



**In the matter of Magna Pacific (Holdings) Limited 04
[2007] ATP 10**

Catchwords:

Letter from bidder to target shareholders – false and misleading – only offer capable of acceptance – no evidence to establish influence on shareholders – no attempt to address concerns commercially – genuine attempt to resolve issues commercially before engaging with the Panel – deliberate attempt to trick unaware and unsophisticated target shareholders into accepting inferior offer – decline to commence proceedings

Magna Pacific (Holdings) Limited – Lionsgate Australia Pty Ltd – destra Corporation Limited

These are the Panel's reasons for deciding not to commence proceedings in relation to an application from Magna Pacific (Holdings) Limited (see [TP07/27](#)).

APPLICATION

1. These reasons relate to an application to the Panel dated 18 May 2007 from Magna Pacific (Holdings) Limited (**Magna Pacific**), in relation to the affairs of Magna Pacific and an off-market, cash takeover bid for Magna Pacific by Lionsgate Australia Pty Ltd (**Lionsgate**), a wholly owned subsidiary of Lions Gate Entertainment Inc.
2. Magna Pacific's application related to a letter sent by Lionsgate to Magna Pacific shareholders on 9 May 2007 (**Lionsgate Letter**). Magna Pacific submitted that, in the context of the proposed scheme of arrangement between Magna Pacific and destra Corporation Ltd, certain of Lionsgate's assertions, including encouraging Magna Pacific shareholders to accept its offer on the basis that its offer "remains the only offer capable of acceptance", constituted unacceptable circumstances.
3. Magna Pacific sought a declaration of unacceptable circumstances, interim orders freezing acceptances into Lionsgate's bid and final orders including requiring Lionsgate to withdraw the Lionsgate Letter and to return acceptances (after obtaining appropriate ASIC relief) received from Magna Pacific shareholders after the date of the Lionsgate Letter.

THE PANEL & PROCESS

4. The President of the Panel appointed Susan Doyle, Braddon Jolley (sitting President) and Karen Wood (sitting Deputy President) as the sitting Panel to consider Magna Pacific's application.

SUMMARY

5. The Panel considered that the Lionsgate's Letter fell short of good market practice and may have created a false and misleading impression. However, in the absence of evidence that Magna Pacific shareholders had been influenced by, or had accepted Lionsgate's offer on the basis of, the Lionsgate Letter, the Panel did not consider that the submissions in Magna Pacific's application provided a sufficient basis for the Panel to commence proceedings. If evidence had emerged from Magna Pacific

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shareholders that they had been misled, acted on the Lionsgate Letter and accepted the offer, the Panel would have considered commencing proceedings.

6. Although it declined to commence proceedings, the Panel noted its disappointment with Lionsgate's correspondence to shareholders and with Magna Pacific's limited attempt to address its concerns commercially, or to address the circumstances by writing to Magna Pacific shareholders in the first instance (see [TP07/31](#)).
7. The Panel considered the conduct of both parties fell short of good practice and noted that it expected both parties to be more considered in any further correspondence with shareholders and in their approach to resolving issues during the takeover process.

