

IN THE SUPREME COURT OF WESTERN AUSTRALIA

COR 163 of 2024

IN THE MATTER OF PANORAMIC RESOURCES LIMITED (SUBJECT TO DEED OF
COMPANY ARRANGEMENT) (RECEIVERS AND MANAGERS APPOINTED) (ACN 095 792
288)

EX PARTE

WOODHOUSE, WARWICK AND WHITE IN THEIR CAPACITIES AS
JOINT AND SEVERAL DEED ADMINISTRATORS OF PANORAMIC
RESOURCES LIMITED (SUBJECT TO DEED OF COMPANY
ARRANGEMENT) (RECEIVERS AND MANAGERS APPOINTED)
(ACN 095 792 288)

First Plaintiffs

PANORAMIC RESOURCES LIMITED (SUBJECT TO DEED OF
COMPANY ARRANGEMENT) (RECEIVERS AND MANAGERS
APPOINTED) (ACN 095 792 288)

Second Plaintiff

**PLAINTIFFS' OUTLINE OF SUBMISSIONS IN SUPPORT OF
SECTION 444GA APPLICATION**

Case Manager: The Honourable Justice Hill

Date of document: 15 December 2024

Filed on behalf of: The Plaintiffs

Date of filing: 15 December 2024

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A INTRODUCTION

- 1 This is an application made by the first plaintiffs (together, the **Administrators** or **Deed Administrators** (as applicable)) for orders under section 444GA of the *Corporations Act 2001* (Cth) (**Act**) (**Section 444GA Orders**) in respect of the transfer of all of the shares in Panoramic Resources Limited (Subject to Deed of Company Arrangement) (Receivers and Managers Appointed) (ACN 095 792 288) (**Panoramic**) to Zeta Resources Limited (ARBN 162 902 481) or its nominee (**Zeta**) (**Section 444GA Application**).

FILED

15 DEC 2024

Via eLodgment

CENTRAL OFFICE
SUPREME COURT

2 The Deed Administrators rely on the following affidavits filed in support of their Section 444GA Application:

- (a) the first affidavit of Daniel Hillston Woodhouse affirmed 25 October 2024 (**First Woodhouse Affidavit**);
- (b) the second affidavit of Daniel Hillston Woodhouse affirmed 29 October 2024 (**Second Woodhouse Affidavit**);
- (c) the third affidavit of Daniel Hillston Woodhouse affirmed 13 December 2024 (**Third Woodhouse Affidavit**);
- (d) the affidavit of Richard Scott Tucker sworn 13 December 2024 (**Tucker Affidavit**);
- (e) the affidavit of Paul John Dunbar affirmed 13 December 2024 (**Dunbar Affidavit**); and
- (f) the affidavit of Nicole Brooke Lewis affirmed 13 December 2024 (**Lewis Affidavit**).

3 It is also anticipated that, prior to the final hearing, the Deed Administrators will file an affidavit of Mark Griffiths in relation to the report prepared by Gordon Brothers Pty Ltd.

4 Unless otherwise indicated, capitalised terms in these submissions have the same meaning as in the affidavits listed above.

B RELEVANT BACKGROUND

B1 The Panoramic Group

5 Panoramic is a nickel mining, processing and exploration company, which was formerly listed on the ASX under the code "PAN".¹

6 Panoramic is the ultimate holding company of:

- (a) Savannah Nickel Mines Pty Ltd (Subject to Deed of Company Arrangement) (ACN 103 729 282) (**Savannah**);
- (b) PAN Transport Pty Ltd (Subject to Deed of Company Arrangement) (ACN 627 691 598) (**PAN**); and
- (c) Pindan Exploration Company Pty Ltd (Subject to Deed of Company Arrangement) (ACN 129 252 197) (**Pindan**),

which, together with Panoramic, form part of the Panoramic corporate group (collectively, the

¹ Third Woodhouse Affidavit, [13].

Companies or the Panoramic Group).²

- 7 The Panoramic Group's main asset is the Savannah Nickel Project, which produces and processes nickel, copper and cobalt from a mine located in the East Kimberly region of Western Australia.³

B2 Appointment of administrators to the Panoramic Group

- 8 The Administrators were appointed as joint and several voluntary administrators of Panoramic, Savannah and PAN on 14 December 2023, and of Pindan on 15 January 2024, in each case pursuant to section 436A of the Act.⁴
- 9 The directors' decision to place each of the Companies into voluntary administration was the result of:
- (a) the declining nickel price to levels that were insufficient to generate profits and, consequently, the positive cash flow required to fund current and future financial obligations; and
 - (b) the Panoramic Group being unsuccessful in securing new funding to support ongoing operations.⁵

B3 Savannah Nickel Project placed onto care and maintenance

- 10 Immediately following their appointment to Savannah on 14 December 2023, the Administrators continued to operate the Savannah Nickel Project on a "business as usual" basis, whilst reviewing operational issues and potential recapitalisation options for the Companies.⁶
- 11 However, in the period between the Administrators' appointment and early-January 2024, the nickel price continued to decline.⁷ Accordingly, the Administrators suspended operations at the Savannah Nickel Project on 8 January 2024.⁸ The Savannah Nickel Project was transitioned to care and maintenance over a period of approximately four weeks from 8 January 2024,⁹ and has remained on care and maintenance since that time.

