

Takeovers Panel
Reasons - The Agency Group Australia Limited 01 & 02
[2021] ATP 2

AGM	Annual General Meeting of Agency
Bid	Magnolia's off-market takeover bid for Agency
Bid Announcement	has the meaning given in paragraph 9
Bidder's Statement	has the meaning given in paragraph 17
Cash Consideration Statements	has the meaning given in paragraph 67(b)
Controllers	has the meaning given in paragraph 67(b)(ii)
Court Orders	has the meaning given in paragraph 20
Court Proceedings	proceeding No. WAD7/2021
Debt	alleged debt owed by Agency to MCL 105 Pty Ltd of \$385,000 for fees on a mandate for the purpose of Agency securing debt funding
Deed of Forbearance	deed of forbearance between, amongst others, Agency and Macquarie
Demands for Payment	the demands made by Magnolia for payment of the Debt
Funding Evidence	has the meaning given in paragraph 23(a)
Guarantee Shareholders	the shareholders said in the Notice of AGM to have each provided a joint and several guarantee in relation to senior debt facilities advanced by Macquarie to Agency
IER	the independent expert report prepared by Nexia in relation to the proposed potential issue of fully paid ordinary shares to Peters and its associates upon conversion of convertible notes and/or upon exercise of options and dated 23 November 2020
Interim Orders	has the meaning given in paragraph 35
Macquarie	Macquarie Bank Limited
Magnolia	Magnolia Equities III Pty Limited
Magnolia Group	has the meaning given in paragraph 67(b)(ii)
Nexia	Nexia Perth Corporate Finance Pty Ltd
Nexia Response	has the meaning given in paragraph 15
Notice of AGM	has the meaning given in paragraph 4
Peters	Peters Investments Pty Ltd

Takeovers Panel

Reasons - The Agency Group Australia Limited 01 & 02 [2021] ATP 2

Peters Proposal	the issue of 5,000,000 convertible notes and grant of 3,170,441 options to Peters to support an investment of \$5 million by Peters in Agency
Peters Proposal Condition	the condition of the Bid that none of the Peters Proposal Resolutions be moved or passed at the AGM
Peters Proposal Resolutions	resolutions 3-7 in Agency's Notice of AGM
Resolution 6	resolution 6 in Agency's Notice of AGM giving approval for the purposes of section 611 item 7 and for all other purposes for Agency to issue 5,000,000 convertible notes and 3,170,441 options to Peters
Second Third Party Assessment	has the meaning given in paragraph 95
Subsequent Events	MCL 105 Pty Ltd appointing Administrators to Agency under section 436C, the appointment of Administrators to Agency triggering further defeating conditions (including 8.7(d), (f), (h) and (i) of the Bidder's Statement), Magnolia's statement that it has " <i>considered its attitude to the combination of triggered defeating conditions</i> " and accordingly will not be sending out offers to Agency shareholders, the Court Proceedings and the Court Orders
Supplementary IER	the supplementary independent expert's report prepared by Nexia and dated 10 December 2020
Third Party	has the meaning given in paragraph 12
Third Party Assessment	has the meaning given in paragraph 12
Third Party Comments	has the meaning given in the interim order set out in Annexure A
Wholesale Investor Commitments	has the meaning given in paragraph 67(c)

FACTS

- Agency is an ASX listed company (ASX code: AU1). Agency provides real estate and property services.
- On 24 November 2020, Agency dispatched to its shareholders a notice of AGM to be held on 23 December 2020 and an accompanying Explanatory Statement (**Notice of AGM**). One of the resolutions to be put to shareholders at the AGM related to the approval of the Peters Proposal. The Notice of AGM attached the IER.

Takeovers Panel
Reasons - The Agency Group Australia Limited 01 & 02
[2021] ATP 2

5. On 2 December 2020, Magnolia wrote to Agency indicating that it was considering making a takeover bid for Agency. Magnolia is a company associated with Mr Mitchell Atkins. Mr Atkins was a director of Agency from 1 October 2019 to 8 May 2020. As at 16 September 2020, Mr Atkins, Magnolia and entities associated with Magnolia held voting power of 16.65% in Agency.
6. On 4 December 2020, Magnolia stated (by way of letter to Agency) that it intended to make the Bid. The letter stated, among other things, that *“the Bid provides [Agency] shareholders with a competing proposal to the Peters Proposal discussed in [Agency’s] Notice of AGM...”* and *“Given that the Macquarie Bank facility has already expired and is subject to forbearance conditions expiring on 31 December 2020...Magnolia proposes that it will arrange for the repayment in full of the current Macquarie Bank facility with a replacement facility on the same or terms more favourable to [Agency] than the current Macquarie Bank facility including without the need for individual guarantees from directors or [Agency] shareholders”*. The letter included an indicative timetable which stated that Magnolia’s bidder’s statement would be lodged with ASIC, ASX and Agency in *“Late December 2020”*.
7. On 4 December 2020, Agency responded to Magnolia’s letter and requested that Magnolia provide *“...as a matter of urgency, cogent information as to financial resources available to Magnolia, and the financial arrangements made by Magnolia, with respect to the proposed [Bid]”*.
8. On 6 December 2020, Magnolia responded to Agency’s letter stating, among other things, that *“the disclosure of the funding arrangements in relation to a takeover bid...is a matter for the bidder’s statement”* and *“Magnolia confirms that it made the [letter of 4 December 2020]...having satisfied itself on reasonable grounds that it was complying with its obligations in relation to the [letter of 4 December 2020] itself and would be able to comply with its future obligations”*.
9. On 8 December 2020, Agency made an announcement on ASX regarding Magnolia’s proposal to make the Bid and attached a copy of Magnolia’s letter of 4 December 2020 (**Bid Announcement**).
10. Also on 8 December 2020, Agency made the application in The Agency Group Australia Limited 01 described below.¹
11. On 11 December 2020, Agency dispatched an addendum to the Notice of AGM and a Supplementary IER which had been updated by Nexia following announcement of the Bid.
12. On 16 December 2020, a third party² appointed by Magnolia (**Third Party**) delivered to Magnolia their confidential report setting out an independent opinion as to deficiencies in the IER and Supplementary IER (**Third Party Assessment**). The Third Party Assessment formed part of Magnolia’s application to the Panel.

¹ See paragraphs [21] to [23]

² An expert engaged by Magnolia who did not consent to the release of their identity

Takeovers Panel
Reasons - The Agency Group Australia Limited 01 & 02
[2021] ATP 2

13. On 16 December 2020, Magnolia made the application in The Agency Group Australia Limited 02 described below.³
14. On 22 December 2020, we made the Interim Orders described below⁴ in response to Magnolia's application. On the same day, to comply with the Interim Orders, Agency made an ASX announcement adjourning the AGM to 9am (WST) on Wednesday, 30 December 2020.
15. On 24 December 2020, Nexia produced a document (released on ASX's market announcements platform on 29 December 2020) responding to certain comments of the Third Party in the Third Party Assessment (**Nexia Response**). The Nexia Response was required by the Interim Orders.
16. On 29 December 2020, Agency made a further ASX announcement that the board of directors had resolved to postpone the AGM to 9am (WST) on Monday, 4 January 2021. Agency advised that a further postponement was required to comply with the Interim Orders by ensuring the Nexia Response was released to shareholders no less than 3 days (including at least 1 business day) before the AGM.
17. On 4 January 2021 at 9.32am (AEDT), Magnolia's Bidder's Statement dated 3 January 2021 (**Bidder's Statement**) was released on ASX's market announcements platform. The Bidder's Statement stated the Bid was subject to a number of defeating conditions including the Peters Proposal Condition.
18. Also on 4 January 2021, Agency announced the results of its AGM that all resolutions (including the Peters Proposal Resolutions) passed on a poll. The AGM results triggered the Peters Proposal Condition under the Bidder's Statement.
19. On 19 January 2021, MCL 105 Pty Ltd (a related entity of Magnolia) appointed, or purported to appoint, administrators to Agency under section 436C⁵ to recover the Debt, which Magnolia submitted triggered further defeating conditions under the Bidder's Statement. Magnolia subsequently submitted to the Panel that it had "*considered its attitude to the combination of triggered defeating conditions and...decided that it will rely on the triggered defeating conditions*" and accordingly would not be sending out offers to Agency shareholders.
20. Also on 19 January 2021, Agency commenced the Court Proceedings disputing the appointment or purported appointment of the administrators. Orders were made by Justice Colvin on 20 January 2021 restraining the administrators from acting or purporting to act (the **Court Orders**).

