



**In the matter of Magna Pacific (Holdings) Limited 02  
[2007] ATP 03**

**Catchwords:**

*Avoidance of takeover provisions; Basis for directors' recommendation; Proposed rival scheme of arrangement - Sufficiency of information in ASX announcement;- "disclosure of speculation"- timing of announcement -funding arrangements of rival bidder - publication of Heads of Agreement - operation of break fee arrangements and fiduciary exception; fiduciary carve out; lock-up agreement; false and misleading statements;; exclusivity provisions of lock up agreement; ;calculation of break fee; 1% cap on break fee;*

*Corporations Act 2001 - Division 2 of Part 7.10, s411(17);*

*Guidance Note 7 - Lock-up devices*

*Magna Pacific (Holdings) Limited - Lionsgate Australia Pty Ltd - destra Corporation Limited - Macquarie Private Portfolio Management Limited*

**These are the Panel's reasons for deciding not to commence proceedings in relation to an application from Lionsgate Australia Pty Ltd regarding the affairs of Magna Pacific (Holdings) Limited and destra Corporation Limited (see [TP07-14](#)). The Panel decided not to commence proceedings following additional disclosure from Magna Pacific and destra, and some changes to the lock-up agreement in question which addressed the Panel's concerns.**

## **THE PROCEEDINGS**

1. These reasons relate to an application to the Panel dated 5 April 2007 from Lionsgate Australia Pty Ltd (Lionsgate), a wholly owned subsidiary of Lions Gate Entertainment Inc. Lionsgate is currently making an off-market, cash takeover bid for Magna Pacific (Holdings) Limited (Magna Pacific) at an offer price of \$0.32 per Magna Pacific share. Lionsgate's application related to an ASX release dated 30 March 2007 announcing the intention of destra Corporation Ltd (destra) and Magna Pacific to implement a scheme of arrangement (Proposed Scheme) under which destra would acquire all the issued capital in Magna Pacific (Announcement) for consideration that included a cash alternative of \$0.38 per Magna Pacific share.

## **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 any 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.

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## SUMMARY

5. The Panel considered that Lionsgate's claims regarding the sufficiency of information provided in the Announcement and the adequacy of the break fee and exclusivity arrangements, were addressed by destra and Magna Pacific publishing the Heads of Agreement they had executed in relation to the Proposed Scheme (**Heads of Agreement**). In the covering announcement to the Heads of Agreement destra and Magna Pacific clarified the operation of the fiduciary exception to the satisfaction of the Panel.
6. Following the publication of the Heads of Agreement and changes that Magna Pacific and destra agreed to make to the lock-up agreement (both at the request of the Panel), the Panel decided not to commence proceedings.

## APPLICATION

### Background

7. On 5 February 2007 Lionsgate lodged a substantial holder notice in relation to a pre-bid acceptance agreement with Macquarie Private Portfolio Management Limited (**Macquarie**) under which Macquarie agreed to accept the Lionsgate bid (subject to a higher offer), and Lionsgate acquired voting power over Macquarie's holding of 11.65% of Magna Pacific securities (**Macquarie Agreement**).
8. Lionsgate lodged its bidder's statement with the Australian Securities and Investments Commission on 13 February 2007 and dispatched a replacement bidder's statement to Magna Pacific on 26 March 2007 following a Panel decision dated 21 March 2007 (Magna Pacific 01 see [TP07-07](#) and [TP07-11](#)). Lionsgate's offer is for all of the shares in Magna Pacific at \$0.32 per share.
9. On 30 March 2007 destra Corporation Ltd (**destra**) and Magna Pacific announced their intention to implement the Proposed Scheme. Under the Proposed Scheme, Magna Pacific shareholders would have an option of electing to receive \$0.38 cash, or \$0.15 cash and one destra share, for each Magna Pacific share.

