



**In the matter of Magna Pacific (Holdings) Limited
[2007] ATP 02**

Catchwords:

Basis for bidder's opinions in bidder's statement – misleading statements – presentation of graph – use of emotive language – reference date for calculation of premium – forward looking statements – role of target's statement

Corporations Act 2001 – sections 602(b)(iii), 636(1)(m), 670A

ASIC Policy Statement 170 - Prospective financial information

Southcorp Limited [2005] ATP 4

Guidance Note 16 – Correction of takeover documents

Magna Pacific (Holdings) Limited – Lionsgate Australia Pty Ltd

These are the Panel's reasons for declining to make a declaration of unacceptable circumstances on an application by Magna Pacific (Holdings) Limited dated 23 February 2007 in relation to the off-market takeover bid for Magna Pacific by Lionsgate Australia Pty Ltd. The Panel decided not to make a declaration of unacceptable circumstances having received supplementary disclosure by Lionsgate which addressed its concerns in relation to certain statements in Lionsgate's bidder's statement dated 13 February 2007 which the Panel considered to be deficient, and misleading because of the omission of material information.

THE PROCEEDINGS

1. These reasons relate to an application to the Panel from Magna Pacific (Holdings) Limited (**Magna Pacific**) on 23 February 2007 in relation to an off-market, cash takeover bid for Magna Pacific by Lionsgate Australia Pty Ltd (**Lionsgate**), a wholly owned subsidiary of Lions Gate Entertainment Inc.

THE PANEL & PROCESS

2. The President of the Panel appointed Susan Doyle, Braddon Jolley (sitting President) and Karen Wood (sitting Deputy President) as the sitting Panel (the **Panel**) for the proceedings (the **Proceedings**) arising from the application.
3. The Panel adopted the Panel's published procedural rules for the purposes of the Proceedings.
4. The Panel consented to the parties being legally represented by their commercial lawyers in the Proceedings.

SUMMARY

5. Lionsgate lodged and served its bidder's statement on 13 February 2007 (**Bidder's Statement**). On 23 February 2007 Magna Pacific made an application to the Panel and submitted that the Bidder's Statement contained a number of deficiencies.
6. The key issues in Magna Pacific's application related to:
 - (a) **Misleading statements** – Magna Pacific submitted that Lionsgate had expressed opinions on a number of matters relating to Magna Pacific without:

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- (i) providing its reasons or bases for making the statements; or
- (ii) disclosing relevant and material publicly available information concerning the subject matter of Lionsgate's opinions.

Magna Pacific submitted that the omitted information made the statements misleading.

- (b) **Forward looking statements** – Magna Pacific submitted that a number of the Lionsgate statements to which it objected related to future financial performance of Magna Pacific, or other future matters. In relation to those forward looking statements, Magna Pacific submitted that ASIC's Policy Statement 170 requires prospective financial information to be supported by detailed analysis of how the information was derived, including assumptions, sensitivity analyses, risk statements and other information.
- (c) **Calculation of premium** – Lionsgate calculated the premium it claimed its offer represented by reference to the market price of Magna Pacific shares on 23 January 2007. This was the date Lionsgate commenced confidential discussions with Macquarie Private Portfolio Management Limited (**Macquarie**) in relation to a pre-bid acceptance agreement. Magna Pacific submitted that the use of this date without explanation for the choice was inappropriate. Magna Pacific submitted that Lionsgate should be required to also calculate the premium by reference to 1 February which was the date the bid was announced.

7. The Panel considered that a number of statements in, and omissions from, the Bidder's Statement were sufficiently misleading, because of the omission of either publicly available information or of Lionsgate's bases for its opinions, to give rise to unacceptable circumstances. However, the Panel accepted an undertaking by Lionsgate to make corrective disclosure to the Panel's satisfaction.
8. Lionsgate also made some corrections of items which it had previously agreed with Magna Pacific, and there were other claims raised by Magna Pacific in its application to the Panel on which the Panel did not require Lionsgate to make additional disclosures.
9. On 21 March 2007 Lionsgate lodged and served a replacement bidder's statement which addressed the Panel's concerns. On this basis the Panel declined to make a declaration of unacceptable circumstances.

