

# Kingsgate Consolidated Limited

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## PUBLIC RELEASE

via ASX ONLINE, 10 November 2017

### Update on Legal Proceedings re Chatree Gold Mine, Thailand

#### INTRODUCTION

On 13 October 2017, Kingsgate Consolidated Limited (ASX:KCN) ("Kingsgate" or the "Company") announced that it would be commencing proceedings in the Supreme Court of New South Wales against Zurich Australia Insurance Limited and other named insurers under a US\$200 million Political Risk Insurance Policy (the "PRI Claim").

On 2 November 2017, the Company announced that it would commence international arbitration proceedings against the Kingdom of Thailand ("Thailand" or the "State") under the Australia Thailand Free Trade Agreement ("TAFTA") to recover substantial losses resulting from the unlawful expropriation of the Chatree Gold Mine in 2016, and other unlawful measures taken against the Company's covered investments in Thailand (the "TAFTA Claim").

Both sets of proceedings have now been commenced.

Kingsgate has established a highly experienced and effective legal team to prosecute both sets of proceedings, and will be closely managing the team to ensure the optimum outcome for shareholders.

The purpose of this release is to introduce you to the team, and to briefly describe the two claims and the processes to be followed in prosecuting each claim.

#### LEGAL TEAM

**Dr Andrew Bell SC** has been appointed Senior Counsel in respect of both claims.

Andrew Bell has a broad national practice and has appeared in almost 30 High Court appeals across a broad range of fields, and in numerous special leave applications. He also regularly appears in the New South Wales and Western Australia Courts of Appeal and the Full Court of the Federal Court, as well as at first instance and in domestic and international arbitrations.

He specialises in private international law and transnational litigation and arbitration, in which areas he has taught and written extensively. He has also acted as an arbitrator and appeared in domestic and international arbitrations under various laws and rules. Andrew's practice includes corporate and commercial litigation, class actions, general appellate matters, public and constitutional law, including electoral law, sports law and shipping and transport disputes.

Andrew has regularly been named in the Litigation and Alternative Dispute Resolution categories in the annual Australian Financial Review survey of top Australian lawyers, and is ranked Band 1 of all Australian barristers by Chambers Asia Pacific.

**Dr Sam Luttrell** is the lead partner at Clifford Chance, a major international law firm with an extensive practice in litigation and international arbitration, who is responsible for prosecuting the TAFTA Claim on behalf of the Company.

Sam Luttrell is an international arbitration specialist. He represents clients in cross-border disputes with other businesses and in claims against foreign governments under Bilateral Investment Treaties ("BITs") and Free Trade Agreements ("FTAs").

Sam's practice is focused on the energy and natural resources sector and he is currently conducting a number of mining-related treaty claims against foreign governments in Asia and Africa. In addition to his work representing parties in such cases, Sam is widely published in the fields of international arbitration and investment law and regularly teaches these subjects at universities and arbitral institutions around the region.

Sam is ranked in Band 1 for arbitration in Chambers Global and Chambers Asia-Pacific and is listed for arbitration in Who's Who Legal. In 2017, he was awarded "International ADR Practitioner of the Year" at the Australian Disputes Centre awards in Sydney. Sam is also named in the International Arbitration category in the Australian Financial Review survey of Australia's best lawyers.



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**Mr Ben Luscombe** is the lead Clifford Chance partner on the PRI Claim. Ben leads the Litigation and Dispute Resolution practice in Perth.

Ben Luscombe has 37 years experience representing parties in litigation, arbitration, mediation and investigations throughout Australia and Asia. Ben's practice is focused on disputes in the energy and natural resources sector and he is currently acting for a number of mining companies in court and arbitral proceedings arising out of the expropriation of mines in Asia and Africa.

Ben is ranked across all major legal directories including Chambers Asia-Pacific and Doyles Guide. He has been listed in the Litigation category in the Australian Financial Review survey of Australia's best lawyers every year since 2010.

Ben's team at Clifford Chance has won the "ADR Team of the Year" award at the Australian Disputes Centre awards in Sydney the last two years in a row.



## PRI CLAIM

The PRI Claim is brought under a Political Risk Insurance Policy (the "PRI Policy") issued by a syndicate of Australian and international insurance companies, led by Zurich Australian Insurance Limited (collectively, the "Insurers").