² Third Woodhouse Affidavit, [15].

³ Third Woodhouse Affidavit, [16].

⁴ First Woodhouse Affidavit, [12].

⁵ First Woodhouse Affidavit, DHW-7 p 428 [4.9].

⁶ Third Woodhouse Affidavit, [20].

⁷ Third Woodhouse Affidavit, [21].

⁸ Third Woodhouse Affidavit, [21].

⁹ Third Woodhouse Affidavit, [22].

B4 Appointment of Receivers

- 12 On 7 March 2024, Trafigura Pte Ltd (**Trafigura**), a secured creditor of Panoramic and Savannah, appointed Thomas Birch and Jeremy Nipps of Cor Cordis (**Receivers**) as joint and several receivers and managers of certain property of Panoramic.¹⁰

B5 First creditors' meetings

- 13 The concurrent first creditors' meetings of Panoramic, Savannah and PAN were held on 28 December 2023, and the first creditors' meeting of Pindan was held on 25 January 2024.¹¹

B6 Extension to convening period

- 14 On 19 January 2024, the Administrators obtained orders to extend the convening period for the second creditors' meetings of the Companies to 23 July 2024.¹²

B7 Adjournment of second creditors' meetings

- 15 The second creditors' meetings were convened on 30 July 2024, at which the chair adjourned the meetings by up to 45 business days to allow the Administrators additional time to pursue the sale and recapitalisation process in relation to the Panoramic Group.¹³

B8 Sales Process

- 16 Following their appointment, the Administrators, with the assistance of the Panoramic Group's strategic and financial advisor, Treadstone Resource Partners Pty Ltd, undertook an extensive sale and recapitalisation process in relation to the Panoramic Group, which process ran from 14 December 2023 to 23 October 2024 (**Sale Process**).¹⁴
- 17 Further details regarding the Sale Process are set out in [39] - [41] of the Third Woodhouse Affidavit, and at pages 433 - 434 and 504 of the First Woodhouse Affidavit.
- 18 As a result of this comprehensive Sale Process:
- (a) five interested parties submitted non-binding indicative offers (**NBIO**) for the sale or recapitalisation of the Panoramic Group;
 - (b) of those five interested parties, three were shortlisted based on the potential returns

¹⁰ Third Woodhouse Affidavit, [23].

¹¹ Third Woodhouse Affidavit, [24].

¹² First Woodhouse Affidavit, [14], DHW-6.

¹³ First Woodhouse Affidavit, [17].

¹⁴ Third Woodhouse Affidavit, [37] - [38].

under their NBIO to all creditor classes, conditions precedent and evidence of their ability to transact;

- (c) the three shortlisted parties were invited to submit binding offers by 5 April 2024, which deadline was extended to 26 April 2024 following the appointment of the Receivers;
- (d) during the period from 26 April 2024, two of the three interested parties did not proceed with binding offers given the further deterioration of the nickel market, their inability to secure financing to complete a transaction, and/or their concerns in relation to the high project holding costs and uncertain outlook of the nickel industry and pricing; and
- (e) the Administrators received a binding DOCA proposal from the only remaining and preferred bidder, Zeta, to acquire the Companies, which proposal the Administrators considered to be in the best interests of the creditors of the Panoramic Group.¹⁵

19 Despite this comprehensive Sale Process, the Administrators did not receive any other binding offers for the sale or recapitalisation of the Companies.¹⁶ Accordingly, the only real alternative to approval of the Zeta DOCA was the Companies being placed into liquidation.¹⁷

20 A liquidation would trigger the DOCG between Panoramic and Savannah, pursuant to which Panoramic would become liable for Savannah's unsecured creditor claims and employee claims in the amount of approximately \$29,113,707.03.¹⁸

B9 Supplementary Creditors' Report

21 On 25 September 2024, the Administrators issued the Supplementary Creditors' Report pursuant to section 75-225 of the IPR.¹⁹ In the Supplementary Creditors' Report, the Administrators estimated that, under the Zeta DOCA:

- (a) unsecured creditors would receive approximately 9.68 cents in the dollar, in comparison to (a high) of approximately 1.8 cents in the dollar in a liquidation scenario; and
- (b) priority employee creditors would receive 100 cents in the dollar.²⁰

22 Further, while Trafigura, the group's secured creditor, would not receive any return (as an "excluded creditor") under the Zeta DOCA, it would remain a secured creditor of the Companies

¹⁵ Third Woodhouse Affidavit, [39].

¹⁶ Third Woodhouse Affidavit, [40].

¹⁷ Third Woodhouse Affidavit, [40].

¹⁸ Third Woodhouse Affidavit, [76].

¹⁹ First Woodhouse Affidavit, [18], DHW-8.

