



Australian Government

Takeovers Panel

Reasons for Decision

International All Sports Limited

[2009] ATP 4

Catchwords:

Proposed takeover bid – sale process – standstill – confidentiality – confidential information – price-sensitive information – forecasts – public interest – decline to make a declaration

International All Sports Limited – Centrebet International Limited

Corporations Act 2001 (Cth), section 602

Skywest Limited 03 [2004] ATP 17

Goodman Fielder Limited 02 [2003] ATP 5

Pinnacle VRB Ltd 08 [2001] ATP 17

INTRODUCTION

1. The sitting Panel, Teresa Handicott (sitting president), Irene Lee and Andrew Sisson, declined to make a declaration of unacceptable circumstances in relation to the affairs of IAS. The Panel was prepared to accept the term of the standstill covenant (putting the covenant regarding use of confidential information to one side) as commercially justifiable in this case, having regard to the information intended to be, and actually, provided. The Panel was not satisfied that the information provided had ceased to be price-sensitive such that it should release Centrebet from its agreement.
2. In these reasons, the following definitions apply.

Term	Meaning
Centrebet	Centrebet International Limited
Confidentiality Deed	Confidentiality Deed dated 8 April 2008 given by Centrebet in favour of IAS
IAS	International All Sports Limited
proposed bid	the proposed bid by Centrebet for all of the shares in IAS at 28 cents per share, announced on 2 February 2009

3. In these proceedings, the Panel:
 - (a) adopted the Panel's published procedural rules and
 - (b) consented to parties being represented by their commercial lawyers.

FACTS

4. IAS and Centrebet are both Australian public companies listed on ASX (ASX codes: IAS and CIL).

5. On 11 September 2007, IAS announced that it had been approached by prospective offerors seeking to acquire shares in, or assets of, IAS and had agreed to enter preliminary discussions with those persons. IAS then established a formal sale process to elicit indicative offers from those persons and other persons.
6. In early December 2007, Centrebet commenced discussions with IAS regarding the possibility of Centrebet participating in the sale process. IAS required that Centrebet give confidentiality and standstill covenants before Centrebet could participate in the sale process, which would include due diligence on IAS. Among other things, Centrebet covenanted not to:
 - (a) make any announcement regarding an acquisition of all IAS shares or any IAS assets, unless authorised in writing by IAS or as required by law, for a period of 24 months from the date of the Confidentiality Deed or
 - (b) buy shares in IAS, without IAS's prior written approval, for a period of 12 months from the date Centrebet notified IAS that it did not propose to proceed with any acquisition of all IAS shares or any IAS assets.
7. An extract of the relevant provisions in the Confidentiality Deed is set out below.

"2.1 [Centrebet] covenants with each [IAS] Group Entity that [Centrebet] and the officers, employees and advisers of [Centrebet] who have knowledge of or access to Confidential Information will:

- (a) *not disclose, discuss, use or copy any Confidential Information other than in accordance with this deed;*
- (b) *keep the Confidential Information and any material containing or relating to any Confidential Information secure and ensure there is no unauthorised disclosure, use or copying of the Confidential Information; and*
- (c) *not, unless authorised in writing by [IAS], make or cause to be made any announcement regarding a Transaction¹ or the possibility of a Transaction or any interest in a Transaction or an offer related thereto occurring or not occurring, save where [Centrebet] is required by law to make such an announcement but only to the extent so required and provided [Centrebet] gives [IAS] reasonable notice in writing prior to making any such disclosure and [Centrebet] uses reasonable endeavours to consult with [IAS] about the disclosure....*

2.4 The obligations of confidentiality hereunder shall remain in force for a period of 24 months following the date of this deed....

