

FUNDING DISCLOSURE IN FOCUS - THE AGENCY GROUP AUSTRALIA LIMITED 01 & 02

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Legal Briefings - By **Simon Reed and Katerina Jovanovska**

IN BRIEF

- In making a declaration of unacceptable circumstances in relation to the affairs of The Agency Group Limited, the Takeovers Panel has reiterated the expectations on bidders to make clear and coherent disclosure regarding funding sources.
- The Panel noted that the specific circumstances in which a bid is made can impact the nature of disclosure required in relation to those funding sources, as well as what constitutes 'timely disclosure' of that funding information.
- The Panel also reaffirmed that it applies a high bar in assessing when to question the correctness of an independent expert's report.

BACKGROUND

In November 2020, The Agency Group Australia Limited (**Agency**) dispatched its annual general meeting (**AGM**) notice to be held on 23 December 2020. The notice included a resolution seeking shareholder approval for the issue of 5 million convertible notes and a grant of over 3 million options to Peters Investments Pty Ltd (**Peters**), to support an investment of \$5 million by Peters in Agency (**Peters Deal**). The Peters investment was to be used in part for repayment of existing debt facilities, those repayments being due by 30 December. The AGM notice was accompanied by an independent expert's report (**IER**).

Shortly after dispatch of the AGM notice, Magnolia Equities III Pty Ltd (**Magnolia**), a company associated with Mr Mitchell Atkins, a former director of Agency, wrote a letter to Agency stating that it intended to make an off-market takeover bid for Agency and that the bid was intended to provide Agency shareholders with a competing proposal to the Peters Deal. In that letter, Magnolia also said that it would arrange for full repayment of the existing debt facilities and the provision of a replacement facility on the same or more favourable terms. The proposed bid would be subject to a number of defeating conditions, including a condition that none of the resolutions in relation to the Peters Deal be moved or passed at the AGM.

Agency responded within a day, asking Magnolia to provide further information regarding the sources of funding for the proposed takeover. Magnolia responded to the effect that disclosure of the funding arrangements in relation to a takeover bid “is a matter for the bidder’s statement”.

On 8 December, Agency both announced Magnolia’s proposal to make the bid and made an application to the Panel seeking orders, among others, that Magnolia provide evidence of Magnolia’s ability to pay the consideration under the bid and repay in full Agency’s existing facility (the **Funding Evidence**), and that Magnolia be prohibited from proceeding with its bid until it provided the Funding Evidence.

On 16 December, Magnolia made its own application to the Panel seeking an interim order that the AGM be adjourned and asserting (among other things) that the IER provided with the AGM notice was deficient.

INTERIM ORDERS AND IER

After deciding to conduct proceedings and having assessed the materials provided, the Panel formed a preliminary view that Magnolia’s submissions regarding deficiencies in the IER (which included an independent opinion from a third party in support of the assertion of IER deficiencies) raised a serious question as to whether Agency shareholders had sufficient information to properly consider the Peters Deal resolutions.

On 22 December, the Panel made interim orders that Agency defer consideration of the Peters Deal resolutions at the AGM (which was due to be held the following day). The interim orders permitted a vote on the Peters Deal resolutions to proceed on or after 30 December, provided Agency made available to its shareholders a response by the expert who prepared the IER to the issues raised in the third party opinion obtained by Magnolia.

In response to the interim orders, Agency released further materials from the independent expert which responded to the alleged deficiencies in the IER. Agency also postponed the AGM to 4 January 2021, to ensure that shareholders had sufficient time to review the additional independent expert materials before the AGM.

The Panel noted the previous consideration of its role in relation to the correctness of an independent expert’s report in *Mungana Goldmines Limited OIR*¹ and the high threshold the Panel has set to question the correctness of an expert report. In relation to Agency’s IER, the Panel considered that issues in dispute regarding the IER “were not likely to go beyond matters of judgement in respect of which experts might reasonably disagree”. Following release of the response materials from the independent expert in accordance with the interim orders, the Panel was satisfied that Agency shareholders had sufficient information to assess the merits of the Peters Deal.