³ See paragraphs [24] to [26]

⁴ See paragraphs [26] to [35]

⁵ Unless otherwise indicated, all statutory references are to the *Corporations Act 2001* (Cth), and all terms used in Chapter 6 or 6C have the meaning given in the relevant chapter (as modified by ASIC)

THE AGENCY GROUP AUSTRALIA LIMITED 01

Declaration sought

21. By application dated 8 December 2020, Agency sought a declaration of unacceptable circumstances.
22. Agency submitted, among other things, that:
 - (a) Magnolia had provided insufficient evidence of having funding, or a reasonable basis to support its assertion that it would be able to perform its obligations relating to the Bid if a substantial proportion of the offers under the Bid were accepted
 - (b) by virtue of the Peters Proposal Condition, shareholders were, in effect, being asked to choose between the Peters Proposal and the Bid and it was therefore important that Magnolia provide Agency shareholders with sufficient information about the Bid, including in particular the source and availability of funding to effect the Bid and
 - (c) as ultimate controller of Magnolia's stake in Agency, Mr Atkins' spouse ought to have filed a substantial shareholder notice in May 2020 at the time she acquired all the issued shares in the ultimate controller of Magnolia and had not done so.

Final orders sought

23. Agency sought final orders including that:
 - (a) by no later than 13 December 2020, Magnolia provide the Panel and Agency with evidence of Magnolia's ability to pay the consideration under the Bid and repay in full Agency's existing Macquarie facility (**Funding Evidence**) failing which there be a declaration of unacceptable circumstances
 - (b) Agency be permitted to provide the Funding Evidence to its shareholders in advance of the AGM
 - (c) Magnolia be prohibited from proceeding with its Bid until it provided Funding Evidence
 - (d) if Magnolia is permitted to proceed with the Bid, Magnolia be required to include in its bidder's statement sufficient evidence regarding the ultimate source of funds, the amount to be given by any lender and the security (if any) given for the funds and
 - (e) Mr Atkins' spouse immediately lodge a substantial shareholder notice.

THE AGENCY GROUP AUSTRALIA LIMITED 02

Declaration sought

24. By application dated 16 December 2020, Magnolia sought a declaration of unacceptable circumstances.
25. Magnolia submitted, among other things, that:

Takeovers Panel
Reasons - The Agency Group Australia Limited 01 & 02
[2021] ATP 2

- (a) the IER and Supplementary IER were deficient
- (b) the Bid Announcement was incorrect and misleading in respect of a number of the reasons that Agency listed for not considering the Bid to be “*a credible ‘Proposal’ or constitute a legitimate alternative to the Peters Proposal*” and
- (c) certain shareholders would receive a material benefit from the Peters Proposal, different from the benefits which shareholders in general would receive and it was unclear whether Agency was proposing that those persons would vote on Resolution 6 at the AGM.

Interim order sought

- 26. Magnolia sought an interim order that Agency adjourn all parts of the AGM concerning the Peters Proposal until a date not less than 14 days after the conclusion of the Panel proceedings.
- 27. On 17 December 2020, after we decided to conduct proceedings on the applications, we sought submissions on whether we should make the interim order requested by Magnolia.
- 28. Agency submitted that “*none of the matters raised by Magnolia are sufficient to justify the adjournment of the parts of the AGM dealing with the Peters Proposal*” in circumstances where the Deed of Forbearance is due to expire imminently⁶ and Agency also has other debts that are due. Agency submitted that it required certainty, as soon as possible, regarding its funding arrangements and noted there were “*practical and financial consequences of deferring the aspects of the meeting dealing with the Peters Proposal*”. Agency further submitted that suspension of the ordinary insolvency process enacted by the *Corporations and Bankruptcy Legislation Amendment (Extending Temporary Relief for Financially Distressed Businesses and Individuals) Regulations 2020* in response to COVID-19 also ended on 31 December 2020 and Agency considered “*this may be a factor in Macquarie’s decision making to date and in the future*” and it must also be a factor in Agency’s decision making.
- 29. ASIC submitted that it “*may be beneficial for the relevant resolutions to be adjourned as proposed. This will enable shareholders to be informed of any updates on the proposed bid (including funding) and enable any informational and/or voting deficiencies (if any) in the current shareholder meeting documents to be addressed*”.
- 30. We requested further information from Agency and Magnolia before deciding to make an interim order.
- 31. In response to our questions:

⁶ Agency’s Notice of AGM disclosed that the Agency group had senior debt with Macquarie which was originally due for repayment on 30 September 2020 and Agency had effectuated an option to renew for a further three months to 31 December 2020. Agency submitted to the Panel there were no extant negotiations with Macquarie seeking a further extension given that the AGM was due to be held on 23 December 2020 seeking shareholder approval of the Peters Proposal

Takeovers Panel

Reasons - The Agency Group Australia Limited 01 & 02 [2021] ATP 2

- (a) Magnolia submitted that “*subject to matters outside its control impeding it from doing so, Magnolia currently believes and intends that it will lodge and serve its bidder’s statement for its bid for Agency shares on or before 31 December 2020*”
 - (b) Agency submitted that it was not willing to voluntarily defer consideration of the Peters Proposal Resolutions to a date on or after 6 January 2021 as:
 - (i) Agency owed Macquarie approximately \$9,300,000 which was required to be reduced to \$5,000,000 by 30 December 2020
 - (ii) Agency had communicated with Macquarie with respect to a possible extension of the Deed of Forbearance and it had not been extended
 - (iii) the existing Macquarie forbearance had been granted to allow Agency time to seek shareholder approval of the Peters Proposal on the basis that the Peters Proposal be put to shareholders before 30 December 2020
 - (iv) unless Agency shareholders approved the Peters Proposal Resolutions the \$1,000,000 debt owing to Peters under the May 2020 Note Agreement (as defined in the Notice of AGM) would be due for repayment on 31 December 2020 and
 - (v) Agency also owed \$750,000 to Kalonda Pty Ltd which was due to be repaid on 31 December 2020 and the facility could not be extended.
32. Before making a decision on the interim order, we had the opportunity to consider Magnolia’s application and submissions received from the parties on the interim order. Our preliminary view on the substantive matters raised by Magnolia’s application was that the Third Party Assessment raised a serious question whether Agency shareholders had sufficient information for any approval under item 7 of section 611 at the AGM to occur in an efficient, competitive and informed market (see further discussion at paragraphs 91-101 below).
33. We were minded to make an interim order that allowed Agency to address the matters outlined in paragraph 32 and proceed with a vote on the Peters Proposal by 30 December 2020, or make other arrangements to ensure shareholders were adequately informed, but otherwise maintain the status quo pending determination of the applications.
34. In formulating the interim orders, we were mindful of the potential for Agency to default under the Macquarie facility.
35. We made orders on 22 December 2020 that, among other things, permitted a vote on the Peters Proposal Resolutions to proceed on or after 30 December 2020 provided Agency made available to Agency shareholders (no less than 3 days beforehand) a response by Nexia to the Third Party Comments (**Interim Orders** – see Annexure A).

Final orders sought

36. Magnolia sought final orders including that:
- (a) Nexia address in a replacement independent expert’s report any defects identified by the Panel in the IER and Supplementary IER

Takeovers Panel
Reasons - The Agency Group Australia Limited 01 & 02
[2021] ATP 2

- (b) Agency send the replacement independent expert's report to Agency shareholders together with a statement identifying the shareholder/s who would be excluded from voting on Resolution 6
- (c) Agency adjourn all parts of the AGM relating to the Peters Proposal to a date not less than 14 days after the dispatch of the replacement IER
- (d) Agency make an ASX announcement retracting and correcting the defects in the Bid Announcement and
- (e) if Resolution 6 is voted on at the AGM, Agency publish a voting exclusion statement in relation to certain shareholders and their associates that Magnolia submitted would obtain a material benefit.