BACKGROUND

8. Lionsgate's offer is for all of the shares in Magna Pacific at \$0.32 per share. In its bidder's statement dated 23 February 2007, Lionsgate described its offer as "an attractive price" and constituting "a substantial premium" to the market price of Magna Pacific shares. Magna Pacific rejected, and continues to reject, the offer as too low.
9. On 30 March 2007 destra Corporation Ltd (**destra**) and Magna Pacific announced their intention to implement a scheme of arrangement under which destra would acquire all the issued capital in Magna Pacific (**destra Proposal**). Under the destra Proposal, all of the shares in Magna Pacific were proposed to be acquired by destra for consideration of either \$0.38 cash, or 1 fully paid ordinary share in destra and \$0.15 cash (which was the equivalent of \$0.41 based on the last closing price of the destra shares on ASX before the announcement of the destra Proposal).
10. On 27 April 2007 destra announced that all necessary funding commitments to acquire Magna Pacific pursuant to the destra Proposal had been secured and destra and Magna Pacific had signed a binding Scheme Implementation Agreement to implement the destra Proposal. Magna Pacific and destra announced that a scheme booklet would be sent to Magna Pacific shareholders on or before 31 May 2007 and a scheme meeting followed by a general meeting would be held on or before 9 July 2007.
11. On 12 April 2007 the Panel received an application from Lionsgate in relation to Magna Pacific's target's statement dated 5 April 2007. Lionsgate's concerns related primarily to descriptions of the destra Proposal by Magna Pacific in its target's statement. After considering Lionsgate's application, the Panel invited Lionsgate to resolve its concerns directly with Magna Pacific. The Panel advised parties and announced publicly that it considered parties should make a genuine attempt to resolve issues commercially before engaging with the Panel.
12. On 4 May 2007 Magna Pacific issued a supplementary target's statement to its shareholders that Magna Pacific and Lionsgate agreed addressed the concerns raised in Lionsgate's application (**Supplementary Target's Statement**). Certain of the statements in the Supplementary Target's Statement were said to have been made in an endeavour by Magna Pacific to respond to concerns raised by Lionsgate in negotiations between Magna Pacific and Lionsgate which Magna Pacific entered into

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in accordance with the Panel's request that parties attempt to negotiate outcomes in good faith. Magna Pacific's directors stated that they believed that Magna Pacific had made every reasonable effort to accommodate Lionsgate in relation to the Supplementary Target's Statement. On the basis of the Supplementary Target's Statement Lionsgate advised the Panel that it proposed to withdraw its application. The Panel welcomed the commercial resolution of Lionsgate's concerns by the parties and accepted the withdrawal.

Lionsgate Letter

13. On 9 May 2007 Lionsgate sent a letter to Magna Pacific shareholders advising of the extension of the Lionsgate offer to 15 June 2007. The Lionsgate Letter, after referring to the Supplementary Target's Statement also stated:

"Lionsgate does not believe Magna Pacific shareholders have been adequately informed about the risks and conditions of the destra proposal.

The Lionsgate Australia Offer remains the only offer capable of acceptance now and I [Simon Franks, Lionsgate Chairman] believe is worthy of serious consideration. Unlike the proposed destra scheme, the Lionsgate Australia Offer has no hurdles in front of it and has no defeating conditions. You will be paid within 7 days of receipt of your acceptance. I urge you to consider the risks of not accepting this Offer and waiting to see if the destra proposal is implemented."

14. At the time of the application to which these reasons relate (being 18 May 2007), the market price for Magna Pacific shares was \$0.42 and the value of the scrip and cash alternative consideration under the destra Proposal was \$0.47.

APPLICATION

15. In its application, Magna Pacific submitted that Lionsgate had deliberately attempted to trick unaware and unsophisticated Magna Pacific shareholders into accepting Lionsgate's offer in circumstances where no properly informed Magna Pacific shareholder would accept Lionsgate's offer at that time. Magna Pacific submitted that on that basis the Lionsgate Letter amounted to unacceptable circumstances.
16. Magna Pacific sought orders that Lionsgate be required to:
- (a) immediately announce to ASX and send Magna Pacific shareholders a letter withdrawing the existing letter and explaining that:
 - (i) Magna Pacific shareholders should receive a significantly higher price for their shares if they sold on-market instead of accepting Lionsgate's offer at this time;
 - (ii) the value of the consideration under the destra Proposal is significantly higher than Lionsgate's offer price; and
 - (iii) Lionsgate's offer may be extended until after it is known whether or not the destra Proposal has been successful,
 - (b) subject to Lionsgate obtaining an ASIC exemption from section 654A, offer to return all acceptances received between the date of the Lionsgate Letter and one

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business day after the date Magna Pacific shareholders receive the corrected disclosure in the mail.

