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Standstill Restraints – not going anywhere soon

by David P. Selig¹

The recent Takeovers Panel (**Panel**) proceedings of International All Sports Limited 01 [2009] ATP 4 (**Original Proceedings**) and the review of those proceedings in International All Sports Limited O1R [2009] ATP 5 (**Review Proceedings**) provide some interesting and timely observations on the Panel's attitude towards important policy considerations in relation to standstill restraints in the context of control transactions.

Facts

The facts in the Original Proceedings² were:

1. Centrebet International Limited (**Centrebet**) had entered into a confidentiality deed (**Confidentiality Deed**) for the benefit of International All Sports Limited (**IAS**), as a condition precedent to being permitted to participate in an asset sale process being conducted by IAS;
2. a key provision of the Confidentiality Deed was that Centrebet was prevented (without IAS's prior consent) from, inter alia:
 - (a) subscribing for or otherwise acquiring any securities in IAS or its subsidiaries (**IAS Securities**); and
 - (b) procuring anyone else to acquire any IAS Securities,until the first anniversary of Centrebet's withdrawal from the asset sale process (**Standstill Restraint**);
3. the Confidentiality Deed also prohibited Centrebet from making any announcement regarding a "*relevant transaction*", which included an actual or proposed acquisition by Centrebet of all of IAS Securities, except where such announcement was required by law, for a period of 24 months commencing on the date of the Confidentiality Deed;

¹ Partner, Addisons Lawyers, Sydney – Addisons acted on behalf of Centrebet International Limited in connection with both the Original Proceedings and the Review Proceedings.

² International All Sports Limited 01 [2009] ATP 4, paragraphs 4 - 11 inclusive

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4. Centrebet withdrew from the IAS asset sale process and returned all of IAS's confidential information in its possession;
5. approximately 7 months after such withdrawal, Centrebet requested IAS's voluntary release from the Standstill Restraint;
6. in light of IAS's refusal to grant such release, Centrebet announced its intention to make a takeover bid for all IAS Securities and immediately after making that announcement, lodged an application with the Panel that led to the Original Proceedings (**Application**);
7. at the time of the Application:
 - (a) all of IAS's information provided to Centrebet in the course of the asset sale process (**IAS Information**) was at least 10 months old and, in many instances, significantly older and had not been updated in the interim period; and
 - (b) several "*material events*"³ had occurred in the economic and operational landscape in which IAS and Centrebet operated, particularly at the time when the IAS Information had been prepared, such as the release of IAS's report for the half-year ending 31 December 2008, the introduction of race field product fees, removal of state-based advertising and sponsorship restrictions on corporate bookmakers and the general and significant deterioration in economic conditions in the Australian and overseas economies.

The essence of the Application was that, despite IAS's refusal to release Centrebet from the Standstill Restraint, the Panel should, after declaring the existence of unacceptable circumstances, make consequential orders, the effect of which would be to release Centrebet from the Standstill Restraint.

Jurisdictional Issues

IAS submitted that the Panel was not the appropriate forum for considering the matters raised in the Application. Rather, it argued that those matters should be considered by the courts, primarily due to the limitations on the ability of the Panel to conduct forensic examinations of evidence and subsequently to make findings of fact or law. IAS also submitted that the Panel, not being a judicial body, was not empowered to do the things necessary to resolve the matters raised in the Application.⁴ The Panel rejected this argument and accepted Centrebet's submission that based on:

- (a) the terms of s.659B(1) and s.659B(4)(a)(i) of the Corporations Act 2001 (Cth) (**Act**);
- (b) the fact that Centrebet had, prior to making the Application, publicly proposed an intent to make a takeover bid⁵; and
- (c) the clear intent and import of the decision in *Lionsgate Australia v Macquarie Private Portfolio*⁶,

³ International All Sports Limited 01 [2009] ATP4, paragraph 30

⁴ IAS relied on *Attorney-General (Commonwealth) v Alinta Limited & Ors* (2008) 255 CLR 542

⁵ s.631(1) of the Act; ASX Announcement 2 February, 2009

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the Panel had jurisdiction to conduct these proceedings on the grounds that they were “*in relation to a ... proposed takeover bid*”.

