



**Australian Government**

**Takeovers Panel**

**Reasons for Decision  
CD Private Equity Fund II  
[2022] ATP 23**

**Catchwords:**

*Decline to conduct proceedings – trust scheme merger – responsible entity – trustee duties – judicial advice – disclosure*

*Corporations Act 2001 (Cth), sections 601FC, 601GC, 602(a), 602(b), 657C*

*Trustee Act 1925 (NSW), section 63*

*Guidance Note 12: Frustrating Action, Guidance Note 15: Trust Scheme Mergers*

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

## INTRODUCTION

1. The Panel, Yasmin Allen (sitting President), Marissa Freund and Ian Jackman SC, declined to conduct proceedings on an application in relation to the affairs of CD Private Equity Fund II. The application concerned the proposed merger of the fund by way of a trust scheme of arrangement. The proposed merger was withdrawn shortly after the application was made. In light of this withdrawal, the Panel considered that there was no reasonable prospect that it would declare the circumstances unacceptable.

2. In these reasons, the following definitions apply.

<b>Act</b>	<i>Corporations Act 2001 (Cth)</i>
<b>Baauer</b>	Baauer Pty Ltd atf the Baauer Family Trust
<b>CD1</b>	CD Private Equity Fund I, a registered managed investment scheme listed on the ASX (ASX code: CD1)
<b>CD2</b>	CD Private Equity Fund II, a registered managed investment scheme listed on the ASX (ASX code: CD2)
<b>CD3</b>	CD Private Equity Fund III, a registered managed investment scheme listed on the ASX (ASX code: CD3)
<b>CD4</b>	CD Private Equity Fund IV, an unlisted registered managed investment scheme
<b>CD funds</b>	CD1, CD2, CD3 and CD4
<b>Court</b>	Supreme Court of New South Wales
<b>E&amp;P</b>	E&P Investments Limited, in its capacity as the responsible entity of each of the CD funds

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<b>Explanatory Memorandum</b>	The Explanatory Memorandum published on ASX by E&P on 7 October 2022 in connection with the Proposed Merger as supplemented by the Supplementary Explanatory Memorandum
<b>Merged Fund</b>	CD3, to be restructured from a closed-ended listed trust to an open-ended unlisted unit trust and renamed ‘CD Private Equity Fund’ following implementation of the Proposed Merger
<b>Product Disclosure Statement</b>	The Product Disclosure Statement for the Merged Fund published on ASX by E&P on 7 October 2022 in connection with the Proposed Merger as supplemented by the Supplementary Product Disclosure Statement
<b>Proposed Merger</b>	The proposed merger of the CD funds by way of a trust scheme of arrangement as publicly announced by E&P on 5 October 2022 and more fully described in the Explanatory Memorandum
<b>Supplementary Explanatory Memorandum</b>	The Supplementary Explanatory Memorandum published on ASX by E&P on 26 October 2022 in connection with the Proposed Merger
<b>Supplementary Product Disclosure Statement</b>	The Supplementary Product Disclosure Statement for the Merged Fund published on ASX by E&P on 26 October 2022 in connection with the Proposed Merger
<b>Withdrawal Announcement</b>	The ASX announcement published on ASX by E&P on 31 October 2022 confirming the withdrawal of the Proposed Merger, as described in paragraph 10 below

## FACTS

3. E&P<sup>1</sup> is the responsible entity of each of the CD funds.
4. Each of the CD funds are “...closed-end self-liquidating trusts to match the profile of the underlying investments. The funds were established as long-term investments of not less than 10 years, and so were listed on the ASX to provide investors with an opportunity for liquidity. [CD4] was not listed on the ASX due to its partly paid structure.”<sup>2</sup>
5. On 5 October 2022, E&P announced the Proposed Merger whereby CD3 would acquire all of the units in CD1, CD2 and CD4 to form the Merged Fund, a single larger and more diversified fund with an indefinite term to be re-named the ‘CD Private Equity Fund’.

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<sup>1</sup> E&P is a wholly owned subsidiary of E&P Financial Group Limited, a public company listed on the ASX (ASX: EP1)