FURTHER INTERIM ORDER REQUESTS

- 37. On 28 December 2020, Magnolia sought a further interim order that no steps be taken to complete the Peters Proposal (or otherwise do any of the matters envisaged by the Peters Proposal Resolutions) before completion of the Panel proceedings.⁷ Magnolia made this request on the basis that the order would *"preserve the current position pending completion of the Panel proceedings, and avoid the difficulty of devising orders dealing with completed transactions and money flows"*.
- 38. In response, Agency submitted that Macquarie was not prepared to extend the Deed of Forbearance beyond 30 December 2020.
- 39. We considered Agency's response, the delay of the AGM to 4 January 2021 and that Agency had provided the Nexia Response.
- 40. We did not consider it necessary to make the further interim order.
- 41. On 4 January 2021, after the AGM results were announced, Magnolia sought a further interim order that Agency not disburse any of the funds received by it in respect of the securities issued by it on 4 January 2021 until further order of the Panel. Magnolia made this request on the basis that the rights of third parties *"may interfere with potential Panel orders and make more difficult the crafting of such orders in a way that does not unfairly prejudice those third parties"*.
- 42. In response to the request from Magnolia, Agency submitted on 5 January 2021 that *"given that a significant portion of the [Peters] funds have now been disbursed to third parties, any interim order of the type sought by Magnolia would be of no utility"*. Agency submitted that:
 - (a) *"the amount of \$3.715m was yesterday paid directly to Macquarie..."* being the amount required to be paid under the Deed of Forbearance with Macquarie that expired on 30 December 2020

⁷ This request was made by Magnolia notwithstanding that there may be affirmative votes on the Peters Proposal Resolutions at the AGM prior to the completion of the proceedings

Takeovers Panel
Reasons - The Agency Group Australia Limited 01 & 02
[2021] ATP 2

- (b) *“Approximately \$752,000 [was paid] to Kalonda Pty Ltd to repay the loan that fell due on 31 December 2020” and it was necessary to pay that amount as soon as possible given the debt was already in default and*
- (c) *it intended to pay a “...further approximately \$2.228 million to the ATO in respect of BAS and GST. Parts of that amount have been overdue for up to 9 months, and have been accumulating month-by-month”.*

43. We ultimately decided not to make the interim order. In making the decision, we considered the relevant factors for making an interim order which are outlined in paragraphs 12 and 13 of *Guidance Note 4: Remedies General*. Among other things, we were of the view that, if unacceptable circumstances were established, there would be scope to address them by final orders.

Undertaking in lieu of interim order

44. On 13 January 2021, we expressed a preliminary view to the parties that we considered there to be:
- (a) information deficiencies in the Bidder’s Statement and that we were considering making an interim order preventing dispatch of the Bidder’s Statement to maintain the status quo while we continued to consider whether to make a declaration and orders and
 - (b) no unacceptable circumstances with respect to Magnolia’s application.
45. In its submissions on the interim order, Magnolia recognised that the passing of the Peters Proposal Resolutions at the AGM had triggered the Peters Proposal Condition in the Bidder’s Statement. At this stage, Magnolia had not made a decision whether to withdraw its Bid.
46. Magnolia further submitted that *“the only situation in which Magnolia will not be relying on the triggering of the [Peters Proposal Condition] will be if Magnolia decides to seek review under s657EA of the Panel’s decision concerning Magnolia’s [application] and the review Panel takes a different view from the Panel”.*
47. Magnolia proffered an undertaking to *“make a public announcement setting out its position, specifically that no offers will be dispatched based on the Bidder’s Statement except in the circumstances that 1. Magnolia decides to seek review under s657EA of the Panel’s decision concerning [the matters raised in the Magnolia application]; and 2. The review Panel takes a different view from the Panel (which any review Panel can ensure is the case through interim orders or undertakings from Magnolia)...after the conclusion of these proceedings or at an earlier time requested by the Panel”.*
48. On the basis of the above, we accepted an undertaking by way of e-mail in lieu of an interim order, to the effect that Magnolia would not dispatch its Bidder’s Statement to Agency shareholders before Thursday, 21 January 2021. We considered that this undertaking was sufficient to maintain the status quo while we continued to consider the matter.

DISCUSSION

Decision to conduct proceedings

The Agency Group Australia Limited 01

49. Agency submitted in its application that Agency shareholders were, in effect, being asked to choose between the Peters Proposal and the Bid and this necessitated that Magnolia provide sufficient information to shareholders about the Bid, including the source and availability of funding, to effect the Bid. Agency submitted that Magnolia's prior assertions (in correspondence from Magnolia's legal representatives) that it was not required to provide information about financial capacity until a bidder's statement was lodged did "*...not bear scrutiny in circumstances where: (i) the AGM is due to be held on 23 December 2020, and shareholders asked to make the choice [between the Peters Proposal and the Bid]... (iii) Magnolia's bid has now been revealed in the media... and (v) timely disclosure by a bidder as to funding is an important aspect of an efficient, competitive and informed market...*"
50. We received a preliminary submission from Magnolia in response to Agency's application. Magnolia submitted that in order for Agency's application to correctly raise issues pertaining to the adequacy of funding, it was essential "*there be evidence on which it can be inferred that the announcement was made recklessly as to whether or not the proposed bidder had the funding capacity*".
51. Magnolia further submitted that the relevant time for the adequacy of funding enquiry is when a bidder's statement is lodged with ASIC.
52. Magnolia also submitted that consideration of the Peters Proposal Resolutions could be "*...adjourned to a later time when [information about Magnolia's capacity to fund] will be available to all shareholders...*" and that there was no "*...immediate danger that Macquarie Bank would take steps to recover its lending and enforce its security nor that the Peters Proposal would be lost... if the meeting were delayed...*"
53. Section 631(2)(b) provides that a person must not publicly propose a takeover bid if they are reckless as to whether they will be able to fulfil their obligations under the bid if a substantial proportion of the offers under the bid are accepted.
54. Magnolia submitted that it was far from lacking financial resources and "*should be presumed to have only made its announcement after considering section 631 and the obligations that it imposes on a proposed bidder*". Agency, on the other hand, submitted that "*Magnolia's apparent financial limitations... [rendered] any such presumption inapplicable*".
55. Timely disclosure by a bidder of its funding arrangements is an important aspect of an efficient, competitive and informed market.⁸ What that requires depends on the circumstances. In the circumstances of this matter where, as Magnolia itself had pointed out to Agency shareholders,⁹ the Bid was a competing proposal to one that

⁸ Guidance Note 14: *Funding Arrangements* at [20]

⁹ See paragraph [6]

Takeovers Panel
Reasons - The Agency Group Australia Limited 01 & 02
[2021] ATP 2

shareholders would shortly need to vote on, we consider that it was especially important for this disclosure to be clear and timely.

56. We considered Agency's application and Magnolia's preliminary submission and were concerned that Agency shareholders did not have sufficient information about Magnolia's capacity to fund its bid. We considered this information may be relevant to Agency shareholders in making an informed choice in voting for or against the Peters Proposal Resolutions.
57. We decided to conduct proceedings on those matters.

The Agency Group Australia Limited 02

58. We received Magnolia's application after we had communicated to the parties that we were minded to conduct proceedings on Agency's application.
59. Our preliminary view on the matters raised by Magnolia's application was that the Third Party Assessment raised a serious question whether Agency shareholders had sufficient information for any approval under item 7 of section 611 at the AGM to occur in an efficient, competitive and informed market.
60. We decided to conduct proceedings in relation to Magnolia's application.
61. We decided to hear each of the matters together and made a direction pursuant to Regulation 16 of the *Australian Securities and Investments Commission Regulations 2001* (Cth).
62. We have considered all the material, but address only specifically that part of the material we consider necessary to explain our reasoning.

Bid funding

63. In response to a brief from the Panel, Magnolia submitted that it was prepared to make a statement that could be disclosed to Agency shareholders that "*Magnolia Group, Mr Atkins and [his spouse] have net assets of around A\$40 million which are available to meet its obligations (either directly or through security for financing facilities) in respect of its announced takeover bid for shares in Agency...in addition, Magnolia confirms that it is in advanced negotiations with several potential financiers to fund both its obligations under its announced bid and in respect of the refinancing of Agency*".
64. Consideration of whether the statement in paragraph 63 was sufficient was overtaken by Magnolia releasing its Bidder's Statement.
65. We considered that whether there was adequate disclosure in the Bidder's Statement of Magnolia's ability to fund the Bid was a matter logically connected to the factual matters and other issues raised in Agency's original application.¹⁰

¹⁰ *Brisbane Markets Limited* [2016] ATP 3 at [28]. See also *Breakfree Limited 04(R)* [2003] ATP 42 at [47]: "...we consider that the Panel is entirely justified in considering all the factual matters and other issues that are raised by the application and all facts and issues that are logically connected with those factual matters and other issues". Also see discussion in *Mungana Goldmines Limited 01R* [2015] ATP 7 at [29] - [49]

Takeovers Panel
Reasons - The Agency Group Australia Limited 01 & 02
[2021] ATP 2

66. We express no view on whether there was a contravention of section 631(2) by Magnolia.

Cash Consideration Statements and compliance with section 636(3)

67. The Bidder's Statement, amongst other things:

- (a) stated that the total amount of consideration Magnolia would be required to provide if all offers were accepted was \$9,967,656.56
- (b) indicated that Magnolia had access to \$10,000,000 in cash to pay the consideration from various sources including:
 - (i) Mr Atkins having \$7.5 million in a bank account "*which he has undertaken to make available*" and \$3.5 million in liquid listed equities (excluding Agency shares) "*which can be readily sold*" if required
 - (ii) net assets of Mr Atkins and his spouse (**Controllers**), the net asset position of whom "*has been verified by a qualified accountant*", including net assets of no less than \$20 million (including repayment of liabilities owed to them by Magnolia and its related bodies corporate (**Magnolia Group**)) – the Controllers having "*agreed with Magnolia to support it to perform its obligations under the Bid*" and
 - (iii) net assets of Magnolia Group of \$40 million (as at 31 December 2020) which had "*been verified by a qualified accountant*" and Magnolia Group had "*undertaken to make available to Magnolia*"(collectively the **Cash Consideration Statements**) and
- (c) stated that Magnolia had also obtained "*not less than \$18 million in commitments from various wholesale investors known to Magnolia*" (**Wholesale Investor Commitments**).

