



Australian Government

Takeovers Panel

Reasons for Decision

**The Agency Group Australia Limited 03R
[2021] ATP 5**

Catchwords:

Review – decline to conduct proceedings – scope of review – disclosure – failure to disclose – need for funds – shareholder approval – share issue

Corporations Act 2001 (Cth), sections 602(a), 602(b)(ii), 602(b)(iii), 606, 611 (item 7), 657B, 657C(3), 657E, 657EA(2)

Australian Securities and Investments Commission Regulations 2001 (Cth) regulations 16, 20

Corporations Regulations 2001 (Cth) 6.10.1

Administrative Appeals Tribunal Act 1975 (Cth), section 3(3)

Eastern Field Developments Limited v Takeovers Panel [2019] FCA 311, Tinkerbell Enterprises Pty Limited as Trustee for the Leanne Catelan Trust v Takeovers Panel [2012] FCA 1272, Shi v Migration Agents Registration Authority [2008] HCA 31, Glencore International AG & Anor v Takeovers Panel & Ors [2005] FCA 1290, Takeovers Panel v Glencore International AG [2005] FCA 1628

Guidance Note 2: Reviewing Decisions

Australian Government Department of Treasury, Takeovers, Corporate Control: a better environment for productive investment, Corporate Law Economic Reform Program Proposals for Reform: Paper No. 4 (1997)

The Agency Group Australia Limited 01 & 02 [2021] ATP 2, Tribune Resources Limited 02R [2018] ATP 22, AWE Limited [2018] ATP 4, Molopo Energy Limited 03R, 04R & 05R [2017] ATP 12, Sovereign Gold Company Limited 01R [2016] ATP 14, Mungana Goldmines Limited 01R [2015] ATP 7, Careers Australia Group Limited 03 [2015] ATP 1, Gondwana Resources Limited 02R [2014] ATP 18, Tranzact Financial Services Limited [2014] ATP 3, Minemakers Limited 02R [2012] ATP 16, Bentley Capital Limited 01R [2011] ATP 13, Bowen Energy Limited 02R [2009] ATP 19, GoldLink IncomePlus Limited 04R [2009] ATP 3, Sydney Gas Limited 01 [2006] ATP 9, Austral Coal Limited 02(RR) [2005] ATP 20, BreakFree Limited 04(R) [2003] ATP 42, National Can Industries Limited 01(R) [2003] ATP 40, Anaconda Nickel Limited 02, 03, 04 & 05 [2003] ATP 4

Procedural Rule 3.3.1 and Note 3 to Procedural Rule 3.3.1, Procedural Rule 6.1.1 and Note 4 to Procedural Rule 6.1.1

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

INTRODUCTION

1. The review Panel, Ian Jackman SC (sitting President), Christian Johnston and Denise McComish, declined to conduct proceedings on a review application by Magnolia Equity III Pty Ltd in relation to the affairs of The Agency Group Australia Limited. The application concerned a review of the initial Panel’s decision not to make a declaration of unacceptable circumstances in relation to information deficiencies in material provided to shareholders of The Agency Group Australia Limited for an

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item 7 of section 611 vote.¹ The Panel considered that there was no reasonable prospect that it would declare the circumstances unacceptable.

2. In these reasons, the following definitions apply.

28 January Issue	the 115,621,485 shares issued to Peters Investments on 28 January 2021 following the conversion of \$3 million of convertible notes together with accrued interest and the exercise of 14 million options
Agency	The Agency Group Australia Limited
Agency 01	the application by Agency dated 8 December 2020
Agency 02	the application by Magnolia dated 16 December 2020
IER	the independent expert's report dated 23 November 2020 prepared by Nexia in relation to a " <i>Proposed potential issue of fully paid ordinary shares to [Peters Investments] and its associates on conversion of convertible notes and/or upon exercise of options</i> "
Macquarie	Macquarie Bank Limited
Magnolia	Magnolia Equities III Pty Ltd
Nexia	Nexia Perth Corporate Finance Pty Ltd
Nexia response	the document dated 24 December 2020 that was released on ASX on 29 December 2020 in which Nexia responded to issues raised by the Third Party concerning the Reports
Peters Investments	Peters Investments Pty Ltd
Peters Proposal	the issue of 5 million convertible notes ² and grant of 3,170,441 options to Peters Investments to support an investment of \$5 million by Peters Investments in Agency
Peters Proposal Resolutions	resolutions 3-7 in Agency's notice of AGM to approve the Peters Proposal
Reports	the IER and Supplementary IER prepared by Nexia in respect of the Peters Proposal
Second Third Party Report	a further confidential report addressed to Magnolia which considered whether the Nexia response adequately addressed or corrected the issues raised in the interim orders of the initial Panel or by the Third Party

¹ 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)

² Convertible at the lower of \$0.027 and the price of shares issued in a capital raising exceeding \$1 million before 31 March 2023

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Supplementary IER the supplementary independent expert's report prepared by Nexia dated 10 December 2020

Third Party an expert³ engaged by Magnolia to provide an independent opinion as to deficiencies in the Reports