²⁰ First Woodhouse Affidavit, [29], DHW-8

(including following effectuation of the Zeta DOCA) up to a cap of USD\$39 million.²¹

B10 Reconvened second creditors' meetings

- 23 The concurrent second creditors' meetings of the Companies resumed on 2 October 2024, at which creditors passed, by reference to both number and value, (among other resolutions) a resolution that each of the Companies execute a DOCA on the terms of Zeta's proposal.²²

B11 Execution of the Zeta DOCA

- 24 The Zeta DOCA was executed by the Deed Administrators, Zeta and each of the Companies on 23 October 2024.²³ A copy of the Zeta DOCA is attached at DHW-1 to the First Woodhouse Affidavit.
- 25 On 23 October 2024, Zeta, Panoramic and Savannah also entered into a Funding Deed, by which Zeta agreed to fund the ongoing operating expenditure of Panoramic and Savannah during the period of the deed administration pursuant to an agreed budget.²⁴ A copy of the Funding Deed is attached at DHW-24 to the Third Woodhouse Affidavit.
- 26 There was no other third party funding available to the Deed Administrators in the administration of the Panoramic Group.²⁵

B12 Conditions precedent to the Zeta DOCA

- 27 The Zeta DOCA includes several conditions precedent that are required to be satisfied (or waived) by no later than 2 January 2025 (unless otherwise extended with Zeta's agreement)²⁶ before "completion" can occur under clause 10 of the Zeta DOCA.²⁷
- 28 As at the date of these submissions, a number of these conditions precedent have already been satisfied, namely:
- (a) the Deed Administrators have obtained a report from an independent expert which concludes that the shareholders of Panoramic have no residual equity in Panoramic, thereby satisfying the condition precedent in clause 9.1 of the Zeta DOCA;²⁸
 - (b) the Australian Government Treasury has no objection to Zeta (or its nominee) acquiring

²¹ First Woodhouse Affidavit, [29(c)], DHW-8 pp 502, 512, 521, 526.

²² First Woodhouse Affidavit, [19].

²³ First Woodhouse Affidavit, [20].

²⁴ Third Woodhouse Affidavit, [61].

²⁵ Third Woodhouse Affidavit, [67].

²⁶ Third Woodhouse Affidavit, [78].

²⁷ First Woodhouse Affidavit, [21].

²⁸ Tucker Affidavit, RST-1 p 13; and see Tucker Affidavit, [15].

an aggregate interest of 100% in Panoramic (subject to certain conditions), thereby satisfying the condition precedent in clause 9.1(e) of the Zeta DOCA;²⁹

(c) Cobby J made orders in Supreme Court of Western Australia proceeding COR 135 of 2024 that:

- (i) the claims made by a project contractor of Savannah, Barmenco Limited (ACN 109 439 894) (**Barmenco**), are, to the extent they reflect liabilities of Savannah, pre-appointment claims in the administration of Savannah (and not priority claims); and
- (ii) the Administrators had no undischarged personal liabilities to Barmenco under section 443A of the Act in respect of Barmenco's claims,

thereby satisfying the condition precedent in clause 9.1(i) of the Zeta DOCA;³⁰ and

(d) Zeta completed a transaction pursuant to which it will receive funds sufficient to enable it to fund the "Proponent Convertible Notes", thereby satisfying the condition precedent in clause 9.1(i) of the Zeta DOCA.³¹

29 The only remaining *substantive* conditions precedent to completion of the Zeta DOCA are the grant of:

- (a) Section 444GA Orders, as required under clause 9.1(d) of the Zeta DOCA;³² and
- (b) ASIC Relief in respect of section 606 of the Act, to enable Zeta (or its nominee) to acquire voting power of greater than 20% in Panoramic without shareholder approval, as required by clauses 9.1(b) and (c) of the Zeta DOCA.³³

30 As to the condition precedent in subparagraph (b) above, ASIC has informed the Deed Administrators that it has made an "in-principle" decision to grant the ASIC Relief, and that it will finalise the ASIC Relief once the Section 444GA Orders are made.³⁴

31 The other conditions precedent to the Zeta DOCA (in clauses 9.1(f) (no application to terminate), (g) (no termination) and (h) (Transaction Document)) will be satisfied provided that, at the time of "completion":

²⁹ Third Woodhouse Affidavit, [46] - [53], [79(c)].

³⁰ Third Woodhouse Affidavit, [46] - [53], [79(c)].

³¹ Third Woodhouse Affidavit, [79(d)].

³² Third Woodhouse Affidavit, [80(a)].

³³ Third Woodhouse Affidavit, [80(b)].

³⁴ Third Woodhouse Affidavit, [81].

- (a) there is no Court application to terminate the Zeta DOCA;
- (b) the Zeta DOCA has not been terminated or otherwise ended; and
- (c) the “Transaction Documents” have been duly executed by the relevant parties (which includes the Zeta DOCA and the Creditors’ Trust Deed).³⁵

32 If the Conditions Precedent are not satisfied or waived by 2 January 2025 (unless otherwise extended with Zeta’s agreement), the Zeta DOCA will automatically terminate.³⁶

B13 IER

33 On 14 October 2024, the Deed Administrators engaged Mr Richard Tucker of KordaMentha (**Independent Expert**), an experienced insolvency practitioner, to provide an independent expert report (**IER**) in relation to the residual value of the shares in Panoramic in a liquidation scenario.³⁷

34 In preparing the IER, the Independent Expert had regard to reports prepared by technical experts to value certain assets of the Panoramic Group,³⁸ consistent with ASIC RG 111.74 and 111.136.

