



**Australian Government**

**Takeovers Panel**

**Reasons for Decision  
Macmahon Holdings Limited  
[2017] ATP 3**

**Catchwords:**

*Decline to conduct proceedings – disclosure – target’s statement – misleading statements*

*Corporations Act 2001 (Cth), sections 624(2), 638(1A)*

*Mungana Goldmines Limited 01R [2015] ATP 7, Australian Industrial REIT [2015] ATP 10, Magna Pacific (Holdings) Limited [2007] ATP 2*

Interim order	IO undertaking	Conduct	Declaration	Final order	Undertaking
NO	NO	NO	NO	NO	NO

**INTRODUCTION**

1. The Panel, Peter Day, Byron Koster (sitting President) and Karen Phin, declined to conduct proceedings on an application by CIMIC Group Investments Pty Limited and CIMIC Group Limited in relation to the affairs of Macmahon Holdings Limited. The application concerned an off-market takeover bid by CGI for Macmahon. The bidder submitted that certain disclosures by the target were potentially misleading. The Panel considered in the circumstances that further disclosure was not required and there was no reasonable prospect that it would declare the circumstances unacceptable.

2. In these reasons, the following definitions apply.

AMNT	PT Amman Mineral Nusa Tenggara
CGI	CIMIC Group Investments Pty Limited
Lonerган	Lonerган Edwards & Associates Limited
Macmahon	Macmahon Holdings Limited

**FACTS**

3. Macmahon is an ASX listed company (ASX code: MAH).
4. On 24 January 2017, CGI announced an off-market takeover bid for Macmahon at \$0.145 cash per share.
5. On 27 February 2017, Macmahon released its target's statement. The target’s statement included an independent expert’s report. The independent expert, Lonergan, concluded that the offer was neither fair nor reasonable.
6. Before trading opened on 28 February 2017, Macmahon placed its securities in a trading halt pending an announcement.
7. The next morning, on 1 March 2017, Macmahon announced that it had entered into a heads of agreement with AMNT for a proposed transaction and released a first

## Takeovers Panel

### Reasons – Macmahon Holdings Limited [2017] ATP 3

supplementary target's statement disclosing the AMNT proposed transaction, among other things.

8. Also on 1 March 2017, CGI released a fourth supplementary bidder's statement highlighting concerns with Macmahon's prospective financial information disclosure, among other things.
9. On 2 March 2017, CGI released a fifth supplementary bidder's statement highlighting concerns with the AMNT proposed transaction. Shortly after, CGI released a sixth supplementary bidder's statement declaring that the offer would "*not be increased in any circumstances during the Offer Period*" and would close at 7:00pm on 9 March 2017 and would not be voluntarily extended.<sup>1</sup>
10. On 3 March 2017, Macmahon released a second supplementary target's statement in response to CGI's fifth and sixth supplementary bidder's statements.

## APPLICATION

### Declaration sought

11. By application dated 6 March 2017, the applicants sought a declaration of unacceptable circumstances. The applicants submitted, among other things, that:
  - (a) the prospective financial information about Macmahon included in the target's statement was misleading and deceptive
  - (b) the target's statement should have included disclosures regarding the AMNT proposed transaction
  - (c) the first supplementary target's statement did not adequately disclose the risks of the AMNT proposed transaction and the description of the benefits of the AMNT proposed transaction was misleading and
  - (d) the independent expert relied on Macmahon's prospective financial information without independent evaluation and failed to update its report in response to the AMNT proposed transaction.
12. The applicants submitted that the effect of the circumstances was that trading in Macmahon shares was not taking place in an efficient, competitive and informed market and holders of Macmahon shares had not been given sufficient or accurate information to enable them to assess the merits of CGI's offer or the AMNT proposed transaction.

### Interim orders sought

13. The applicants sought interim orders including for the reversal of or rights to rescind on-market purchases of Macmahon shares since the release of the target's statement and for Macmahon to advise its shareholders not to rely on information pending determination of the application.
14. In light of CGI's no increase and no extension statement, the applicants did not seek interim orders extending the offer period. CGI stated that it did not consider that such an order would be appropriate.

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<sup>1</sup> The offer closed at 7:00pm on 9 March 2017

**Final orders sought**

15. The applicants sought final orders including for the reversal of or rights to rescind on-market purchases of Macmahon shares since the release of the target's statement and for corrective disclosure and an updated independent expert's report.