68. Agency submitted that the Cash Consideration Statements did not comply with section 636(3) because, among other things:

- (a) there was no statement made that the Controllers consented to the inclusion of the statements attributed to them regarding their ability and willingness to provide funding
- (b) references were made to the Controllers' assets and the Magnolia Group's assets having been "*verified by a qualified accountant*" but no mention was made of the identity of the accountant, nor that the accountant consented to the inclusion of that statement and
- (c) Magnolia asserted that Magnolia Group "*has undertaken to make [funds] available to Magnolia*" but no details were provided of the terms of the undertaking.

69. Agency considered, among other things, that the "*Bidder's Statement does not indicate that any binding commitments exist between Magnolia...and the wider Magnolia Group*" and no disclosure has been made as to the "*...(ii) the terms of intra-group funding arrangements...*"

Takeovers Panel

Reasons - The Agency Group Australia Limited 01 & 02 [2021] ATP 2

70. Magnolia submitted in rebuttals that section 4.3 of the Bidder's Statement established that *"Mr Atkins has cash and listed securities (other than [Agency] shares) which are more than sufficient for this purpose, and that he and [his spouse] have undertaken to Magnolia to make those funds available"*. Magnolia further submitted that *"all the rest of the disclosures in Section 4.3 and the disclosure in Sections 4.4 and 4.5 are relevant only to show that there are other assets which might be used either for provision of the cash consideration or to fund the refinancing of [Agency's] banking facilities"*.¹¹
71. In addition, Magnolia submitted that Agency *"fundamentally misunderstands the purpose and operation of s636(3)...if the bidder in its bidder's statement uses the name of another party to an arrangement to which the bidder is party as part of identifying that arrangement, this is not the attribution of any statement in any way to the other party"* and that Agency's submissions *"proceed on the basis apparently that whenever anyone is mentioned, their consent to being mentioned must be obtained. This goes well beyond both the words of s636(3) and its purpose"*.
72. Section 636(3) states that a bidder's statement may only include, or be accompanied by, a statement by a person, or a statement said in the bidder's statement to be based on a statement by a person, if:
- (a) the person has consented to the statement being included in the bidder's statement, or accompanying it, in the form and context in which it is included
 - (b) the bidder's statement states that the person has given this consent and
 - (c) the person has not withdrawn this consent before the bidder's statement is lodged with ASIC.
73. ASIC Regulatory Guide 55 (to which ASIC refers in its guidance regarding takeover documents¹²) states that a person's consent is needed only if a disclosure document holds out that a statement was 'by' or 'made by' a person, as opposed to where a person's views are used *"without express or implied attribution"*. However, RG55 goes on to indicate that the consent requirements apply where a view is attributed to an unnamed person.¹³
74. The Bidder's Statement does not state that Mr Atkins, his spouse, related bodies corporate of Magnolia or the referenced *"qualified accountant[s]"* have given consents in accordance with section 636(3) in respect of the Cash Consideration Statements.

¹¹ Section 4.3 of the Bidder's Statement is titled 'Funding of Cash Consideration'. Section 4.4 is titled 'AU1's Existing Debt Funders' and discloses that Magnolia has spoken with a number of senior funders that have existing arrangements in place with Agency including Macquarie, Kalonda Pty Ltd and Peters. The purpose of these discussions was to discuss the funders continued interest in providing funding for Agency or whether the funder would be willing to assign their rights under the funding arrangements to Agency. Section 4.5 is titled 'Funding of Macquarie's Facility Replacement' and discloses that Magnolia has spoken with a number of alternative senior funders to replace the Macquarie facility.

¹² ASIC Regulatory Guide 9 at [9.482]

¹³ ASIC Regulatory Guide 55 at [55.20]

Takeovers Panel
Reasons - The Agency Group Australia Limited 01 & 02
[2021] ATP 2

75. The Panel's guidance note requires that a bidder's statement disclose funding arrangements.¹⁴ If funding is by or through the bidder's corporate group, it should be binding and fully documented before the bidder's statement is given to ASIC.¹⁵ In addition, a bidder should consider making disclosure if the funder is a group member in respect of the terms of the intra-group arrangements.¹⁶
76. We were concerned about the information deficiencies in the Bidder's Statement and asked the parties additional questions. In response, Magnolia submitted that "*it is artificial for agreements and undertakings between [Mr Atkins] and Magnolia or between Magnolia and other members of the Magnolia Group which are disclosed in the Bidder's Statement to be documented or the subject of consent...the requirement for documentation and/or consent is unnecessary where the same individual is the party or the only controlling mind and will of all other relevant parties*". We note that, while the Bidder's Statement indicated that Mr Atkins is the sole Director of Magnolia and one of its Controllers, it did not clearly state that he is Magnolia's "*only controlling mind and will*".
77. ASIC submitted in its rebuttals that "*even in circumstances where there are commonality of directorships or ownership, ASIC submits that an entity proposing a takeover bid should take appropriate steps to provide it with a reasonable basis for bid funding...this would generally include the bidder entity entering into documentation with binding and enforceable commitments*".¹⁷ ASIC does not consider Magnolia's situation warrants a departure from this general approach". Agency similarly submitted that "*even where financial support is offered by others within a corporate group, the disclosure requirements apply*".
78. We agree with ASIC and Agency's submissions. In our view, this case demanded a high standard of disclosure given that:
- (a) Agency had promptly raised questions about Magnolia's financial resources¹⁸
 - (b) a shareholder vote to decide between competing proposals was imminent
 - (c) the Panel had made Interim Orders requiring further disclosure by Agency and
 - (d) the Interim Orders had the effect of giving Magnolia more time than Magnolia submitted it would require¹⁹ to lodge its Bidder's Statement.
79. We consider that proper assessment of Magnolia's proposal has been, and continues to be, inhibited by Magnolia's failure to indicate clearly that persons providing cash consideration:
- (a) were appropriately bound to do so (due to Magnolia's failure to indicate whether the undertakings and agreements referred to in the Cash Consideration Statements have been properly documented) or

¹⁴ Guidance Note 14: *Funding Arrangements* at [20] to [22]

¹⁵ Guidance Note 14: *Funding Arrangements* at [13]

¹⁶ Guidance Note 14: *Funding Arrangements* at [21b]

¹⁷ Guidance Note 14: *Funding Arrangements* at [11], [13] and [18]-[19]

¹⁸ See paragraph [7]

¹⁹ See paragraph [6]

Takeovers Panel
Reasons - The Agency Group Australia Limited 01 & 02
[2021] ATP 2

- (b) had otherwise accepted responsibility, and liability,²⁰ for statements regarding their intention to provide funding (due to Magnolia's failure to obtain and disclose consents in accordance with section 636(3)).

80. We consider unacceptable circumstances arise on this ground.²¹

Wholesale Investor Commitments

81. Section 636(1)(f) requires bidders to disclose details of:

- (a) the cash amounts (if any) held by the bidder for payment of the consideration
- (b) the identity of any other person who is to provide, directly or indirectly, cash consideration from that person's own funds and
- (c) any arrangements under which cash will be provided by a person referred to in sub-paragraph (b).

82. ASIC Regulatory Guide 9 at [9.369] specifies that a bidder should ensure that the bidder's statement "*if some or all of the cash consideration is not sourced from the bidder's funds – identifies the person or persons providing the funds and provides details of the arrangements under which those funds are to be provided*".

83. Agency submitted that "*Magnolia has failed to comply with the requirements of s636(1)(f) by failing to identify each alleged source of cash consideration Magnolia proposes to offer under the proposed bid*". Agency further submitted that the "*various wholesale investors*" ought to have been specifically identified and the details of the "*commitments*" should have been disclosed.