4.1 (a) Subject to clause 4.2², [Centrebet] covenants with each [IAS] Group Entity that from the date of this deed until 12 months from the date [Centrebet] notifies [IAS] in writing that it does not propose to proceed with or undertake a Transaction,

¹ 'Transaction' is defined as the acquisition of all IAS shares and options over IAS shares or any IAS assets, or any proposal to do so

² Clause 4.2 sets out exceptions to clause 4.1. One of those exceptions is that the undertakings in clause 4.1 would not apply if another person announces or makes a takeover bid for all IAS shares

Takeovers Panel

International All Sports Limited
[2009] ATP 4

[Centrebet] and its related bodies corporate and controlled entities (alone or with others) will not without [IAS's] prior written approval:

- (1) subscribe for, buy, sell, transfer or otherwise deal in shares in or other securities of a [IAS] Group Entity;
 - (2) procure, induce or encourage another person to subscribe for, buy, sell, transfer or otherwise deal in shares in or other securities of a [IAS] Group Entity; ..."
8. As part of due diligence Centrebet was given access to information about IAS.
 9. During the sale process, Centrebet submitted a number of indicative offers, each of which IAS rejected. Centrebet subsequently notified IAS that it had withdrawn from the sale process.
 10. On 30 January 2009, by a letter of that date Centrebet informed IAS that it was currently considering making its proposed bid and sought a release from clauses 2.1(c) and 4 of the Confidentiality Deed. On 1 February 2009, IAS informed Centrebet that it would not provide the release.
 11. On 2 February 2009, Centrebet announced its intention to make a takeover bid. A condition to its bid relevant to this application is set out below.

"3. Release and waiver of Confidentiality Deed by IAS Group or Takeovers Panel

Centrebet receives from and by:

- (a) each member of the IAS Group an unconditional written declaration, release or waiver, as the case may be, to the effect that:
 - (i) the confidentiality and standstill provisions of the Confidentiality Deed are void, unenforceable and of no effect;
 - (ii) each member of the Centrebet Group and their respective officers, employees and advisers (each a **Relevant Party**) did not breach their respective obligations under the Confidentiality Deed or otherwise by reason of any Relevant Party making a public announcement of or in relation to the Proposed Bid (**Public Announcement**) or by taking any preparatory or other action in connection with the making of the Public Announcement or the Proposed Bid; and
 - (iii) the provisions of the Confidentiality Deed will not be breached by reason of any Relevant Party making, or proposing to make, or taking any preparatory or other action in connection with any future acquisition of any IAS Shares, including under the Proposed Bid;

or

- (b) the Takeovers Panel makes orders and declarations that have the same or substantially the same effect as each and every one of the unconditional written declarations, releases or waivers, as the case may be, referred to in paragraph 3(a) such that Centrebet is no longer restrained under the Confidentiality Deed from announcing and making the Offer and enforcing its rights and entitlements, and performing its obligations, under the terms and conditions of the Offer."

APPLICATION

Declaration sought

12. By application dated 2 February 2009, Centrebet submitted that clauses 2.1(c) and 4 of the Confidentiality Deed constituted unacceptable circumstances on the basis that the provisions were (among other things):
 - (a) an anti-competitive lock-up arrangement without proper legal or commercial justification and
 - (b) a frustrating action tantamount to a poison pill.
13. Centrebet submitted that those provisions and IAS's refusal to release Centrebet from them had the effect of excluding Centrebet from the market for IAS shares. This meant that IAS shareholders were being denied the opportunity of participating in the proposed bid without any proper commercial justification, which was contrary to the principles in ss602(a) and (c)³ namely:
 - (a) inhibiting an efficient, competitive and informed market for IAS shares and
 - (b) denying shareholders a reasonable and equal opportunity.
14. Centrebet also submitted that (among other things) the Confidentiality Deed should have been disclosed, but did not seek orders for disclosure. It submitted that non-disclosure indicated an intention by the IAS board to render IAS 'takeover proof' unless the IAS board first approved of the bid.

