Panel to conduct proceedings concerning a scheme of arrangement.

22. The Courts[9] and the legislature[10] have accepted that a scheme of arrangement is an acceptable alternative to a Chapter 6 bid, subject to certain safeguards. Some of those are inherent in the general nature of a scheme of arrangement; others were introduced specifically to ensure that schemes gave shareholders protection comparable to takeover bids.

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[7] Subsection 657C(3).
[8] Subparagraph 657A(2)(a)(i).
[9] *Re the Bank of Adelaide* (1979) 4 ACLR 393.
[10] *Companies (Acquisition of Shares) Act Amendment Act 1981*. An extract from the Explanatory Memorandum for this Act is reproduced in an Appendix. See now item 17 in section 611.

23. Under section 411 of the Law, the Court has control over the process for approving a scheme of arrangement: it orders which meetings are to be held, decides whether members need to be divided into classes for that purpose and approves the explanatory statement to be sent to members.

24. The general supervisory role of the Court also involves a limited review of the merits of the scheme itself. In addition, the Court must assess whether the proposal is legal and effective and whether the scheme is one that members could reasonably decide was in their interests, as members. Schemes which were oppressive or wholly one-sided have been rejected on this basis.

25. In addition, a scheme of arrangement must have the support of the scheme company's board, as it cannot be requisitioned.[11]

26. Since 1982, the explanatory statement for a members' scheme must contain broadly the same information as offerees would receive under a bid[12] and must be registered by ASIC.

27. In addition, since 1982, subsection 411(17)[13] of the Law and its predecessor provisions have provided that a Court shall not approve a scheme of arrangement unless:

> *"(a) it is satisfied that the [scheme] has not been proposed for the purpose of enabling any person to avoid the operation of any of the provisions of Chapter 6; or*
> *(b) there is produced to the Court a statement in writing by the Commission stating that the Commission has no objection to the [scheme];*
> *but the Court need not approve a [scheme] merely because a statement by the Commission stating that the Commission has no objection to the[scheme] has been produced to the Court…"*

28. The Court has closer control over the implementation of a scheme than the Panel could exercise: while the Panel can, in appropriate cases, limit the exercise of votes attached to certain shares, the Court supervising a scheme has full control over all aspects of the approval process. The Court does not simply apply black letter law: it exercises a wide discretion over process and substance. In so doing, it is guided by the same objectives as would guide the Panel: namely, that the members of the scheme company make informed decisions on the merits of the

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[11] *Isle of Wight Railway Co v Tahourdin* (1884) 25 Ch D 320. *National Mutual Life Association of Australia v Windsor* (1991) 4 ACSR 177.

[12] These requirements were first imposed in the *Companies Regulations* and are based on those for Part A and Part B statements under the *Companies (Acquisition of Shares) Act 1981* and *Codes*.

[13] Originally sub-section 315(21) of the *Companies Act 1981* and *Codes*. See also the Companies Bill 1981 Explanatory Memorandum, paragraph 775.

proposal. For this purpose, members may be divided up into various classes, each with largely common interests.

29. In recent decisions, the Courts have made it clear that the 'functional equivalence' of takeovers, on the one hand, and schemes of arrangement and reductions of capital, on the other hand, require a convergence in the principles applied to their discretionary assessment.[14]

The role of the Panel in schemes of arrangement

30. Accordingly, were the Panel to involve itself in a scheme of arrangement which was already before the Court, it would be pursuing similar ends to the Court, but without the Court's power to deal with all aspects of the matter. That may lead to unproductive confusion.

31. Section 659AA provides that the Panel is the main forum for resolving disputes about a takeover bid – there is no mention of schemes of arrangement. The Law expressly reserves schemes of arrangement for the jurisdiction of the Courts. The fact that subsection 411(17) gives the Courts such a wide discretion is evidence of a legislative intention that the Courts be the forum for the resolution of issues relating to schemes.

32. Accordingly, the Panel will generally be reluctant to initiate proceedings where a Court had already commenced its scrutiny of a scheme. If there are defects in the Court's ability to apply the policy of section 411, there may be scope for action by the Panel supplementary to that of the Court.

DECISION

33. Providing the relief requested by the Applicants would involve the Panel intervening in the scheme meetings ordered by the Court and intervening in a process supervised by the Court.

34. While there may be exceptional cases in which the Panel's functions may complement rather than interfere with those of the Court this is not one of those cases.

35. Under Regulation 20 of the ASIC Regulations we decline to conduct proceedings in this matter. For purposes of civil relief, any disclosure deficiencies affecting the 9 February transactions have now been remedied. The scheme of arrangement is being supervised by the Court. The parties may raise all of the matters in the application with the Court.

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[14] *Catto v Ampol Ltd* (1989) 7 ACLC 717 at 720; *Re Goldfields Kalgoorlie; Winpar Holdings Ltd v Goldfields Kalgoorlie* (2000) 34 ACSR 737, paragraphs 4 – 5 and 69 – 71.

There is nothing that the Panel can usefully do to assist the Court in this process and there is no point in duplicating proceedings.

CONCLUSION

36. We thank all parties who made submissions.

37. We intend to provide to the Court considering the proposed merger between St Barbara and Taipan a copy of this decision and reasons.

Simon McKeon
11 October 2000

APPENDIX

Extract from the Explanatory Memorandum to the *Companies (Acquisition of Shares) Amendment Bill 1980.*

Cl.3: restriction on acquisitions of shares

11. Sub-section 11(6) of the Principal Act [the *Companies (Acquisition of Shares) Act 1981*] provides that the provisions of the A.C.T. Companies Ordinance relating to schemes of arrangement (sub-sections 181, 183 and 185) have effect subject to the take-overs provisions. This was done to overcome the danger that if the take-over provisions were tightened up, companies seeking to effect take-overs would attempt to do so under the guise of schemes of arrangement or reconstructions. Sub-section 11(6) of the Principal Act will now be omitted (Bill cl. 3).

12. The effect of the proposed amendment will be that s-secs. 181, 183 and 185 of the Companies Ordinance will no longer have effect subject to the general restrictions on the acquisition of shares in sec. 11 of the Principal Act. However, certain modifications have been made to provisions in the proposed Companies Bill corresponding to s-secs 181, 183 and 185 of the Companies Ordinance to ensure that the provisions of the Principal Act are not avoided. For example, the Court will not be able to approve a compromise or arrangement unless it is satisfied that the compromise or arrangement is not proposed for the purpose of enabling any person to avoid the operation of the Principal Act (Companies Bill s-cls. 315(20); 317(4)).

Cl. 4: acquisitions to which section 11 does not apply

13. Section 12 of the Principal Act sets out a number of acquisitions to which the share acquisition code does not apply.

14. Consequential on the amendment to sec. 11 of the Principal Act, it will now be provided that the share acquisition code will not apply to share acquisitions pursuant to a compromise or arrangement approved by the Supreme Court under Part VII of the A.C.T. Companies Ordinance (Bill cl. 4).