84. ASIC made similar submissions.

85. Magnolia submitted that once a bidder has disclosed in its bidder's statement a sufficient source of funding for 100% of the cash consideration that it might be required to provide it has "*finished with section 636(1)(f) so that any further information provided by the bidder on its financial affairs should be regarded as additional information provided under section 636(1)(m)*".

86. Magnolia submitted that details of the Wholesale Investor Commitments were provided in the Bidder's Statement to "*allow shareholders to form a view as to the capacity of the bidder to give effect to its intentions*". Magnolia accepted that "*the Panel might consider that the presentation of [the information] suggests that it is provided in relation to the source of the consideration for the bid*". Magnolia considered that its proposed undertaking (see paragraph 47) was "*intended to encompass amendment of these disclosures to allow the distinction between the source of the bid consideration and the general financial strength of Magnolia to be reflected more clearly*".

²⁰ See section 670A(1)

²¹ We did not consider if there were any deficiencies in sections 4.4 and 4.5 of the Bidder's Statement on the basis that these sections did not disclose sources of cash consideration for the purposes of section 636(1)(f) or provide evidence of Magnolia's ability to fund the Bid, and therefore did not raise issues sufficiently connected to the applications.

Takeovers Panel
Reasons - The Agency Group Australia Limited 01 & 02
[2021] ATP 2

87. We consider that the Bidder's Statement implies that the Wholesale Investor Commitments are a source of funding to pay the Bid consideration which we consider may cause confusion for Agency shareholders when assessing the Bid.
88. We consider this unacceptable in circumstances where Magnolia submitted to us that the commitments were provided to give evidence of Magnolia's broader financial standing.
89. We consider, among other things, that proper assessment of Magnolia's proposal has been, and continues to be, inhibited by a failure to indicate clearly which sources of funding are to be used to pay the Bid consideration.
90. If the Wholesale Investor Commitments were intended to be a source of cash consideration to fund the Bid, it may have been necessary for Magnolia to disclose the identity of the "*various wholesale investors*"²² and details of appropriate documentation entered into with these investors.

IER and Supplementary IER

91. Magnolia submitted that given the IER was prepared for the purposes of shareholder approval of the Peters Proposal under section 611 item 7 "*it [was] appropriate for the Panel to consider whether the IER has defects in it that should be rectified*". Magnolia submitted that the Third Party Assessment had identified a number of defects in the IER and that "*shareholders [need to] have all the information...to make a proper assessment of the effect of the Peters Proposal on their shares, since this is the purpose of the IER being obtained and provided to them*". Magnolia also considered that the Supplementary IER contained the same defects as the IER.
92. Agency submitted that the Third Party Assessment did not "*state that the [IER and Supplementary IER] should not be relied upon*".
93. We made the Interim Orders (see paragraph 35) as we were concerned that the Third Party Assessment included issues that, if not addressed or refuted, raised a serious question whether Agency shareholders had sufficient information for the vote on Resolution 6 at the AGM to occur in an efficient, competitive and informed market.
94. In response to the Interim Orders, Agency provided the Nexia Response.
95. Magnolia subsequently provided to the Panel a further confidential report addressed to Magnolia which considered whether the Nexia Response adequately addressed or corrected the issues raised in the Interim Orders or the Third Party Assessment (**Second Third Party Assessment**). Magnolia submitted that "*the [Third Party] considers that the Nexia Response does not respond adequately to the issues raised in the Panel's Interim Orders*". Magnolia further submitted that based on this material, "*the shareholders of [Agency] did not receive an independent expert report of the kind and standard envisaged by applicable ASIC regulatory guidance and that, lacking that information, unacceptable circumstances arise in respect of all the Peters Proposal*

²² See ASIC Regulatory Guide RG 9 at [9.384] for discussion on this requirement in the context of section 636(1)(f)

Takeovers Panel
Reasons - The Agency Group Australia Limited 01 & 02
[2021] ATP 2

Resolutions, with respect to which the [IER] and Nexia Response material was supposed to inform [Agency] shareholders”.

96. Agency submitted that *“it is clear from the shareholders’ votes that shareholders favoured the Peters Proposal (and the fact that no votes were changed following the Nexia Response); indeed the only effect it had on voting was to prompt one additional shareholder to submit a proxy in favour of the Peters Proposal Resolutions”.* Agency further submitted that *“no shareholders who had submitted proxies attended the AGM in person to change their vote”.*
97. Magnolia submitted in rebuttals that *“it is not surprising that there was no substantial change to the shareholder’s votes in circumstances where at best, shareholders had only 3 business days to consider the material and lodge any changes to the proxies at a time of year where it is likely most shareholders were on holidays”.*
98. In *Mungana Goldmines Limited 01R*, the Panel considered its role in relation to the correctness of an independent expert’s report and noted the high threshold set for the Panel to question the correctness of an expert report.²³
99. We considered the IER, Supplementary IER, the Third Party Assessment, the Nexia Response and the Second Third Party Assessment. We consider that the matters raised by Magnolia (through the Third Party Assessment) in relation to the IER and Supplementary IER are not likely to go beyond matters of judgement in respect of which experts might reasonably disagree.
100. In compliance with the Interim Orders, the Nexia Response was uploaded to Agency’s website on 24 December 2020 (announced to ASX on 29 December 2020) and the AGM was further adjourned to 4 January 2021 to allow for the required number of days between the announcement of the Nexia Response and the AGM. We consider that the provision of the Nexia Response to Agency shareholders more than three business days (five calendar days) before the AGM afforded Agency shareholders an adequate opportunity to review the Nexia Response.
101. Given the provision of the Nexia Response, we consider shareholders had sufficient information to enable them to assess the merits of the Peters Proposal. We are not satisfied based on the material provided that it is appropriate to declare that this ground amounts to unacceptable circumstances.

Voting exclusions

102. Magnolia submitted that there were *“shareholders who [would] receive a material benefit from the Peters Proposal, different from the benefits which shareholders in general [would] receive”.* Section 8.3(g) of the Explanatory Statement in the Notice of AGM stated that the Guarantee Shareholders had each provided a joint and several guarantee to Macquarie in relation to the debt facility, that the funds received from Peters were intended to be applied towards reducing the debt facility and *“there [would] ultimately be a corresponding reduction in their [sic] guarantees provided by the Guarantee Shareholders”.* Magnolia further submitted that this provided the Guarantee

²³ [2015] ATP 7 at [50], citing *Minemakers Limited 02R* [2012] ATP 16 at [10]-[11]. See also *Tranzact Financial Services Limited* [2014] ATP 3 at [29]

Takeovers Panel
Reasons - The Agency Group Australia Limited 01 & 02
[2021] ATP 2

Shareholders with a real interest in the outcome of the Peters Proposal such that those shareholders should be regarded as “associates” of Peters. Magnolia considered that the total number of shares that may be affected by those interests was no less than approximately 46% of Agency’s issued capital.

103. Agency submitted that “*the fact that certain entities may receive a tangential benefit if the Peters Proposal is accepted by shareholders does not make them “associates” of Peters” and “Magnolia has also contacted the ASX to raise this concern; ASX have not indicated that they have any difficulty with the [Guarantee Shareholders] voting”.*
104. Magnolia further submitted that in the process of preparing the Bidder’s Statement it had “*identified other publicly available material which identifies previous business associations and coordinated actions involving Peters and Mr Peters and the controllers of the Guarantee Shareholders”.* In response, Agency submitted that it had “*sought legal advice on the matters raised by Magnolia in relation to the Guarantee Shareholders. There was disclosure of the Guarantee Shareholders issue in the notice of meeting; it was also addressed in the [IER]”.*
105. It is a condition of approval under section 611 item 7(a)(i) that no votes are cast in favour of any resolution by the person proposing to make an acquisition and their associates.²⁴ The mechanism is designed to enable the acquisition of control over voting shares provided the acquisition is approved by “*disinterested shareholders”.*²⁵
106. We were persuaded by Agency’s submissions that it had “*sought legal advice on the matters raised by Magnolia in relation to the Guarantee Shareholders”.* A copy of this legal advice was provided to us.
107. We are not satisfied that the reduction in the guarantees provided by the Guarantee Shareholders gives them a sufficient interest in the outcome of the Peters Proposal such as to make them associates in the manner submitted by Magnolia.
108. We also are not satisfied that the “*previous business associations and coordinated actions”* between Peters, Mr Robert Peters²⁶ and the controllers of the Guarantee Shareholders establish that they are associates.
109. We do not consider that the material benefit the Guarantee Shareholders stood to obtain from the Peters Proposal was so exceptional to justify excluding those shareholders from voting on the Peters Proposal Resolutions.²⁷
110. We are not satisfied on the basis of the material before us that it was appropriate to declare that the circumstances surrounding the issue of the convertible notes and

²⁴ See ASIC Regulatory Guide RG 74 at [74.48]-[74.50]

²⁵ *Colonial First State Property Trust Group* [2002] ATP 15 at [43]

²⁶ Mr Peters is a director and controller of Peters

²⁷ In response to a request from the Panel, Agency provided the votes of the Guarantee Shareholders and each of their associates on each of the Peters Proposal Resolutions. It appears based on the record of votes cast, that even if all the shareholders whose votes Magnolia submitted ought to be excluded were disregarded (and Magnolia’s votes counted), the Peters Proposal Resolutions would still have passed

Takeovers Panel
Reasons - The Agency Group Australia Limited 01 & 02
[2021] ATP 2

options to Peters were unacceptable, including disclosure and voting of Guarantee Shareholders.

