

FLEXIBLE AND BESPOKE BID CONDITIONS - PROTECTING AGAINST MATERIAL RISKS

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Legal Briefings - By **Paul Branston and Gabrielle Sumich**

In *E&P Financial Group Limited* [2021] ATP 1, the Takeovers Panel has confirmed that bidders have considerable latitude to craft and impose bid conditions that are designed to protect against material risks – subject always to the conditions not being prohibited by law or policy, such as conditions which turn on the bidder’s opinion or are in the bidder’s sole control. This latitude is particularly relevant to hostile bid situations where bidders may use bespoke bid conditions to attempt to mitigate risks arising from the limited access to information they have regarding the target.

TAKEOVERS PANEL CONTINUES TO ALLOW BIDDERS FLEXIBILITY IN FORMULATING THEIR BID CONDITIONS

The Takeovers Panel declined to conduct proceedings in relation to an application by E&P Financial Group Limited (**E&P**) in relation to the off-market takeover bid by 360 Capital Group Limited and 360 Capital FM Limited as the responsible entity of the 360 Capital Investment Trust (**360 Capital**) for E&P. The Panel did not consider that certain conditions of 360 Capital’s offer were so vague or uncertain as to offend the terms or policy of section 629 of the *Corporations Act 2001* (Cth) (**Corporations Act**), which prohibits defeating conditions the fulfilment of which depends on the bidder’s opinion or conditions that are within the bidder’s control.

Prior to the offer, E&P had announced that its wholly-owned subsidiary was subject to ASIC proceedings for alleged breaches in the provision of personal financial product advice (**ASIC Proceedings**). 360 Capital's offer was subject to a condition requiring the withdrawal, discontinuation, settlement or financial determination of the ASIC Proceedings (subject to certain monetary thresholds) within the offer period. This condition could be waived at the discretion of 360 Capital.

360 Capital's bid was also subject to other conditions that were at issue in the application including a condition requiring all consents under E&P's material contracts and financing arrangements for the change of control to be obtained and a condition requiring any other regulatory approvals for the acquisition of E&P by 360 Capital to be obtained.

E&P submitted in its application for a declaration of unacceptable circumstances in relation to the conditions that:

1. the relevant conditions (in particular the ASIC Proceedings condition) were so unlikely to be satisfied during the period of the offer that the conditions provided 360 Capital with a free option to withdraw from the Bid at any time and therefore that the offer was illusory;
2. the conditions were vaguely drafted and uncertain and the market had no meaningful way of assessing the likelihood of the conditions being satisfied; and
3. the conditions breached the express terms or policy of section 629.

E&P also submitted that the bidder's statement's did not give sufficiently prominent disclosure to the ASIC Proceedings condition in particular.

The Takeovers Panel declined to conduct proceedings in relation to E&P's application.

The Panel acknowledged that vaguely drafted and uncertain conditions may offend the policy of section 629, by in effect giving the bidder a discretion in relation to interpretation of the condition ie. so that fulfilment depends on its opinion. However, the Panel did not consider that any of the conditions were so vague and uncertain that fulfilment would depend on the bidder's opinion or any of the other proscribed matters in section 629.

The Panel also acknowledged that a condition that is highly unlikely to be fulfilled and will inevitably need to be waived may offend the policy underpinning section 629 and because it gives a bidder control over whether the bid becomes unconditional ie. a bid subject to such a condition would be a "bluffing" bid and the waiver of a condition that is bound to fail is an event within the control of the bidder and would give the bidder a free option.

Whilst the Panel considered that it might be likely, or even very likely that the conditions would not be satisfied during the period of the offer - in particular the ASIC Proceedings condition, noting the length of time such proceedings may typically take to resolve - the Panel did not consider failure of the conditions inevitable.

In considering the acceptability of the conditions, the Panel emphasised the importance of not focusing solely on the likelihood of fulfilment of the condition, but also the broader circumstances. This included an assessment of the hostile nature of the bid, the bidder's access to due diligence, whether the conditions addressed matters of significance to a bidder and market practice for bid conditions.

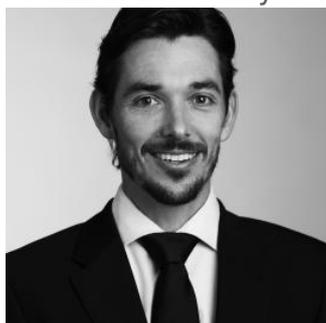
The Panel was of the view that the change of control and regulatory conditions were not inconsistent with market practice and, whilst the ASIC Proceedings condition was unique, it was not inconsistent with the bespoke nature of conditions designed to protect the bidder against the risk of material liabilities in making a bid where the bidder has limited information regarding the subject matter of the condition because the bid is hostile. The Panel has taken a similar approach to due diligence conditions in takeover bids, recognising that a bidder may generally make its offer subject to such conditions, but that non-compliance with the conditions by the target will not necessarily amount to frustrating action giving rise to unacceptable circumstances.

However, the Panel did agree with E&P's concern regarding the level of disclosure in the bidder's statement on the ASIC Proceedings condition. Being a material condition, the Panel noted that references to the ASIC Proceedings condition should be more prominently disclosed towards the front of the bidder's statement. The Panel was satisfied with 360 Capital's undertaking to provide supplementary disclosure in this respect.

See the Panel's [media release](#) and [reasons for its decision](#).

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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