**DISCUSSION**

**Prospective financial information**

16. The applicants submitted that Macmahon's earnings guidance for financial years 2017 and 2018 in the target's statement was not based on reasonable grounds and was not accompanied by adequate disclosure of the underlying assumptions or related risks, specifically, in relation to:
  - (a) the inclusion of three prospective contracts from Macmahon's tender pipeline in the revenue forecast
  - (b) anticipated improvements in the financial/operating performance of two existing Macmahon projects
  - (c) ongoing revenue from Macmahon's contracted order book and
  - (d) improved sector conditions.
17. In response, Macmahon submitted in preliminary submissions that there were reasonable grounds for its guidance and it had provided adequate disclosure including:
  - (a) the grounds for including three prospective contracts from its tender pipeline in its revenue forecast on a risk weighted basis and the impact if the contracts were not secured
  - (b) the basis for its revenue projections for existing projects (including an expected revenue increase by approximately 25% in the 2017 calendar year from the Tropicana project), together with sensitivity analysis and proximate cross-references to the risk factors section in the target's statement
  - (c) that revenue from its contracted order book was included on the assumption that none of its existing contracts would be terminated and
  - (d) a discussion of sector conditions that followed standard market practice.
18. In our view, Macmahon appeared to take an approach to its earnings guidance in its target's statement that was similar to other companies of its type. The guidance included a discussion of the underlying assumptions and risks (albeit predominantly by cross-reference to the risk factors section in the target's statement). We consider the level of detail of the additional disclosure requested by the applicants might, in some cases, have been excessive and have required the disclosure of commercially sensitive information.
19. When taken as a whole, we do not consider the earnings guidance disclosures to be materially misleading.
20. In arriving at this decision, we took into consideration the extent to which the independent expert relied on Macmahon's guidance in its independent expert's

report. The report indicated that its EBITDA valuation was based on the level of contracted work on hand as at 31 December 2016 and the historic annual level of ad hoc revenues – it did not include the three prospective contracts and only included the original value of contracted work at the Tropicana project.

21. We also noted that in its fourth supplementary bidder’s statement CGI expressed its concerns and reasons for why the assumptions underlying Macmahon’s guidance may not be met. Consequently, holders of Macmahon shares had the benefit of an alternative opinion.

### **AMNT proposed transaction**

#### *Timing of disclosure*

22. The applicants submitted that the existence and terms of the AMNT proposed transaction were material to making an informed assessment of whether to accept the offer. Accordingly, given the AMNT proposed transaction was announced only 48 hours after the release of the target’s statement and following a 24 hour trading halt, the target’s statement should have disclosed that Macmahon was well advanced in negotiations of the heads of agreement, its key terms and the timing and process for entry into the heads of agreement.
23. Macmahon submitted that discussions were still ongoing in relation to key terms of the AMNT proposed transaction on the date it issued its target’s statement (being the last day permitted under the Corporations Act). Given that it was not clear that terms would be agreed with AMNT, Macmahon submitted that it was not practicable to make a disclosure at that time.<sup>2</sup> Macmahon also noted that the target’s statement did refer to the potential for an alternative proposal given Macmahon’s engagement with third parties since the announcement of CGI’s bid.
24. In our view, it was not in Macmahon’s interests to delay disclosure of the AMNT proposed transaction. We have no reason to believe that the disclosure was improperly delayed.

#### *Disclosure regarding the AMNT proposed transaction*

25. The applicants submitted that the first supplementary target’s statement:
- (a) did not adequately disclose that the AMNT proposed transaction was non-binding and subject to a number of conditions
  - (b) used expressions that gave a misleading impression of certainty of the AMNT proposed transaction and
  - (c) provided misleading and deceptive information concerning the benefits of the AMNT proposed transaction including:
    - (i) the implied value of the AMNT transaction compared to the value of CGI’s offer

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<sup>2</sup> Referring to s638(1A)(b) of the *Corporations Act 2001* (Cth) which only requires the disclosure of information to the extent known to any of the directors

## Takeovers Panel

### Reasons – Macmahon Holdings Limited [2017] ATP 3

- (ii) Macmahon’s implied market capitalisation following the issue of shares to AMNT in connection with the AMNT proposed transaction and
- (iii) the increase in Macmahon’s order book if the AMNT proposed transaction were completed

in each case given that the AMNT proposed transaction was non-binding, had not been fully negotiated and remained subject to a valuation.

