



Australian Government

Takeovers Panel

MEDIA RELEASE

No: TP21/04

Monday, 1 February 2021

The Agency Group Australia Limited 01 & 02 – Declaration of Unacceptable Circumstances and Orders

The Panel has made a declaration of unacceptable circumstances (Annexure A) and final orders (Annexure B) in relation to applications dated 8 December 2020 by The Agency Group Australia Limited (**Agency**) and 16 December 2020 by Magnolia Equities III Pty Ltd (**Magnolia**), both in relation to the affairs of Agency (see [TP20/85](#) and [TP20/87](#)).

Background

On 24 November 2020, Agency gave notice convening its Annual General Meeting to be held on 23 December 2020 (**AGM**). The resolutions to be put to shareholders at the AGM included resolutions to approve the issue of convertible notes and options to Peters Investments Pty Ltd (**Peters**) to support an investment of \$5 million by Peters (**Peters Resolutions**).

On 4 December 2020, Magnolia sent a letter to Agency and ASX stating that it intended to make a cash takeover bid for 100% of Agency shares, providing Agency shareholders with “*a competing proposal to Peters Proposal discussed in [Agency’s AGM notice]*”. The letter indicated that the proposed bid would be subject to a number of defeating conditions, including a condition that none of the Peters Resolutions be moved or passed at the AGM.

On 22 December 2020, in order to comply with an interim order made by the Panel on application by Magnolia, Agency postponed the AGM to 9.00am (WST) on 30 December 2020. On 29 December 2020, Agency announced the Board had resolved to further postpone the AGM to 9.00am (WST) on 4 January 2021.

On 4 January 2021, at 9.32am (Melbourne time), Magnolia’s Bidder’s Statement dated 3 January 2021 in relation to its offer for Agency (**Bidder’s Statement**) was released on ASX’s market announcements platform. The Bidder’s Statement, among other things:

- indicated that Magnolia has access to \$10,000,000 in cash to pay the consideration from various sources including references to undertakings

provided by Mr Atkins¹ and Magnolia and its related bodies corporate (**Magnolia Group**) and agreements with the Magnolia Group and Mr Atkins and his spouse and

- stated that Magnolia has also obtained “*not less than \$18 million in commitments from various wholesale investors known to Magnolia*”.

Also on 4 January 2021, Agency announced the results of its AGM, that all resolutions (including the Peters Resolutions) were passed on a poll. The AGM results thereby triggered a defeating condition under the Bidder’s Statement.

On 19 January 2021, MCL 105 Pty Ltd purported to appoint administrators to Agency under s436C², which triggered further defeating conditions under the Bidder’s Statement. Magnolia subsequently submitted to the Panel that it had “*considered its attitude to the combination of triggered defeating conditions and has decided that it will rely on the triggered defeating conditions*” and accordingly would not be sending out offers to Agency shareholders.

Declaration

The Panel considered, among other things, that proper assessment of Magnolia’s proposal has been, and continues to be, inhibited by a failure to indicate clearly which sources of funding are to be used to pay the consideration, that persons providing cash consideration were appropriately bound to do so or had otherwise accepted responsibility for statements regarding their intention to provide funding and were aware of their potential liability for loss or damage resulting from misstatements or omissions.

The Panel considered that the circumstances were unacceptable:

1. having regard to the effect that the Panel is satisfied the circumstances have had, are having, will have or are likely to have on:
 - (a) the control, or potential control, of Agency or
 - (b) the acquisition, or proposed acquisition, by a person of a substantial interest in Agency
2. in the alternative, having regard to the purposes of Chapter 6 set out in s602 and
3. in the further alternative, because they gave rise to, or will or are likely to give rise to, a contravention of a provision of Chapter 6.

¹ Mr Mitchell Atkins is the sole director of Magnolia

² Unless otherwise indicated, all statutory references are to the *Corporations Act 2001* (Cth), and all terms used in Chapter 6 or 6C have the meaning given in the relevant chapter (as modified by ASIC)

The Panel did not consider it against the public interest to make the declaration, and in making it had regard to the matters in s657A(3).

In light of further information provided by Agency and the deferral of the AGM, the Panel did not consider that any matters raised in the application by Magnolia amounted to unacceptable circumstances.

Orders

The Panel has made orders that, among other things, Magnolia be restrained from dispatching its Bidder's Statement without the Panel's consent.

The sitting Panel was Anthony Jarvis, Rebecca Maslen-Stannage and John O'Sullivan (sitting President).

The Panel will publish its reasons for the decision in due course on its website www.takeovers.gov.au.