APPLICATION

Background

10. Magna Pacific is a company listed on Australian Securities Exchange Limited and incorporated in Queensland. Magna Pacific is now an independent film and DVD distributor. In 2005 Magna Pacific changed its business strategy from being solely a DVD distributor to become an "all-rights" distributor of content (which refers to the distribution of film and movie content via cinemas, on DVD, on free to air television and on pay television etc).
11. Lionsgate is ultimately owned by Lions Gate Entertainment Corporation, a Canadian incorporated company which is listed on the New York Stock Exchange. Lionsgate

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announced its intention to make an off-market takeover bid for Magna Pacific on 1 February 2007 for an offer price of \$0.32 for each Magna Pacific share.

12. Lionsgate lodged and served its Bidder's Statement on 13 February 2007. The Panel was copied in on correspondence between Lionsgate and Magna Pacific in relation to Magna Pacific's claim that there were material defects in the Bidder's Statement. Lionsgate conceded that there were several minor errors that required correction and agreed to dispatch an amended version to shareholders containing the corrections.
13. Magna Pacific considered that Lionsgate's response did not address its concerns sufficiently and made an application to the Panel on 23 February 2007.

Declaration and orders sought in the Application

14. Magna Pacific sought interim orders restraining dispatch of the Bidder's Statement. Lionsgate offered, and provided, an undertaking that it would not dispatch its Bidder's Statement to Magna Pacific shareholders until the earlier of the Panel issuing its final decision in relation to the Proceedings, or the Panel consenting to dispatch. The Panel welcomed Lionsgate's undertaking and on that basis, decided that interim orders to restrain dispatch were unnecessary.
15. Magna Pacific sought a declaration of unacceptable circumstances under section 657A in relation to the defects it submitted existed in disclosure in the Bidder's Statement, and final orders requiring Lionsgate to send a replacement bidder's statement to Magna Pacific shareholders.

DISCUSSION

Lionsgate Statements and emotive language

16. Magna submitted that Lionsgate had not provided supporting information as to how Lionsgate formed its view in relation to:
 - (a) its statement, and accompanying graph, on Magna Pacific's cash balances which were given prominent focus in the opening section of the Lionsgate Bidder's Statement;
 - (b) Lionsgate's expectation as to future performance of a number of films for which Magna Pacific had bought the full Australian rights;
 - (c) a statement that Lionsgate considered that Magna Pacific's business model may have an adverse effect on Magna Pacific's business; and
 - (d) a paragraph headed "Highly uncertain dividends", where the paragraph under the heading merely said that a decline in Magna Pacific's future financial performance (and other financial matters) may affect Magna Pacific's ability to pay dividends
(collectively, the **Lionsgate Statements**).
17. The Panel's findings in relation to each of the Lionsgate Statements are discussed in detail below.

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Decline in cash balances statement and cash balance graph

18. Section 1.2 of the Bidder's Statement contained the following statement:

"Over the last three years Magna Pacific's cash balance has fallen substantially....In Lionsgate Australia's opinion, Magna Pacific shareholders should be particularly concerned about these falling cash balances, particularly with the significant capital expenditure associated with Magna Pacific's "all-rights" business model as explained at section 1.4 below". (Concern Statement)

