



Australian Government

Takeovers Panel

**Reasons for Decision
Australian Industrial REIT
[2015] ATP 10**

Catchwords:

Decline to conduct proceedings – disclosure – information outside bidder’s statement – letter to target unitholders – cashflow – misleading statements – effect on control – long running bid

Guidance Note 5: Specific Remedies – Information Deficiencies; Guidance Note 18: Takeover documents

Foster’s Group Limited [2011] ATP 15; Programmed Maintenance Services Limited 02 [2008] ATP 9; Consolidated Minerals Limited 01 [2007] ATP 20; Nexus Energy Limited [2006] ATP 17; Universal Resources Limited [2005] ATP 6

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

INTRODUCTION

1. The Panel, Ron Malek, Tony Osmond and Robert Sultan (sitting President), declined to conduct proceedings on an application by Fife Capital Funds Limited as responsible entity of Australian Industrial REIT in relation to the affairs of ANI. 360 Capital Investment Management Limited as responsible entity of the 360 Capital Industrial Fund had made an off-market takeover bid for ANI. Fife Capital submitted that statements in a notice distributed by 360 Capital to ANI unitholders were misleading. The Panel considered that the statements were not materially misleading in the context of the long running bid. Given that 360 Capital had issued a clarifying statement and it had been open to Fife Capital to make its own corrective announcement, the Panel concluded there was no reasonable prospect that it would declare the circumstances unacceptable.

2. In these reasons, the following definitions apply.

- 360 Capital** 360 Capital Investment Management Limited as responsible entity of TIX
- ANI** Australian Industrial REIT
- Fife Capital** Fife Capital Funds Limited as responsible entity of ANI
- TIX** 360 Capital Industrial Fund
- TIX notice** A notice distributed by 360 Capital to ANI unitholders dated 30 September 2015
- TIX offer** Off-market takeover bid for all units of ANI by 360 Capital

FACTS

3. ANI is an ASX listed real estate investment trust (ASX code: ANI). ANI acquires and holds Australian industrial properties. Fife Capital is the responsible entity of the fund.
4. On 3 February 2015, 360 Capital made a predominantly scrip off-market takeover bid for all of the units in ANI. The TIX offer was declared unconditional on 6 May 2015.
5. On 25 May 2015, at an extraordinary meeting convened by 360 Capital, ANI unitholders did not pass a resolution to replace Fife Capital as responsible entity of ANI.
6. On 21 September 2015, ANI announced that it had received an indicative, non-binding proposal for an all cash offer of \$2.40 per unit to acquire 100% of ANI units from a consortium. The consortium had stated that the possible cash offer would be subject to a 50.1% minimum acceptance condition.
7. On 22 September 2015, 360 Capital announced an increase of the TIX offer to 0.90 TIX units and 24.5 cents per ANI unit and an extension of the closing time to 5.00pm (Sydney time) on 12 October 2015. On the closing day, TIX units would be quoted ex-distribution on ASX unless the record date was extended. The record date for the TIX quarterly distribution was 14 October 2015.
8. On 28 September 2015, 360 Capital convened a further extraordinary meeting of ANI unitholders to replace Fife Capital as responsible entity of ANI. The meeting is to be held on 26 October 2015. It also released its fourth supplementary bidder's statement.
9. 360 Capital distributed the TIX notice to ANI unitholders dated 30 September 2015. The TIX notice was not released to ASX.
10. The TIX notice contained the following statements:
 - "ANI's June distribution was partially funded by debt reflecting cashflow issues"*
 - and
 - "If 360 Capital is voted in as responsible entity of ANI, it will undertake an immediate strategic review of ANI to address leasing and cashflow situation".*
11. On 6 October 2015, Fife Capital released its explanatory statement in response to the 28 September 2015 notice of meeting, and fourth supplementary bidder's statement in response to the increase in the TIX offer, and announced an update on the possible cash offer. The announcement stated that the consortium expected all remaining pre-conditions to its offer could be satisfied by 9 October 2015.
12. Also on 6 October 2015, the TIX notice came to the attention of Fife Capital.
13. It appears that the TIX notice was received by the unitholders on or after 6 October 2015.
14. At 6 October 2015, TIX had a relevant interest of approximately 36% of all ANI units.

APPLICATION

15. By application dated 7 October 2015, Fife Capital sought a declaration of unacceptable circumstances. Fife Capital submitted that:
- (a) ANI unitholders who read the TIX notice would be left with the impression that ANI had insufficient earnings, paid distributions out of debt rather than income and there was a question as to ANI's ongoing solvency. Fife Capital submitted that ANI's earnings exceeded its distributions, the June distribution was well within ANI's policy of distributing between 90% and 100% of distributable earnings, and ANI is solvent.
 - (b) The TIX notice was misleading in the context of prior disclosures because the statement concerning cashflow issues was not included in the fourth supplementary bidder's statement and had not previously been publicly stated by 360 Capital.
 - (c) Corrective disclosure alone would be an insufficient remedy given that the TIX offer was unconditional and a significant number of ANI units had been accepted into the TIX offer since the date of the TIX notice.
16. Fife Capital submitted that the misleading disclosure in the TIX notice created a false and uninformed market and would have a material effect on the control of ANI.

Final orders sought

17. Fife Capital sought final orders to the effect that:
- (a) TIX send all ANI unitholders a notice which explained the misleading nature of the statements in the TIX notice referring to cashflow issues and that the TIX notice should be considered in the context of all disclosures made by TIX and ANI
 - (b) ANI unitholders who accepted the TIX offer after the date of the TIX notice and before the date that is 5 business days following corrective disclosure have a right to withdraw their acceptance
 - (c) the closing date of the TIX offer and the record date for the TIX quarterly distribution be extended by 5 business days from mailing the corrective disclosure, to allow ANI unitholders to consider the corrective disclosure and
 - (d) TIX be restrained from processing any acceptances until corrective disclosure is made, to allow for the withdrawal right.

