CASE NOTES

REFUSAL TO OVERRIDE CONFIDENTIALITY AGREEMENT

CENTAUR MINING & EXPLORATION LTD (RECS & MGRS APPTD) (ADMINISTRATORS APPTD) -V- ANACONDA NICKEL LTD[1]

Section 424 Corporations Act 2001 (Cth.) — *disclosure of confidential information.*

Andrew Komesaroff* and Scott Millar**

BACKGROUND

Centaur Mining & Exploration Ltd (recs & mgrs apptd) (Administrators apptd) ("Centaur") owned and operated a nickel and cobalt mining and processing facility in Western Australia. In order to expand the production capacity, Centaur sought the assistance of a neighbouring operator, Anaconda Nickel Ltd ("Anaconda"). The negotiations between the companies resulted in a preliminary agreement under which Anaconda would commission and manage a Pre-Feasibility Study and a Feasibility Study ("Studies"). In summary, the preliminary agreement provided that Anaconda would pay the costs of the Studies and would acquire ownership in the project in approximately equal shares with Centaur. The parties envisaged that in order to conduct the expansion project, a joint venture would be entered into in the future. A draft joint venture agreement was annexed to the preliminary agreement.

On 14 March 2001, receivers were appointed to Centaur. At this time the project had developed to a point where the Pre-Feasibility Study had been completed by Anaconda. The receivers proposed to divest the assets of Centaur including the nickel mining business. In order to achieve the best possible return for creditors, the receivers wished to make the information contained in the Pre-Feasibility Study available to prospective purchasers. The receivers sought directions to this effect from the Court pursuant to section 424 of the *Corporations Act* 2001 which provides as follows:

> A controller of property of a corporation may apply to the court for directions in relation to any matter arising in connection with the performance or exercise of any of the controller's functions and powers as controller.

Clause 16 of the preliminary agreement dealt with the matter of confidentiality. It provided that the parties would make a joint announcement to the Australian Stock Exchange and the press in

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1 [2001] VSC 224, 29 June 2001.

relation to the preliminary agreement. However, in all other respects the subject matter of the preliminary agreement and the Studies were to be maintained as confidential.

Clause 13.3 of the draft joint venture agreement contained a fuller confidentiality clause. It provided that subject to certain exceptions, all joint venture documents, data and interpretations were to be maintained as confidential and were not to be disclosed to any person. Disclosure was permitted to a proposed assignee of an interest under the joint venture agreement provided that the preposed assignee first undertook to maintain the confidentiality of the data and interpretations.

CLAIMS BY CENTAUR

Centaur submitted that there were three grounds to support its claim that it was appropriate for the receiver to release a copy of the Pre-Feasibility Study to prospective purchasers. Each of these grounds were considered by the Court in turn.

A proper construction of the preliminary agreement permitted disclosure of the Pre-Feasibility Study

Given the assignment clauses contained in the preliminary agreement, Centaur argued that it would be commercially unrealistic to suggest that any party would be prohibited from disclosing the Pre-Feasibility Study to potential assignees. More specifically, Centaur submitted that the proper construction of the confidentiality clause (clause l6) was that it only operated as a restraint upon the parties from making general disclosure to the public at large of the contents of the Pre-Feasibility Study or the Feasibility Study.

However, Warren J rejected this construction stating that:

> On the plain and ordinary meaning of the expression "confidential" in my view it is apparent that pursuant to cl6 of the preliminary agreement the parties intended that the information they shared was not intended for public knowledge, was written or spoken in confidence and that they entrusted each other with the information and intended that information to be treated as a secret. In my view it is common sense that information will not remain a "secret" or removed from "public knowledge" if it is disclosed to third parties even if those parties themselves are committed to confidential terms.[2]

The receivers also relied on clause 13.3 of the draft joint venture agreement in support of their argument. As stated above, this clause permitted disclosure by a party of information to a proposed assignee. The receiver argued that if a decision to proceed with the expansion had been made and the parties had entered into the joint venture agreement, disclosure of the Pre-Feasibility Study would have been permitted to a proposed assignee under clause 13.3. The receivers further proposed that it did not make sense if, based on Anaconda's construction, disclosure of the Pre-feasibility Study could not be made simply because there had been no commitment made to the development of the expansion project.

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2 *Centaur Mining & Exploration Ltd (recs & mgrs apptd) (Administrators apptd) v Anaconda Nickel Ltd* [2001] VSC 224, para 43.