FACTS

3. Agency is an ASX listed company (ASX code: AU1).
4. The facts are set out in *The Agency Group Australia Limited 01 & 02*.⁴ In those proceedings, two applications were heard together pursuant to ASIC Regulation 16⁵ as related matters. They were Agency 01, an application by Agency in respect of Magnolia's disclosure of the bid funding in Magnolia's proposed bid for Agency; and Agency 02, an application by Magnolia in respect of Agency's disclosure to shareholders for the proposed vote on the Peters Proposal under item 7 of section 611.
5. This review application concerns the initial Panel's decision in relation to Agency 02. The relevant facts are, in summary:
 - (a) On 24 November 2020, Agency dispatched its notice of AGM for a meeting on 23 December 2020. The notice included a resolution seeking shareholder approval for the Peters Proposal under item 7 of section 611 (and for all other purposes). Approval of the Peters Proposal could result in Peters Investments obtaining 49.53% of Agency.⁶ The notice attached the IER. Nexia's opinion was that the Peters Proposal was not fair but reasonable to non-associated shareholders. It was considered not fair, given the conversion price of the convertible notes to be issued to Peters Investments (see footnote 2 above), because Nexia valued Agency shares between \$0.033 and \$0.055. It was considered reasonable because, among other things, Nexia considered that the transaction would significantly reduce Agency's risk of default on its loan from Macquarie and may be Agency's only funding option.
 - (b) On 11 December 2020, following Magnolia's proposal to bid for Agency, Agency dispatched an addendum to the notice of AGM and the Supplementary IER, which incorporated (inter alia) consideration of Magnolia's proposed bid for Agency. Nexia's opinion was unchanged.
 - (c) Magnolia regarded its proposed bid as a competing proposal to the Peters Proposal and engaged the Third Party to review the Reports. The Third Party produced a report identifying what it said were deficiencies in disclosure in those documents.

³ The expert did not consent to the release of its identity in the initial Panel's proceedings

⁴ [2021] ATP 2

⁵ A reference to an ASIC Regulation is to a regulation in the *Australian Securities and Investments Commission Regulations 2001* (Cth)

⁶ Peters Investments also has a pre-existing convertible note agreement with Agency for \$1 million

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- (d) On 16 December 2020, Magnolia made its application to the initial Panel, supported by the Third Party report. Among other things, it submitted, in effect, that Agency shareholders would have misleading and incomplete information concerning the Peters Proposal. Magnolia sought an interim order in its initial application that Agency adjourn the item 7 vote until at least 14 days after the initial Panel's proceedings.
- (e) On 22 December 2020, the initial Panel made an interim order requiring consideration of the Peters Proposal to be deferred but allowing the consideration to proceed, no earlier than 30 December 2020, provided Agency gave shareholders a copy of Nexia's response to each point raised by the Third Party at least 3 days before the resumed meeting, and provided that Agency kept a record of votes cast at the resumed meeting.
- (f) Also on 22 December 2020, to comply with the interim orders, Agency postponed its AGM until 30 December 2020.
- (g) On 24 December 2020, Nexia provided its response to the Third Party's comments. Agency emailed the response to shareholders and put the response on its website.
- (h) 24 December was a half day for the ASX and the Nexia response was published on ASX's market announcement platform on the next market day, 29 December 2020.
- (i) Also on 29 December 2020, Agency further postponed its AGM to 4 January 2021 (it said this was to comply with the interim orders by ensuring the response to the Third Party's comments was released to shareholders no less than 3 days before the AGM).
- (j) On 4 January 2021, Agency held its AGM. The item 7 vote passed with approximately 81% of the vote in favour.
- (k) Also on 4 January 2021, Agency issued the 5 million convertible notes and granted the 3,170,441 options to Peters Investments.
- (l) On 6 January 2021, Agency announced it had refinanced its funding by (among other things) paying down \$3.715 million to Macquarie.
- (m) Also on 6 January 2021, the Third Party produced the Second Third Party Report stating that "*In our view, Nexia's responses to the interim orders are inadequate*". The Third Party pointed out that it had not been requested to opine on the Peters Proposal but to "*critique the Reports*". It provided a table of its further comments on the Nexia response. Based on this, Magnolia submitted to the initial Panel that "*the shareholders of [Agency] did not receive an independent expert report of the kind and standard envisaged by applicable ASIC regulatory guidance...*"
- (n) On 13 January 2021, the initial Panel indicated to the parties that the material before it "*did not satisfy the Panel that it was appropriate to declare that the*

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circumstances surrounding the approval for the issue of convertible notes and options to Peters Investments Pty Ltd were unacceptable..." and

- (o) On 28 January 2021, Peters Investments converted \$3 million of the convertible notes and exercised 14 million options to become a substantial holder in Agency with 30.24% (holding 129,621,485 shares).
6. Along the way, the initial Panel had declined to make two further interim orders requested by Magnolia:
 - (a) The first was requested on 28 December 2020 that no steps be taken to complete the Peters Proposal and
 - (b) The second was requested on 4 January 2021 for Agency not to disburse the funds received in relation to the securities issued on that day.
7. The initial Panel made a declaration of unacceptable circumstances on 29 January 2021 in relation to Magnolia's bid proposal and the sources of funding to be used to pay the consideration (that is, on Agency 01). The initial Panel did not make a declaration of unacceptable circumstances in relation to the circumstances in Agency 02.

