



**In the Matter of Lion Selection Limited 02**

**[2008] ATP 16**

**Catchwords:**

*Canvassing shareholders - corporate electoral process - decline to conduct proceedings - - frustrating action meeting - Lion Plan - lodgement of proxy - notice of meeting - proxy - proxy solicitation - undertaking*

*Lion Selection Limited - Indophil Resources NL*

*Corporations Act 2001 2001 (Cth) sections - 250A(3) - 250A(7) - 602 - 657A - 657D*

*Bisan v Cellante [2002] VSC 430*

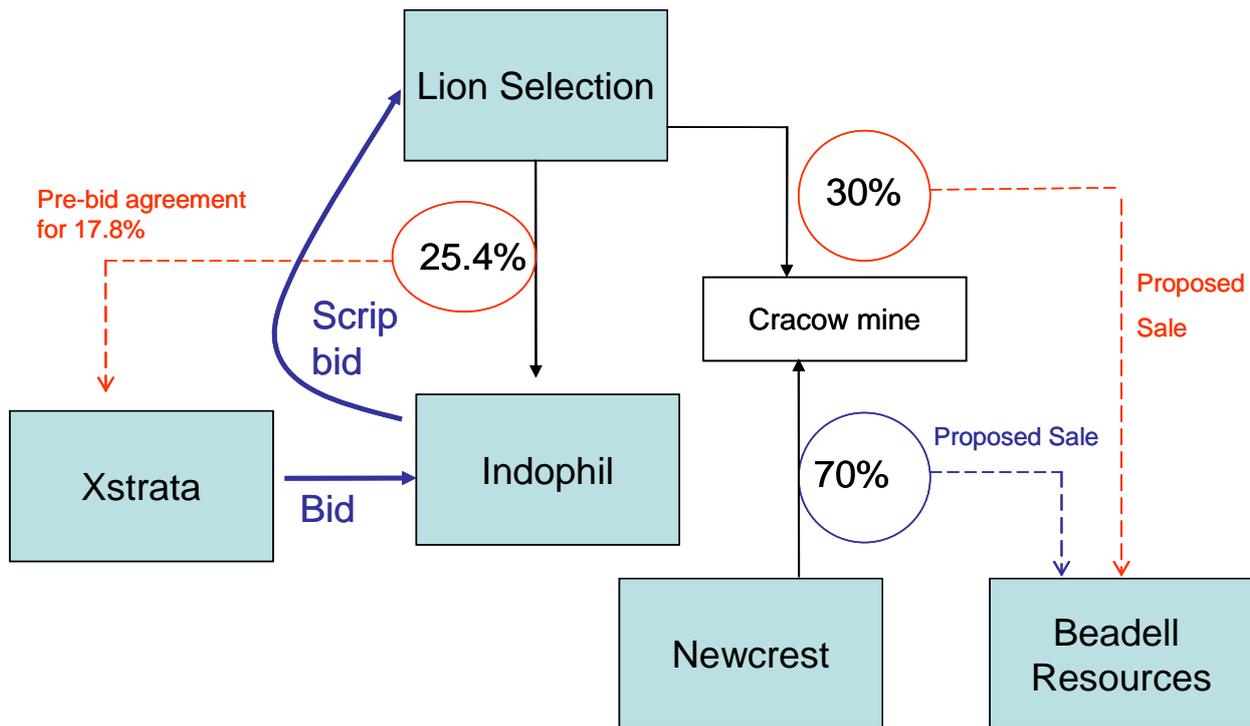
**INTRODUCTION**

1. The Panel, Robyn Ahern, Hamish Douglass and Alison Lansley (sitting President), declined to conduct proceedings following undertakings and receipt of information about proxies given to Indophil for lodgement with Lion that made it clear that the proxies would not affect the outcome of Lion's shareholder meeting. Accordingly, the Panel considered there was no reasonable prospect of it finding there were unacceptable circumstances.
2. In these reasons the following definitions apply.

<b>Term</b>	<b>Meaning</b>
Indophil	Indophil Resources NL
Lion	Lion Selection Limited
Lion Plan	A plan to sell some of Lion's assets and to return surplus cash to Lion shareholders
Notice of meeting	Lion's Notice of Meeting and Explanatory Memorandum dated 19 May 2008 and announced to the ASX on 23 May 2008 to approve the Lion Plan
Target's statement	Lion's Target Statement dated 23 May 2008
Xstrata	Xstrata Queensland Limited