A further argument posed by IAS was that Centrebet was time barred in making its Application, due to the provisions of s.657C of the Act. Section 657C(3) provides that an application for a declaration of “unacceptable circumstances” can only be brought within 2 months after “*the circumstances have occurred*” or such longer period as the Panel determines. Centrebet submitted that “*the circumstances*” referred to in s. 657C(3)(a) included the *combination* of the following:

- (a) the absence of Centrebet possessing any “Confidential Information” (as defined in the standstill agreement);
- (b) the width and duration of the Standstill Restraint; and
- (c) IAS’s refusal to release Centrebet from the Standstill Restraint.

Centrebet submitted that this combination of circumstances first occurred when IAS refused to release Centrebet from the Standstill Restraint and were continuing. This argument was implicitly accepted by the Panel conducting the Original Proceedings (**Original Panel**) and expressly accepted by the Panel conducting the Review Proceedings⁷ (**Review Panel**) (collectively, **Panels**).

Policy Considerations

In determining whether or not to make a declaration of “unacceptable circumstances”, both Panels were required to reconcile two important, but potentially competing, policy interests these being:

- the need for certainty in contract by holding Centrebet to its bargain, and the need for directors to have confidence that those bargains will be upheld when directors seek to deal with a company’s proprietary information, in the best interests of that company’s shareholders; and
- the Eggleston Principles⁸, as contained in s.602 of the Act, particularly, the need to maintain an efficient, competitive and informed market and, as far as practicable, ensuring that target company shareholders have a reasonable and equal opportunity to participate in the benefits of takeover bids.

Original Proceedings

In seeking to reconcile these two policy considerations, the Original Panel concentrated its attention upon:

⁶ [2007] NSW SC 318 (5 April, 2007)

⁷ International All Sports Limited 01R [2009] ATP 5, paragraphs 12 – 14 (inclusive); also Re Phosphate Resources Ltd 2003 ATP 3 at paragraph 25; Re Brickworks Ltd (No. 1) [2000] ATP 6 at paragraphs 28 – 31; Re Trysott Corporation Ltd [2003] ATP 26 at paragraphs 95 - 99

⁸ This is a shorthand reference to the principles that were set out in the Company Law Advisory Committee’s Second Interim Report to the Standing Committee of Attorney Generals in February, 1969, that was chaired by Mr R M Eggleston

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(a) Use of the Standstill

The Original Panel had no problem with the *per se* use of standstill arrangements⁹. It held that target company directors, subject to compliance with their fiduciary and other duties, are “entitled to release the target’s information at their discretion and with the conditions they desire”¹⁰. The Original Panel relied on *Goodman Fielder Limited No. 2*¹¹.

(b) Duration of the Standstill

The Original Panel held that the term of the Standstill Restraint had to be “commercially justifiable according to the nature of the information to be provided under it ... The end date therefore needs to be based on the information to be provided”¹². It held that the term of the Confidentiality Deed was 12 months from the date of withdrawal of IAS’s asset sale process, that being a period of restraint that it regarded as being “consistent with market practice”¹³.

The information provided to Centrebet included a detailed Information Memorandum, access to a data room and information arising from consultations with IAS’s senior management. In considering the nature of that information, the Original Panel particularly concerned itself with the fact that Centrebet received IAS’s income and profit forecasts for the 2009/2010 financial year (**Forecasts**). Given that the period to which the Forecasts applied extended beyond the period of the Standstill Restraint, the Original Panel held that the term of that restraint was reasonable and, of itself, did not give rise to unacceptable circumstances¹⁴.

(c) Price-sensitive information

The Original Panel also considered whether unacceptable circumstances would exist where IAS insisted on enforcing the Standstill Restraint where it could also be shown that Centrebet no longer possessed any price-sensitive information.