APPLICATION

8. On 2 February 2021, Magnolia sought the President's consent to make a review application (discussed below starting at paragraph 17). The President gave consent.
9. By application dated 2 February 2021, Magnolia sought a review of the "*decision of the initial Panel in The Agency Group Australia Limited 02 not to make a declaration under s657A and consequent orders...*".
10. Magnolia submitted that:
 - (a) Information provided to Agency shareholders for the AGM (ultimately held on 4 January 2021) was deficient, did not provide Agency shareholders with all material known to Agency relevant to the Peters Proposal Resolutions and accordingly the Peters Proposal Resolutions "*were not passed in a way that engages s611 item 7*".
 - (b) No substantial holder notice for Peters Investments had been lodged recording the 28 January Issue.⁷
11. Magnolia submitted that the effect of the circumstances was to place Peters Investments "*in a position to obtain control of [Agency]*", and it had commenced obtaining control, without the required information being made available to Agency shareholders.

⁷ A substantial holder notice was lodged on 3 February 2021

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Interim order sought

12. Magnolia sought an interim order (as clarified) that Peters Investments not further convert any convertible notes or exercise any further options until further order of the Panel.
13. Peters Investments offered an undertaking that until completion of the Panel proceedings it would not without the Panel's consent convert any further convertible notes or exercise any further options.
14. The President accepted the undertaking (Annexure A) and accordingly considered that no interim order was required.
15. We did not think any interim order was required to be made by us.

Final orders sought

16. Magnolia sought final orders that:
 - (a) the 28 January Issue be reversed or the shares be vested in ASIC for sale
 - (b) Agency obtain a new independent expert's report
 - (c) Agency convene a new shareholders' meeting to vote on whether to ratify the conversion of convertible notes and exercise of options by Peters Investments
 - (d) the item 7 approval on 4 January 2021 not be relied on by any person and
 - (e) Agency be given the right to repay the convertible notes at face value at any time within the next 6 months without penalty.

DISCUSSION

Consent to review

17. Magnolia requested consent to review the decision of the initial Panel pursuant to section 657EA.⁸ Its request was made within the time limit for reviews set in Corporations Regulation 6.10.1.⁹
18. The President considered the bases on which consent should be granted.¹⁰
19. Magnolia in its request for consent submitted (among other things) that:
 - (a) the initial Panel gave no, or insufficient, weight to defects in the Reports
 - (b) there was new information, which the President took to be the meaning of the submission that "...the whole of the relevant circumstances relevant to the Magnolia

⁸ Section 657EA(2) provides that if the decision is not a decision to make a declaration under section 657A or an order under section 657D or 657E, the person may apply for review only with the consent of the President of the Panel

⁹ Corporations Regulation 6.10.1 provides "For subsection 657EA(3) of the Act, an application for review of a decision of the Panel must not be made later than 2 business days after the day on which the decision was made."

¹⁰ See Guidance Note 2: *Reviewing Decisions* at [29]. For example, *Careers Australia Group Limited 03* [2015] ATP 1 at [11]-[12]

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Application Proceeding (some of which were not known by the Panel at the time of their initial decision)...” and

- (c) there was insufficient time for shareholders to make an informed decision after the initial Panel’s interim orders (see paragraph 5(e) above).
20. The President agreed to receive a submission made on behalf of Agency, and took it into account.
21. Agency submitted (among other things) that consent ought not be granted because:
- (a) shareholder approval had been given almost a month before, the transactions were completed and the proceeds had been applied (as per the notice of meeting)
 - (b) there was no utility in any review
 - (c) Magnolia had issued a media release saying it *“welcomed and accepted the technical findings by the Takeovers Panel”* and
 - (d) *“The pattern of conduct of Magnolia and its related companies illustrates a lack of good faith”* and this *“academic”* exercise ought not to be countenanced.
22. The President considered that granting consent to the review was warranted on the bases that, accepting at face value for this purpose Magnolia’s submission, there was a credible allegation of new information or potential error (which a review Panel could correct if sustained).
23. The President considered that, while it may turn out to be academic to conduct a review, such an issue would be for the review Panel to consider when it was appointed, as would the other issues. The President considered that the review Panel may (for example and without him indicating any view on it) decline to conduct proceedings. Moreover, the potential lack of a commercial outcome also went to what the review Panel made of the review application, rather than to whether consent should be given in this case.
24. The President noted that the review could take place without the added difficulty of the time pressure over Christmas.
25. The President also noted that the declaration of unacceptable circumstances made by the initial Panel is headed *“The Agency Group Australia Limited 01 & 02”* and the media release refers to the initial Panel having made a declaration of unacceptable circumstances in relation to Agency 01 and Agency 02. Those matters were heard together pursuant to ASIC Regulation 16. While it is unclear if that removes the need for consent (even though the text of the declaration itself is reasonably clear that it is the circumstances in Agency 01 that are unacceptable circumstances), for avoidance of doubt, on this basis also, the President consented to this review.