DISCUSSION

Lionsgate Letter

Price comparison

17. The Panel considered that the Lionsgate Letter fell short of good market practice and may have created a false and misleading impression.
18. At the time of the Lionsgate Letter, and in the circumstances of the particular takeover offer, where the consideration under the Lionsgate offer was:
 - (a) 19% below the proposed cash consideration under the destra Proposal and 28% below the proposed cash and scrip alternative consideration (based on the last closing price of destra shares on ASX before the announcement of the destra Proposal); and
 - (b) 28% below the then current market price of \$0.41 (as at 28 May 2007, the date of the Panel's decision),

the Panel considered that Lionsgate should have taken more care to ensure that the Lionsgate Letter did not mislead Magna Pacific shareholders.¹

Available offers

19. The Panel considered the statement in the Lionsgate Letter that "*the Lionsgate offer remains the only offer capable of acceptance now*", may have created a false and misleading impression in the circumstances. The implication was that the only opportunity a Magna Pacific shareholder had at that stage to sell their Magna Pacific shares for a price of \$0.32 was to accept the Lionsgate offer. However, at the date of the Lionsgate Letter, the market price of Magna Pacific shares was \$0.42.
20. The Panel noted however that it had not been provided with evidence to establish that any Magna Pacific shareholder had actually been misled or deceived. On this basis the Panel did not consider there to be a sufficient basis to commence proceedings.

Conduct of Magna Pacific

21. On receipt of Magna Pacific's application the Panel initially queried why Magna Pacific had not first attempted to either address its concerns with Lionsgate or directly with its shareholders.
22. Magna Pacific submitted that:
 - (a) it had not received the Lionsgate Letter until 16 May, even though the Lionsgate Letter was sent to all Magna Pacific shareholders on 9 May²,

¹ However, the Panel did not imply that all correspondence with target shareholders during a takeover must advise them of the alternatives to the bidder's offer (which would include selling on market).

² Magna Pacific subsequently confirmed this and also advised that Magna Pacific officers who were also shareholders of Magna Pacific did not receive copies of the letter as shareholders of Magna Pacific until 15

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- (b) on becoming aware of the Lionsgate Letter it had negotiated in good faith before making an application and had not made any application for orders until after Lionsgate had formally rejected Magna Pacific's requests with no scope for negotiation; and
 - (c) it was not appropriate for Magna Pacific to address concerns with shareholders where the bidder had an obligation not to mislead shareholders.
23. The Panel considered that in these particular circumstances, it would have been more appropriate for Magna Pacific to immediately correct any misleading communication by lodging its own release with ASX or by writing to its shareholders setting out its concerns, rather than apply to the Panel in the first instance. Although the Panel did not consider it would always be appropriate for targets to correct deficient disclosure, in these circumstances, if Magna Pacific considered there was a serious risk that its shareholders would be misled by the Lionsgate Letter, the most timely resolution of its concerns would have been to raise the concern with its shareholders. It would then have been open for Magna Pacific to make an application to the Panel if it thought it appropriate.
24. The Panel accepted that it may have appeared unlikely that Lionsgate would be responsive to a request to send a corrective communication without backing by the Panel and to that end the ability of Magna Pacific to resolve the matter by negotiation may have been limited. However the Panel was concerned with the speed at which Magna Pacific approached the Panel without any prior "self-help" efforts.

DECISION

25. The Panel considers that the Lionsgate's Letter fell short of good market practice and may have created a false and misleading impression. However without evidence to establish that shareholders acted on the statements which Magna Pacific submitted were misleading, the Panel did not consider that the circumstances provided a sufficient basis for the Panel to commence proceedings.

Braddon Jolley
President of the Sitting Panel
Decision dated 28 May 2007
Reasons published 3 July 2007

May 2007 at the earliest and did not open them until later. Magna Pacific also noted that Lionsgate did not give the Lionsgate Letter to ASX at any time.