**BACKGROUND**

3. Various relationships between the parties are described in the following diagram:



**Facts**

4. On 19 March 2008, Indophil announced its intention to make a conditional scrip takeover bid for Lion.
5. On 15 May 2008, Lion announced that it had:
  - (a) agreed to sell its 30% interest in the Cracow Gold Mine, subject to Indophil’s consent or Lion shareholder approval being obtained and
  - (b) entered into a pre-bid agreement with Xstrata to sell a 17.8% interest in Indophil to Xstrata if Xstrata made a takeover offer for Indophil.
6. On the same day, Xstrata announced it intended to make a takeover offer for Indophil conditional on, among other things, Indophil consenting to Lion’s acceptance of the Xstrata offer in accordance with the pre-bid agreement or Lion shareholder approval being obtained.
7. On 19 May 2008, Lion announced the Lion Plan. The Lion Plan involved 4 stages:
  - (a) sale of Lion’s investments in the Cracow Gold Mine and Indophil
  - (b) generation of cash from the above sales and from the sale by African Lion funds of their interest in Albidon Limited
  - (c) return to shareholders of surplus cash and
  - (d) Lion retaining a portfolio of early stage mining and exploration investments.
8. On 23 May 2008, Lion lodged the notice of meeting and a target’s statement. The notice of meeting sought shareholder approval of:
  - (a) sale of a 17.8% stake in Indophil to Xstrata pursuant to the pre-bid agreement

- (b) sale of Lion's Indophil shares, other than pursuant to the pre-bid agreement, for not less than \$1 per share
  - (c) sale of a 30% interest in the Cracow Gold Mine and
  - (d) distribution to Lion shareholders of up to \$1.50 per Lion share (expected to be \$1.35).
9. Lion called the shareholders' meeting because the sales of its interest in Indophil and the Cracow Gold Mine and the return of surplus cash to shareholders could be defeating conditions; that is, prevent Indophil's offer conditions from being able to be satisfied, amounting to frustrating action.
10. On 30 May 2008 Indophil announced it had sent a letter to Lion shareholders, accompanied by a pre-populated form appointing Indophil as proxy and instructing Indophil to vote against each of the Lion Plan resolutions. The Indophil proxy stated that it had to be received by Indophil in sufficient time to lodge with Lion no later than 48 hours before the commencement of the meeting at 10 am on Monday, 23 June 2008. The letter was also accompanied by a pre-paid return envelope addressed to Indophil.
11. On 16 June 2008, Lion wrote to Indophil requesting Indophil to lodge the proxy forms it had received and to provide an undertaking that it will lodge all further proxy forms it received immediately after receipt.
12. On 17 June 2008, Indophil responded that it agreed to comply with Lion's request subject to Lion undertaking not to "*contact any of those shareholders who have lodged proxy forms with Indophil voting against any of the resolutions seeking to persuade such shareholders to change their vote*".
13. Lion did not provide the undertaking sought by Indophil. Lion said that it was inappropriate to provide an undertaking which restricted its ability to communicate with its own shareholders.

### Application

14. Lion submitted that the following constitutes unacceptable circumstances:
- (a) Indophil directing that proxy forms be returned to Indophil (rather than Lion)
  - (b) Indophil delaying the lodgement of proxy forms it received and
  - (c) Indophil failing to undertake to lodge with Lion all further proxy forms it receives immediately after receipt.
15. Lion further submitted that Indophil's actions affected the integrity of the voting process for the meeting and causes the acquisition of control over Lion's shares not to occur in an efficient, competitive and informed market.

### Orders Sought

16. Lion sought orders that Indophil immediately lodge with Lion all proxy forms it had received and provide an undertaking that it will lodge with Lion all further proxy forms it received immediately after receipt.

**Interim Orders**

17. No interim orders were sought. However, the Panel considered that interim orders (or undertakings) would ensure that there was proper handling of the proxies Indophil had solicited and would establish whether the handling of the proxies gave rise to any issues that should concern the Panel. On the basis of undertakings, the Panel did not need to make interim orders.

**Undertakings**

18. On 19 June 2008, Indophil gave undertakings to the Panel:
- (a) not to filter or otherwise inappropriately handle any proxies and
  - (b) if any proxy was given to it prior to 10 am on Saturday 21 June 2008 but such that it was too late to lodge it with Lion’s registry, to use best endeavours to contact the shareholder and advise them the proxy was too late and they may vote by attending the meeting.
19. On 19 June 2008, Lion gave undertakings to notify the Panel, ASIC and Indophil by 9.00 am on 23 June 2008:
- (a) of any proxies lodged by Indophil for which a proxy had already been lodged with its registry
  - (b) whether Lion was treating the proxy as valid or not and why and
  - (c) the total number of proxies for and against.
20. Lion provided a letter to the Panel at 9.00 am on 23 June 2008. The letter said that the total number of shares in respect of which a proxy had been instructed at that time were as follows<sup>1</sup>:

Resolution	For	Against	Directors’ Recommendation
1	37,561,278	41,096,591	29,325,004 <sup>2</sup>
2	66,031,718	39,396,566	n/a
3	103,499,798	5,103,303	n/a
4	102,957,379	5,666,216	n/a

21. The letter also said that Indophil had lodged 162 proxy forms with Lion. Of the 162 forms lodged by Indophil, Lion had already received 33 proxies lodged directly with its registry (i.e. 33 instances where shareholders had lodged more than 1 proxy).