Other matters

111. In respect of Agency's argument that Mr Atkins' spouse ought to have filed a substantial shareholder notice in May 2020 (see paragraph 22(c)), an updated substantial shareholder notice was lodged by Magnolia on 18 December 2020. Accordingly, we did not need to consider this issue any further.

DECISION

Declaration

112. Given the Subsequent Events, Magnolia suggested that the Panel should suspend consideration of the matter pending the outcome of the Court Proceedings. In its rebuttals, Agency submitted that the Court Proceedings had no bearing on the Panel proceedings and there was no reason for the Panel to await the outcome of the Court Proceedings.
113. We agree with Agency. We did not consider it necessary to delay our decision until the conclusion of the Court Proceedings.
114. Magnolia submitted that a declaration was unnecessary because it was prepared to provide undertakings (the terms of which are discussed in paragraphs 47 and 119) that would address any unacceptable circumstances. While we acknowledge the preparedness of Magnolia to provide undertakings, we did not consider it appropriate to accept the undertakings in lieu of making a declaration because (amongst other things):
- (a) the undertakings were offered at a point in the proceedings where no advantage could be gained from a cost or time point of view²⁸
 - (b) it was in the public interest for the declaration to be made so potential bidders are aware of how the Panel will treat similar circumstances in the future²⁹
 - (c) a declaration was more appropriate given our decisions in paragraphs 79 and 89³⁰ and
 - (d) a declaration enabled us to make orders which we felt were appropriate in the circumstances.
115. It appears to us that the circumstances are unacceptable:
- (a) having regard to the effect that the Panel is satisfied the circumstances have had, are having, will have or are likely to have on:
 - (i) the control, or potential control, of Agency or

²⁸ *Resource Generation Limited* [2015] ATP 12 at [137]. See Guidance Note 4: *Remedies General* at [9], fn 8 and Procedural Rule 7.1.1 at note 1

²⁹ Guidance Note 4: *Remedies General* at [40]. See also *Summit Resources Limited* [2007] ATP 9; *Mildura Co-operative Fruit Company Limited* [2004] ATP 5 at [96]

³⁰ *Yowie Group Limited 01 & 02* [2019] ATP 10 at [73]

Takeovers Panel
Reasons - The Agency Group Australia Limited 01 & 02
[2021] ATP 2

- (ii) the acquisition, or proposed acquisition, by a person of a substantial interest in Agency
- (b) in the alternative, having regard to the purposes of Chapter 6 set out in section 602
- (c) in the further alternative, because they gave rise to, or will or are likely to give rise to, a contravention of a provision of Chapter 6.

116. We made the declaration set out in Annexure B and consider that it is not against the public interest to do so. We had regard to the matters in section 657A(3).

Orders

117. Following the declaration, we made the final orders set out in Annexure C which, among other things, restrain Magnolia from dispatching its Bidder's Statement without the Panel's consent. The Panel is empowered to make 'any order'³¹ if 4 tests are met:

- (a) it has made a declaration under section 657A. This was done on 29 January 2021.
- (b) it must not make an order if it is satisfied that the order would unfairly prejudice any person. We are satisfied that our orders do not unfairly prejudice any person.
- (c) it gives any person to whom the proposed order would be directed, the parties and ASIC an opportunity to make submissions. This was done on 13 January 2021 and 21 January 2021.
- (d) it considers the orders appropriate to either protect the rights and interests of persons affected by the unacceptable circumstances, or any other rights or interests of those persons. The orders do this by requiring Magnolia to obtain the Panel's consent to the dispatch of its Bidder's Statement.

118. On 13 January 2021, we provided draft orders to the parties and ASIC. These draft orders differed from the final orders, and provided that (in effect):

- (a) Magnolia was restrained from dispatching its Bidder's Statement without Panel consent until it had lodged with ASIC and ASX and served on Agency a replacement bidder's statement which in relation to each potential source of cash consideration identified, either provided:
 - (i) details of appropriate documentation in accordance with Guidance Note 14: Funding Arrangements or
 - (ii) equivalent details of undocumented agreements with, and consents in accordance with section 636(3) from, each person agreeing to provide consideration and

³¹ Including a remedial order but other than an order requiring a person to comply with a provision of Chapters 6, 6A, 6B or 6C

Takeovers Panel
Reasons - The Agency Group Australia Limited 01 & 02
[2021] ATP 2

- (b) the replacement bidder's statement was required to comply with section 636, Guidance Note 14: Funding Arrangements and applicable regulatory guides.
119. Magnolia submitted that we should not make the orders. It offered to provide an undertaking in the terms of the orders described in paragraph 118.
120. In light of the Subsequent Events (in particular, Magnolia's statement that it would not be dispatching its Bidder's Statement to Agency shareholders), we asked the parties what orders (if any) were appropriate in such circumstances.
121. Magnolia continued to submit that no final orders should be made.
122. Agency submitted that the matter should be referred to ASIC to investigate whether there had been a contravention of section 631 and Magnolia should pay Agency's costs of the applications. Agency considered that although, strictly speaking, the withdrawal of the Bid may of itself remedy the unacceptable circumstances, these orders were necessary to "*show the Panel's disapprobation of the circumstances that have arisen*".
123. In its rebuttals Magnolia submitted that:
- (a) ASIC is a party to all Panel proceedings and has access to all the material before the Panel. Accordingly, ASIC has the relevant information available to it to decide whether or not it wishes to conduct an investigation.
 - (b) Agency is at least an equal contributor to any costs incurred by the parties.
124. We considered that there was utility in making orders, notwithstanding the Subsequent Events and the proffering of undertakings³² as:
- (a) Magnolia only proffered the undertakings very late in the proceedings³³
 - (b) Magnolia later submitted that it was "*bearing the costs of preparing an updated bidder's statement*" and we were concerned to ensure that Magnolia did not dispatch its Bidder's Statement with information deficiencies and
 - (c) orders can be varied if the original orders do not satisfactorily address our concerns, on the other hand, an undertaking cannot be varied unless the person giving the undertaking agrees to do so.³⁴
125. We made orders that require Magnolia to obtain the Panel's consent to dispatch its Bidder's Statement and give the parties and ASIC the liberty to apply for further orders in relation to the orders.

Costs

126. We asked the parties if the Panel should make any orders in relation to costs.
127. Agency sought an order that Magnolia pay its costs for the proceedings because, among other things:

³² See *Brisbane Markets Limited* [2016] ATP 3 at [108]-[111] and *Northern Iron Limited* [2014] ATP 11

³³ See Guidance Note 4: *Remedies General* at [39]

³⁴ *Brisbane Markets Limited* [2016] ATP 3 at [111]

Takeovers Panel
Reasons - The Agency Group Australia Limited 01 & 02
[2021] ATP 2

- (a) had proper evidence existed of Magnolia's capacity to fund the Bid, there would have been no need for Agency to institute the proceedings
- (b) Magnolia made its own application which had the effect of forcing the delay of the AGM, with resultant financial risk to Agency as well as delaying and prolonging the Panel proceedings and
- (c) the Bidder's Statement included defeating conditions that were, in effect, within Magnolia's own control and Magnolia then relied on them to withdraw the Bid after learning that the Panel intended to make a declaration of unacceptable circumstances.

128. Magnolia submitted that the Panel should not make any orders in relation to costs as, among other things:

- (a) costs orders are the exception and not the rule³⁵
- (b) a party is entitled to make, or resist, an application once without exposure to a costs order, provided it presents a case of reasonable merit in a businesslike way³⁶
- (c) there is no suggestion that Magnolia's case lacks reasonable merit³⁷
- (d) Magnolia conducted itself in a businesslike way throughout the proceedings
- (e) Magnolia did not reargue any issue which was determined by the Panel and
- (f) Magnolia put all relevant material before the Panel.