The Original Panel was particularly focussed on the relevance of the Forecasts, and the period to which they related. The Original Panel reasoned that, as a general rule, and despite the facts referred to at the start of this paper:

*“The fact that time has passed and material events have occurred since the preparation of these forecasts does not necessarily render them immaterial in the sense that they would be unlikely to influence a person who commonly invests in those securities in deciding whether or not to acquire or dispose of the securities ... In any forecast, there will be valuable data embedded.”*¹⁵

⁹ International All Sports Limited 01 [2009] ATP 4, paragraphs 20 and 22

¹⁰ Ibid, paragraph 22

¹¹ Goodman Fielder Limited 02 [2003] ATP 5 at paragraph 90

¹² International All Sports Limited 01 [2009] ATP 4, paragraph 23

¹³ Ibid, paragraph 25

¹⁴ Ibid, paragraphs 23 and 24

¹⁵ Ibid, paragraph 30

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The Original Panel, although accepting the facts that the Forecasts were prepared more than 10 months prior to being given to Centrebet and related to the 2009/2010 financial year, as well as that “*significant changes in the economic climate*”¹⁶ had occurred since their preparation, nevertheless held that the information underlying the Forecasts, such as assumptions, qualifications, base data and modelling, “*may remain material, and may allow the construction of an alternative conclusion to the forecasts that would not otherwise be available.*”¹⁷ Based on this analysis, the Original Panel held that the Forecasts were inherently price-sensitive at the time they were given, and simply were not satisfied that the Forecasts “*or all of the information contained in them have ceased to be price-sensitive*”¹⁸ at the time of Centrebet’s bid announcement.

Review Proceedings

Centrebet applied for a review of the decision in the Original Proceedings. Despite raising the same jurisdictional issues as referred to above in connection with the Original Proceedings, a Review Panel was constituted and decided to conduct the Review Proceedings. The Review Panel upheld the decision of the Original Panel and declined to make a declaration of unacceptable circumstances.

However, interesting features of the findings of the Review Panel were its affirmation of:

- (a) the legitimacy of the per se use of standstill arrangements¹⁹ as a protection “*against the forced disclosure of information under s.636 if a bid is made*”²⁰ and extended the validity of that protection to what may also have been the forced disclosure that might be required of a target under s. 638 of the Act. The Review Panel held a party will succeed in being released from a standstill covenant only if it establishes that “*unacceptable circumstances*” will exist if it is not so released²¹; and
- (b) the principle that the term of a standstill restraint should be “*commercially justifiable*”, according to the nature of the information to be provided under it²². The Review Panel also took particular note, when examining the “*nature*” of such information that both Centrebet and IAS competed in the gaming business in Australia and that the information provided “*seemed to be of a type helpful to an operator of such a business*”²³.

In addition, the Review Panel held that, in contrast to Centrebet²⁴, one of the other 22 potential bidders that were all subject to Standstill Restraints, did not have access to commercially-sensitive information because it had only received the Information Memorandum, and did not have access to the data room. This was despite the fact that the Information Memorandum contained the Forecasts that seemed so intrinsically price-sensitive to the Original Panel. It is reasonable to conclude that the Review Panel felt that the Forecasts were not price-sensitive, as shown by the Review Panel comment that:

¹⁶ Ibid, paragraph 31.

¹⁷ Ibid, paragraph 31

¹⁸ Ibid, paragraph 36

¹⁹ International All Sports Limited 01R [2009] ATP 5, paragraphs 15 and 18

²⁰ Ibid, paragraph 16

²¹ Ibid, paragraph 18

²² Ibid, paragraph 19

²³ Ibid, paragraph 19

²⁴ Ibid, paragraph 22

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“As a result of additional submissions by both parties that the confidential information was not required to be disclosed in their respective bidder’s or target’s statements, it was questionable whether the information is currently price-sensitive.”²⁵

Nevertheless the Review Panel extended the scope for which target companies can legitimately use standstill agreements, to encompass the protection of “*commercially-sensitive information*.”²⁶

The Review Panel held that, irrespective of whether or not Centrebet was in possession of “*price-sensitive information*” at the time of seeking a release from the Standstill Restraint, it nevertheless had been provided with “*commercially-sensitive information*” that was protected by the Standstill Restraint. That alone, according to the Review Panel, was sufficient to enable it to decline making a declaration²⁷.