19. This statement was accompanied by a graph that started at the financial year ending 30 June 2004 (FY04) and finished at the financial year ending 30 June 2006 (FY06) (**Cash Balance Graph**). The Cash Balance Graph showed a cash balance position of \$28.5 million at FY04 and \$3.7 million at FY06 and had a sharply downward sloping arrow above.
20. Magna Pacific submitted that it was misleading to focus on a decline in cash balances over that limited period without also referring to publicly available information that:
- in the three years before FY04 the cash balance position of Magna Pacific had been between approximately \$5-7 million;
 - in 2004, Magna Pacific raised \$19.4 million as a result of the exercise of options and a placement of shares to an institutional investor; and
 - Magna Pacific has spent the funds raised in 2004 and other funds on the acquisition of 50% of its main operating subsidiary (\$22.3 million), acquiring back catalogue products, dividends (\$12.3 million), and buy-backs (\$2.9 million).
21. Lionsgate submitted that its statements concerning cash balances, including the Concern Statement, were explained and supported by its statements at section 1.4 of the Bidder's Statement that Magna Pacific's "all-rights" strategy required significant capital expenditure.
22. The Panel considered that it was misleading to present a decline in cash balances in a bar graph that started at a high point following a capital raising, without referring to, or showing the cash balances before, the capital raising and without showing that the decline was as a result of expectations for which the capital raising was undertaken. The manner in which the Cash Balance Graph was originally presented in the Bidder's Statement misleadingly conveyed the impression that the cash balance position for FY04 was consistent with previous years when this was not the case.
23. The Panel furthered considered that it was misleading for Lionsgate to suggest that Magna Pacific shareholders should be concerned about falling cash balances without also giving equal prominence to the publicly available information explaining the source and timing of Magna Pacific's 2004 cash reserves and how and why Magna Pacific had used its cash since FY04.
24. The information in relation to Magna Pacific's capital raising in 2003 and 2004 and subsequent investments and returns to shareholders (by dividends or otherwise) was information that was readily available to Lionsgate. The Panel considered the omission of this information and the presentation of the declining cash balance to be misleading. The Concern Statement and the Cash Balance Graph as originally presented in the Bidder's Statement were likely to be interpreted in a different

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manner (i.e. as “cash burn”) if the additional publicly available information was not included.

25. The Panel decided that in any corrective disclosure, a graph showing cash balances should, in the circumstances (including the Lionsgate application), appropriately start at least at FY02 and any statements in relation to cash balances should more accurately present the intentional capital expenditure from funds which included funds raised specifically for that purpose.
26. The Panel accepted that Lionsgate was entitled to have, and state, a view about Magna Pacific’s future need for cash flow to fund its “all rights” business model. However, the Panel also considered that any statements of opinion by Lionsgate about Magna Pacific’s need for cash flow in the future should be supported by explanations of the basis for that view, including Lionsgate’s views about Magna Pacific’s future cash inflows and outflows. The Panel considered that these explanations should be proximate to the Concern Statement. The Panel was concerned that the statements that Lionsgate submitted supported its Concern Statement were in a different section and spread over a number of pages, with inadequate cross references back to the Concern Statement.

Future performance statement

27. Section 1.4 of the Bidder’s Statement contained the following statement:

“Key to the future performance of Magna Pacific is the performance of the titles referred to above, namely 'Flyboys', 'August Rush', 'Because I said So' and 'Astronaut Farmer'. Lionsgate Australia has reviewed the performance, where already released and expected performance where not yet released, of these films in overseas markets and does not believe they will produce strong results for Magna Pacific in the Australian market, placing significant pressure on its future financial result” (**Future Performance Statement**)

28. The Panel accepted Lionsgate’s submissions that Magna Pacific itself had stated in an ASX announcement that the future performance of the four films would be important to Magna Pacific’s financial performance in 2007 and 2008. The Panel also accepted that Lionsgate had provided a clear quote from Magna Pacific to this effect in the Bidder's Statement.
29. Similarly, the Panel accepted that Lionsgate was entitled to have, and state, a view about the likely future performance of the four films (if it had a reasonable basis for its view), and that Lionsgate’s experience in the film industry was likely to give weight to its opinions on the four films.
30. However, the Panel agreed with Magna Pacific that Lionsgate had not provided an adequate explanation of the basis for its opinion expressed in the Future Performance Statement. The Panel did not agree with Lionsgate’s submission that Lionsgate’s experience in the film industry alone was an adequate explanation of, or basis for, the Future Performance Statement. The Panel considered that the mere description of Lionsgate’s credentials (which was several sections and pages further into the Bidder's Statement, with no cross references to the Future Performance Statement) was not sufficient to enable Magna Pacific shareholders to rely on the merits of the Future Performance Statement.

