



Australian Government

Takeovers Panel

**Reasons for Decision
E&P Financial Group Limited
[2021] ATP 1**

Catchwords:

Decline to conduct proceedings – conditions – offer terms – bidder’s statement – fulfilment of conditions – ASIC proceedings condition – regulatory approvals condition – change of control consent condition – bidder’s statement disclosure – undertaking

Corporations Act 2001 (Cth), sections 625(2), 629, 636(1)(m)

Guidance Note 12: Frustrating Action

NGM Resources Limited [2010] ATP 11, DoloMatrix International Limited [2008] ATP 10, Southcorp Limited [2005] ATP 4, Novus Petroleum [2004] ATP 2, Goodman Fielder 01 [2003] ATP 1, SA Liquor Distributors [2002] ATP 22

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

INTRODUCTION

1. The Panel, Karen Evans-Cullen (sitting President), Bill Koeck and Shirley In't Veld, declined to conduct proceedings on an application by E&P Financial Group Limited in relation to its affairs. E&P is subject to a takeover bid from 360 Capital ED1 Pty Limited, a controlled entity of 360 Capital Group Limited and 360 Capital FM Limited as the responsible entity of the 360 Capital Investment Trust. The application concerned (among other things) whether certain conditions of 360 Capital’s bid were so vague or uncertain as to offend the terms or policy of section 629.¹ The Panel decided not to conduct proceedings after accepting undertakings provided by the bidder. The Panel considered that there was no reasonable prospect that it would declare the circumstances unacceptable.

2. In these reasons, the following definitions apply.

- 360 Capital** 360 Capital ED1 Pty Limited, 360 Capital Group Limited and 360 Capital FM Limited as the responsible entity of the 360 Capital Investment Trust, as the context requires
- ASIC proceedings** the proceedings referred to in paragraph 4
- ASIC Proceedings Condition** the Bid condition described in paragraph 16(c)
- Bid** 360 Capital’s takeover bid for E&P announced on 11 December 2020

¹ 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)

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Bidder's Statement	360 Capital's bidder's statement for the Bid lodged with ASIC on 5 January 2021
Change of Control Condition	the Bid condition described in paragraph 16(a)
E&P	E&P Financial Group Limited
first proposed bid	360 Capital's proposed takeover bid for E&P announced on 27 October 2020 and withdrawn on 11 December 2020
Other Regulatory Approvals Conditions	the Bid condition described in paragraph 16(b)
Relevant Conditions	the ASIC Proceedings Condition, Change of Control Condition and Other Regulatory Approvals Condition collectively

FACTS

3. E&P is an ASX listed company (ASX code: EP1). 360 Capital (ASX: TGP) is the largest shareholder of E&P, with voting power of 19.55% (having acquired the first 18.33% at the end of August 2020).
4. On 4 September 2020, E&P announced that ASIC had commenced proceedings against E&P's wholly-owned subsidiary, Dixon Advisory & Superannuation Services Ltd (**DASS**) in relation to alleged breaches in providing personal financial product advice to retail clients. The announcement indicated that DASS would file a comprehensive defence after receiving and reviewing ASIC's detailed statement of claim, and noted that "[t]hese processes are expected to take a considerable period of time".
5. On 27 October 2020, 360 Capital announced its intention to make the first proposed bid for E&P.
6. On 11 December 2020, 360 Capital announced that:
 - (a) it was withdrawing the first proposed bid on the basis that a condition to that offer was triggered by the passing of a resolution² at E&P's annual general meeting held on 11 November 2020 and
 - (b) it would make the Bid. The conditions of the Bid were similar to those of the first proposed bid but with the addition of the ASIC Proceedings Condition and the deletion of the (breached) condition referred to in paragraph 6(a).
7. On 5 January 2021, 360 Capital lodged the Bidder's Statement, which contained conditions substantially the same as those announced on 11 December 2020. Page 12 of the Bidder's Statement indicated that the Bid was "subject to a number of conditions, including no material adverse change, no litigation and no prescribed occurrences" and that

² The resolution related to the approval of an options/rights plan and the issue of shares and options under that plan

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the full list of conditions was set out in Annexure 1. The Bidder's Statement did not otherwise refer to or discuss the ASIC Proceedings Condition.