Finally, the Review Panel declined to “*second guess*” the IAS directors’ sustained refusal to release the Standstill Restraint and held that a consideration of whether or not those directors performed their fiduciary duties in the course of such refusal was best considered by the courts²⁸.

Implications of the Proceedings

It is worth bearing in mind that, as far as the author is aware, the Panel had not previously considered the standstill restraint issues that arose in these Proceedings. Accordingly, the Proceedings provide some interesting guidance on various matters. These include:

(a) *Duration of Standstill and commercially sensitive information*

Both Panels held that the acceptability of the duration of a standstill restraint was dependant on the nature of the information that would be provided to a potential bidder, in consideration of that person entering into such restraint. The Review Panel widened the scope of inquiry into the “*nature*” of such information beyond an analysis of whether or not it was “price-sensitive”, to whether or not it was “commercially-sensitive”. The Review Panel failed to provide or refer to any definition of “*commercially-sensitive information*”, and for which there is no statutory or generally accepted case law definition, or what distinguishes it from “price-sensitive information”. However, it is reasonable to draw from the Review Panel’s Reasons for Decision that the term “*commercially-sensitive information*” is intended to refer to information that whilst not necessarily price-sensitive, could give a material commercial benefit to a competitor, particularly in assisting (or at least being seen to be capable of assisting) that person in evaluating whether or not to make a bid for the provider of that information, or its associate.

²⁵ Ibid, paragraph 24

²⁶ Ibid, paragraph 25

²⁷ Ibid, paragraph 27

²⁸ International All Sports Limited 01R [2009] ATP 5, paragraphs 29 - 31

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(b) *Certainty of contract*

In the contest of the policy considerations referred to above, the sanctity of contract has been accorded very significant emphasis, possibly to the detriment of the scope of application of the Eggleston Principles, as embodied in s.602 of the Act.

Circumstances such as:

- (i) IAS having 23 potential bidders²⁹ for its shares subject to a Standstill Restraint, where only Centrebet and one other potential bidder actually had access to the IAS data room;
- (ii) IAS's sustained failure to reveal the nature of any IAS Information until *after* Centrebet, and possibly all other potential bidders, had signed the Confidentiality Deed and hence become bound by the Standstill Restraint, thereby denying Centrebet an ability to appreciate the nature or scope of the IAS Information that they were to be given in relation to the reasonableness of the Standstill Restraint period;
- (iii) all restrained potential bidders, including the 21 companies that had no access to the data room, remaining bound by their respective Standstill Restraints;
- (iv) IAS using the Standstill Restraints in such a manner that the effect, if not also the intent, was to significantly minimise the prospects of a bid being made for IAS for the duration of the various Standstill Restraint periods; and
- (v) the existence, terms and number of such restraints never being disclosed to the market,

failed to outweigh, in the view of both Panels, the need for certainty of contract.

The Panels' focus was on the issue of whether or not Centrebet had received price-sensitive information or, in the case of the Review Panel, commercially-sensitive information. Neither Panel expressed any concern that IAS had used, and insisted on the enforcement of, the Standstill Restraints in an indiscriminate manner, the practical effect of which was to either lock up IAS from, or frustrate, potential bids. Rather because the Panels remained unconvinced that Centrebet did not have any price-sensitive or commercially-sensitive information, and notwithstanding those above circumstances, Centrebet had to be held to the provisions of the Standstill Restraint.

Clearly, at the outset of any future negotiations in relation to a proposed control transaction, potential bidders should insist upon being informed about the nature and scope of a target's information *before* entering into any confidentiality or standstill restraint, in order to enable the parties to properly evaluate and agree upon whether or not the proposed duration and scope of that restraint is within the bounds of prevailing market practice.