The PRI Policy was taken out by the Company in August 2015. The PRI Policy, which includes confidentiality provisions, has a maximum limit of liability of US\$200 million and provides coverage for, amongst other things, Expropriatory Acts which are in violation of TAFTA. The PRI Policy was in place on 10 May 2016 when the Royal Thai Government committed an Expropriatory Act by ordering the closure of the Chatree Gold Mine which led to the Company suffering a permanent deprivation of its assets in Thailand (further detail on the expropriation is provided in the discussion of the TAFTA Claim below).

The Insurers denied cover. On 19 October 2017 the Company instituted proceedings under the PRI Policy in the Supreme Court of New South Wales (the "Court"). In the PRI Claim, the Company seeks the maximum cover provided under the PRI Policy, being US\$200 million. As noted above, the PRI Claim is being led by Ben Luscombe of Clifford Chance, with Dr Andrew Bell SC as counsel.

Kingsgate will endeavour to have the PRI Claim dealt with by the Court as quickly as possible. It is expected that the dispute will be subject to mediation in accordance with the Rules of Court by March, 2018 and that any hearing will take place by around June or July 2018.

## TAFTA CLAIM

### (a) Background

Kingsgate began to consider its rights under TAFTA shortly after 10 May 2016, when the Chatree Mine was unlawfully expropriated by the Royal Thai Government. Since mid-2016, Clifford Chance has been actively supporting the Company in preparations for a possible claim under TAFTA, including in the collection of evidence in Thailand and Australia. As noted above, Dr Sam Luttrell of Clifford Chance is leading the TAFTA Claim for the Company and he and his team were instrumental in this preparatory work.

Following the Company's commencement of formal consultations under TAFTA, as announced to the ASX on 3 April 2017, the Company engaged in extensive negotiations with the Royal Thai Government and actively sought to amicably resolve its investment dispute with Thailand. The Company's efforts to amicably resolve its investment dispute with Thailand included multiple face-to-face meetings between the Company's representatives and representatives of the Royal Thai Government in Bangkok. As a result of requests for extension by the Royal Thai Government, these negotiations extended well beyond the three-month period recommended under TAFTA.

It was only when it became clear that no satisfactory resolution of the TAFTA Claim could be achieved that the Company commenced international arbitration against Thailand under TAFTA.

### (b) TAFTA

TAFTA is an FTA which establishes a series of standards of treatment and protections for Australian investors in Thailand. TAFTA also gives Australian investors the right to refer disputes relating to covered investments to international arbitration.

### (c) Basis for claim

The TAFTA Claim results from a series of acts and omissions by Thailand against the Company and Akara Resources Public Co Limited (Akara), the Thai company that operates the Chatree Mine. Kingsgate holds a 100% economic interest in Akara.

The State acts that form the basis of the Company's TAFTA Claim include (but are not limited to):

- the State's 10 May 2016 decision that Akara's Metallurgical Processing Licence ("MPL") for the Chatree Mine's processing plant would only be renewed until the end of 2016 (the "Limited MPL Renewal"), rather than a period of 3 or 5 years (as it had been renewed previously);
- the State's 10 May 2016 order to Akara to proceed with the closure of the Chatree Mine (the "Shut-Down Order"); and
- the 13 December 2016 order of the Prime Minister of Thailand, issued under Section 44 of the Thai Constitution (the "Section 44 Order"), suspending all gold mining operations and other gold mining related activities in Thailand from 31 December 2016.

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In the TAFTA Claim, the Company contends that, through these and other unlawful measures taken by Thailand against the Company and its covered investments, Thailand has breached its obligations under TAFTA.

## **(d) "Fair and Equitable Treatment" claim**

TAFTA requires that Thailand "ensure fair and equitable treatment in its own territory of investments". Many investment treaties and Free Trade Agreements contain "Fair and Equitable Treatment" ("FET") clauses in similar or identical terms to TAFTA. Such FET clauses, which are often invoked by foreign investors in situations similar to the TAFTA Claim, have been interpreted to require that the host State (in this case, Thailand):

- respect and protect the basic expectations that were taken into account by the foreign investor (in this case, Kingsgate) to make the investment;
- maintain a transparent, stable and predictable legal and regulatory environment for the investment; and
- refrain from treating the investor or its investments in a manner that is discriminatory, arbitrary, or unfair.

The Company contends that the State's treatment of the Company's covered investments violated all of the above requirements of the FET standard.