Preliminary submissions

26. Agency made a preliminary submission, described by Magnolia as an *“out-of-process”* submission.

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27. We do not consider the preliminary submission of Agency to be “out-of-process”. In any event, we agreed to receive it.
28. Agency submitted that Magnolia was essentially seeking a review of the initial Panel’s decisions regarding interim orders. It submitted that:
- (a) the initial Panel had made an interim order on 22 December 2020 which addressed the issue of time for Agency shareholders to consider the Nexia response
 - (b) the initial Panel had refused on 28 December 2020 to make a further interim order, requested by Magnolia, that no step be taken to complete the Peters Proposal. Hence the issue in the review that there were further deficiencies in the Reports had been dealt with and
 - (c) the initial Panel had refused on 4 January 2021 to make another interim order, requested by Magnolia, that Agency not disburse any of the funds received on 4 January 2021. Hence the issue in the review concerning disbursement of proceeds had been dealt with.
29. Agency submitted that as Magnolia was, in effect, seeking a review of the decisions on interim orders it had “*failed to seek a review of the relevant decision within time.*” As an application for review must not be brought later than 2 business days after the day on which the decision was made,¹¹ Agency submitted that therefore we did not have jurisdiction to consider the review application.
30. In support of its submission, Agency pointed to the statutory context, which it submitted included:
- (a) the President’s consent for review is required if the decision is not to make a declaration under section 657A or orders under sections 657D (final orders) or 657E (interim orders)¹²
 - (b) the time for seeking a review cannot be extended (compare the extensions of time available for making a declaration¹³ or making an application for a declaration¹⁴) and
 - (c) the consent requirement¹⁵ does not itself include a power to extend time and “*has nothing to do with time limits*”.
31. Agency also submitted that, even if time could be extended, it should not be extended because:
- (a) Magnolia was well out of time
 - (b) the events had taken place and

¹¹ Corporations Regulation 6.10.1

¹² Section 657EA(2)

¹³ Section 657B

¹⁴ Section 657C(3)

¹⁵ Section 657EA(2)

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- (c) Magnolia was alleging unacceptable circumstances by Agency complying with the initial Panel's orders and taking actions that the initial Panel refused to prevent.
32. Magnolia responded to Agency's submission, which it asked us to receive if we received Agency's submission. We agreed to receive the response.
33. Magnolia submitted:
- (a) Its review application was not in respect of interim order decisions but in respect of the initial Panel's decision "*that no declaration of unacceptable circumstances be made in connection with matters in the [Agency 02] proceedings*".
 - (b) Agency's submission was "*a fundamental mischaracterisation of the Review Application*". Magnolia submitted that it was not seeking to review the interim order decisions but was relying upon the same (and further) information and material in relation to seeking a review of the decision not to make a declaration. Until the initial Panel's decision not to make a declaration of unacceptable circumstances had been made, there was no basis for Magnolia to seek a review and accordingly, the review was not out of time.
 - (c) Further, the initial Panel's communications in relation to interim orders were "*couched in terms that do not suggest that there had been a decision of the kind that enlivened the review jurisdiction*", such as "*not minded to make any further interim orders at this point in time*".
 - (d) Agency had known since 15 January 2021 that Magnolia might seek a review but had not taken any timing point of the kind now raised.
34. We agree with Magnolia that its review application asks for a review of the final decision of the initial Panel in Agency 02, that is, a decision not to make a declaration of unacceptable circumstances. Under the heading "Decision sought" Magnolia states in its application:
- "Review of decision of Initial Panel in The Agency Group Australia Limited 02 not to make a declaration under s657A and consequent orders and to make such declaration and orders as set out below"*.
35. The request for the President's consent was to the same effect – for consent to file an application for a review of the decision not to make a declaration - and the application subsequently lodged after consent was granted footnoted that "*This application is to be read with the request for leave to seek review (sic) from Magnolia of 2 February 2021*".
36. This is not surprising. As submitted by Agency, the events have taken place. Therefore, there would be little utility in Magnolia making an application now for review of the initial Panel's decisions in respect of the interim orders.
37. If the requested review had been in respect of the interim order decisions, we would agree that it is now out of time and the time cannot be extended. However, the requested review is not in respect of those decisions, although of course the interim order that resulted in the Nexia response is a fundamental aspect of the review.

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38. While it is open in appropriate circumstances to seek a review of an interim order decision, the Panel's process would quickly become unworkable if a review of every interim order decision was needed so as to comply with the review timeframe set out in Corporations Regulation 6.10.1.
39. To understand the provisions as requiring such reviews would result in every interim order that a party disagreed with needing to be the subject of a request for the President's consent (since there would at that stage be no declaration or orders¹⁶). Then a review Panel would need to be appointed to consider it, at the same time as the initial Panel was undertaking its consideration of the substance of the initial application. If the review Panel took a different view to the initial Panel on the interim order, it could change the basis of the initial Panel's consideration. This cannot have been intended.
40. The Panel is required (and does) operate to a tight timeline. Agency submitted that "*a person who has been a party to a Panel proceeding (which jurisdiction has the aims of speed, informality and certainty), ought to know almost immediately if they wish to seek a review... [and] ... a company the subject of Panel proceedings (and the market and many other potential stakeholders affected) should not be subject to the uncertainty that a party may seek a review later than when is strictly necessary.*"
41. This is true. But it does not mean that a review of an interim order is required. The principle is met by a timely review of the final decision.
42. It would undermine the purposes of speed and finality if the processes involved in reviewing interim orders along the way led to significantly delaying a final outcome. Such delay may be exacerbated if an initial Panel considered that it should suspend or defer the initial proceedings pending the establishment and consideration of a review Panel to consider an interim order decision that had been made by the initial Panel. We do not accept the submissions of Agency on this point.
43. Lastly, we point out that interim orders are intended to maintain the status quo. That may change during an initial proceeding and may give rise to a further request for an interim order, which in our view the initial Panel can make even though it may have declined a similar (or identical) order earlier. There is nothing in section 657E to suggest that it is exhausted because an interim order has been refused. Indeed, if that were the case, the intention of maintaining the status quo may not be achieved. In our view, section 657EA(2)(b) does not disentitle a party from seeking a review of a final decision of the initial Panel.
44. Accordingly, we do not accept the submission of Agency and consider that we have jurisdiction.