35 The technical experts relied upon by the Independent Expert in the IER were:

- (a) Valuation and Resource Management Pty Ltd (**VRM**) in relation to the value of the Panoramic Group’s mining assets. A copy of the valuation report prepared by VRM (**VRM Report**) is appended at Appendix 9 to the IER (at pages 352 - 431 of the Tucker Affidavit); and
- (b) Gordon Brothers Pty Ltd (**Gordon Brothers**) in relation to the value of the Panoramic Group’s processing plant and mining equipment. A copy of Gordon Brothers’ valuation report is appended to the VRM Report (at pages 88 - 114 of the Dunbar Affidavit).

36 The Independent Expert has opined that:

- (a) the value of the Panoramic Group’s assets (in millions (\$)) are as follows:³⁹

³⁵ Third Woodhouse Affidavit, 82.

³⁶ First Woodhouse Affidavit, [26]; Third Woodhouse Affidavit, [85].

³⁷ Tucker Affidavit, [11].

³⁸ Tucker Affidavit, [14].

³⁹ Tucker Affidavit, RST-1 p 23.

Asset	Low	High	Adopted
<i>Circulating assets</i>			
Cash	14.64	14.64	14.64
Total circulating assets	14.64	14.64	14.64
<i>Non circulating assets</i>			
Net assets of Cherish	-	7.55	3.80
Mining assets			
<i>Savannah Nickel Project (mining assets with LOMP)</i>	<i>43.90</i>	<i>116.00</i>	<i>73.20</i>
<i>Savannah Regional Tenements (exploration tenure outside LOMP)</i>	<i>14.00</i>	<i>23.30</i>	<i>18.70</i>
<i>Exploration assets</i>	<i>1.10</i>	<i>3.30</i>	<i>2.20</i>
<i>Mining assets: market value</i>	<i>59.00</i>	<i>142.70</i>	<i>94.10</i>
Mining assets: forced liquidation scenario	53.10	64.90	59.00
Total non-circulating assets	53.10	72.45	62.80
<i>Other assets</i>			
Antecedent transactions	-	-	-
Total other assets	-	-	-
Total assets	67.74	87.09	77.44

(b) the total indebtedness of the Panoramic Group (in millions (\$)) is as follows:⁴⁰

Liability	Low	High	Adopted
Funding Agreement - Zeta	-	-	-
Administrators - remuneration and disbursements (est.)	4.66	4.66	4.66
Liquidators – remuneration and disbursements (est.)	1.40	0.90	1.15
Administrators / Liquidators - legal costs (est.)	1.80	1.33	1.55
Deed Administrators' remuneration	0.37	0.37	0.37
Liquidator - trading costs (est.)	2.40	1.00	1.70
Employee entitlements	4.49	4.49	4.49
Trafigura debt	61.30	61.30	61.30
Unsecured creditors	26.80	18.75	22.40
Related party loan - Magma Metals Pty Ltd	6.98	6.98	6.98

⁴⁰ Tucker Affidavit, RST-1 pp 23 - 24.

Total indebtedness	109.48	99.78	104.60
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- (c) based on subparagraphs (a) and (b) above, the Panoramic Group has the following net asset deficiency (in millions (\$)):⁴¹

	Low	High	Adopted
Total assets	67.74	87.09	77.44
Total indebtedness	(109.48)	(99.78)	(104.60)
(Net deficiency)	(41.74)	(12.69)	(27.16)

- 37 The conclusion of the Independent Expert in the IER is that the residual equity value of the Panoramic Group in a liquidation is nil.⁴²
- 38 Moreover, the Independent Expert has opined that, for the reasons set out in [2.4] of the IER, there is no reasonable prospect that Panoramic's shares will attain value over a period of approximately 12 months from the date of the IER.⁴³
- 39 Mr Woodhouse, an experienced insolvency practitioner, and one of the joint and several Deed Administrators, has also given evidence that, based on his review of the expert evidence and the Deed Administrators' investigations as external administrators of the Panoramic Group, it is likely that Panoramic's shares have no residual value in a liquidation.⁴⁴

B14 Cherish

- 40 In his valuation of the net assets of the Panoramic Group, the Independent Expert adopted (on a "conservative basis" which favoured shareholders⁴⁵) the "value" of a potential claim against Cherish Metals Pty Ltd (**Cherish**) arising under a DOCG, to which Panoramic and Savannah are party.⁴⁶ In doing so the Independent Expert adopts a valuation of Cherish based on the price paid by Black Mountain Metals LLC (**Black Mountain**) in 2018 to acquire Cherish from Panoramic of \$15.1 million and the "carrying value" of Cherish's net assets, as recorded in its financial statements lodged with ASIC as at 30 June 2022, being \$10.2 million.⁴⁷
- 41 Under the DOCG, each party to it guarantees to each creditor (being a creditor external to the DOCG group) payment in full of any debt (as defined) upon a winding up of those parties. A

⁴¹ Tucker Affidavit, RST-1, p 24.

⁴² Tucker Affidavit, RST-1, p 24.

⁴³ Tucker Affidavit, RST-1, pp 24 - 25.

⁴⁴ Third Woodhouse Affidavit, [116].

⁴⁵ Tucker Affidavit, RST-1 pp 23, 60 - 61.

⁴⁶ Tucker Affidavit, RST-1 p 60.

⁴⁷ Tucker Affidavit, RST-1, p 61.

copy of the DOCG is attached at DHW-27 at pages 823 - 896 of the Third Woodhouse Affidavit.