APPLICATION

Declaration sought

8. By application dated 21 December 2020, E&P sought a declaration of unacceptable circumstances. E&P submitted (among other things) that:
 - (a) shareholders were being presented with an illusory offer as one or more of the Relevant Conditions were *"so unlikely to be satisfied"*
 - (b) the Relevant Conditions were vaguely drafted and uncertain and the market had no meaningful way of assessing the likelihood of the Relevant Conditions being satisfied and
 - (c) the Relevant Conditions breached the express terms or policy of section 629.
9. E&P submitted that the effect of the circumstances was that:
 - (a) E&P's directors and shareholders did not have enough information to assess the merits of the Bid and
 - (b) a potential acquisition of control was not taking place in an efficient, competitive and informed market.

Interim order sought

10. E&P sought an interim order restraining despatch of the Bidder's Statement. 360 Capital undertook to give the Panel and parties at least 2 business days' notice before despatching the Bidder's Statement, making an interim order unnecessary.

Final orders sought

11. E&P sought final orders to remove or modify the Relevant Conditions, including to remove or waive the ASIC Proceedings Condition.

DISCUSSION

Preliminary submissions

12. We received preliminary submissions from 360 Capital submitting that we should decline to conduct proceedings.
13. After forming an initial view that we were not inclined to conduct proceedings on some matters raised by the application, we asked 360 Capital whether it was willing to provide an undertaking to address our other concerns regarding the disclosure of, in particular, the ASIC Proceedings Condition in the Bidder's Statement.
14. We also invited E&P to respond to 360 Capital's preliminary submissions. E&P submitted (among other things) that:
 - (a) It shared the Panel's concerns about the absence of any prominent disclosure and substantive discussion of the ASIC Proceedings Condition in the Bidder's Statement. However, *"more prominent disclosure in the Bidder's Statement about*

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the existence of [the ASIC Proceedings Condition] and the likelihood of its satisfaction does not cure the fundamental issues presented by the condition; namely, that there is no reasonable need for the condition and no reasonable likelihood that it will be satisfied within the maximum 12 month offer period."

- (b) It disputed 360 Capital's rationale for the inclusion of the ASIC Proceedings Condition (360 Capital submitted that the inclusion of the condition reflected an asymmetry of information between it and E&P and that it was a fundamental condition going to the value of the Bid), querying how 360 Capital could reasonably require the condition given it increased its shareholding after the ASIC proceedings were made public but before the Bid was announced.
- (c) 360 Capital was not genuinely relying on the ASIC Proceedings Condition but rather was using it (together with the other Relevant Conditions) to obtain a "free option whether or not to proceed" with the Bid, irrespective of the level of acceptances. It submitted that the Bid, incorporating the "uncertain and vague" Relevant Conditions, was "consistent with 360 Capital's complete indifference to its actions destabilising EP1's businesses".

15. We have considered all the material, but address specifically only that part of the material we consider necessary to explain our reasoning.

Subjective conditions and conditions unlikely to be fulfilled

16. The application concerns the three Relevant Conditions of the Bid, namely (in summary):
- (a) Condition B (Change of control consents): requires E&P and 360 Capital to have been provided "*in writing a binding, irrevocable and unconditional waiver or release*" from every person who is entitled or states an intention to exercise any right, upon a change of control of E&P, to:
 - (i) "*terminate, vary the terms of or accelerate the performance of obligations under a Material Contract;*
 - (ii) "*acquire or require the disposal of any interest in or alter the terms of investment in any one or more companies, businesses, trusts, assets, shares or shares held by EP1 with a value of more than \$10.0 million in aggregate; or*
 - (iii) "*without limiting (i), require the repayment, immediately or earlier than the repayment date would otherwise have been, of any monies borrowed or raised by, or any other monetary obligations of EP1 or a subsidiary of EP1*".
 - (b) Condition C (Other regulatory approvals): requires E&P "*to have obtained on an unconditional basis all approvals, licences, authorisations, authorities, consents, permissions, clearances, grants, confirmations, orders, exemptions, waivers or rulings (together, Approvals) required by law or by any Authority*" as are necessary to permit the acquisition of E&P by 360 Capital.
 - (c) Condition F (ASIC proceedings): requires the withdrawal or discontinuation of the ASIC proceedings or that the ASIC proceedings be settled or finally determined in an amount not exceeding \$10 million in the aggregate.