Scope of a review

45. This is a *de novo* review on the merits¹⁷ and we exercise our own discretion. Under Panel Procedural Rule 3.3.1, review of a decision of the Panel is a *de novo*

¹⁶ Section 657EA(2)

¹⁷ Procedural Rule 3.3.1, Guidance Note 2: *Reviewing Decisions* at [31]

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consideration on the merits, having regard to the information available at the time of the review. Note 2 to that rule says “A *de novo* review means the review Panel considers afresh the circumstances in the application being reviewed and any new circumstances raised (which may have arisen subsequent to the initial decision), and makes its own findings and decisions.”

46. The Panel has consistently adopted this approach of “de novo review”.¹⁸ The approach has been considered in a number of court cases.¹⁹
47. The question that arises here is whether our review is limited to a review of Agency 02 or must encompass also Agency 01.
48. The question arises because there were two applications but the review was limited in terms to only one. The two applications, Agency 01 and Agency 02, were considered together pursuant to ASIC Regulation 16 as related matters. The applications may appear to have merged, based on the heading to the declaration and the text of the media release announcing the decision of the initial Panel,²⁰ but in our view this impression is incorrect. The text of the declaration addresses the circumstances in Agency 01 and not the circumstances in Agency 02.
49. The circumstances of each application are different, although related in the sense that they concerned competing proposals – the bid for Agency the subject of Agency 01 included a condition that the Peters Proposal the subject of Agency 02 not proceed.
50. Our starting point is to consider the decision that is sought to be reviewed. In *Tribune Resources 02R* the Panel said, comparing the Administrative Appeals Tribunal Act 1975 (Cth) with the Panel’s review jurisdiction, “The boundaries of our jurisdiction are set by reference to the decision subject to review.”²¹ The High Court has stated that the first step on a review is to determine what the decision is that is under review since this marks the boundary of the review.²²
51. The decision under review here is the decision not to make a declaration and orders in Agency 02. ASIC Regulation 16(1)(a) provides that the Panel may “direct that 2 or more related matters are to be considered in Panel proceedings”. This suggests that related matters may be heard together but it does not mean that they become one application.

¹⁸ See for example *Sovereign Gold Company Limited 01R* [2016] ATP 14 at [28]; *Bentley Capital Limited 01R* [2011] ATP 13 at [24] (question reserved); *Austral Coal Limited 02(RR)* [2005] ATP 20 at [23]; *National Can Industries Limited 01(R)* [2003] ATP 40 at [21]

¹⁹ For example, *Glencore International AG & Anor v Takeovers Panel & Ors* [2005] FCA 1290 at [10]; *Takeovers Panel v Glencore International AG* [2005] FCA 1628 at [5]-[6]; *Eastern Field Developments Limited v Takeovers Panel* [2019] FCA 311 at [181]

²⁰ The media release commences: “The Panel has made a declaration of unacceptable circumstances (Annexure A) and final orders (Annexure B) in relation to applications dated 8 December 2020 by The Agency Group Australia Limited (Agency) and 16 December 2020 by Magnolia Equities III Pty Ltd (Magnolia), both in relation to the affairs of Agency (see TP20/85 and TP20/87)”

²¹ [2018] ATP 22 at [11]

²² *Shi v Migration Agents Registration Authority* [2008] HCA 31 per Kiefel J at [133]

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52. Under section 657EA(1), ASIC and any party to proceedings may apply for a review of a decision²³ of the Panel made on an application under section 657C. Under section 657EA(4) the Panel, in conducting a review, has the same power to make a declaration or orders as the Panel has when considering an initial application under section 657C. The section 657C application, Agency 02, asked for a declaration in respect of disclosure concerns in the Reports.
53. In our view, while a review Panel does not have more power than an initial Panel, it has the same power. Under section 657C, the (initial) Panel may make a declaration or orders “*only on an application made under this section*”.²⁴ That application was Agency 02. It follows that it is Agency 02 that is the subject of the review.
54. We note that no point was taken concerning Agency 01 by any party.
55. In any event, ASIC Regulation 16(1)(b) allows the Panel to “*identify the issues to be considered by the Panel in its proceedings.*” Should we be wrong, we would have decided (had we conducted proceedings) that the issues to be considered were those in Agency 02.
56. The further question is whether, within Agency 02, we are restricted to considering only the points raised in the review application that arise from the initial application, or can look at the whole of the circumstances raised by either the review application or initial application. We think we are not limited by the issues raised in the review application. We can consider the whole of the initial application and any new circumstances²⁵, although we are not obliged to go further than the review application if we do not consider it necessary. The Panel said in *Molopo Energy Limited 03R, 04R & 05R*:²⁶
- Our review is not limited by the findings of the initial Panel or confined to the grounds raised in the review applications. This is because our review is a de novo hearing of the matters before the initial Panel based on the material before us and on which we exercise our own discretion. It is open for us to re-consider all aspects of the initial applications...*
57. It is the case that the Panel determines the scope of its review in that it considers “*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.*”²⁷ (emphasis added)
58. This construction of the breadth of a review is to be preferred to a narrower construction because, under section 657EA(4), after conducting a review a Panel may:
- (a) *vary the decision reviewed; or*