- 42 Cherish was previously a member of the Panoramic Group and a party to the DOCG.⁴⁸ Cherish owns the Lanfranchi Nickel Project,⁴⁹ which (based on publicly available information) has been in care and maintenance since November 2015.⁵⁰
- 43 On or around 13 September 2018, Panoramic sold its shares in Cherish to Black Mountain for \$15.1 million,⁵¹ which transaction completed on 6 December 2018.⁵²
- 44 Despite ceasing to be a member of the Panoramic Group on or about 6 December 2018, it appears (based on publicly available records) that:
- (a) no valid notice of disposal was lodged with ASIC by Cherish on completion of the 2018 sale transaction; and
 - (b) no valid revocation deed was lodged with ASIC by Cherish and Panoramic in relation to the DOCG.⁵³
- 45 Accordingly, *prima facie*, Cherish remains a party to the DOCG.
- 46 Having regard to the observations of the Court of Appeal in the recent decision of *Kipoi* with respect to insolvency practitioners purporting to give valuation evidence,⁵⁴ the Deed Administrators prudently engaged Paul Dunbar of VRM to provide an independent technical report in relation to (inter alia) whether there is likely to have been any material change in the value of Cherish's Lanfranchi Nickel Project asset as disclosed in Cherish's annual financial report for the year ended 30 June 2022 (\$10.2 million),⁵⁵ which was relied upon by the Independent Expert in the IER.⁵⁶
- 47 VRM has opined that:
- (a) there would have been a material (adverse) change in the value of the Lanfranchi Nickel Project since 30 June 2022;⁵⁷ and

⁴⁸ Dunbar Affidavit, RST-1 p 32.

⁴⁹ Dunbar Affidavit, RST-1 p 33.

⁵⁰ Dunbar Affidavit, PJD-4, pp 464, 472.

⁵¹ Tucker Affidavit, RST-1 p 60, RST-26 p 796.

⁵² Dunbar Affidavit, PJD-3 p 118.

⁵³ Tucker Affidavit, RST-1 p 33, RST-24 pp 793 - 794.

⁵⁴ *Kipoi Holdings Mauritius Limited v Robert Michael Kirman and Robert Conry Brauer as joint and several administrators of Tiger Resources Limited (Subject to Deed of Company Arrangement)* [No 4] [2024] WASCA 145 (**Kipoi**).

⁵⁵ Dunbar Affidavit, PJD-3 p 115.

⁵⁶ Tucker Affidavit, RST-1 p 61.

⁵⁷ Dunbar Affidavit, PJD-4 p 464.

- (b) the likely market value of the Lanfranchi Nickel Project is now between \$4.9 million and \$8.6 million, with a preferred valuation of \$6.7 million.⁵⁸

48 On the assumption that a claim were available against Cherish under the DOCG, and incorporating VRM's valuation of the Lanfranchi Nickel Project into the summary table of Panoramic's assets and indebtedness (as determined by the Independent Expert) at paragraph 36 above, there would remain a net asset deficiency (in millions (\$)) in the Panoramic Group's net assets in all scenarios:

	Low	High	Adopted
<i>Total assets (Independent Expert)</i>	67.74	87.09	77.44
Total assets (with full VRM valuation of Lanfranchi Nickel Project)	72.64	88.14	80.34
Total indebtedness	(109.48)	(99.78)	(104.60)
<i>(Net deficiency) (Independent Expert)</i>	(41.74)	(12.69)	(27.16)
(Net deficiency) (with full VRM valuation of Lanfranchi Nickel Project)	(36.84)	(11.64)	(24.26)

49 The table above does not account for the uncertainties and issues associated with this claim, as detailed in section 9.4.3 of the IER (at page 60 of the Tucker Affidavit).

C RELEVANT LEGAL PRINCIPLES

C1 Objects of Part 5.3A of the Act

50 Part 5.3A of the Act deals with the voluntary administration of a company's affairs, with a view to executing a DOCA. The object of Part 5.3A of the Act is set out in section 453A as follows:

The object of [Part 5.3A] ... is to provide for the business, property and affairs of an insolvent company to be administered in a way that:

- (a) maximises the chances of the company, or as much as possible of its business, continuing in existence; or
- (b) if it is not possible for the company or its business to continue in existence – results in a better return for the company's creditors and members than would result from an immediate winding up of the company.

C2 Section 444GA

51 Section 444GA(1) of the Act provides that an administrator of a DOCA may transfer shares in the company either with:

⁵⁸ Dunbar Affidavit, PJD-4 p 465.

- (a) the written consent of shareholders; or
- (b) leave of the Court.

52 The discretion of the Court to grant leave is only enlivened if it is satisfied that the interests of the shareholders are not “unfairly prejudiced” by the transfer of their shares.⁵⁹

53 The purpose of section 444GA is to give deed administrators the ability to compulsorily sell a company’s shares where that is necessary for the purpose of implementing a DOCA under which payment of creditors’ debts is dependent upon such a transfer occurring or where such a transfer is necessary for the success of the DOCA.⁶⁰ This is notwithstanding an owner’s opposition to the transfer.⁶¹

C3 No unfair prejudice

54 The Court may only grant leave if it is satisfied that the sale would not “unfairly prejudice” the interests of shareholders.⁶²

55 The test in section 444GA(3) involves “unfair” prejudice to the interests of shareholders.⁶³

56 Whether or not “unfair prejudice” will result from a transfer of the shares is to be determined having regard to all the circumstances of the case and the policy of the Act.⁶⁴

57 The fact that shares are to be transferred without compensation is not sufficient, of itself, to establish unfair prejudice.⁶⁵

58 In determining whether the share transfer would unfairly prejudice the interests of members, the Court must consider whether there is any residual value in the company.⁶⁶ This involves comparing the circumstances in the event the shares are transferred with the circumstances in the event that the company is liquidated (where that is the likely or necessary consequence of the transfer not being approved).⁶⁷

59 Where the equity in the company has no residual value, the members are unlikely to suffer

⁵⁹ Act s 444GA(3).