### Application

10. In its application, Lionsgate submitted that:
  - (a) **Misleading disclosure**
    - (i) Magna Pacific and destra had not explained that the Proposed Scheme was a mere "disclosure of speculation", i.e. a proposal subject to a number of preconditions such that it may never proceed;
    - (ii) Magna Pacific had not disclosed a basis for its opinion as to value in comparing the destra proposal against Lionsgate's offer; and
    - (iii) on these bases, the Announcement was misleading.
  - (b) **Timing of Announcement** - Magna Pacific and destra may have timed the Announcement in an attempt to cause the Macquarie Agreement to lapse;

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- (c) **destra's financial position** - destra's financial position is such that it will require significant fundraising, whether by debt or equity, to implement the \$41 million plus proposal;
  - (d) **Break fee and exclusivity arrangements** - the break fee arrangements and exclusivity restrictions between Magna Pacific and destra did not meet the requirements of Guidance Note 7 – Lock-up devices.
11. The Panel notes that Lionsgate also submitted that:
- (a) **Recommendation** without a basis: Magna Pacific directors had recommended the destra scheme to Magna Pacific shareholders without a reasonable basis and without adequately explaining the risks to Magna Pacific shareholders, and not advising Magna Pacific shareholders that the Lionsgate offer may close before the scheme becomes operative (if in fact it does) and not be available to Magna Pacific shareholders if the scheme is not proposed or approved; and
  - (b) **avoidance of Chapter 6:** destra may have announced its proposed scheme to avoid certain Chapter 6 requirement in circumstances where it could not have announced a takeover.
12. The Panel however did not consider it necessary to consider the issues outlined in paragraph 11(b) in reaching its decision and only considered the issues in paragraph 11(a) to the extent set out in paragraph 19.
13. Lionsgate sought a declaration of unacceptable circumstances under section 657A and final orders restraining Magna Pacific and destra from implementing the Proposed Scheme.

## DISCUSSION

### Adequate disclosure of risks of destra Proposal not proceeding

14. The Panel considered that the Announcement was sufficiently qualified by:
- (a) detailed disclosure of the pre-conditions to the Proposed Scheme and the fact it was sufficiently clear that the Proposed Scheme was at that stage only a reflection of the two companies' intentions, and
  - (b) the directors' recommendations (which were themselves sufficiently qualified by reference to any superior offer and a proposed independent expert report),
- to ensure that the Announcement was not "disclosure of speculation".
15. The Panel discovered, on requesting all relevant documentation, that although a formal implementation agreement had not yet been signed<sup>1</sup>, the parties had executed a Heads of Agreement setting out the key terms of the Proposed Scheme which was dated 30 March 2007 (the same date as the Announcement).
16. The fact that the Heads of Agreement had been executed confirmed the Panel's view set out in paragraph 14.

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<sup>1</sup> Note that destra and Magna Pacific executed a Scheme Implementation Agreement on 27 April 2007, the key terms of which are set out in a joint ASX announcement dated the same day.

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17. The Panel was concerned that some of the details in the Heads of Agreement were not accurately reflected in the Announcement and as a consequence, there was important information of which Magna Pacific shareholders and Lionsgate were not aware (including the exact wording of the fiduciary exception, detail in relation to the no material adverse change condition and certain termination events).
18. At the Panel's request, Magna Pacific and destra addressed this concern by agreeing to release the full text of the Heads of Agreement to ASX, and accordingly the Panel did not consider there to be a basis to commence proceedings in relation to this issue.

#### **Basis for opinion as to value**

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

#### **Timing of the Announcement**

20. The Panel considered that the timing of the announcement by Magna Pacific and destra of their intention to implement the Proposed Scheme was not outside normal market practice in Australia for timing of such announcements. The Panel considered that the continuous disclosure provisions may have made it difficult (or impossible) for Magna Pacific and destra not to have made an announcement at the time that the Heads of Agreement was signed.

#### **destra's financial position**

21. Lionsgate submitted that destra had not provided evidence that it could fund the Proposed Scheme and on that basis should not have made the announcement with Magna Pacific. The Panel did not consider that Lionsgate provided evidence that destra did not have a reasonable basis for believing it would be able to fund the Proposed Scheme. Further, the Panel considered the ability of destra to fund the consideration offered under the Proposed Scheme would be an issue before the court in its consideration of the Proposed Scheme.
22. The Panel noted that destra was being advised by an experienced and reputable investment bank and legal firm. The Panel further noted the provisions of Division 2 of Part 7.10 of the Corporations Act which apply to the Announcement. In the absence of evidence to the contrary the Panel considered it was entitled to assume, and did assume, that Magna Pacific and destra would have been advised by their financial and legal advisers, and would be aware, of:
  - (a) the requirement to have a reasonable basis for the Announcement, and
  - (b) their obligations not to make false or misleading statements.

