



Australian Government

Takeovers Panel

**Reasons for Decision
Asia Pacific Data Centre Group
[2017] ATP 19**

Catchwords:

Decline to conduct proceedings – disclosure – bidder's statement – target's statement – efficient, competitive and informed market – financial assistance

Corporations Act 2001 (Cth), sections 260A, 636, 638

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

INTRODUCTION

1. The Panel, Ron Malek (sitting President), Robert McKenzie and Diana Nicholson, declined to conduct proceedings on an application by NEXTDC Limited in relation to the affairs of Asia Pacific Data Centre Group. Asia Pacific Data Centre Group was the subject of an off-market takeover bid by 360 Capital FM Limited (in its capacity as trustee for the 360 Capital Diversified Property Fund) for all stapled securities in Asia Pacific Data Centre Group that it did not own. The application concerned, amongst other things, whether disclosure in the bidder's statement and the target's statement was adequate in respect of a proposed capital distribution which may be implemented after the end of the offer period. The Panel considered any further disclosure on this issue would be speculative and therefore there was no reasonable prospect that it would declare the circumstances unacceptable.
2. In these reasons, the following definitions apply.

360 Capital 360 Capital FM Limited (in its capacity as trustee for the 360 Capital Diversified Property Fund)

APDC Asia Pacific Data Centre Group¹

NEXTDC NEXTDC Limited

FACTS

3. APDC is a real estate investment trust (ASX code: AJD). APDC invests in data centre investment properties in Australia.
4. On 13 September 2017, 360 Capital announced a proposal to make an unconditional off-market takeover offer to acquire all APDC securities that it did not own for \$1.95 cash per security. APDC had been the subject of competing proposals from 360 Capital and NEXTDC (NEXTDC's offer was announced on 31 July 2017 and lapsed on 15 September 2017).

¹ Securities in Asia Pacific Data Centre Group are stapled securities. Each security comprises one ordinary share in Asia Pacific Data Centre Holdings Limited and one unit in Asia Pacific Data Centre Trust

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5. On 26 September 2017, 360 Capital lodged an initial bidder's statement² and announced that it had instructed its broker to purchase APDC securities on-market at up to the offer price of \$1.95 per security.
6. The bidder's statement disclosed an intention that APDC, after the close of the 360 Capital offer, may make a capital distribution to APDC securityholders (including 360 Capital), which 360 Capital may use to repay a debt facility available to fund part of that offer.
7. On 4 October 2017, APDC lodged a target's statement in relation to the offer from 360 Capital.

APPLICATION

Declaration sought

8. By application dated 9 October 2017, NEXTDC sought a declaration of unacceptable circumstances. NEXTDC submitted that 360 Capital's bidder's statement and APDC's target's statement both omitted material information (in contravention of section 636(1)(m) and section 638(1),³ respectively) about the likelihood that securityholder approval would be required for the proposed capital distribution to be implemented.
9. NEXTDC submitted that the effect of the circumstances was that, unless corrected, it would result in the acquisition of control taking place in a market that was not efficient, competitive and informed.

Interim orders sought

10. NEXTDC sought interim orders that 360 Capital immediately cease processing acceptances, and be prevented from acquiring securities on market, pending determination of NEXTDC's application.
11. On 10 October 2017, after considering NEXTDC's application, the substantive President decided not to make interim orders. The substantive President considered that final orders would be an adequate remedy if the Panel made a declaration of unacceptable circumstances, noting the final orders sought in the application.
12. The substantive President also noted that the request for interim orders could be revisited by the sitting Panel.

Final orders sought

13. NEXTDC sought final orders to the effect that both 360 Capital and APDC issue corrective disclosure, all acceptances received by 360 Capital and processed be reversed, and all APDC securities acquired by 360 Capital on-market after the publication of the bidder's statement and before the date of the corrective disclosure be unwound.

