



Tuesday, 17 April 2007

Magna Pacific (Holdings) Limited 02 - Panel Decision

The Takeovers Panel advises that following additional disclosure, and some changes to the lock-up agreement, it has decided not to commence proceedings in relation to an application from Lionsgate Australia Pty Ltd, a wholly owned subsidiary of Lions Gate Entertainment Inc. in relation to the affairs of Magna Pacific (Holdings) Limited (see [TP07-14](#)). Lionsgate is currently making an off-market, cash takeover bid for Magna Pacific. The Panel has previously received an application in relation to Lionsgate's Bidder's Statement from Magna Pacific (Magna Pacific 01 see [TP07-07](#) and [TP07-11](#)).

Lionsgate dispatched a replacement bidder's statement to Magna Pacific on 26 March 2007 following a Panel decision dated 21 March 2007.

On 30 March 2007 destra Corporation Ltd and Magna Pacific announced their intention to implement a scheme of arrangement (**Proposed Scheme**) under which destra would acquire all the issued capital in Magna Pacific (**Announcements**).

Lionsgate's application related to issues including:

- the recommendation by the Magna Pacific board to vote in favour of the Proposed Scheme when Lionsgate submits that the Proposed Scheme is not currently capable of acceptance;
- whether Magna Pacific has provided adequate information and explanations in relation to the Proposed Scheme and the related conditions, in particular the funding arrangements; and
- whether the break fee arrangements meet the requirements in Guidance Note 7 - Lock-Up Devices

Following additional disclosure by Magna Pacific which the Panel requested, and some changes that Magna and destra have agreed to make to the lock-up agreement, (which the Panel also requested), the Panel decided not to commence proceedings.

Adequate disclosure of risks of destra Proposal not proceeding

The Panel considered that Magna Pacific had adequately disclosed the fact that Magna Pacific and destra currently only have an intention to implement the Proposed Scheme and have executed a heads of agreement to this effect, and that the Proposed Scheme is subject to a number of pre-conditions.

The Panel considered that the nature of the announcement by Magna Pacific and destra in announcing an intention to propose a scheme of arrangement was not unduly precipitate. The Panel considered that the continuous disclosure provisions may have made it difficult (or impossible) for Magna Pacific and destra not to have made an announcement at the time that the Heads of Agreement was signed. In addition the Panel did not consider the timing of the Announcement to be outside normal market practice in Australia for timing of such announcements (subject to the additional disclosure and lock-up agreement changes requested by the Panel).

The Panel discovered, on requesting all relevant documentation, that although a merger implementation agreement had not yet been signed, the parties had executed a Heads of Agreement setting out the key terms of the Proposed Scheme which is dated the same as the Announcement (**Heads of Agreement**). The Panel was concerned that the level of detail in the Heads of Agreement is not reflected in the Announcement and as a consequence, there is significant information (including the exact wording of the fiduciary exception, detail in relation to the no material adverse change condition and certain termination events) of which currently only Magna Pacific and destra are aware. Magna Pacific and destra have addressed this concern by agreeing to release the Heads of Agreement to ASX, and accordingly the Panel does not consider there is a basis to commence proceedings in relation to this issue.

The Panel considered that the Announcement was sufficiently qualified by disclosure of the intentions and pre-conditions to the Proposed Scheme, and the directors' recommendations were sufficiently qualified by reference to any superior offer and a proposed independent expert report, to ensure that the Announcement was not "disclosure of speculation". The fact that the Heads of Agreement had been executed confirmed this view.

Magna Pacific has disclosed that the consideration to be offered under the Proposed Scheme includes a cash alternative of \$0.38 compared to Lionsgate's cash offer of \$0.32. The Panel considers that this provides an adequate basis for Magna Pacific's opinion as to value in comparing the Lionsgate offer against the Proposed Scheme.

destra's financial position

Lionsgate submitted that destra has not provided evidence that it can fund the Proposed Scheme and on that basis should not have made the announcement with Magna Pacific. The Panel does not consider that Lionsgate has provided evidence that destra does not have a reasonable basis for believing it will be able to fund the Proposed Scheme. The ability of destra to fund the consideration offered under the Proposed Scheme will be an issue before the court in its consideration of the Proposed Scheme.