²³ “Decision” has the same meaning for this purpose as in the *Administrative Appeals Tribunal Act 1975* (Cth). Under s3(3) of that Act, a decision includes (a) *making, suspending, revoking or refusing to make an order or determination....;*

²⁴ However, note s657E(1)(b) which says that the Panel may make an interim order even if “*no application to the Panel for a declaration of that kind has been made*”

²⁵ For example, the review included disclosure in the notice of meeting as well as the Reports

²⁶ [2017] ATP 12 at [41] footnotes omitted

²⁷ *BreakFree Limited 04(R)* [2003] ATP 42 at [47]. See also *Mungana Goldmines Limited 01R* [2015] ATP 7 at [42]

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(b) *set aside the decision reviewed; or*

(c) *set aside the decision reviewed and substitute a new decision.*

59. This suggests a broader approach is required than simply looking into the issues raised in a review application. It is more consistent with the type of *de novo* review in which the rehearing body considers afresh the question that was before the initial decision maker, including receiving any new information.²⁸
60. These provisions support an objective of speed and finality, which were significant considerations in the establishment of the modern Panel.²⁹

This review application

61. In response to the review application, we received all the material before the initial Panel and its draft reasons and obtained further submissions during our consideration. We have considered all the material but address only that part of the material we consider necessary to explain our reasoning.
62. When making our assessment of all the material in this matter we have relied on our skills, knowledge and experience as practitioners (which has been made known to the parties) and as members of the sitting review Panel.³⁰

Timing issue

63. Magnolia submitted that there was insufficient time for Agency's shareholders to make an informed decision after the initial Panel's interim orders. It submitted that shareholders did not have time to consider whether they should attend and vote, appoint a proxy or change a previous direction, particularly given the time of year.
64. We do not agree with Magnolia's submission.
65. The initial Panel considered the timing issue when it made its interim order. Among other things, it considered Agency's submission to the effect that debts were due imminently, particularly the debt to Macquarie (referred to in the notice of meeting) that was the subject of a Deed of Forbearance until 31 December 2020 (as extended), that the government's insolvency relief in response to COVID-19 was due to end, and Magnolia's submission regarding the timing of its proposed bid. The initial Panel formed a preliminary view that the Third Party report "*raised a serious question whether Agency shareholders had sufficient information for any approval under item 7...*" and considered that the interim order balanced competing interests in the face of a dynamic situation.

²⁸ *Gondwana Resources Limited 02R* [2014] ATP 18; *Mungana Goldmines Limited 01R* [2015] ATP 7; *Sovereign Gold Company Limited 01R* [2016] ATP 14; *Molopo Energy Limited 03R, 04R & 05R* [2017] ATP 12. This is not to prevent a review Panel declining to conduct proceedings (*GoldLink IncomePlus Limited 04R* [2009] ATP 3) or, if it conducts proceedings, limiting the review to certain issues (ASIC Regulation 20)

²⁹ Australian Government Department of Treasury, *Takeovers, Corporate Control: a better environment for productive investment, Corporate Law Economic Reform Program Proposals for Reform: Paper No. 4* (1997)

³⁰ See *Tinkerbell Enterprises Pty Limited as Trustee for The Leanne Catelan Trust v Takeovers Panel* [2012] FCA 1272 at [114]

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66. The initial Panel made the interim order on 22 December 2020, clearly being conscious of the time of year. Equally clearly, the initial Panel was conscious of the possibility that shareholders may wish to lodge or change a proxy.
67. The initial Panel made its decision on the matter on 29 January 2021, having indicated its likely position on 13 January 2021, knowing what had transpired since making its interim order. The initial Panel concluded³¹ on the timing point: “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”.
68. Now those pressures no longer exist we are asked to consider afresh whether shareholders were given enough time. Magnolia submitted to us, among other things, (omitting the footnote) that:
- It is irrelevant that the Initial Panel was aware of the timing, including any “financial imperative”, or that the timing in part was the consequence of the Initial Panel's conduct of the proceedings. The point of a review is that a new panel can look at the circumstances de novo. The applicant for review does not need to establish that the Initial Panel erred, but the total circumstances affecting the relevant company's affairs, including the effect of the conduct condoned or caused by the Initial Panel, can properly be considered in determining whether unacceptable circumstances exist.*
69. We agree with Magnolia to the extent that we are conducting a *de novo* look at the circumstances. We agree also that the initial Panel simply prescribed a minimum time.
70. Agency submitted to us, among other things, that the initial Panel sought to balance the timing and information requirements against Agency’s “financial imperative” and shareholders in fact had more time than the initial Panel had originally envisaged (given the AGM was delayed until 4 January 2021). We agree.
71. In all the circumstances we think the shareholders were given enough time. In saying this, we have not regarded our task as one of considering whether the initial Panel was wrong, but one of looking at all the relevant circumstances as they existed and now exist. On the timing question we do not think there are subsequent facts that alter the position.
72. Interested shareholders had access to the Supplementary IER and the Nexia response. They had from 11 December 2020 to read the Supplementary IER. The AGM was deferred for 11 days in total (albeit with holidays). Shareholders had at least 5 clear days (including holidays) to read the Nexia response published on ASX on 29 December 2020 (or 10 clear days if they obtained a copy from the Agency website or received an email from Agency on 24 December 2020). It is not a particularly lengthy or difficult document to read. In our view, similar to the view the Panel took in *Anaconda 02, 03, 04 & 05*,³² the timeframe was less than ideal but