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17. E&P submitted that the Relevant Conditions “[provide] 360 Capital with significant latitude”, “will inevitably be unsatisfied and require waiver at the sole discretion of 360 Capital” and therefore give 360 Capital a “call option” on whether to proceed with the Bid, in breach of section 629 or its underlying policy.
18. Specifically in respect of the ASIC Proceedings Condition, E&P submitted the resolution of the relevant ASIC proceedings “is likely to take considerably longer than one year, being the maximum permitted duration of 360 Capital’s offer period”. Accordingly, the condition has “little if any prospect of being satisfied on any realistic scenario”.
19. 360 Capital submitted that the Change of Control Condition and Other Regulatory Approvals Condition were consistent with market practice and were not vague or indefinite. On the ASIC Proceedings Condition, it submitted that “[i]t is entirely reasonable to assume that the proceedings may be resolved before the end of the offer period”, including because it was open to E&P to settle the proceedings at any time or because ASIC could withdraw or discontinue the proceedings.
20. The Panel has generally taken the approach that a bidder may make its bid (or potential bid) subject to any conditions it chooses, unless the law or policy requires otherwise.³
21. Section 629 prohibits off-market bids being subject to defeating conditions if the fulfilment of the condition depends on (among other things) the bidder’s, or its associate’s, opinion, belief or other state of mind or on the happening of an event that is within the sole control of the bidder or its associate. It renders void any such conditions.
22. The Panel has previously observed that conditions that were vaguely drafted and uncertain in their operation might offend the policy of section 629 by, in effect, giving the bidder a discretion in relation to the interpretation of the condition. This would mean that whether or not the condition was triggered or fulfilled would depend on the bidder’s construction of the condition.⁴
23. We were not satisfied that any of the Relevant Conditions were void due to fulfilment depending on the matters specified in section 629.
24. We accept that a condition that is highly unlikely to be fulfilled, and will inevitably need to be waived, may offend the policy of section 629 because it gives the bidder control over whether the bid becomes unconditional, in a similar manner to conditions that are void under section 629. Such a condition may well give rise to unacceptable circumstances.
25. In this case, we consider that while it might be likely, and even very likely, that the Relevant Conditions will need to be waived, we do not think it is inevitable.

³ Section 625(2) “Offers under an off-market bid may be subject to conditions that are not prohibited by sections 626 to 629”, Guidance Note 12: Frustrating Action footnote 8, *Southcorp Limited* [2005] ATP 4 at [124]

⁴ See *Novus Petroleum* [2004] ATP 2 at [43], citing *SA Liquor Distributors* [2002] ATP 22 and *Goodman Fielder 01* [2003] ATP 1

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26. Additionally, in our view, whether a condition is unacceptable should not be determined purely on the basis of likelihood of fulfilment (or the need for waiver) without regard to the broader circumstances.
27. In the circumstances of this matter, we consider the following relevant:
- (a) Although some aspects of their drafting could have been tighter, the Relevant Conditions are not, in our view, so vague or uncertain as to offend the policy of section 629, and render the Bid illusory.
 - (b) The Bid is hostile and 360 Capital has not had the benefit of due diligence.
 - (c) The Relevant Conditions address matters that we would expect to be significant for a bidder making a hostile bid.
 - (d) Conditions similar to the Change of Control Condition and the Other Regulatory Approvals Condition are not, in our view, inconsistent with market practice in the context of a hostile bid.
 - (e) While the ASIC Proceedings Condition is unique, it is also, in our view, not inconsistent with market practice for a hostile bid to contain bespoke conditions designed to protect the bidder against the risk of a potentially material liability. There was also limited publicly available information about the ASIC proceedings.
28. In that context, we do not consider the inclusion of the Relevant Conditions in the Bidder's Statement, or the likelihood that one or more of them will need to be waived, gives rise to unacceptable circumstances. However, that should not be taken to suggest that:
- (a) 360 Capital would necessarily be able to rely on a non-material breach of the Relevant Conditions⁵ or
 - (b) action by E&P resulting in breach of the Relevant Conditions would necessarily amount to unacceptable frustrating action.⁶
29. Rather, such matters would need to be assessed in the circumstances in which they arise.

