



Australian Government

Takeovers Panel

**Reasons for Decision
Mungana Goldmines Limited
[2015] ATP 6**

Catchwords:

decline to conduct proceedings – investor presentation – production target – capital expenditure – misleading statements – materiality – independent expert report – technical report

Corporations Act 2001 (Cth), sections 602, 638

ASX Listing Rule 5.16.4

Guidance Note 18 – Takeover Documents

Magna Pacific (Holdings) Limited [2007] ATP 2

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

INTRODUCTION

1. The Panel, Rodd Levy (sitting President), Sophie Mitchell and Tony Osmond declined to conduct proceedings on an application by Auctus Chillagoe Pty Ltd in relation to the affairs of Mungana Goldmines Limited. Auctus had made an off-market takeover bid for Mungana. Auctus submitted that Mungana’s investor presentation had overstated a production target and understated estimated pre-production capital expenditure. Mungana made further disclosure and the Panel considered that there was no reasonable prospect that it would declare the circumstances unacceptable.
2. In these reasons, the following definitions apply.
Auctus Auctus Chillagoe Pty Ltd
Mungana Mungana Goldmines Limited

FACTS

3. Mungana is an ASX listed company (ASX code: MUX). Mungana is a base metals exploration and development company based near Cairns, North Queensland.
4. Auctus is a special purpose vehicle established by private equity funds advised by US private equity firm Denham Capital Management LP.
5. On 29 April 2015, Auctus made an off-market takeover bid for Mungana at \$0.135 cash per share. The bid is initially scheduled to close on 15 June 2015.¹
6. On 11 May 2015, Mungana released an investor presentation to ASX that made the following statements in relation to its King Vol zinc project:

¹ Postscript – the bid was extended on 5 June 2015 and is now scheduled to close on 6 July 2015

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- (a) *“First production targeted for end of 2016 at throughput rate of 350,000tpa for 40,000tpa zinc in concentrate”* and
 - (b) *“Estimated capex less than \$40M due to key infrastructure and plant components already in place”*.
7. On 14 May 2015 and 25 May 2015, Auctus wrote to Mungana expressing concerns about Mungana’s investor presentation.
8. On 26 May 2015, Mungana withdrew the investor presentation and replaced it with an updated investor presentation. The updated investor presentation made the following statements in relation to Mungana’s King Vol zinc project:
 - (a) *“Aiming for first production by the end of 2016 at an annualised throughput rate of 350,000tpa for 35,000-40,000tpa zinc in concentrate and additional bi-product credits - See Appendix B for cautionary statement and material assumptions.”* (**production target**) and
 - (b) *“Aiming for estimated pre-production capex of less than \$40M due to key infrastructure and plant components already in place (subject to ongoing assessment)”* (**estimated pre-production capex**) [footnote omitted].
9. The updated investor presentation also included (among other things):
 - (a) a cautionary statement in relation to the production target, as required under ASX Listing Rule 5.16.4
 - (b) assumptions in relation to the production target and
 - (c) the following statement in relation to the estimated pre-production capex:

This estimated pre-production capital of less than \$40M is based on an initial high-level review by Entech Pty Ltd for the mine establishment and development, and GR Engineering Services Limited for the processing requirements and the company’s own knowledge and understanding of the project.

There is a risk associated with this pre-production capital estimate in that following detailed review at the appropriate study levels this estimate may be incorrect.
10. On 28 May 2015, Mungana announced it had secured commitments from investors to raise approximately \$5m through a share placement at \$0.14 per share, subject to shareholder approval.
11. On 29 May 2015, Mungana released its target's statement to ASX.

APPLICATION

Declaration sought

12. By application dated 1 June 2015, Auctus sought a declaration of unacceptable circumstances. Auctus submitted that:
 - (a) The production target was materially overstated. The production target utilised *“an assumption of 100% conversion of resource to mineable inventory”* and therefore *“assumes that all of its inferred and indicated resource will be extracted for mining processing”*. Best practice would be a conversion rate of 70% to 75%.

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- (b) The estimated pre-production capex was materially understated. The total pre-production capital expenditure to bring the King Vol project into production was approximately \$90 million, based on Auctus' estimates. The required level of capital expenditure to bring the King Vol project into production was a material statement for Mungana's shareholders when considering the bid.
13. Auctus submitted that Mungana's public disclosures were misleading and/or deceptive, or likely to mislead or deceive, and therefore Auctus' takeover for Mungana was not taking place in an efficient, competitive and informed market.

Final orders sought

14. Auctus sought an order for costs and final orders to the effect that:
- (a) Mungana issue a supplementary target's statement, in a form approved by the Panel, and dispatch it to Mungana shareholders
 - (b) Mungana release an ASX announcement retracting the production target and estimated pre-production capex and
 - (c) Mungana make a statement that the corrective disclosures were required by the Panel.