²⁹ At the time of writing this article, the author believes that the status remains as stated in the Review Panel's Decisions for Review

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(c) *Negative onus*

In considering whether or not a potential bidder is in possession of price-sensitive or commercially-sensitive information provided under the protective umbrella of a confidentiality agreement, the Panel may be reluctant to independently examine and closely consider the substance and relevance of that information. Neither the Original Panel nor the Review Panel appeared to engage in any overt analysis, or take any independent expert advice³⁰, as to whether or not the IAS Information provided to Centrebet was intrinsically either price-sensitive or, for the Review Panel, commercially-sensitive. The onus of this task was on Centrebet and both Panels found that Centrebet had failed to discharge that onus. If the information merely *appears*³¹ or *seems*³² likely of being capable of being price-sensitive or commercially-sensitive, that will likely be sufficient justification for the Panel to maintain the enforceability of any standstill restraints contained in that confidentiality agreement.

(d) *Fiduciary duties*

The Panel may also be reluctant to consider whether directors of a target company have acted in accordance with their fiduciary duties, in the course of considering whether or not the provisions of confidentiality or standstill restraints, or the target's refusal to release those restraints, constitute unacceptable circumstances. Whilst such an attitude appears to be consistent with the Panel's repeated insistence that it is ultimately concerned with the effect³³, as opposed to any underlying intent, of actions or circumstances that may be considered "unacceptable", it also indicates that the Panel is willing to disregard circumstances such as whether or not parties have observed their fiduciary or statutory duties or the intent (insofar as it is evidence of the intended effect) that attached to their actions in bringing about the circumstances being examined by the Panel.

(e) *Forecasts*

The Panels held that the Forecasts were price-sensitive or commercially-sensitive, despite material evidence to the contrary. Neither Panel sought an undertaking from Centrebet to include in its Bidder's Statement, the Forecasts, their underlying assumptions and where appropriate, updates or a critique of those assumptions or alternatively, ordered that such disclosure be made in either or both the Bidder's Statement and/or the Target's Statement³⁴. This approach is in contrast to the Review Panel's position in *In the Matter of Skywest Limited 03(R)*³⁵ in circumstances where both the original panel and the review panel in those proceedings had much less certainty than was the case in the Proceedings, as to exactly what information had been disclosed to the Bidder and whether or not it was price-sensitive. Nevertheless, in *Skywest*, the review panel held that "*Skywest shareholders should not be deprived of the opportunity to consider the CVC Bid, if they are given appropriate*

³⁰ Australian Securities and Investments Commission Regulations, Regulations 16(1)(g) and 16(2)(b)(ii)

³¹ International All Sports Limited 01 [2009] ATP 4, paragraph 27

³² International All Sports Limited 01R [2009] ATP 5, paragraph 19

³³ Guidance Note 1, paragraphs 9, 14 and 15; Guidance Note 7, Lock-Up Devices, paragraphs 7.3 and 7.4; Guidance Note 12, Frustrating Actions, paragraph 12.5

³⁴ 03(R) [2004] ATP 20 - the terms of the orders in Annexure B to the Reasons for Decision

³⁵ Ibid, at paragraphs 40 to 59 (inclusive)

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*supplementary information*³⁶. The distinction appears to be that the *Skywest* review panel felt that the interests of those affected by the unacceptable circumstances would be adequately protected by additional ordered disclosure contained in supplementary statements³⁷. In contrast, the Panels felt that, given the amount of information allegedly given to Centrebet and its deemed price-sensitive or commercially-sensitive nature, the enforcement of the Standstill Restraint was more important for the protection of IAS shareholders' interests, than allowing Centrebet's bid to proceed, even if made with supplementary disclosure ordered by the Panel.