The Panel notes that destra is advised by an experienced and reputable investment bank and legal firm. The Panel further notes the provisions of Division 2 of Part 7.10 of the Corporations Act which apply to the Announcement. In the absence of evidence that the Announcement is false or misleading the Panel assumes that Magna Pacific and destra will have been advised of the requirement by their financial

advisers and by their legal advisers to have a reasonable basis for the Announcement, and that they will have such a reasonable basis, and that Magna Pacific and destra will have been advised (and will be aware) of their obligations not to make false or misleading statements.

Break fee and exclusivity arrangements

The Panel considered the break fee arrangements and exclusivity restrictions set out in the Announcement and the Heads of Agreement, in particular:

- (a) the calculation of the break fee based on the value of the Proposed Scheme cash consideration;
- (b) the provisions of the break fee agreement to which the fiduciary carve-out apply;
- (c) the exclusivity provisions of the break fee agreement; and
- (d) the period of the exclusivity provisions of the break fee agreement.

Lionsgate submitted that the relevant value of the break fee should have regard to the value of the target securities on the date the proposal was announced, not the total consideration. The Panel considers that calculating the break fee based on the value of the Proposed Scheme cash consideration is consistent with paragraph 7.18 of Guidance Note 7 that:

“the equity value is the aggregate of the value of all classes of equity securities issued by the target, where relevant having regard to the value of the consideration under the bid, as at the date the bid is announced.”

Accordingly, the Panel did not consider that the proposed break fee arrangements provided a basis to commence proceedings.

The Panel had concerns with the wording of the fiduciary exception as explained in the Announcement that stated that:

“despite the exclusivity restrictions, Magna may respond to any unsolicited higher offer where Magna receives legal advice that failing to respond would breach fiduciary duties of Magna directors”

The Panel considered it may be overly onerous to require legal advice that *“failing to respond **would** breach their fiduciary duties”* and may effectively render the fiduciary exception meaningless. The Panel would have been more comfortable to leave the decision to the directors having a reasonable basis to believe that failing to respond would be likely to breach their fiduciary duties.

The Panel recognised that the Announcement only provided a summary of the exclusivity restrictions. Before expressing a view in relation to its concerns with the fiduciary exception the Panel requested a copy of the agreement between Magna Pacific and destra which set out the terms of the fiduciary exception. Magna Pacific provided the Panel with the Heads of Agreement dated 30 March 2007.

The fiduciary duties exception in the Heads of Agreement provides:

"Despite the restrictions in (a) to (d) above, Magna Pacific shall be entitled to respond to the offer by Lionsgate Australia Pty Limited or any unsolicited offer where failing to respond would in Magna Pacific's reasonable opinion (acting in good faith) constitute a breach of directors' fiduciary or statutory obligations, having received written advice from external legal advisers to that effect"

The Panel was concerned that the summary in the Announcement was inaccurate and that the wording in this clause was ambiguous. Magna Pacific confirmed that the intended interpretation of the clause was that "advice from external legal advisers to that effect" meant receiving legal advice to the effect that failing to respond to a higher unsolicited bid *would* constitute a breach of the Magna directors' fiduciary duties.

Magna Pacific and destra have addressed the Panel's concerns outlined above by agreeing to amend the fiduciary exception clause when the formal merger implementation agreement is signed to have the effect that Magna will be entitled to respond to the offer by Lionsgate Australia or any unsolicited higher offer where failing to respond would in Magna's reasonable opinion (acting in good faith) **be likely to** constitute a breach of the directors' fiduciary or statutory duties, having received written advice from external legal advisers to the effect that in the opinion of the advisers, failing to respond would **be likely to** constitute a breach of such duties. (emphasis added)

In the meantime, Magna Pacific and destra have agreed to include a note in the covering announcement to the Heads of Agreement outlining the revised fiduciary exception clause that will be included in the formal merger implementation agreement.

The Panel will publish its reasons for declining to commence proceedings on its website at www.takeovers.gov.au in due course.

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