129. We were concerned by Magnolia's action in appointing or purporting to appoint administrators to Agency in the days after Magnolia learned of the Panel's intention to make a declaration of unacceptable circumstances. We note that there was only very vague disclosure of the Demands for Payment included in the Bidder's Statement³⁸ and the disclosure included no indication that the Demands for Payment had previously been made by Magnolia or that MCL 105 Pty Ltd had the right to appoint administrators on the basis of the Debt (thereby self-triggering one of the defeating conditions to the Bid).

130. These issues gave us pause. However, ultimately we found Magnolia's submissions on costs persuasive and did not consider it necessary to make a costs order. In making our decision, we had regard to the factors set out in paragraph 29 of Guidance Note 4: Remedies General.

John O'Sullivan
President of the sitting Panel
Decision dated 29 January 2021
Reasons given to parties 18 February 2021
Reasons published 23 February 2021

³⁵ Guidance Note 4: *Remedies General* at [28(c)]. See also *Northern Iron Limited* [2014] ATP 11 at [64]

³⁶ Guidance Note 4: *Remedies General* at [28(d)]

³⁷ Guidance Note 4: *Remedies General* at [29(3)]. See also *Taipan Resources NL 11* [2001] ATP 16 at [100]-[101]

³⁸ See section 1.7.12 of the Bidder's Statement

Takeovers Panel
Reasons - The Agency Group Australia Limited 01 & 02
[2021] ATP 2

Advisers

Party	Advisers
Agency	Tottle Partners
Magnolia	Blackwattle Legal



Australian Government

Takeovers Panel

Annexure A

**CORPORATIONS ACT
SECTION 657E
INTERIM ORDERS**

THE AGENCY GROUP AUSTRALIA LIMITED 01 & 02

The Agency Group Australia Limited (**Agency**) made an application to the Panel dated 8 December 2020 and Magnolia Equities III Pty Ltd (**Magnolia**) made an application to the Panel dated 16 December 2020, both in relation to the affairs of Agency.³⁹

The Panel ORDERS:

1. Subject to paragraph 2, Agency must defer consideration of the Peters Proposal Resolutions until a date after the Panel has made a determination in respect of *The Agency Group Australia 01 & 02*.
2. The Peters Proposal Resolutions may be considered at a resumption of the AGM on a date no earlier than Wednesday, 30 December 2020, provided that Agency:
 - (a) in an announcement to ASX no less than 3 days (including at least 1 business day) before the Resumption, makes available to Agency shareholders a response by Nexia to the Third Party Comments (submitted by Magnolia in connection with its application) that responds specifically to each comment, and
 - (b) keeps for 3 months a record of any votes cast on the Peters Proposal Resolutions by each Guarantee Shareholder, or associate of a Guarantee Shareholder, and how those votes were cast, and provides the same to the Panel on request.
3. Agency must make an announcement to ASX as soon as reasonably practicable explaining the effect of these orders. If consideration of the Peters Proposal Resolutions is deferred under paragraph 2, the announcement must:
 - (a) specify the date to which it is deferred and
 - (b) clearly and prominently inform Agency shareholders of their right to submit a new proxy form not later than 48 hours before commencement of the Resumption of the AGM.

³⁹ The matters are being heard together under a direction of the Panel

Takeovers Panel
Reasons - The Agency Group Australia Limited 01 & 02
[2021] ATP 2

4. These interim orders have effect until the earliest of:
- (i) further order of the Panel
 - (ii) the determination of the proceedings and
 - (iii) 2 months from the date of these interim orders.

5. In these orders the following terms apply:

AGM	the Annual General Meeting of Agency convened by the Notice of AGM
Guarantee Shareholder	has the meaning given in paragraph 8.3(a) of the Notice of AGM
Independent Expert Report	the Independent Expert's Report and Financial Services Guide produced by Nexia dated 23 November 2020
Nexia	Nexia Perth Corporate Finance Pty Ltd
Notice of AGM	Agency's Notice of Annual General Meeting dated 23 November 2020
Peters	Peters Investments Pty Ltd
Peters Proposal	potential issue of fully paid ordinary shares in Agency to Peters and its associates if \$5 million in new convertible notes are converted and/or if the options issued to Peters in May 2020 and October 2020 are exercised
Peters Proposal Resolutions	resolutions 3-7 in the Notice of AGM
Reports	Independent Expert Report and Supplementary Independent Expert Report
Resumption	resumption of the AGM in accordance with paragraph 2
Supplementary Independent Expert Report	the Supplementary Independent Expert's Report and Financial Services Guide produced by Nexia dated 10 December 2020

Takeovers Panel
Reasons - The Agency Group Australia Limited 01 & 02
[2021] ATP 2

Third Party Comments

the attached summary (Annexure A) of comments in a review dated 16 December 2020 of the Reports by a third party appointed by Magnolia and provided to the parties in the proceedings

Tania Mattei
Counsel
with authority of John O'Sullivan
President of the sitting Panel
Dated 22 December 2020

**ANNEXURE A: SUMMARY OF REVIEW OF NEXIA REPORTS BY A THIRD PARTY
ENGAGED BY MAGNOLIA**

NOTE: The comments below summarise a review dated 16 December 2020 of the Reports by a third party appointed by Magnolia. The comments below do not represent or reflect any finding or conclusion by the Panel.

1. Nexia do not clearly identify the valuation date⁴⁰, do not rely on “...economic, market and other conditions prevailing at the date of this Report” as referred to by Nexia in the Reports⁴¹ and do not define the standard of value.⁴²
2. Nexia do not compare Agency’s current share price to the exercise price of the options. The maximum exercise price under the Peters Proposal of \$0.027 per share is 46% lower than Agency’s share price on 9 December 2020 of \$0.05 per share and materially dilutive.
3. Real estate businesses are often valued on a sum of parts basis rather than valuing the business as a whole using the capitalisation of earnings method given the different earnings profile of Agency’s operating segments. This does not appear to be considered by Nexia.
4. Nexia uses an average of two separate valuation calculations, which is inconsistent with market practice. Further, Nexia do not attempt to reconcile the material difference between its separate valuation calculations using the capitalisation of earnings method and quoted market price method.
5. In relation to alternative funding and the possibility of Macquarie appointing a receiver Nexia have not (or do not appear to have):
 - (a) performed a valuation of Agency on the basis of its value in exchange on a piecemeal basis as part of an orderly realisation of assets
 - (b) sought further information on the possibility of further forbearance by Macquarie, noting there were several extensions during FY20
 - (c) commented on other financing options referred to in Agency’s ASX announcement on 29 October 2020
 - (d) commented on the impact of the Peters Proposal on the 101,515,093 listed options which are exercisable at \$0.065 and expire on 31 December 2020⁴³

⁴⁰ Nexia state the Reports have been prepared in accordance with APES 225 Valuation Services (**APES 225**). APES 225 paragraph 5.2c requires that a valuation report clearly communicate the date at which the value has been determined

⁴¹ See page 56 of the Supplementary Independent Expert Report

⁴² APES 225 paragraph 5.2h requires a valuation report to clearly communicate and define the standard of value

⁴³ See section 5.7.2 of the Supplementary Independent Expert Report

Takeovers Panel
Reasons - The Agency Group Australia Limited 01 & 02
[2021] ATP 2

- (e) commented on the history of the Macquarie relationship or commented on the likelihood of Macquarie appointing a receiver on or after 30 December 2020 and
 - (f) reviewed or considered correspondence, historic or current draft Macquarie facility documents or deeds of forebearance.
6. In relation to the estimation of expected earnings, Nexia:
- (a) capitalised FY20 EBITDA adjusted for the removal of the west coast rent roll business (**West Coast Business**) sold after 1 July 2020 using trailing multiples of comparable companies. Nexia have included a scenario where 100% of EBITDA for the West Coast Business is excluded. This is an unreasonable assumption given the reciprocal arrangement in place with Managex. Nexia have also included two other scenarios where 25% and 62.5% of FY20 EBITDA is removed from normalised EBITDA. These scenarios seem to be purely subjective
 - (b) have not factored anticipated growth in agent numbers as referred to by Agency in the FY20 annual report
 - (c) exclude reference to continued growth achieved in the “*record-breaking quarter*” in the first quarter of FY21
 - (d) have not quantified the impact of COVID-19 and
 - (e) have not compared their estimate of normalised EBITDA to the cash flow forecasts prepared by Agency Directors.⁴⁴
7. In the capitalisation of earnings valuation Nexia have made the following omissions/errors:
- (a) incorrectly applied a control premium to EBITDA multiples of comparable companies, whereas the control premium should be applied to equity value
 - (b) not included lease liabilities in their calculation of net debt (whereas they have excluded the lease expenses in EBTIDA)
 - (c) not included the present value of the remaining retention amount from the sale of the West Coast Business of up to \$0.485 million
 - (d) in assessing the value per share if the Peters Proposal does not go ahead Nexia have not deducted circa \$320,000 that will have to be repaid to Peters and
 - (e) not included any other normalisation adjustments for example any potential one-off and non-recurring legal and consulting costs.