DISCUSSION

Further disclosure and preliminary submissions

18. On 8 October 2015, 360 Capital released a clarifying statement to ASX which stated, among other things:

...In a letter to ANI Unitholders dated 30 September 2015, TIX stated "ANI's June distribution was partially funded by debt reflecting cash flow issues".

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The statement was made on the basis of ANI's practice of paying its distributions by drawing down on debt rather than using available cash flow. ANI explains this practice in its 2015 financial statements as follows:

"The consolidated Financial Statements are prepared on a going concern basis. The Directors note that the Fund is in a net current asset deficiency position primarily due to the provision for the June 2015 distribution. The Fund has minimal cash and cash equivalents as it is the policy of the Responsible Entity to use surplus cash to repay debt. The Fund has the ability to drawdown funds to pay the distribution on 28 August 2015, having available headroom in the Fund's debt facility of \$16.0 million."

The statement in the [TIX notice] needs to be considered in the context of the numerous previous statements made by TIX, including in the Fourth Supplementary Bidder's Statement, in relation to its opinion on the financial, earnings and distribution profile of ANI, which clearly shows that TIX believes that on an ongoing basis, ANI is earnings and distribution positive.

19. Also on 8 October 2015, 360 Capital made preliminary submissions, among others, to the effect that:
 - (a) The statement in relation to ANI's cashflow issues was not misleading.
 - (b) Fife Capital had declined to provide clarification to ANI's unitholders regarding the statement, noting that over the 9 month bid period there had been many occasions where Fife Capital had either announced to the ASX or directly corresponded with ANI unitholders when it considered that 360 Capital had made misleading statements.
 - (c) In its 8 October 2015 announcement, 360 Capital had issued a clarifying statement which would ring-fence the potential class of investors who "*even theoretically*" could have been affected by the TIX notice.
 - (d) There was no evidence that any ANI unitholders who had accepted the TIX offer since the TIX notice was sent had been misled into acceptance. 360 Capital submitted that 0.31% of unitholders had accepted the bid on 6 and 7 October 2015 with 6 October 2015 being the earliest day on which any unitholders would have received the TIX notice based on delivery timetables.
 - (e) The application was made for purely tactical reasons to delay the TIX offer and provide more time for the potential counterbidder to put forward an unconditional proposal.
 - (f) An order extending the TIX offer would be inconsistent with the alleged "*unacceptable conduct*" and would potentially be onerous on TIX.
 - (g) If the Panel found that certain ANI unitholders had been misled by the TIX notice, the Panel could order withdrawal rights notwithstanding that the TIX offer had closed.
20. 360 Capital submitted that the statement in the TIX notice regarding "*cashflow issues*" was based on a description in ANI's 2015 financial statements of ANI's cashflow management practices, including that ANI uses "*surplus cash to repay debt*" and "*has the ability to drawdown funds to pay*" its June distribution. 360 Capital has clarified the basis for its statement in its 8 October 2015 ASX announcement.

Further, the 8 October announcement stated that, in the context of numerous previous statements made by TIX, TIX believed that *“on an ongoing basis, ANI is earnings and distribution positive”*.

21. We accept the substance of 360 Capital’s preliminary submissions. Although the statements regarding cashflow in the TIX notice could have been better worded, the statements are, in the context of the long running bid, not materially misleading. We are not satisfied that the statements in the TIX notice had a material effect on acceptances into the TIX offer.
22. In arriving at this decision, we took into consideration 360 Capital’s market announcement clarifying the statement regarding *“cashflow issues”*. We also took into account that it was open to Fife Capital to make its own corrective statement, either immediately upon becoming aware of the TIX notice or at any time since, and it had chosen not to do so but instead to pursue the application. The Panel generally prefers that disclosure issues are remedied promptly. Given the impending closing date of the TIX offer and the subject matter of the information, a corrective statement by Fife Capital would have been an appropriate response to the TIX notice.
23. We note that the TIX notice was not included in a supplementary bidder’s statement. The Panel has previously emphasised that *“the same standard of care and the same standard of disclosure should be applied to any takeover document sent to offeree shareholders as is applied to the formal bidder’s statement or target’s statement”*.¹ This standard applies whether the disclosure is a direct assessment of the adequacy of a bid or, in this instance, disclosure regarding the target’s cashflow position that will affect unitholders’ assessment of the merits of the TIX offer.² No less a standard should have been applied to the TIX notice. It could have been more carefully framed.
24. We also note that if 360 Capital had made the TIX notice available on ASX, rather than only sending it to ANI unitholders, the statements in the TIX notice could have been clarified more quickly.

DECISION

25. 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).

¹ GN 5 at [17] referring to *Universal Resources Limited* [2005] ATP 6 at [16]; *Consolidated Minerals Limited* 01 [2007] ATP 20 at [75]; *Programmed Maintenance Services Limited* 02 [2008] ATP 9 at [20]; *Foster's Group Limited* [2011] ATP 15 at [24]-[25]

² See *Nexus Energy Limited* [2006] ATP 17 at [31] and *Foster's Group Limited* [2011] ATP 15 at [26]-[27]

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Orders

26. 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.

Robert Sultan
President of the sitting Panel
Decision dated 9 October 2015
Reasons published 19 October 2015

Advisers

Party	Advisers
360 Capital Investment Management Limited as responsible entity of 360 Capital Industrial Fund	Clayton Utz
Fife Capital Funds Limited as responsible entity of Australian Industrial REIT	King & Wood Mallesons