<sup>2</sup> Explanatory Memorandum, p 35

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6. On 7 October 2022, in response to an application by E&P for judicial advice in respect of the Proposed Merger made under section 63 of the *Trustee Act 1925* (NSW), the Court confirmed that (among other things):
  - (a) E&P would be justified in convening meetings of the unitholders of each of the CD funds to consider resolutions required to approve and implement the Proposed Merger (including to amend the trust constitutions of each of the CD funds) and
  - (b) subject to the unitholders of each of the CD funds passing the required resolutions, E&P would be justified in proceeding with the Proposed Merger on the basis that amending the trust constitutions of each of the CD funds would be within the powers of alteration conferred by the trust constitutions and section 601GC of the Act.
7. Following receipt of the judicial advice, on 7 October 2022, E&P issued the Explanatory Memorandum and the Product Disclosure Statement to CD2 unitholders.
8. On 14 October 2022, E&P announced that, in response to investor feedback, it intended to lodge a Supplementary Explanatory Memorandum and Supplementary Product Disclosure Statement describing a modification to the Proposed Merger relating to the operation of the withdrawal mechanism under which unitholders in the Merged Fund could fully or partially exit their position in the Merged Fund.
9. On 26 October 2022, E&P released a Supplementary Explanatory Memorandum and Supplementary Product Disclosure Statement addressing the issues raised in paragraph 8 above.
10. On 31 October 2022, E&P issued an ASX announcement stating that it had determined to withdraw the Proposed Merger following feedback from investors and having regard to proxies received.<sup>3</sup> E&P confirmed that no further changes to the structure of CD2 were contemplated at that time.
11. On 7 November 2022, the CD2 unitholders resolved that the resolutions to approve the Proposed Merger be withdrawn and not be put to a vote at the general meeting.

## APPLICATION

12. By application dated 27 October 2022, Baauer sought a declaration of unacceptable circumstances. Baauer submitted (among other things) that:
  - (a) in recommending the Proposed Merger to CD2 unitholders, and in wording the Explanatory Memorandum, E&P:
    - (i) was not acting honestly

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<sup>3</sup> E&P confirmed that while the general meeting to approve the Proposed Merger would still be held, at the commencement of the general meeting, the Chair would withdraw the resolutions or adjourn the meeting indefinitely, such that the Proposed Merger would not be voted on at the meeting.

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- (ii) did not exercise the degree of care and diligence that a reasonable person would have exercised if they had been in E&P's position
- (iii) was not acting in the best interests of CD2 unitholders and
- (iv) gave priority to its own interests when there was a conflict between the interests of E&P and the interests of CD2 unitholders

in contravention of s601FC(1)(a), s601FC(1)(b) and s601FC(1)(c) of the Act and

- (b) the Explanatory Memorandum overstated the potential benefits of the Proposed Merger that were either immaterial or illusory and understated the downsides of the Proposed Merger.

13. Baauer identified a number of changes that would affect existing CD2 unitholders if the Proposed Merger were to be implemented that it submitted would be detrimental to CD2 unitholders.
14. Baauer submitted that the circumstances were unacceptable having regard to the purposes set out in sections 602(a) and (b) of the Act, including because:

*"The [Explanatory Memorandum's] content and E&P's recommendation of the [Proposed Merger], risk causing massive loss to CD2 unitholders if (as might be expected) many unitholders rely on the [Explanatory Memorandum's] misleading content and E&P's recommendation to vote for the [Proposed Merger] (or abstain from voting on it) when they would have voted against the [Proposed Merger] in the absence of that content and recommendation."*

#### **Interim order sought**

15. Baauer sought an interim order that the vote on the Proposed Merger (and all related votes) be stayed pending determination of its application and the implementation of any orders made by the Panel.

#### **Initial final orders sought**

16. In its application, Baauer sought final orders, including that:
- (a) E&P prepare a replacement Explanatory Memorandum which *"objectively and impartially (and not misleadingly)"* assesses the Proposed Merger and details its attractiveness or otherwise to CD2 unitholders
  - (b) in the replacement Explanatory Memorandum, E&P recommend that CD2 unitholders vote against the Proposed Merger (and all related resolutions)
  - (c) the replacement Explanatory Memorandum be subject to the Panel's approval
  - (d) all votes cast in favour of the Proposed Merger by CD2 unitholders prior to the date that is seven days after the issue of the replacement Explanatory Memorandum be deemed void and that affected unitholders then be promptly informed of that voiding, the reason for their votes being voided and their ability to recast their votes in light of the revised Explanatory Memorandum and recommendation.
17. Baauer submitted that:

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*“The requested orders would ensure that CD2 unitholders are given the opportunity to make an informed decision about whether or not to vote for the [Proposed Merger] and would ensure that any votes that might have been cast in favour of the [Proposed Merger] (and all related resolutions) in reliance upon the existing [Explanatory Memorandum] and E&P’s recommendation would not be counted.”*