26. Macmahon submitted that the first supplementary target’s statement “*clearly and unambiguously references relevant risk factors associated with the HOA, particularly by the repeated confirmation that the HOA is non-binding and is conditional*” and also stated that shareholders should refer to the risk factors section in the target’s statement for various risk factors “*which will also apply to the Proposed Transaction, the HOA and other information disclosed in this announcement*”.
27. We have reservations about the adequacy of Macmahon’s disclosure on risks associated with the AMNT proposed transaction and whether it was sufficiently clear that the heads of agreement was non-binding. Of particular concern was the second supplementary target’s statement which, when comparing CGI’s offer and the AMNT proposed transaction, made no reference to the heads of agreement being non-binding or conditional and included statements such as “*[k]ey commercial terms have been negotiated in the AMNT HOA*”.
28. However, taking into consideration the disclosure overall and CGI’s no increase and no extension statement, we are satisfied that further disclosure is not required.
29. First, promptly following the release of the first supplementary target’s statement, CGI issued its fifth supplementary bidder’s statement setting out its views on the uncertainty and risks of the AMNT proposed transaction. While it is not CGI’s role to remedy materially deficient disclosure by Macmahon,<sup>3</sup> the prominent references in CGI’s response to the non-binding and “*highly conditional*” nature of the AMNT proposed transaction (which were not denied by Macmahon) made it unlikely in our view that any shareholders would be misled on those matters.<sup>4</sup>
30. Secondly, while Macmahon’s disclosure could have been better, we could not ignore the fact that CGI’s confirmation, before making the application, that its offer was final and would not be voluntarily extended,<sup>5</sup> left insufficient time for shareholders to consider and respond to any decision we might make. Given the level of support CGI’s offer had received at that time, and our view that any defects in disclosure would not be material to the decision of shareholders whether to accept the offer, we consider that requiring corrective disclosure at such a late stage would not be appropriate and might even cause confusion.

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<sup>3</sup> *Mungana Goldmines Limited 01R* [2015] ATP 7 at [24]-[28]. See also *Magna Pacific (Holdings) Limited* [2007] ATP 2 at [49]-[52] in relation to disclosure in a bidder’s statement

<sup>4</sup> See *Australian Industrial REIT* [2015] ATP 10 at [22]

<sup>5</sup> Excluding in the case of an automatic extension under s624(2) of the *Corporations Act 2001* (Cth)

**Independent expert's report**

31. The applicants submitted that the independent expert relied on Macmahon's prospective financial information without satisfying itself that the information was based on reasonable grounds and failed to update its report in response to the AMNT proposed transaction.
32. Putting aside the issue of whether there are reasonable grounds for the prospective financial information (which we have discussed above), in our view, Lonergan appeared to have made its own evaluation of the information provided by Macmahon.<sup>6</sup>
33. In respect of the AMNT proposed transaction, Macmahon obtained a letter from Lonergan in response to the application which stated that Lonergan had not changed its valuation range for Macmahon shares as a result of the AMNT proposed transaction because the transaction was not "*sufficiently certain*".
34. We considered whether to require Macmahon to disclose Lonergan's letter. We do not consider this appropriate in the circumstances for the reasons explained in paragraph 30.

**Other disclosure issues**

35. The applicants made several other submissions regarding Macmahon's disclosure. In each case, taking into consideration the disclosure overall and the status of the offer, we are satisfied that further disclosure is not required.

**DECISION**

36. For the reasons above, we do not consider that there is any reasonable prospect that we would make a declaration of unacceptable circumstances. Accordingly, we have decided not to conduct proceedings in relation to the application under regulation 20 of the *Australian Securities and Investments Commission Regulations 2001* (Cth).

**Orders**

37. Given that we have decided not to conduct proceedings, we do not (and do not need to) consider whether to make any interim or final orders.

**Byron Koster**

**President of the sitting Panel**

**Decision dated 7 March 2017**

**Reasons given to parties 14 March 2017**

**Reasons published 15 March 2017**

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<sup>6</sup> See, for example, at [20]

## Takeovers Panel

Reasons - Macmahon Holdings Limited  
[2017] ATP 3

### Advisers

Party	Advisers
CIMIC Group Investments Pty Limited and CIMIC Group Limited	Minter Ellison
Macmahon Holdings Limited	Ashurst