⁶⁰ *Re Paladin Energy Ltd (Subject to Deed of Company Arrangement)* [2018] NSWSC 11 (**Paladin**), [28].

⁶¹ *Kipoi*, [149(a)].

⁶² *Paladin*, [28]; *Kipoi*, [237].

⁶³ *Kipoi*, [149(e)].

⁶⁴ *Re Centennial Mining Limited (subject to deed of company arrangement)* [2019] WASC 441 (**Centennial Mining**), [21]; *Re Diverse Barrel Solutions Pty Ltd (Subject to a Deed of Company Arrangement)* [2014] FCA 53, [19].

⁶⁵ *Kipoi*, [290]; *Chalmsbury Nominees Pty Ltd v Alita Resources Limited (receivers and managers appointed) (subject to deed of Company Arrangement)* [2023] WASC 97 (**Alita**), [56(b)].

⁶⁶ *Kipoi*, [149(e)].

⁶⁷ *Kipoi*, [149(e)].

prejudice, and certainly not *unfair* prejudice, by reason only of the absence of consideration.⁶⁸

60 As held by Vaughan JA in the recent decision of *Kipoi*:

The question whether members hold equity of any residual value is determined by considering the position of the members in a winding up - at least where that is the likely or necessary consequence of the transfer of shares not being approved. That makes it necessary to consider a valuation of the assets and liabilities of the company by reference to a liquidation scenario rather than as a going concern. There would not ordinarily be any prejudice, or at least no prejudice that has the requisite quality of being 'unfairly' prejudicial, if the shares to be transferred would receive no distribution in the event of a liquidation as the only realistic alternative to the proposed transfer.⁶⁹

61 Accordingly, there will not ordinarily be any prejudice, or no prejudice that has the requisite quality of "unfairness", in circumstances where:

- (a) the shares to be transferred have no value; and
- (b) there would be no distribution in the event of a liquidation, where liquidation is the only realistic alternative to the proposed transfer.⁷⁰

C4 Notice to shareholders

62 Another relevant consideration in considering the question of unfairness is whether a full and accurate description of the proposal has been given to shareholders and whether shareholders have been given a full opportunity to appear in opposition to the application.⁷¹

C5 Section 447A(1) of the Act

63 Section 447A of the Act provides that:

- (a) the Court may make such order as it thinks appropriate as to how Part 5.3A is to operate in relation to a particular company;⁷² and
- (b) an order may be made on the application of the company⁷³ or, in the case of a company

⁶⁸ *Alita*, [56(c)]. See also, *Centennial Mining*, [8]; *Kipoi*, [288]; *Re Bizpay Group Limited* [2024] NSWSC 1480 (***Bizpay***), [15]; *Re Smith (as joint and several administrators of Catalano Seafood Ltd) (subject to a deed of company arrangement) (administrators appointed)* [2024] WASC 99, [19].

⁶⁹ At [291]. See also, *Re Virgin Australia Holdings Ltd (Administrators Appointed) [No 9]* [2020] FCA 1652; (2020) 148 ACSR 648, [31] - [33].

⁷⁰ *Bizpay*, [16]; *Re Ten Network Holdings Ltd (subject to a deed of company arrangement) (recs and mgrs apptd)* [2017] NSWSC 1529, [32] - [39]; *Re Openpay Group Ltd (recs and mgrs apptd) (subject to a DOCA)* [2024] NSWSC 789, [20].

⁷¹ *Centennial*, [19].

⁷² Act s 447A(1).

⁷³ Act s 447A(4)(c).

that has executed a DOCA, by the deed administrator.⁷⁴

64 Orders may be made under section 447A to put into effect the proposed transfer of shares.⁷⁵

65 The Court's power in section 447A has been described as "plenary".⁷⁶

D APPLICATION

D1 Jurisdiction

66 The first plaintiffs are the Deed Administrators of Panoramic and are entitled to seek leave of the Court pursuant to section 444GA of the Act.⁷⁷

67 The Court is empowered to grant the Deed Administrators the leave required by section 444GA(1)(b).⁷⁸

D2 No unfair prejudice to shareholders of Panoramic

68 The Independent Expert (with whom the Deed Administrators agree⁷⁹) has opined that there will be a substantial shortfall in the Panoramic Group's assets relative to its liabilities:

(a) in the range of \$41,740,000 (low) and \$12,690,000 (high); and

(b) with an adopted net asset deficiency of \$27,160,000,

in a forced sale (liquidation) scenario.⁸⁰

69 Based on this net asset deficiency, the Independent Expert has opined that the residual value in the equity of Panoramic is nil in a liquidation scenario.⁸¹

70 Moreover, the Independent Expert has opined that there is no reasonable prospect of Panoramic's shares attaining value over a period of approximately 12 months from the date of the IER.⁸²

71 In those circumstances, there is no unfair prejudice to shareholders of Panoramic by proceeding

⁷⁴ Act s 447A(4)(d).