³¹ [2021] ATP 2 at [100]

³² [2003] ATP 4 at [109], albeit an different situation

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was reasonable in the circumstances and not such as to give rise to unacceptable circumstances.

73. Agency submitted that if Magnolia had concerns that shareholders would be prejudiced by the shortness of time, it ought to have sought review of the interim orders before the AGM. We think that Magnolia did seek to put the matter back before the initial Panel by seeking further interim orders. The initial Panel had an opportunity to reconsider the timing on 28 December 2020 and again on 4 January 2021 when it considered requests by Magnolia for further interim orders. We do not agree with Agency, but for other reasons think the timing was sufficient.

Disclosure issues

74. Magnolia submitted that the initial Panel gave no, or insufficient weight, to the defects in the Nexia response identified by the Second Third Party Report.
75. Magnolia further submitted that:
- (a) The information provided by Agency for its AGM³³ did not sufficiently disclose the intended disbursement of the proceeds of the convertible notes upon the approval by shareholders, information regarding cashflow after expenditure of funds, solvency position and expenses due to be paid.
 - (b) The IER, Supplementary IER and Nexia response failed to identify that MCL 105 Pty Ltd (a related entity of Magnolia) had a secured debt and had made a claim for almost \$400,000 against Agency.
 - (c) Agency shareholders did not have sufficient information to make an informed assessment under item 7 of section 611 and, as all material information known to Agency had not been disclosed, the item 7 vote was not effective.
 - (d) Accordingly, the conversion of \$3 million of the convertible notes and the exercise of 14 million options on 28 January 2021 by Peters Investments (to become a substantial holder in Agency with 30.24%) contravened section 606. It also submitted that there was non-compliance with sections 602(a), 602(b)(ii) and 602(b)(iii), making the acquisition by Peters Investments unacceptable.
76. We deal with these issues together as they all relate to disclosure.
77. The initial Panel had the benefit of the Second Third Party Report and Magnolia's submission to the effect that the Nexia response inadequately responded to the issues and shareholders did not have "*an independent expert report of the kind and standard envisaged by applicable ASIC regulatory guidance*".
78. The initial Panel concluded that:
- 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*

³³ Including the IER, Supplementary IER and the Nexia response

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*based on the material provided that it is appropriate to declare that this ground amounts to unacceptable circumstances.*³⁴

79. We also note, as did the initial Panel, that shareholders were aware of the Third Party concerns and the Nexia response at the time they voted on the Peters Proposal Resolutions.
80. In our view, the difference between the disclosures that Magnolia submitted were required and the disclosures Agency made were either not material or have been explained (as, for example, the difference in the Macquarie debt position).
81. For example, the disbursement of the proceeds was sufficiently clear in our view. Under a heading "Reasons for the proposed issue of securities" in Agency's notice of AGM, Agency said "*The funds raised ... will further secure the Company's position to accelerate its growth strategy and have and will continue to be specifically applied to:*
- (i) Reducing existing debts owed to [Macquarie];*
 - (ii) Facilitating fundraising and re-financing costs; and*
 - (iii) Improving the Company's working capital position."*
82. Shareholders would understand that debts needed to be urgently paid and Agency needed capital to do so. The cash flow situation was reasonably clear. Agency included 'working capital' as a purpose of the proposal. Even if specificity would have been desirable, the lack of specifics does not, in our view, give rise to unacceptable circumstances in this case.
83. We do not consider there are any material disclosure issues regarding the alleged debt owed by Agency to MCL 105 Pty Ltd.
84. As for the Nexia response and the Second Third Party Report, we agree with the initial Panel that the threshold set for a Panel to question the correctness of an expert's report is high. It follows that the same high threshold applies to the Nexia response. In *Minemakers 02R*,³⁵ followed in *Mungana*,³⁶ the Panel adopted the principle that it should not undertake inquiries into the correctness of an independent expert's report in the absence of strong preliminary indications of:
- (a) a clear fault in the methodology, which would normally include non-compliance with relevant industry codes
 - (b) statements that are plainly false and material to the conclusion
 - (c) the expert having reached a conclusion that no reasonable expert could reasonably arrive at
 - (d) a question mark over the independence of the expert or

³⁴ [2021] ATP 2 at [101]

³⁵ [2012] ATP 16 at [10]-[11]. See also *Tranzact Financial Services Limited* [2014] ATP 3 at [29], where the Panel said that while the expert's report could have been better prepared, most of the issues raised were either not material or would not have caused the expert to reach a different conclusion.