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23. For these reasons the Panel did not consider there to be a basis to commence proceedings in relation to the issue of destra's financial position and funding arrangements.<sup>2</sup>

#### Break fee and exclusivity arrangements

24. The Panel considered the break fee arrangements and exclusivity restrictions set out in the Announcement and the Heads of Agreement, in particular:
- (a) the calculation of the break fee based on the value of the Proposed Scheme cash consideration;
  - (b) the provisions of the break fee arrangements to which the fiduciary carve-out applies; and
  - (c) the exclusivity provisions of the break fee arrangements.
25. Lionsgate submitted that the relevant value of the break fee should have regard to the value of the target securities on the date the proposal was announced, not the total consideration. The Panel considered that calculating the break fee based on the value of the Proposed Scheme cash consideration was consistent with paragraph 7.18 of Guidance Note 7 that:
- “the equity value is the aggregate of the value of all classes of equity securities issued by the target, where relevant having regard to the value of the consideration under the bid, as at the date the bid is announced.”*
26. Accordingly, the Panel did not consider that the proposed break fee arrangements provided a basis to commence proceedings.
27. The Panel had concerns with the wording of the fiduciary exception (as it was explained in the Announcement) that:
- “despite the exclusivity restrictions, Magna may respond to any unsolicited higher offer where Magna receives legal advice that failing to respond would breach fiduciary duties of Magna directors”*
28. The Panel considered it overly onerous to require legal advice that “failing to respond **would** breach their fiduciary duties” (emphasis added) and this may have effectively rendered the fiduciary exception meaningless. The Panel would have been more comfortable to leave the decision to the directors having a reasonable basis to believe that failing to respond **would be likely** to breach their fiduciary duties.
29. The Panel recognised that the Announcement only provided a summary of the exclusivity restrictions. Before expressing a view in relation to its concerns with the fiduciary exception the Panel requested a copy of the agreement between Magna Pacific and destra which set out the terms of the fiduciary exception. Magna Pacific provided the Panel with the Heads of Agreement.
30. The fiduciary duties exception in the Heads of Agreement provided:

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<sup>2</sup> Note that following the Panel's decision destra has announced that it intends to fund the Proposed Scheme through a combination of bank debt and a placement of up to \$10.4 million to Prime Television. See destra ASX announcement dated 27 April 2007.

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

31. The Panel was concerned that the summary in the Announcement was inaccurate and that the wording in this clause was ambiguous. Magna Pacific confirmed that the intended interpretation of the clause was that *"advice from external legal advisers to that effect"* meant receiving legal advice to the effect that failing to respond to a higher unsolicited bid **would** constitute a breach of the Magna Pacific directors' fiduciary duties.
32. Magna Pacific and destra addressed the Panel's concerns outlined above by agreeing to amend the fiduciary exception clause when the formal merger implementation agreement was signed to have the effect that Magna Pacific would be entitled to respond to the offer by Lionsgate Australia or any unsolicited higher offer where failing to respond would in Magna Pacific's reasonable opinion (acting in good faith) **be likely** to constitute a breach of the directors' fiduciary or statutory duties, having received written advice from external legal advisers to the effect that in the opinion of the advisers, failing to respond **would be likely to** constitute a breach of such duties. (emphasis added)
33. In the interim before the Scheme Implementation Agreement was executed, Magna Pacific and destra included a note in the covering announcement to the Heads of Agreement outlining the revised fiduciary exception clause that was to be included in the formal merger implementation agreement.<sup>3</sup>

## DECISION

34. Having regard to the additional disclosure and revised terms of the fiduciary exception provided by Magna Pacific and destra and accepted by the Panel, the Panel decided not to commence proceedings in relation to Lionsgate's application.

**Braddon Jolley**  
**President of the Sitting Panel**  
**Decision dated 17 April 2007**  
**Reasons published 29 May 2007**

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<sup>3</sup> Note that Magna Pacific and destra included a clause to this effect in the Scheme Implementation Agreement dated 27 April 2007.