⁷⁵ *Alita*, [56(c)].

⁷⁶ *Cawthorn v Keira Constructions Pty Ltd* (1994) 13 ACSR 337, 341.

⁷⁷ Act s 444GA(1); IPS s 90-20.

⁷⁸ IPS s 90-15.

⁷⁹ Third Woodhouse Affidavit, [111].

⁸⁰ Tucker Affidavit, RST-1 p 24.

⁸¹ Tucker Affidavit, RST-1 p 24.

⁸² Tucker Affidavit, RST-1 pp 24 - 25.

with the Section 444GA Application.⁸³

72 If the Section 444GA Application is unsuccessful, the DOCA will terminate and Panoramic will likely fall into liquidation,⁸⁴ in which case the return to shareholders is nil.⁸⁵

73 Accordingly, the possibility of unfair prejudice to shareholders of Panoramic as it relates to a potential loss of any real or perceived residual value does not arise in any circumstances where the Section 444GA Application is not successful.

D3 No benefit in further investigations

74 In addition, the financial interests of the shareholders of Panoramic would not be unfairly prejudiced by the transfer of their shares in circumstances where, despite their investigations, the Deed Administrators have not identified any potential claims that would necessitate significant further investigation by a liquidator.⁸⁶

D4 Notice to shareholders

D4.1 Hearing Notice

75 Pursuant to the orders made by Hill J on 30 October 2024 (**Orders**), the Deed Administrators gave notice of the hearing of this Section 444GA Application to Panoramic shareholders by:

- (a) uploading a copy of the Hearing Notice to the FTI Portal on 1 November 2024.⁸⁷ A copy of the Hearing Notice is attached at NBL-1 at pages 8 - 10 of the Lewis Affidavit;
- (b) causing a copy of the Hearing Notice to be sent by email on 1 November 2024 to each Email Shareholder of Panoramic;⁸⁸
- (c) causing a copy of the Hearing Notice to be sent by post on 4 November 2024 to each other shareholder of Panoramic (ie who was not an Email Shareholder);⁸⁹ and
- (d) causing a copy of the Newspaper Notice to be published in the AFR and The West Australian on 6 November 2024.⁹⁰ Copies of the Newspaper Notices are attached at DHW-35 - DHW-36 at pages 922 - 923 of the Third Woodhouse Affidavit.

⁸³ See, Third Woodhouse Affidavit, [115] - [118].

⁸⁴ Third Woodhouse Affidavit, [116]; Tucker Affidavit, RST-1 pp 24 - 25.

⁸⁵ Third Woodhouse Affidavit, [116]; Tucker Affidavit, RST-1 pp 25 - 25.

⁸⁶ First Woodhouse Affidavit, DHW-8 p 513.

⁸⁷ Third Woodhouse Affidavit, [95(a)].

⁸⁸ Lewis Affidavit, [9].

⁸⁹ Lewis Affidavit, [9].

⁹⁰ Third Woodhouse Affidavit, [97].

D4.2 Explanatory Statement and IER

76 The Deed Administrators also prepared an Explanatory Statement for shareholders in relation to the Section 444GA Application, which (among other things):

- (a) explains the nature of the Section 444GA Application for leave of the Court;
- (b) explains members' rights to object to the Section 444GA Application;
- (c) explains the requirement for ASIC Relief under section 606 of the Act;
- (d) includes a link to the IER; and
- (e) includes a copy of the Section 444GA Application,

as required under ASIC RG 6.196.

77 A copy of the Explanatory Statement is attached at DHW-14 at pages 26 - 45 of the Third Woodhouse Affidavit.

78 The Deed Administrators gave notice of the Explanatory Statement and IER to Panoramic shareholders by:

- (a) uploading a copy of the Explanatory Statement and IER to the FTI Portal on 4 December 2024;⁹¹
- (b) causing an email to be sent on 4 December 2024 to each Email Shareholder of Panoramic, which email contained a website link where Email Shareholders could access and download a copy of the Explanatory Statement and IER;⁹²
- (c) causing a copy of the Explanatory Statement to be sent by post on 4 December 2024 to each Postal Shareholder of Panoramic;⁹³ and
- (d) causing a copy of an Access Letter to be sent by post on 4 December 2024 to each Other Shareholder of Panoramic, which letter contained the FTI Portal address where shareholders of Panoramic could access and download a copy of the Explanatory Statement and IER.⁹⁴ A pro forma copy of the Access Letter is attached at NBL-8 at pages 44 - 45 of the Lewis Affidavit.

⁹¹ Third Woodhouse Affidavit, [100].

⁹² Lewis Affidavit, [18].

⁹³ Lewis Affidavit, [20(a)].

⁹⁴ Lewis Affidavit, [20(b)].