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<sup>1</sup> The table does not reflect the proxy position at the time that the polls on various resolutions were conducted as a number of shareholders revoked their proxy instructions or attended in person and their proxies were suspended. The total number of proxies at the time of the meeting is set out in Lion’s Proxy Summary Report which was announced to ASX on 23 June 2008.

<sup>2</sup> The Director’s recommendation was “For” the resolution

22. In relation to the duplicate proxies, Lion said that it had treated the proxies lodged by Indophil as prevailing except where the proxy form was invalid. Of these 33 proxies Lion treated 4 as invalid for various reasons.
23. Of the total of 162 forms lodged by Indophil (including the 33 above) Lion treated 14 proxy forms in total, representing 29,074 shares, as invalid. The valid Indophil proxy forms lodged with Lion represented 1,883,077 shares (0.99% of total Lion shares).

## DISCUSSION

24. The meeting was to obtain shareholder approval for a proposal that would amount to frustrating action. The Panel thought that this entitled it to consider the issues raised, where otherwise the matters might not be within the Panel's jurisdiction.
25. The integrity of the corporate electoral process is important to the operation of an efficient, competitive and informed market in cases of the approval of frustrating actions.
26. In *Bisan Ltd v Cellante* Justice Dodds-Streeton commented that:  
*"The interception of proxy appointment forms by an intermediate party who is under no fiduciary duty or other apparent obligations in relation to their safeguarding, entails an inherent exposure to the possibility of filtering or other inappropriate handling ... The apparent, as well as the actual integrity of the corporate electoral process, is important."*<sup>3</sup>
27. Lion was concerned that Indophil might not lodge with Lion any proxy form which did not support Indophil's position in relation to the Lion Plan resolutions. Lion submitted that in such circumstances Lion would not know that such proxy forms existed and the vote of shareholders would not be exercised as the shareholder intended. The Panel considered that Indophil's undertakings (see paragraph 18) adequately resolved this issue.
28. Under section 250A(3)<sup>4</sup>, an undated appointment of a proxy is taken to have been dated on the day it is given to the company convening the meeting. Section 250A(7) provides that a later appointment revokes an earlier one if both appointments could not be validly exercised at the meeting.
29. Neither the Lion nor the Indophil proxy form had a section for the shareholder to date them. Lion submitted that if it received two proxy forms from a shareholder with inconsistent voting instructions (for example, if a shareholder sent the Indophil proxy to Indophil and then changed his mind and lodged the Lion proxy form with Lion), it would not know which form reflected the final instruction (especially if Indophil lodged the proxy forms it held immediately prior to the 48 hour deadline in accordance with section 250B).
30. Indophil submitted that the undertaking it sought (see paragraph 12) did not impose any restrictions on the ability of Lion to make contact with its shareholders, rather ensured that shareholders who voted against the Lion Plan resolutions were not

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<sup>3</sup> [2002] VSC 430 at para 44

<sup>4</sup> In these reasons, all section references are references to the *Corporations Act 2001 (Cth)*

singled out and contacted by Lion in an attempt to change their votes in favour of the Lion Plan resolutions.

31. Indophil also submitted that the orders sought by Lion bore no correlation to the issue complained about (i.e. which proxy should prevail). Given that the proxies were undated, requiring Indophil to lodge the proxy forms it held immediately would not help Lion's registry ascertain which proxy reflected the shareholder's final instructions i.e. which proxy was the most recent. In the end, the Panel did not need to consider this issue.
32. Section 250A(3) assumes direct lodgement of proxies with the company holding the meeting. The law does not address the potential conflict where shareholders lodge a proxy through an intermediate party and then lodge a subsequent proxy directly with the company. In these circumstances, the company is unlikely to know the shareholder's final instruction. The Panel did not need to decide whether unacceptable circumstances arose by Indophil holding onto proxies until the last minute; however the Panel would be concerned to ensure that a shareholder's final voting intentions were represented at any meeting of shareholders.
33. The Panel also considers that unacceptable circumstances may arise where an intermediate party filters or otherwise inappropriately handles proxies. The Panel was not provided with any evidence to indicate that Indophil had inappropriately handled any proxies. In this case, undertakings were received and there was nothing further required.
34. Given the number of votes that were actually cast "For" and "Against" the resolutions, the Panel considered that the Indophil proxies did not affect the outcome of Lion's shareholder meeting.
35. Lastly, the Panel considers that, if a company uses lodged information to single out shareholders who have lodged a proxy and attempts to solicit them to change their vote that might create an advantage over the others in a proxy campaign. Whether this might give rise to unacceptable circumstances was not considered by the Panel, and as undertakings were received there was nothing further required.

## DECISION

36. On the basis of undertakings and that the proxies were voted in accordance with their instructions and that there was no impact from the duplicate proxies, the Panel declined to conduct proceedings.

**Alison Lansley**  
**President of the Sitting Panel**  
**Decision dated 23 June 2008**  
**Reasons published 24 June 2008**