Disclosure regarding Relevant Conditions

30. We had significant concerns about 360 Capital's disclosure in relation to the bid conditions in the Bidder's Statement. In particular, we were concerned that the Bidder's Statement did not discuss or give prominence to the ASIC Proceedings Condition – which was only referenced in Annexure 1 to the Bidder's Statement.
31. As indicated above, we do not consider it *inevitable* that the ASIC Proceedings Condition will need to be waived. However, we do think that it is likely, and more so than for the other Relevant Conditions. In our view, that should be material to the

⁵ NGM Resources Limited [2010] ATP 11 at [16]-[30]

⁶ Guidance Note 12: Frustrating Action at [12b,g],[20] and [21]

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decision of E&P shareholders whether to accept the Bid,⁷ given that accepting shareholders will not be entitled to be paid until 10 business days after the Bid becomes unconditional,⁸ and will be unable to accept a superior offer while the Bid remains open unless it is extended while conditional by more than 1 month.⁹ No doubt E&P will draw that to shareholders' attention, but in our view, that does not justify 360 Capital making no reference to the ASIC Proceedings Condition in the Bidder's Statement apart from including it, in an annexure, in the last 3 pages of the Bidder's Statement.

32. We indicated to parties our preliminary view that the ASIC Proceedings Condition should, at a minimum, be addressed in the Chairman's Letter and the Frequently Asked Questions section of the Bidder's Statement, with some disclosure of the likelihood of that condition being met. We also expressed a preliminary view that the Bidder's Statement should identify material approvals required by the Other Regulatory Approvals Condition or indicate that 360 Capital is not aware of any.¹⁰
33. In response, 360 Capital agreed to give the attached undertaking (**Annexure A**) which we are satisfied sufficiently addresses our concerns.

DECISION

34. Given the undertakings offered by 360 Capital, and for 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).
35. 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.

Karen Evans-Cullen

President of the sitting Panel

Decision dated 19 January 2021

Reasons given to parties 17 February 2021

Reasons published 19 February 2021

⁷ and required to be included in the Bidder's Statement under section 636(1)(m) unless that would be unreasonable to require because of previous disclosure to E&P shareholders

⁸ Bidder's Statement, section 11.5.1(a)(ii)

⁹ Bidder's Statement, section 11.7.1(a)

¹⁰ *DoloMatrix International Limited* [2008] ATP 10 at [17]

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Advisers

Party	Advisers
E&P	MinterEllison
360 Capital	Clayton Utz



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Annexure A

AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION ACT 2001 (CTH) SECTION 201A UNDERTAKING

E&P FINANCIAL GROUP LIMITED

360 Capital Group Limited and 360 Capital FM Limited as responsible entity of the 360 Capital Investment Trust undertakes to the Panel that it will not dispatch the bidder's statement dated 5 January 2021 in relation to its off-market bid to acquire all of the shares in E&P Financial Group Limited until it has lodged with the Australian Securities and Investments Commission a supplementary bidder's statement addressing the disclosure concerns communicated by the Panel in respect of Condition F (ASIC Proceedings) and Condition C (Other regulatory approvals) and dispatches the supplementary bidder's statement with the bidder's statement (or incorporates the supplementary bidder's statement into a replacement bidder's statement).

**Signed by Tony Pitt, Managing Director
with the authority, and on behalf, of**

**360 Capital Group Limited and 360 Capital FM Limited as responsible entity of the 360
Capital Investment Trust**

Dated 15 January 2021