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31. The Future Performance Statement related to future matters, or matters of future financial performance. Accordingly, under section 670A Lionsgate was required to have reasonable grounds for the statement. The Panel considered whether, if Lionsgate had reasonable grounds for the statement, those grounds were also required to be disclosed. The Panel noted that Lionsgate had expressed the performance of the films in question to be “key to the future performance of Magna Pacific” and had cited statements by Magna Pacific that supported this conclusion.
32. The Panel determined that, in the circumstances, Lionsgate’s grounds for its opinion in relation to the performance of key films were likely to be material to the decision of Magna Pacific shareholders whether to accept the offer and should be disclosed. In the Panel’s view, putting Lionsgate’s credentials aside, it was appropriate that Magna Pacific shareholders have access to the objective information on which Lionsgate based its opinions, in order to be able to assess how much weight they should give to Lionsgate’s opinions, rather than only being provided with Lionsgate’s conclusions.
33. The Panel considered that the information in relation to Lionsgate’s industry experience should be expanded and clearly cross-referenced in the opening section of the Bidder’s Statement, if this information was to be used as a basis for any of Lionsgate’s opinions.
34. In its submissions, Lionsgate provided further information about the recent performance of some of the films (which had not been available at the time of lodging the Bidder's Statement). The Panel considered that this, more recent, publicly available information relating to the *actual* performance of the films in question was material information which should be included in any supplementary or corrective disclosure Lionsgate provided.

Terminal decline statement

35. Section 1.4 of the Bidder’s Statement contained the following statement concerning one aspect of Magna Pacific’s business strategy, which Lionsgate characterized as Magna Pacific cutting prices “to avoid further declines in earnings”:
“in Lionsgate Australia’s view, this strategy is unsustainable in the long run, increases Magna Pacific’s risk profile and may lead to a terminal decline in Magna Pacific’s business”
36. The Panel considered that the emotive language in the expression “*terminal decline*” was not adequately supported. The Panel considered that the stronger and more emotive the language Lionsgate used, the more and better quality information Lionsgate needed to provide to substantiate the statement. In this respect, the Panel required Lionsgate to provide further information in relation to Lionsgate’s reasoning (including the factual bases and assumptions) if Lionsgate wished to retain the reference to “terminal decline”. In its replacement bidder's statement Lionsgate deleted the “terminal” description while still suggesting that it considered the strategy would lead to a decline in Magna Pacific’s business.

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Highly uncertain dividend statement

37. Section 1.4 of the Bidder's Statement contained a heading: "*Highly uncertain dividends*" followed by a paragraph:

"A decline in the future financial performance of Magna Pacific, including an increase in capital expenditure required to fund the 'all rights' business strategy and declining cash balances may, in Lionsgate Australia's opinion, impact the ability of Magna Pacific to pay future dividends"

38. The Panel considered that the heading "Highly uncertain dividends" was not substantiated by the associated text in the Bidder's Statement and was not adequately supported (either in the associated text itself or by any clear cross reference in the associated text to where Magna Pacific shareholders may find Lionsgate's explanation for its statement).
39. The Panel did not object to the text of the paragraph underneath the heading "*Highly uncertain dividends*" if it was supported by Lionsgate's reasoning and bases for its opinion. However, the Panel considered there was a disconnect between the heading and following paragraph in that the text of the paragraph was largely factual whereas the heading was a forward looking statement in which Lionsgate gave a negative opinion about the likelihood of future dividend payments by Magna Pacific. The Panel reiterated its view that if Lionsgate (or any other bidder or target) wished to include strong and opinionated statements (particularly where such statements were placed in a prominent position such as a heading in the opening section), it should also provide equally strong accompanying information to substantiate the statement.

Forward looking financial statements

40. The Panel considered that the Lionsgate Statements were statements about future matters, or forward looking statements, and some were also prospective financial statements. The Panel considered that, in accordance with the requirement in section 670A, Lionsgate should have reasonable grounds for all statements about future matters or forward looking statements. In this case, the Panel considered that:
- (a) Magna Pacific shareholders would be likely to expect to find those grounds clearly disclosed in the Lionsgate Bidder's Statement; and
 - (b) the bases and reasonable grounds underlying the Lionsgate Statements was information which should be disclosed in accordance with the sufficient information principle in section 602(b)(iii) and the disclosure requirements in section 636(1)(m).
41. The Panel considered that the Lionsgate Statements were forward looking, and therefore necessarily speculative to some degree. However, it did not consider that any of the Lionsgate Statements were unreasonably speculative, or that Lionsgate did not have a reasonable basis for holding the views. The Panel did however consider that Lionsgate had not included in the Bidder's Statement sufficient explanation of the basis for a number of these necessarily speculative, forward looking statements and had not included relevant information such as the assumptions on which Lionsgate had based some of the Lionsgate Statements.