D4.3 Adequate level of disclosure to shareholders

79 The level of disclosure to the shareholders of Panoramic in the Hearing Notice, Newspaper Notices and Explanatory Statement meets the threshold identified by Justice Vaughan in *Centennial Mining* that shareholders receive:

- (a) a full and accurate description of the proposal; and
- (b) a full opportunity to appear on the application.⁹⁵

80 Notwithstanding the disclosure regime described in paragraphs 75 - 78 above — despite there being various communications received by the Deed Administrators from shareholders (which communications are addressed in section D7 below) — no shareholder, creditor or other interested party has, as at the date of these submissions, filed a notice of appearance or sought to be joined to these proceedings.

81 Pursuant to the Orders, the deadline for any interested party to file a notice of appearance (indicating their grounds of objection) and to apply to be joined to oppose the Section 444GA Application was 4pm (AWST) on 11 December 2024. This deadline was prominently disclosed in the Explanatory Statement.⁹⁶

D5 Notice to creditors

D5.1 Hearing Notice

82 Pursuant to the Orders, the Deed Administrators also gave notice of the hearing of the Section 444GA Application to the creditors of Panoramic by:

- (a) uploading a copy of the Hearing Notice to the FTI Portal on 1 November 2024;⁹⁷
- (b) causing a copy of the Hearing Notice to be sent by email on 1 November 2024 to each creditor of Panoramic who had provided a contact email address to the Deed Administrators;⁹⁸
- (c) causing a copy of the Hearing Notice to be sent by post on 1 November 2024 to each other creditor of Panoramic who had provided a contact postal address to the Deed Administrators;⁹⁹ and

⁹⁵ *Centennial Mining*, [19].

⁹⁶ Third Woodhouse Affidavit, DHW-14, at pp 27, 28, 35, 43.

⁹⁷ Third Woodhouse Affidavit, [95(a)].

⁹⁸ Third Woodhouse Affidavit, [94(a)].

⁹⁹ Third Woodhouse Affidavit, [94(b)].

- (d) causing a copy of the Newspaper Notice to be published in the AFR and The West Australian on 6 November 2024.¹⁰⁰

D5.2 Explanatory Statement and IER

83 The Deed Administrators also gave notice of the Explanatory Statement and IER to Panoramic creditors by:

- (a) uploading a copy of the Explanatory Statement and IER to the FTI Portal on 4 December 2024;¹⁰¹
- (b) causing a copy of the Access Letter to be sent by email on 4 December 2024 to each creditor of Panoramic who had provided a contact email address to the Deed Administrators;¹⁰² and
- (c) causing a copy of the Access Letter to be sent by post on 4 December 2024 to each other creditor of Panoramic who had provided a contact postal address to the Deed Administrators.¹⁰³

D6 Notice to ASIC

- 84 The Deed Administrators have also provided notice of the Section 444GA Application to ASIC.¹⁰⁴
- 85 ASIC has informed the Deed Administrators that it does not propose to intervene in these proceedings, as the Section 444GA Application is a matter properly left for the determination of the Court.¹⁰⁵
- 86 Further, as noted in paragraph 30 above, ASIC has informed the Deed Administrators of its decision to provide In-principle Relief under section 606 of the Act, with the final relief being provided on receipt of the Section 444GA Orders.¹⁰⁶

D7 Shareholder communications

- 87 Between 1 November 2024 and 12 December 2024, the Deed Administrators (or their legal advisers) received a number of communications from shareholders of Panoramic in relation to

¹⁰⁰ Third Woodhouse Affidavit, [97].

¹⁰¹ Third Woodhouse Affidavit, [100].

¹⁰² Third Woodhouse Affidavit, [103(a)].

¹⁰³ Third Woodhouse Affidavit, [103(b)].

¹⁰⁴ Third Woodhouse Affidavit, DHW-30, DHW-39.

¹⁰⁵ Third Woodhouse Affidavit, DHW-39.

¹⁰⁶ Third Woodhouse Affidavit, DHW-30.

the Section 444GA Application.

- 88 A summary of the shareholder communications, and the Deed Administrators' (or their legal advisers') responses is at attachment DHW-41 at pages 1044 - 1087 of the Third Woodhouse Affidavit.
- 89 None of the shareholder communications raise any legal basis for objecting to the Section 444GA Orders.
- 90 Further, no shareholder (or other interested party) has filed a notice of appearance or sought to be joined as a party to these proceedings, despite shareholders and creditors being on notice of the requirement to do so by no later than 4pm on 11 December 2024.¹⁰⁷ Nor has any interested party sought to file any evidence in opposition to the Section 444GA Application.

D8 Ancillary orders

- 91 The Zeta DOCA contemplates that the shares of Panoramic will be transferred to Zeta (or its nominee) on "Completion" as defined in the Zeta DOCA.
- 92 Section 447A of the Act grants the Court a wide power regarding the operation of Part 5.3A with respect to the administration of Panoramic. In the context of this Section 444GA Application, orders in the nature of those contended for by the Deed Administrators have been made pursuant to section 447A(1) in a number of cases and are necessary to give effect to the share transfer contemplated by this Section 444GA Application.

E CONCLUSION

- 93 For the reasons above, and in the supporting affidavits filed in support of this Section 444GA Application, the Section 444GA Orders ought to be made.

W.C.J. Zappia

Counsel for the Plaintiffs

Gilbert + Tobin

Solicitors for the Plaintiffs

¹⁰⁷ Third Woodhouse Affidavit, DHW-14, pp 27, 28, 35, 43, 1044, 1045, 1063, 1065, 1067, 1073, 1075 - 1078, 1082, 1086.