DISCUSSION

Further disclosure and preliminary submission

15. On 5 June 2015, Mungana released an announcement to ASX which stated, among other things, that:

... Mungana made assumptions about the King Vol production target in the absence of a detailed scoping, pre-feasibility or feasibility study and noted that for the King Vol project to be developed, more work needed to be done and substantial capital expenditure was required and that there were a number of uncertainties inherent in the feasibility stage and subsequent development stages of the project, including the availability of adequate funding. The development of the King Vol Zinc Project and the exploration associated with the Chillagoe Zinc Project is the key focus of the company. The projected annualised zinc production was determined in the absence of sufficient certainty in respect of specific JORC modifying factors relevant to its achievement. Accordingly, Mungana retracts the King Vol production target as it did not intend it to be considered a production target, as it is not based on reasonable grounds, and therefore should be treated as an aspirational statement. (emphasis added)

16. Also on 5 June 2015, Mungana made a preliminary submission. Mungana submitted that neither the production target nor the estimated pre-production capex were "sufficiently material to the decision of Mungana's shareholders" whether to accept Auctus' bid, "given the existing disclosure in relation to those matters and the conclusions of the Independent Expert".

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17. Mungana’s preliminary submission attached opinions from its independent expert and technical expert.² Mungana’s independent expert stated that the ‘alleged unresolved defects’ in relation to the production target and estimated pre-production capex had no material bearing on its valuation range. The independent expert stated that the technical expert had placed “*no reliance on future economic benefits arising from the potential future zinc production of the King Vol Project which would be impacted by*” the alleged unresolved defects. The independent expert also stated that the fair market value of the King Vol project, as assessed by the technical expert, consisted of only approximately 12% of the independent expert’s mid-point equity valuation of Mungana. In comparison, the independent expert had assessed Auctus’ bid price to be approximately 51% below the mid-point of the fair market value per share in Mungana before the offer.
18. Mungana’s technical expert stated, among other things, that its “*preferred valuation approach for the King Vol Project was a market based approach and has therefore not considered ‘forward looking statements’ regarding potential development, but rather valued the asset on the value of the in-situ*” resources.
19. Mungana also submitted in its preliminary submission that:
 - (a) In its 5 June 2015 announcement, Mungana had withdrawn its production target “*as a ‘production target’ and re-characterised it as an aspirational statement*”. In any event, Mungana had used a conversion rate of between 70% and 77% of estimated resources, not 100% as submitted by Auctus.
 - (b) The estimated pre-production capex was limited to bringing the King Vol project to first production. It did not include ongoing costs associated with Mungana’s corporate and other activities, which would be incurred “*regardless of the status of the King Vol zinc project*” nor did it include mine operating costs once first production was achieved. Mungana submitted that Auctus included \$26 million of costs associated with “*operating the King Vol mine*”. The remaining \$63.8 million of Auctus’ estimated pre-production capex was excessive based on Mungana’s “*detailed and current knowledge of the existing infrastructure in place*”.
 - (c) The estimated pre-production capex was expressed as an ‘estimate’ and, in the updated investor presentation, ‘subject to ongoing assessment’.

Is further disclosure required?

20. We are persuaded by the substance of Mungana’s preliminary submission and agree that the statements regarding the production target and estimated pre-production capex are not material in the context of the independent expert’s valuation of Mungana’s shares.
21. Mungana has retracted the statement made in relation to the production target and has clarified that it was not based on reasonable grounds and should be treated as an

² Postscript: On 9 June 2015, Mungana released a supplementary target’s statement attaching the opinions of the independent expert and technical expert

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aspirational statement. Therefore, in our view, Mungana has adequately rectified any misleading issues in relation to the production target.

22. There is a difference of opinion between Auctus and Mungana in relation to Mungana's estimated pre-production capex. The statement made in relation to Mungana's estimated pre-production capex is subject to a number of qualifications (see paragraph 9(c)). We consider that it is open to Auctus to express its view on Mungana's estimated pre-production capex in, for example, a supplementary bidder's statement.³
23. Mungana's original 11 May 2015 investor presentation may not have been prepared with "*the same standard of care and same standard of disclosure*" as should be applied to a target's statement.⁴ However we consider that Mungana has subsequently dealt with the issues raised in the application through its subsequent disclosure, in part prompted by Auctus.

DECISION

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

Rodd Levy
President of the sitting Panel
Decision dated 5 June 2015
Reasons published 12 June 2015

³ see *Magna Pacific (Holdings) Limited* [2007] ATP 2 at [49]

⁴ see Guidance Note 18 – Takeover Documents at [41]

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Advisers

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