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42. Although the Panel recognises that Policy Statement 170 was specifically drafted to relate to disclosure documents and Product Disclosure Statements, the Panel accepted ASIC's submissions that ASIC Policy Statement 170 provides useful guidance to a bidder where forward looking statements are also prospective financial statements. The Panel does not consider that all forward looking statements will necessarily be required to meet every requirement detailed in Policy Statement 170. However, the Panel considers that PS 170 provides useful assistance to bidders and targets in considering disclosure to support any forward looking statements in a bidder's statement or target's statement.

Reference date for calculation of premium

Basis for selecting 23 January 2007

43. In its Bidder's Statement, Lionsgate chose 23 January 2007 as the reference date against which it calculated the premium which it stated its offer represented over market values for Magna Pacific shares. Lionsgate submitted that 23 January 2007, which was the date Lionsgate commenced confidential discussions with Macquarie in relation to a pre-bid acceptance agreement, was a more appropriate reference date than 1 February 2007 which was the date on which Lionsgate announced its takeover offer.
44. Lionsgate submitted that between 23 January and the date the bid was announced, there was a significant increase in the trading volume and price of Magna Pacific shares which could only be explained by takeover speculation. For this reason, Lionsgate submitted it was more appropriate to calculate its premium by reference to a date before the share price of Magna Pacific was influenced by takeover speculation.
45. The Bidder's Statement did footnote the fact that discussions with a shareholder had commenced on 23 January 2007, and the Panel accepted that Lionsgate may have had a reasonable basis for choosing 23 January 2007. However, the Panel did not consider that Lionsgate had adequately explained why the date was chosen or why the discussions were significant for the calculation of the offer premium i.e. because the price of Magna Pacific shares had moved from the date of the discussions. Therefore, the Panel required Lionsgate to provide clear additional information on this issue. The Panel considered that it was appropriate for this information to go into the body of the replacement bidder's statement rather than in a footnote.
46. The Panel accepted that a bidder may have valid reasons for choosing a date other than the date immediately prior to the announcement of its offer (**Pre-announcement date**) for the purpose of calculating a premium. The Panel considered, however, that where a bidder does choose an alternative date to the Pre-announcement date it would also usually be appropriate to provide a clear explanation for why it considers that the date it has chosen is more appropriate than the Pre-announcement date.

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Comparing 23 January 2007 to other takeover premiums

47. In the Bidder's Statement Lionsgate also compared the takeover premium of its offer¹ against "acquisition premiums for takeover offers in the Australian sharemarket over the last year". Given that Lionsgate had chosen to make this comparison, the Panel further considered that Lionsgate should also show the calculation of its premium against the market price of Magna Pacific shares on 1 February 2007. The Panel does not suggest that in every instance where a bidder chooses a date other than the Pre-announcement date for calculating a premium, the bidder will also be required to show the premium by reference to the Pre-announcement date.
48. Although Lionsgate pointed to several bids where a date other than a Pre-announcement date had been used as a reference, the Panel considered that it is generally more common for premiums to be calculated by reference to Pre-announcement dates. For this reason, the Panel considered that if Lionsgate wished to compare the premium it is offering to premiums offered under other takeover bids, it should compare like with like and show the calculation of the premium by reference to the Pre-announcement date or announcement date of its offer. Given the comparison to market premiums, the Panel considered it misleading to only show the calculation of Lionsgate's premium by reference to 23 January 2007.