FUNDING SOURCE DISCLOSURE

Magnolia's Bidder's Statement was lodged on 4 January. The total amount of consideration that could be required under the bid was just under \$10 million and the outstanding amounts under the existing debt facilities to be replaced were approximately \$9.3 million.

The Bidder's Statement stated that Magnolia had access to \$10 million in cash to pay the bid consideration from various sources, including:

- Mr Mitchell Atkins having \$7.5 million in a bank account "which he has undertaken to make available" and \$3.5 million in liquid listed equities "which can be readily sold" if required;
- net assets of Mr Atkins and his spouse, the net asset position of whom "has been verified by a qualified accountant", including net assets of no less than \$20 million (including repayment of liabilities owed to them by Magnolia and its related bodies corporate); and
- net assets of Magnolia Group of \$40 million (as at 31 December 2020) which had "been verified by a qualified accountant" and which Magnolia Group had "undertaken to make available to Magnolia".

The Bidder's Statement also stated that Magnolia had also obtained "not less than \$18 million in commitments from various wholesale investors known to Magnolia".

On the same day as the release of Magnolia's Bidder's Statement, all resolutions (including the Peters Deal resolutions) were passed at the Agency AGM, thereby triggering a defeating condition under the Bidder's Statement.

Agency submitted that the Bidder's Statement disclosures did not comply with the Corporations Act, due (in part) to not containing confirmation of consents from the relevant controlling entities and persons regarding the statements being attributed to them and a lack of detail regarding the referenced funding undertakings. Agency also raised concerns regarding the deficiency of the disclosure regarding the wholesale investor commitments referred to in the Bidder's Statement.

Ultimately, the Panel made a declaration of unacceptable circumstances in relation to Magnolia's funding sources disclosure. The Panel considered that proper assessment of Magnolia's proposal was inhibited by Magnolia's failure to indicate clearly that persons providing cash consideration were appropriately bound to do so or had otherwise accepted responsibility (and the associated liability) for statements regarding their intention to provide funding.

The Panel also considered the disclosure regarding the wholesale investor commitments was unacceptable on the basis that, notwithstanding Magnolia's submission that those commitments were provided as evidence of Magnolia's "broader financial standing", the Bidder's Statement implied that those commitments were a source of funding for the bid consideration. The Panel considered that this could cause further confusion for Agency's shareholders and again inhibit the proper assessment of Magnolia's bid.

Notably, the Panel found that the circumstances of Magnolia's bid for Agency demanded a high standard of disclosure on funding sources, given that:

- Agency had very quickly raised with Magnolia concerns regarding Magnolia's financial resources;
- a shareholder vote to effectively decide between competing proposals (being the Peters Deal and Magnolia's bid) was imminent;
- the Panel had made interim orders requiring further disclosure by Agency; and
- the interim orders had allowed Magnolia even more time than Magnolia submitted it would require to prepare the relevant disclosures and lodge its Bidder's Statement.

Rather than accept undertakings, the Panel proceeded to make orders restraining Magnolia from dispatching its Bidder's Statement without the Panel's consent. Magnolia had in any event stated that it would not be dispatching its Bidder's Statement, due to various triggered defeating conditions.

REVIEW APPLICATION DECLINED

Magnolia made an application for review of the Panel's decision in relation to the issues regarding the IER. The review Panel declined to conduct proceedings,² agreeing with the initial Panel that the threshold set to question the correctness of an expert's report is high. The review Panel considered that the matters raised in the review did not meet that threshold.

ENDNOTES

1. [Mungana Goldmines Limited 01R \[2015\] ATP 7.](#)
2. [The Agency Group Australia Limited 03R \[2021\] ATP 5.](#)

KEY CONTACTS

If you have any questions, or would like to know how this might affect your business, phone, or email these key contacts.



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