² On 4 October 2017, 360 Capital lodged a replacement bidder's statement

³ 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)

DISCUSSION

14. NEXTDC's application referred to the following disclosures made by 360 Capital in its replacement bidder's statement:
- (a) 360 Capital had entered into a new \$60 million debt facility from Bankwest (**Bankwest facility**), guaranteed by a related entity of 360 Capital (360 Capital Group), for the sole purpose of acquiring securities in APDC
 - (b) 360 Capital's intention was that, after the end of the offer period:
 - (i) APDC negotiate and enter into a new 3 year-loan facility (which would increase borrowings of APDC from \$29 million to \$100 million) and
 - (ii) the proceeds from that facility be distributed to Asia Pacific Data Centre Trust unitholders in the form of a capital distribution in respect of the units in Asia Pacific Data Centre Trust and
 - (c) if 360 Capital drew down on the Bankwest facility (which was stated to be conditional on 360 Capital acquiring a relevant interest in 73.25% of APDC securities)⁴, it currently intended to pay down the Bankwest facility from any capital distribution made available to all holders of units in Asia Pacific Data Centre Trust.
15. NEXTDC submitted that:
- (a) the proposed capital distribution likely constitutes financial assistance which materially prejudices the interests of the company or its shareholders under section 260A and therefore requires shareholder approval by a special resolution
 - (b) APDC securityholders who do not accept 360 Capital's offer will have the ability to vote on a special resolution to approve the proposed capital distribution and
 - (c) NEXTDC, which owns 29.2% of APDC securities, is able to prevent approval of the capital distribution,
- and also submitted that 360 Capital had failed to disclose these matters.
16. Both 360 Capital and APDC made preliminary submissions, including that the proposed capital distribution was:
- (a) nothing more than an intention of 360 Capital at the time of the bidder's statement and the target's statement and any implementation of the proposed capital distribution would be subject to APDC's boards' decision and entering into funding arrangements and all applicable laws and
 - (b) was independent of 360 Capital's offer and would only be made after the end of the offer period, following legal and financial advice at the time.
17. 360 Capital also submitted that:

⁴ The Bankwest facility was otherwise subject to customary conditions precedent within the control of 360 Capital

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- (a) there was no requirement or condition under the Bankwest facility that there be a capital distribution to APDC securityholders
 - (b) 360 Capital was only required (and entitled) to draw down on the Bankwest facility to acquire more than 73.25% of APDC securities (and that this would only arise if at least some of the APDC securities held by NEXTDC were accepted into the offer) and
 - (c) accordingly, the link made by NEXTDC between the proposed capital distribution (and any voting to occur in respect of that distribution) and the repayment of the Bankwest facility in circumstances where NEXTDC holds a 29.2% interest in APDC was flawed.
18. NEXTDC had already highlighted its concerns regarding securityholder approval in connection with the capital distribution in its announcement to the market on 26 September 2017 (and 360 Capital responded to that announcement on 27 September 2017). NEXTDC stated that its “29.2% blocking interest in APDC securities would preclude TGP [(360 Capital)] from achieving the requisite 75% voting threshold”, but did not expressly commit to retaining its stake in APDC.
 19. We consider that, given the proposed timing of the decision to proceed and the implementation of any capital distribution (i.e. after the end of the offer period), the circumstances that will exist at that time are subject to a high degree of uncertainty. Among other things, it is not clear to us that APDC securityholders can assume that NEXTDC will continue to hold its stake in APDC. In our view, that may have a significant bearing on the concerns expressed by NEXTDC.
 20. In these circumstances, we think it unlikely that speculation on these issues will contribute to an informed market.

DECISION

21. 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

22. 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.

Ron Malek

President of the sitting Panel

Decision dated 13 October 2017

Reasons given to parties 18 October 2017

Reasons published 20 October 2017

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Advisers

Party	Advisers
NEXTDC	Herbert Smith Freehills Cadence Advisory
APDC	Ashurst Fort Street Advisers
360 Capital	Clayton Utz Morgans Corporate Limited