(f) ***Limited opportunity for creation of "new rights"***

As the Panel has often stated in Guidance Notes and its decisions³⁸, it is empowered to "*create new rights and obligations ... having regard to considerations of legislative and commercial policy.*"

However, in circumstances where:

- (i) IAS's asset sale process, which was conducted on a worldwide basis and was abandoned without receiving any meaningful offers, but after IAS had, in the course of that process, contracted a Standstill Restraint with each of 23 potential bidders³⁹;
- (ii) IAS has failed to pay any dividend to its shareholders in the past 5 years, with the exception of 1.5 cents per share in 2006;
- (iii) prior to Centrebet's bid announcement, there was minimal trading liquidity in IAS's shares;
- (iv) prior to Centrebet's bid announcement, IAS's shares had under performed the ASX Small Ordinaries Accumulation Index by 79.4%;
- (v) Centrebet's takeover bid would have been all for cash and at an opening and untested bid price that was at least 75% in excess of the sale price of IAS shares on the day immediately prior to Centrebet's bid announcement;
- (vi) there had been the passage of considerable time, material intervening events and the provision to the Panels of ample evidence to at least establish that it was "*questionable*"⁴⁰ as to whether or not Centrebet had any price-sensitive information at the time of making its bid announcement;
- (vii) Centrebet submitted to the Panels that it would not be disclosing in its Bidder's Statement or otherwise during the bid process, any of the information that was disclosed to it in the course of the asset sale process; and

³⁶ Ibid, at paragraph 53

³⁷ Ibid, at paragraph 59

³⁸ Guidance Note 1, paragraphs 5, 14 and 15; Guidance Note 12, paragraph 21, Original Proceedings, paragraph 18

³⁹ At the time of writing this article, the writer understands 22 Standstill Restraints remain in place

⁴⁰ International All Sports Limited 01R [2009] ATP 5, paragraphs 24

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- (viii) if Centrebet had been permitted to make its takeover bid, the Standstill Restraint imposed on all other potential bidders for IAS would be automatically removed,

nevertheless both Panels chose not to create any new rights. Rather they felt that the public interest, and presumably also the Eggleston Principles, were best served by the enforcement of the Standstill Restraint, as imposed by the IAS board, without any prior or subsequent IAS shareholder consent or consultation. At least on the facts of the Proceedings, it seems implicit from the Panels' reasoning that it would not be in the interests of an "*efficient, competitive and informed market*" or "*practicable*" to have released Centrebet from the Standstill Restraint and allow the IAS shareholders an opportunity to participate in the former's bid, due to the effects that such a decision would have on the need for certainty of contract.

(g) ***Panel's Jurisdiction***

It appears that *Lionsgate* is accepted authority for the proposition that once a takeover bid has been commenced or at least been proposed, such as by making a public announcement of an intention to make a bid under s.631 of the Act, the Panel will assert jurisdiction over any dispute arising in connection with that bid. If Centrebet had not made an announcement of its proposed bid immediately prior to the lodgement of the Application, IAS may well have been successful in insisting that its allegations of a breach of the Standstill Restraint, be reviewed by the courts, as opposed to by the Panel.

(h) ***Timing of Application***

Both Panels readily accepted Centrebet's submission that, for the purposes of s.657C(3), the 2 month time limit will only commence when *all* the relevant "circumstances" in question have occurred, even where there are significant periods between the occurrence of various of those circumstances.

Conclusion

Potential bidders must give confidentiality agreements, and the standstill restraints commonly contained within them, extremely careful analysis and consideration, and be willing to walk away from a proposed acquisition, if the terms of the proposed restraint are at the outset, or are likely to become at some future time, unacceptable to the potential bidder's current or future plans.

The Panel has clearly indicated that it will enforce these restraint obligations in accordance with their terms, so long as their duration and scope fall within that particular Panel's view of what is reasonable market practice and it is satisfied that the potential bidder received information during that restraint period that appears or seems to be price-sensitive or commercially-sensitive. Furthermore, in the interests of maintaining certainty of contract, the Panel has demonstrated that it is willing to take a relatively liberal approach when considering whether or not that information is actually price-sensitive and/or commercially-sensitive.

As always, the onus of the bidder to prove to the Panel's satisfaction that the bidder did not receive any price-sensitive or commercially-sensitive information, which will usually be



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performed many months after the fact, normally without possession or access to the information in question and within the tight time constraints imposed by Panel proceedings, will remain a very difficult task.

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