Role of Magna Pacific's target's statement

49. Lionsgate submitted that if Magna Pacific disagreed with any of the Lionsgate Statements or the date against which Lionsgate had chosen to calculate its premium, the appropriate forum of address was Magna Pacific's target's statement. The Panel agreed that there were many areas of disclosure in the Bidder's Statement where it was open for Magna Pacific to take a different view to Lionsgate. The Panel decided that where such differences of opinion were merely argumentative, and where Lionsgate had disclosed the bases for its opinions in the Bidder's statement, it would be appropriate to expect Magna Pacific to express any differing views it may have in its target's statement.
50. However, the Panel did not consider it appropriate for Magna Pacific to be obliged to redress misleading statements and misleading presentation of information in its target's statement. Also, it did not consider it appropriate to expect Magna Pacific to provide disclosure which, as material information, Lionsgate was required to disclose in its Bidder's Statement. Further, the Panel did not consider that Magna Pacific should be obliged to rebut Lionsgate's statements of opinion without the benefit of Lionsgate disclosing the bases or explanations for its opinions. Disclosure of material information and the observance of the prohibition in relation to misleading statements are obligations on the part of Lionsgate. The Panel considered it was not the role of Magna Pacific's target's statement to remedy materially deficient disclosure by Lionsgate.
51. The Panel did not agree with Lionsgate's submissions that the decision in *Southcorp Limited* [2005] ATP 4 was applicable in this case. In the *Southcorp* decision the Panel did not find the bidder's opinions in question to be misleading. In that case the Panel considered (at paragraph 114) that the target shareholders were unlikely to accept the

¹ Calculated at 23 January 2007.

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bidder's assertions as unqualified fact and were instead likely to look to their directors to express any contrary view in the target's statement or media release. The Panel in these proceedings also considered that the statements made in the *Southcorp* decision were considerably more objective statements, based on observable fact, than the more subjective and complex opinions expressed by Lionsgate.

52. In this case, the Panel found that the Lionsgate Statements and presentation of the reference date for the calculation of the premium were misleading, and that, if not corrected, Magna Pacific shares would be trading on a misinformed basis. Given the prejudicial nature of misleading statements or omissions of material information, and in the interests of an efficient, competitive and informed market, the Panel considered it was important that statements and omissions of this type be addressed and corrected on a timely basis.

Application of Guidance Note 16 – Correction of takeover documents

53. In accordance with paragraph 16.22 of Guidance Note 16, the Panel required Lionsgate to include the following corrective statement in its replacement bidder's statement:

"On 13 February 2007, Lionsgate Australia lodged a bidder's statement with ASIC. Magna Pacific applied to the Takeovers Panel for a declaration of unacceptable circumstances in relation to certain statements in the Lionsgate bidder's statement. The Takeovers Panel accepted an undertaking from Lionsgate to issue this replacement bidder's statement containing additional disclosures, explanations and some corrections and on that basis decided that a declaration of unacceptable circumstances was unnecessary."

54. The Panel did not require Lionsgate to identify the specific changes in the replacement bidder's statement which it sent to Magna Pacific shareholders. This was because:
- (a) Lionsgate's undertakings to withhold dispatch of the original bidder's statement and to provide a replacement bidder's statement meant that the original Bidder's Statement had not yet been dispatched to Magna Pacific shareholders and therefore there was not as great a need to correct any misleading impressions which may have formed in Magna Pacific shareholders' minds; and
 - (b) the ASIC Class Order relief allowing the issue of a replacement bidder's statement requires the bidder to provide ASIC and ASX with a mark-up against the original Bidder's Statement.

The Panel was satisfied that these two factors addressed the requirement in paragraph 16.22(c) of the Panel's Guidance Note 16 to identify the issue or information which required correction.

55. The Panel considers that where corrective disclosure and a corrective statement in accordance with paragraph 16.22 (**Corrective Statement**) are required, the Corrective Statement should be included in a prominent position. The Panel considered the fact that the original Bidder's Statement had not been dispatched and that the replacement bidder's statement would be the first document from Lionsgate received by Magna Pacific shareholders. This consideration was significant in the Panel's decision not to require the Corrective Statement to be on the front cover of the

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replacement bidder's statement. In this case the Panel accepted Lionsgate including its Corrective Statement in an emboldened box on the contents page.

DECISION

56. Having regard to the replacement bidder's statement provided by Lionsgate and accepted by the Panel, the Panel considered that it was not against the public interest to decline to make a declaration of unacceptable circumstances and therefore declined to do so.

Braddon Jolley

President of the Sitting Panel

Decision dated 21 March 2007

Reasons published 14 May 2007