## **(e) Expropriation claim**

TAFTA does not prohibit Thailand from expropriating Australian-owned covered investments. Rather, what TAFTA does is set out a list of conditions that must be satisfied by the State in order for an expropriation (or a measure having equivalent effect to an expropriation) to be lawful. The expropriation (whether direct or indirect) must be:

- for a public purpose related to the internal needs of Thailand;
- carried out under due process of law;
- non-discriminatory; and
- accompanied by the payment of prompt, adequate and effective compensation.

Unless Thailand satisfies all four conditions, its expropriation will be unlawful and an internationally wrongful act will have been committed.

The Company contends that, in its expropriation of the Company's covered investments in the Chatree Mine, Thailand did not satisfy any of the above conditions.

Most obviously, the expropriation of the Company's investments was not accompanied by the payment of any compensation, let alone the "prompt, adequate and effective" compensation required under TAFTA (and international law generally).

## **(f) Non-impairment claim**

Finally, in the TAFTA Claim, the Company also brings a claim through the Most Favoured Nation clause of TAFTA. This clause requires Thailand to extend to Australian investors such as the Company treatment no less favourable than it accords, in like circumstances, to investments in its territory of investors from other countries.

On this basis, Thailand is obliged not to impair, by arbitrary or discriminatory measures, the management, maintenance, use, enjoyment or disposal of the Company's covered investments in Thailand.

The Company contends that Thailand has breached this obligation in the manner in which it has treated the Company and its covered investments.

## **(g) Compensation**

The Company has incurred substantial loss and damage as a direct and proximate result of the State's violations of TAFTA summarised above. The Company is entitled to be compensated.

The Company will claim damages for unlawful expropriation in an amount equal to the fair market value of the Company's covered investments (including the Chatree Mine) immediately before their expropriation or impending expropriation became public knowledge.

The Company is also entitled to compensation for the loss and damage it suffered as a result of the State's violations of FET and its undertaking not to impair by arbitrary or discriminatory measures foreign investments in its territory. The Company will claim damages for these TAFTA violations as well, subject to not being able to recover the same loss more than once.

As is standard practice in cases of this kind, the Company is yet to fully quantify its claims for compensation under TAFTA. This and other evidentiary aspects of the TAFTA Claim are being developed by the Company in conjunction with Dr Bell and Clifford Chance, and independent experts.

The Company may be required to share the proceeds of its claim against the Royal Thai Government with the PRI insurers to the extent of any payout under the PRI Policy. However, Thailand is barred from asserting at any stage of the TAFTA Claim that the Company has received or will receive any payout under the PRI Policy.

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## (h) Process for TAFTA Claim

TAFTA allows an investor such as the Company to refer a dispute with Thailand to international arbitration before a tribunal established under the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL Rules).

Under the UNCITRAL Rules, arbitral proceedings are initiated by issuance of a Notice of Arbitration. The Company issued its Notice of Arbitration to the State on 2 November 2017. The Company has proposed that a tribunal of three arbitrators be appointed. Three-member tribunals are the norm for cases of this kind. Exercising its right under the UNCITRAL Rules, the Company has appointed as its party-appointed arbitrator a well respected and experienced British national who was formerly a judge.

Regarding the future procedure for the TAFTA Claim, it is not yet possible for the Company to provide a firm projection in this regard. The arbitration will certainly include multiple rounds of written submissions and one or more oral hearings before the arbitral tribunal. In its Notice of Arbitration, the Company proposed that the place of the arbitration be Singapore, and the Company has invited Thailand to agree to this proposal. If Thailand does not agree, and Thailand does not suggest an alternative place that is acceptable to the Company, the matter will be decided by the arbitral tribunal.

The Company has informed the State that it wishes for all hearings in the arbitration under TAFTA to be public and for all orders, decisions and awards of the arbitral tribunal to be published.

## Corporate Directory

### Board of Directors

<b>Ross Smyth-Kirk</b>	Executive Chairman
<b>Peter Alexander</b>	Non-Executive Director
<b>Peter Warren</b>	Non-Executive Director
<b>Sharon Skeggs</b>	Non-Executive Director

### Senior Management

<b>Ross Coyle</b>	Chief Financial Officer & Company Secretary
<b>Alistair Waddell</b>	Vice President, Corporate Development & Exploration
<b>Leonardo Hermosilla</b>	Vice President, Project Development & General Manager, Kingsgate Chile NL
<b>Jamie Gibson</b>	General Manager, Corporate and External Relations Tel: +61 2 8256 4800 Email: <a href="mailto:jgibson@kingsgate.com.au">jgibson@kingsgate.com.au</a>

### Principal and Registered Office

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