Warren J dismissed this argument. Her Honour stated that the receivers' submissions overlooked the fact that the court was construing the preliminary agreement, not the joint venture agreement. It did not follow that the matters the parties had provided for in the joint venture agreement (namely, the disclosure of confidential information to a proposed assignee of a joint venture interest) was relevant to the construction of the preliminary agreement.

No detriment or prejudice would be suffered by Anaconda were the information contained in the Pre-Feasibility Study to be disclosed subject to a confidentiality agreement

Warren J felt that the receiver's argument that Anaconda would not suffer detriment if the information were disclosed subject to a confidentiality agreement prohibiting further disclosure of the information, was difficult to make out. Her Honour stated:

> I have difficulty in accepting that Anaconda's competitors would not use that information, directly or indirectly, to the detriment of Anaconda.[3]

Warren J cited Hayne JA in *Mobil Oil Australia Ltd v Guina Development Pty Ltd*:

> Once the documents are inspected by the principals of the trade rival the information which is revealed is known to the trade rival and cannot be forgotten. Confidentiality is destroyed once and for all (at least so far as the particular trade rival is concerned). [4]

Warren J found that disclosure of the information to competitors would enable those competitors to take advantage of information, technology, skill and knowledge at little or not cost which had been acquired by Anaconda at considerable cost. There was a clear difficulty in accepting the contention of Centaur that no detriment would be suffered by Anaconda.

None of the information contained in the Pre-Feasibility Study was in fact confidential

Warren J ultimately declined to make any orders for the release of the information on the basis that the facts as to whether the information was confidential were too uncertain. Her Honour recognised that there were aspects of the Pre-Feasibility Study which were at least arguably confidential but also pointed to the strong difference of opinion offered by the expert witnesses of each side. Given that the information in the Pre-Feasibility Study was highly technical and that the issues and facts had not been fully ventilated at trial, but rather an application had been brought under an advisory section of the *Corporations Act* 2001, Her Honour was not in a position to be able to make an order for the release of the information.

OBSERVATIONS

It is not uncommon that parties will enter into preliminary agreements to address certain matters, such as the creation and funding of studies, before entering full joint venture documentation. However, it is suggested that even at the stage of entry into preliminary documentation, the parties should recognise that their joint endeavours can lead to the creation of a product (such as a study)

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3 *Ibid*, para 65.
4 [1996] 2 VR 34.

which is of real value to the parties and a purchaser of their interests. Therefore, while preliminary agreements are often characterised by their brevity which suits the interests of the parties at the time, this case is a good reminder that parties should consider the desirability of incorporating a relatively complete confidentiality clause. In this case, prohibition on disclosure of information to potential purchasers, or an exception to allow that disclosure, would have avoided the litigation that ensued.

The case also suggests that the Courts will be unwilling to use section 424 of the *Corporations Act* 2001 to make orders regarding highly technical factual issues. The assessment of whether information contained in a mining feasibility study is confidential falls within this category. Companies wishing to disclose information that may be subject to a confidentiality obligation should be aware that section 424 is unlikely to avoid the need for a full trial in order to make out their case.

IMPLICATIONS FOR QUEENSLAND'S ALTERNATIVE STATE PROCEDURES

CENTRAL QUEENSLAND LAND COUNCIL ABORIGINAL CORPORATION -V- ATTORNEY GENERAL OF THE COMMONWEALTH OF AUSTRALIA AND STATE OF QUEENSLAND [2002] FCA 58

S. 43 Native Title Act – alternative state procedures – invalid determinations – high impact mining tenements

John Briggs*

Justice Wilcox of the Federal Court in Sydney has handed down a decision[1] that has rendered inoperative parts of the Queensland legislative procedures for obtaining high impact exploration and mining tenements. It has been nearly 18 months since the Commonwealth Attorney General made determinations approving these procedures, as required by the *Native Title Act* 1993 (Cth) ("NTA").

The action was brought by the Central Queensland Land Council Aboriginal Corporation (CQLC) 12 months earlier. Justice Wilcox's decision strikes down 4 determinations made by the Attorney-General in May 2000. These determinations approved alternative native title processes for high impact exploration and mining in Queensland contained in legislation which has been operating since September 2000.

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1 *Central Queensland Land Council Aboriginal Corporation v Attorney-General of the Commonwealth of Australia and State of Queensland* [2002] FCA 58.