³⁶ *Mungana Goldmines Limited 01R* [2015] ATP 7

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- (e) some other basis taking the issue beyond what might be described as simply matters on which experts might disagree.
85. We are not persuaded that any of these indications is present. Absent one of these, we think that we should not substitute our view for that of the expert. Of course, that does not mean that an expert's view will always prevail and there are examples of the Panel taking a different view as to materiality of disclosure, or correctness of some aspect of a report, such as methodology.
86. In this case, in our view, the matters raised by Magnolia do not exceed the threshold. We note the initial Panel's comments in paragraph 99 of its reasons regarding "*matters of judgement in respect of which experts might reasonably disagree*" and agree with that proposition in respect of the matters the subject of the review application.
87. We do not think we need to address in detail in these reasons each matter raised by Magnolia.
88. Moreover, we note that ASIC had received the Reports, as well as the material provided to the initial Panel and the material provided to us. ASIC takes a very considered view of expert's reports and has, through the initial and review proceedings, had these expert opinions specifically brought to its attention. ASIC has not raised any concerns either directly – as far as we have been advised – with the expert or Agency, or with us. ASIC has not, for example, made a submission that the expert has not complied with RG 111 – Content of expert reports.³⁷
89. Magnolia submitted, based on the Second Third Party Report, that "*the shareholders of [Agency] did not receive an independent expert report of the kind and standard envisaged by applicable ASIC regulatory guidance...*". We are not persuaded that this is the case.
90. Therefore, we are not persuaded that the information provided or available to shareholders was deficient such that item 7 approval was ineffective.

Presentation issue

91. Magnolia submitted that the information that was given to shareholders was not provided in a clear and succinct way. It submitted that Nexia ought to have been ordered to withdraw its Reports and to produce a revised report. While the Panel has ordered this in the past³⁸ we do not think it was necessary in the circumstances of this case.
92. In all the circumstances, particularly the time available, we do not think this gives rise to unacceptable circumstances. The production, for example, of a new report is not necessarily of assistance to shareholders, particularly those who have read the Supplementary IER or the IER, unless the changes are clearly identified to make tracking simple.³⁹ As noted, shareholders were, by the way the material was presented, made aware of the concerns and the response. It may have been different

³⁷ Compare *Bowen Energy Limited 02R* [2009] ATP 19

³⁸ *Sydney Gas Limited 01* [2006] ATP 9

³⁹ For example, *AWE Limited* [2018] ATP 4

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if Nexia had come to a different conclusion following its consideration of the Third Party comments, but it did not.

Substantial holder notice

93. The review application also stated that Peters Investments had not lodged a substantial holder notice. A substantial holder notice, disclosing voting power of 30.24% of Agency, was lodged by Peters Investments on 3 February 2021. We do not take this issue any further.

Conclusion

94. Magnolia submitted that “*If the Nexia Response had adequately addressed the concerns itemised in the interim orders, then this would have been an effective means by which the shareholders could have obtained the proper information...*”. While Magnolia further submitted that shareholders did not receive proper information, we do not agree.
95. Magnolia also raised an issue regarding voting exclusions on the item 7 vote in its initial application but this was not included in its review application. We do not think that we need to address this issue.

DECISION

96. 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 ASIC Regulation 20.

Orders

97. 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.

Ian Jackman SC

President of the sitting Panel

Decision dated 22 February 2021

Reasons given to parties 12 March 2021

Reasons published 16 March 2021

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Advisers

Party	Advisers
Agency	Tottle Partners
Magnolia	Blackwattle Legal



Australian Government

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Annexure A

**AUSTRALIAN SECURITIES AND
INVESTMENTS COMMISSION ACT 2001 (CTH) SECTION 201A
UNDERTAKING**

THE AGENCY GROUP AUSTRALIA LIMITED 03R

Peters Investments Pty Ltd undertakes to the Panel that, until completion of the Panel proceedings, it will not without the Panel's consent convert any further Convertible Notes or exercise any further Options.

Peters Investments Pty Ltd agrees to confirm in writing to the Panel that it has satisfied its obligations under this undertaking upon completion of the Panel proceedings.

In this undertaking the following terms have their corresponding meaning:

Term	Meaning
Convertible Notes	The convertible notes that have not to date been converted from the 5,000,000 convertible notes issued to Peters Investments Pty Ltd pursuant to section 611 item 7 approval and approval for all other purposes by shareholders of The Agency Group Australia Limited on 4 January 2021
Options	The options that have not to date been exercised from the 3,170,441 options granted to Peters Investments Pty Ltd pursuant to section 611 item 7 approval and approval for all other purposes by shareholders of The Agency Group Australia Limited on 4 January 2021
Panel proceedings	Review proceedings brought by application dated 2 February 2021

**Signed by Robert Peters of Peters Investments Pty Ltd
with the authority, and on behalf, of Peters Investments Pty Ltd
Dated 5 February 2021**