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Takeovers Panel

ANNEXURE A

**CORPORATIONS ACT
SECTION 657A**

DECLARATION OF UNACCEPTABLE CIRCUMSTANCES

THE AGENCY GROUP AUSTRALIA LIMITED 01 & 02

CIRCUMSTANCES

1. The Agency Group Australia Limited (**Agency**) is an ASX listed company (ASX code: AU1).
2. On 24 November 2020, Agency gave notice (**Notice**) convening its Annual General Meeting to be held on 23 December 2020 (**AGM**). The resolutions to be put to shareholders at the AGM included resolutions (**Peters Resolutions**):
 - (a) to approve the issue of convertible notes and options to Peters Investments Pty Ltd (Peters) to support an investment of \$5 million by Peters and
 - (b) to ratify the issue (under ASX Listing Rule 7.4) and approve amendment (under ASX Listing Rule 6.23.4) of convertible notes and options issued to Peters under an agreement announced by Agency on 15 May 2020.
3. The Notice listed advantages of the approval in paragraph 3(a) as including that it would “*significantly reduce the risk of [Agency] defaulting*” on a loan and “*may be [Agency’s] only option for funding in the near future*”.
4. On 4 December 2020, Magnolia Equities III Pty Ltd (**Magnolia**) sent a letter to Agency and ASX stating that it intended to make a cash takeover bid for 100% of Agency shares, providing Agency shareholders with “*a competing proposal to the Peters Proposal discussed in [Agency’s Notice]*”. The letter indicated that the proposed bid would be subject to a number of defeating conditions, including a condition that none of the Peters Resolutions be moved or passed at the AGM. The letter stated that further information regarding the bid would be included in Magnolia’s bidder’s statement and included an indicative timetable showing that Magnolia’s bidder’s statement would be lodged with ASIC, ASX and Agency in “*Late December 2020*” and stated that “*the Bid potentially provides [Agency] shareholders with a cash exit strategy ... and a real alternative to the Peters Proposal*”.

5. On 4 December 2020, Agency requested that Magnolia provide “...*as a matter of urgency, cogent information as to financial resources available to Magnolia, and the financial arrangements made by Magnolia, with respect to the proposed bid*”.
6. On 22 December 2020, in order to comply with an interim order made by the Panel on application by Magnolia, Agency postponed the AGM to 9:00am (WST) on 30 December 2020.
7. On 29 December 2020, Agency announced that it had requested a trading halt and the Board had resolved to further postpone the AGM to 9:00am (WST) on 4 January 2021.
8. On 4 January 2021, at 9:32am (Melbourne time), Magnolia’s Bidder’s Statement dated 3 January 2021 in relation to its offer for Agency (**Bidder’s Statement**) was released on ASX’s market announcements platform. The Bidder’s Statement:
 - (a) stated that the total amount of consideration Magnolia will be required to provide if all offers are accepted is \$9,967,656.56
 - (b) indicated that Magnolia has access to \$10,000,000 in cash to pay the consideration from various sources including:
 - (i) Mr Atkins has \$7.5 million in a bank account “*which he has undertaken to make available*” and \$3.5 million in liquid listed equities (excluding Agency shares) “*which can be readily sold*” if required
 - (ii) net assets of Mr Atkins and his spouse (**the Controllers**), the net asset position of whom “*has been verified by a qualified accountant*”, includes net assets of no less than \$20 million (including repayment of liabilities owed to them by Magnolia and its related bodies corporate (**Magnolia Group**)) – the Controllers having “*agreed with Magnolia to support it to perform its obligations under the Bid*” and
 - (iii) net assets of Magnolia Group of \$40 million (as at 31 December 2020) which have “*been verified by a qualified accountant*” and Magnolia Group “*has undertaken to make available to Magnolia*”
 - (c) stated that Magnolia has also obtained “*not less than \$18 million in commitments from various wholesale investors known to Magnolia*”
 - (d) does not indicate whether the undertakings and agreements in paragraph 3(b) have been documented and does not state that Mr Atkins, his spouse, related bodies corporate of Magnolia or the referenced “*qualified accountant[s]*” have given consents in accordance with section 636(3) in respect of statements on which paragraph 3(b) is based and
 - (e) implies that the commitments in paragraph 8(c) are a source of funding to pay the consideration, in circumstances where Magnolia has submitted to

the Panel that the commitments were provided “to allow shareholders to form a view as to the capacity of the bidder to give effect to its intentions”.

EFFECT

9. Proper assessment of Magnolia’s proposal has been, and continues to be, inhibited by a failure to indicate clearly which sources of funding are to be used to pay the consideration, that persons providing cash consideration were appropriately bound to do so or had otherwise accepted responsibility for statements regarding their intention to provide funding and were aware of their potential liability for loss or damage resulting from misstatements or omissions.

CONCLUSION

10. It appears to the Panel that the circumstances are unacceptable circumstances:
 - (a) having regard to the effect that the Panel is satisfied they have had, are having, will have or are likely to have on:
 - (i) the control, or potential control, of Agency or
 - (ii) the acquisition, or proposed acquisition, by a person of a substantial interest in Agency
 - (b) in the alternative, having regard to the purposes of Chapter 6 set out in section 602
 - (c) in the further alternative, because they gave or give rise to, or will or are likely to give rise to, a contravention of a provision of Chapter 6.
11. The Panel considers that it is not against the public interest to make a declaration of unacceptable circumstances. It has had regard to the matters in section 657A(3).

DECLARATION

The Panel declares that the circumstances constitute unacceptable circumstances in relation to the affairs of The Agency Group Australia Limited.

Allan Bulman
Director
with authority of John O’Sullivan
President of the sitting Panel
Dated 29 January 2021



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ANNEXURE B

**CORPORATIONS ACT
SECTION 657D
ORDERS**

THE AGENCY GROUP AUSTRALIA LIMITED 01 & 02

The Panel made a declaration of unacceptable circumstances on 29 January 2021.

THE PANEL ORDERS

1. Magnolia be restrained from dispatching its Bidder's Statement without the Panel's consent.
2. The parties to these proceedings and ASIC have the liberty to apply for further orders in relation to these orders.
3. In these orders the following terms apply:

Bidder's Statement

Magnolia's Bidder's Statement dated 3 January 2021 in relation to its offer for The Agency Group Australia Limited

Magnolia

Magnolia Equities III Pty Ltd

Allan Bulman
Director
with authority of John O'Sullivan
President of the sitting Panel
Dated 29 January 2021