#### Alternative final orders sought

18. On 2 November 2022 (in response to the Withdrawal Announcement), Baauer sought alternative final orders that:
- (a) E&P meet all of the promises detailed in the Withdrawal Announcement
  - (b) if E&P withdraws the relevant resolutions as foreshadowed in the Withdrawal Announcement, then it must not put any of those resolutions to CD2 unitholders unless it has first obtained the Panel’s approval
  - (c) if E&P adjourns the relevant meeting indefinitely as foreshadowed in the Withdrawal Announcement, then it must not reschedule the meeting unless it has first obtained the Panel’s approval
  - (d) prohibit E&P from proposing, or recommending, to CD2 unitholders any proposal that is similar to the Proposed Merger in any material respect, unless it has first obtained the Panel’s approval as to:
    - (i) any recommendation it proposes to give in relation to such proposal and
    - (ii) the form and content of such proposal and
  - (e) expressly reprimands E&P and its directors for (allegedly) in contravention of s601FC of the Act:
    - (i) spending \$1.4m of unitholders’ money on the Proposed Merger
    - (ii) issuing to unitholders a misleading Explanatory Memorandum and
    - (iii) recommending the Proposed Merger to CD2 unitholders.
19. In support of its request for alternative orders, Baauer submitted that it was concerned that E&P may change its position in relation to the withdrawal of the Proposed Merger and E&P may *“at any time put forward a proposal, purportedly (but in truth, not) in unitholders’ best interests”* that (among other things) has material similarities to the Proposed Merger and/or is misleading in its disclosure (as Baauer alleges the Proposed Merger was).

## DISCUSSION

### Preliminary submissions

20. By way of preliminary submissions, E&P asserted that Baauer’s application principally raised two substantive allegations of unacceptable circumstances, namely that:
- (a) the disclosure in relation to the Proposed Merger was misleading and
  - (b) E&P breached its duties under s601FC of the Act.

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21. In relation to the allegation of misleading disclosure, E&P submitted that, given the withdrawal of the Proposed Merger:
  - (a) there was no potential continuing impact of that disclosure under s602(a) or (b) of the Act and
  - (b) there was no proposal currently on foot that related to control of CD2.
22. In relation to the allegation of breach of trustee duties, E&P submitted that:
  - (a) the Panel’s policy that it does not enforce director’s duties<sup>4</sup> should be applied equally to enforcing trustee duties and
  - (b) in any case, as a matter of comity, the Panel should not relitigate issues that have already been considered by the Court, noting (among other things) that E&P sought and received judicial advice from the Court under s63 of the *Trustee Act 1925* (NSW) in respect of the Proposed Merger and the Explanatory Memorandum (see paragraph 6 above).
23. Additionally, E&P submitted that none of the alternative final orders requested by Baauer would be appropriate in the circumstances, including because:
  - (a) the circumstances the subject of the application no longer existed
  - (b) E&P had represented to the market that the Proposed Merger would not proceed, and CD2 unitholders could always seek to enforce that representation against E&P (either at the Panel or by way of a court action) if E&P sought to resile from it
  - (c) E&P had represented to the market that it has no current intentions to put any new or similar proposal to CD2 unitholders and, in any event, the Panel should not concern itself with future proposals E&P may (but had no current intention to) devise unless and until there is a future allegation of unacceptability and
  - (d) there was no basis for a reprimanding order.

#### **Effect of the withdrawal of the Proposed Merger**

24. We consider that the withdrawal of the Proposed Merger as foreshadowed in the Withdrawal Announcement and approved by CD2 unitholders at its general meeting on 7 November 2022, had the effect of ending the proposed control transaction to which the application related, with the result that the allegedly unacceptable circumstances the subject of Baauer’s application ceased to exist. Accordingly, we consider it is unnecessary to consider Baauer’s specific allegations of misleading disclosure and breach of trustee duties or to comment on the preliminary submissions of E&P referred to in paragraph 22 above<sup>5</sup>.
25. We also consider that there is no reasonable prospect that we would grant any of the alternative final orders requested by Baauer because (among other things):

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<sup>4</sup> Guidance Note 12: Frustrating Action at [7]

<sup>5</sup> For the Panel’s policy generally in relation to trust scheme mergers see Guidance Note 15: Trust Scheme Mergers

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- (a) if E&P sought to resile from its representations to the market in the Withdrawal Announcement or sought to propose or recommend an alternative similar proposal to CD2 unitholders (which E&P has publicly confirmed it has no intention of doing), Baauer could make a new application to the Panel or the Court and
- (b) the primary function of the Panel is to consider whether the circumstances before it are unacceptable, not to speculate on whether theoretical potential future circumstances may be unacceptable or to impose orders to prevent the occurrences of theoretical potential future circumstances. In any event, should such circumstances ever eventuate, the Panel could, on an application by a party with standing under s657C of the Act, consider the circumstances at the relevant time.

## DECISION

26. 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).

## Orders

27. 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.

**Yasmin Allen**

**President of the sitting Panel**

**Decision dated 14 November 2022**

**Reasons given to parties 1 December 2022**

**Reasons published 6 December 2022**

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#### Advisers

Party	Advisers
Baauer Pty Ltd atf the Baauer Family Trust	Deffenti and Queiroz Lawyers
E&P Investments Limited, in its capacity as responsible entity of each of CD Private Equity Fund I, CD Private Equity Fund II, CD Private Equity Fund III and CD Private Equity Fund IV	King & Wood Mallesons