⁴⁴ See section 5.6 of the Supplementary Independent Expert Report

Takeovers Panel

Reasons - The Agency Group Australia Limited 01 & 02 [2021] ATP 2

8. In adopting a quoted market price valuation methodology Nexia have stated there to be a moderate level of liquidity, however, there were 326 days of no trades over the last three years and substantial shareholders and directors were responsible for a large portion of share trades.
9. In assessing the reasonableness of the Peters Proposal, the key items to look at include:
 - (a) whether the offer is fair, which is not stated as a specific disadvantage of the proposed Peters Proposal
 - (b) quantum: a discount of a minimum of 46% to the current share price is material
 - (c) the severe dilutive impact of the Peters Proposal occurring after a record first quarter of FY21
 - (d) comparing the offer to the quantum of any other offers
 - (e) presenting a counterfactual orderly realisation value
 - (f) replacing Macquarie or any other senior debt with a convertible hybrid security is less attractive to shareholders
 - (g) the level of interest being shown by multiple parties in Agency may be positively perceived by the secured creditor as well as its now substantially reduced exposure
 - (h) a non-renounceable rights issue was completed in October 2019 at a price of 6.5 cents per share with an attaching option exercisable at 6.5 cents per share
 - (i) there are alternate options but Nexia does not table alternatives
 - (j) the extent of dilution of existing shareholders
 - (k) acknowledgment of additional value for the options of the convertible notes being issued under the Peters Proposal being material primarily due to the low and dilutive exercise price and
 - (l) release of personal guarantees of a director and senior management.



Australian Government

Takeovers Panel

Annexure B

CORPORATIONS ACT SECTION 657A DECLARATION OF UNACCEPTABLE CIRCUMSTANCES

THE AGENCY GROUP AUSTRALIA LIMITED 01 & 02

CIRCUMSTANCES

1. The Agency Group Australia Limited (**Agency**) is an ASX listed company (ASX code: AU1).
2. On 24 November 2020, Agency gave notice (**Notice**) convening its Annual General Meeting to be held on 23 December 2020 (**AGM**). The resolutions to be put to shareholders at the AGM included resolutions (**Peters Resolutions**):
 - (a) to approve the issue of convertible notes and options to Peters Investments Pty Ltd (**Peters**) to support an investment of \$5 million by Peters and
 - (b) to ratify the issue (under ASX Listing Rule 7.4) and approve amendment (under ASX Listing Rule 6.23.4) of convertible notes and options issued to Peters under an agreement announced by Agency on 15 May 2020.
3. The Notice listed advantages of the approval in paragraph 2(a) as including that it would “*significantly reduce the risk of [Agency] defaulting*” on a loan and “*may be [Agency’s] only option for funding in the near future*”.
4. On 4 December 2020, Magnolia Equities III Pty Ltd (**Magnolia**) sent a letter to Agency and ASX stating that it intended to make a cash takeover bid for 100% of Agency shares, providing Agency shareholders with “*a competing proposal to the Peters Proposal discussed in [Agency’s Notice]*”. The letter indicated that the proposed bid would be subject to a number of defeating conditions, including a condition that none of the Peters Resolutions be moved or passed at the AGM. The letter stated that further information regarding the bid would be included in Magnolia’s bidder’s statement and included an indicative timetable showing that Magnolia’s bidder’s statement would be lodged with ASIC, ASX and Agency in “*Late December 2020*” and stated that “*the Bid potentially provides [Agency] shareholders with a cash exit strategy ... and a real alternative to the Peters Proposal*”.
5. On 4 December 2020, Agency requested that Magnolia provide “*...as a matter of urgency, cogent information as to financial resources available to Magnolia, and the financial arrangements made by Magnolia, with respect to the proposed bid*”.

Takeovers Panel
Reasons - The Agency Group Australia Limited 01 & 02
[2021] ATP 2

6. On 22 December 2020, in order to comply with an interim order made by the Panel on application by Magnolia, Agency postponed the AGM to 9:00am (WST) on 30 December 2020.
7. On 29 December 2020, Agency announced that it had requested a trading halt and the Board had resolved to further postpone the AGM to 9:00am (WST) on 4 January 2021.
8. On 4 January 2021, at 9:32am (Melbourne time), Magnolia's Bidder's Statement dated 3 January 2021 in relation to its offer for Agency (**Bidder's Statement**) was released on ASX's market announcements platform. The Bidder's Statement:
 - (a) stated that the total amount of consideration Magnolia will be required to provide if all offers are accepted is \$9,967,656.56
 - (b) indicated that Magnolia has access to \$10,000,000 in cash to pay the consideration from various sources including:
 - (i) Mr Atkins has \$7.5 million in a bank account *"which he has undertaken to make available"* and \$3.5 million in liquid listed equities (excluding Agency shares) *"which can be readily sold"* if required
 - (ii) net assets of Mr Atkins and his spouse (**the Controllers**), the net asset position of whom *"has been verified by a qualified accountant"*, includes net assets of no less than \$20 million (including repayment of liabilities owed to them by Magnolia and its related bodies corporate (**Magnolia Group**)) – the Controllers having *"agreed with Magnolia to support it to perform its obligations under the Bid"* and
 - (iii) net assets of Magnolia Group of \$40 million (as at 31 December 2020) which have *"been verified by a qualified accountant"* and Magnolia Group *"has undertaken to make available to Magnolia"*
 - (c) stated that Magnolia has also obtained *"not less than \$18 million in commitments from various wholesale investors known to Magnolia"*
 - (d) does not indicate whether the undertakings and agreements in paragraph 8(b) have been documented and does not state that Mr Atkins, his spouse, related bodies corporate of Magnolia or the referenced *"qualified accountant[s]"* have given consents in accordance with section 636(3) in respect of statements on which paragraph 8(b) is based and
 - (e) implies that the commitments in paragraph 8(c) are a source of funding to pay the consideration, in circumstances where Magnolia has submitted to the Panel that the commitments were provided *"to allow shareholders to form a view as to the capacity of the bidder to give effect to its intentions"*.

Takeovers Panel
Reasons - The Agency Group Australia Limited 01 & 02
[2021] ATP 2

EFFECT

9. Proper assessment of Magnolia's proposal has been, and continues to be, inhibited by a failure to indicate clearly which sources of funding are to be used to pay the consideration, that persons providing cash consideration were appropriately bound to do so or had otherwise accepted responsibility for statements regarding their intention to provide funding and were aware of their potential liability for loss or damage resulting from misstatements or omissions.

CONCLUSION

10. It appears to the Panel that the circumstances are unacceptable circumstances:
- (a) having regard to the effect that the Panel is satisfied they have had, are having, will have or are likely to have on:
 - (i) the control, or potential control, of Agency or
 - (ii) the acquisition, or proposed acquisition, by a person of a substantial interest in Agency
 - (b) in the alternative, having regard to the purposes of Chapter 6 set out in section 602
 - (c) in the further alternative, because they gave or give rise to, or will or are likely to give rise to, a contravention of a provision of Chapter 6.
11. The Panel considers that it is not against the public interest to make a declaration of unacceptable circumstances. It has had regard to the matters in section 657A(3).

DECLARATION

The Panel declares that the circumstances constitute unacceptable circumstances in relation to the affairs of The Agency Group Australia Limited.

Allan Bulman
Director
with authority of John O'Sullivan
President of the sitting Panel
Dated 29 January 2021



Australian Government

Takeovers Panel

Annexure C

**CORPORATIONS ACT
SECTION 657D
ORDERS**

THE AGENCY GROUP AUSTRALIA LIMITED 01 & 02

The Panel made a declaration of unacceptable circumstances on 29 January 2021.

THE PANEL ORDERS

1. Magnolia be restrained from dispatching its Bidder's Statement without the Panel's consent.
2. The parties to these proceedings and ASIC have the liberty to apply for further orders in relation to these orders.
3. In these orders the following terms apply:

Bidder's Statement

Magnolia's Bidder's Statement dated 3 January 2021 in relation to its offer for The Agency Group Australia Limited

Magnolia

Magnolia Equities III Pty Ltd

**Allan Bulman
Director
with authority of John O'Sullivan
President of the sitting Panel
Dated 29 January 2021**