Orders sought

Final Orders

15. Centrebet sought final orders in terms of condition 3, namely that:
 - (a) clauses 2.1(c) and 4 of the Confidentiality Deed were void, unenforceable and of no effect
 - (b) a declaration that Centrebet and others did not breach their obligations under the Confidentiality Deed or otherwise by publicly announcing the proposed bid or taking action in connection with that announcement and
 - (c) IAS, its related bodies corporate and controlled entities be restrained from asserting that Centrebet and others breached their obligations or will breach the Confidentiality Deed in connection with any future acquisition of IAS shares, including under the proposed bid.

³ References are to sections of the *Corporations Act 2001* (Cth) unless otherwise indicated

DISCUSSION

Aspects of application considered

16. We decided to conduct proceedings in relation to the effect of clauses 2.1(c) and 4 of the Confidentiality Deed. Clause 2.1(c) is under the heading "Confidentiality". It relates to Centrebet announcing a bid, so could operate as an aspect of the standstill. We did not need to consider the effect of clauses 2.1(a) and (b) of the Confidentiality Deed, which deal with using and disclosing confidential information.
17. We decided not to conduct proceedings in relation to other aspects of the application, including whether any provision in the Confidentiality Deed is void, whether Centrebet breached any provision, and whether IAS should be restrained from asserting any breach.
18. The Panel may make any orders⁴ that create new rights and obligations⁵ and these may have the result that, going forward, it is impractical for a party to maintain an action for a past breach. However, we take the view that it is not open for us simply to declare that Centrebet did not breach its covenants under the Confidentiality Deed or make orders restraining IAS from asserting a breach. Our view is similar to the approach taken by the Panel in *Pinnacle VRB Limited 08*. In that matter, the Panel stated:

*... We are not empowered to enforce compliance with the law or to set aside contracts on equitable grounds ... We do not have the powers which a court of law has to perform any of those functions..."*⁶

19. In any event, we consider that the other aspects of the application are irrelevant to whether there were unacceptable circumstances. We therefore did not consider them.

Use of the standstill

20. A standstill is a useful means to enable price-sensitive information to be provided to a potential acquirer of a company's shares. Among other things, a standstill helps facilitate sale processes, protect companies and their officers against insider trading liability⁷ and ultimately advance shareholders' interests. Standstills also protect against the 'forced' disclosure of information under s636 if a bid is made.
21. There is a public interest in enforcing confidentiality agreements and standstills as they promote the exchange of information and the maximisation of value to shareholders. Failure to enforce such agreements could disrupt the process of negotiating and consummating business transactions.⁸

⁴ Section 657D

⁵ *Attorney General (Cth) v Alinta* [2008] HCA 2

⁶ *Pinnacle VRB Ltd 08* [2001] ATP 17 at [52]

⁷ See s1043A

⁸ Ontario Superior Court in *Certicom Corp v. Research In Motion Limited* (2009) CanLII 1651 (ON S.C.) citing at [92] the U.S. District Court for Northern Texas in *General Portland Inc. v. Lafarge Coppee S.A., et al.* (1981), U.S. Dist. Lexis 10158

22. Our view is that, subject to their duties, target directors are entitled to release the target's information at their discretion and with the conditions they desire. In this case, one such condition was the standstill and the recipient of the information agreed to that condition. This view is supported by the Panel in *Goodman Fielder Limited 02*⁹, despite a different context applying in that matter. In that matter, the Panel stated:

*"In exchange for giving access to company information, the Goodman Fielder directors received valuable undertakings from prospective alternative buyers, requiring them to make only recommended or permitted bids. Goodman Fielder said that similar access for Burns Philp would give Burns Philp additional certainty and reduce its risk. On that basis Burns Philp should not expect to be given the information for free. Goodman Fielder said that more favourable terms for Goodman Fielder shareholders was the appropriate price for reducing Burns Philp's risks and uncertainty. Subject to the overriding requirement to comply with statutory and regulatory requirements it has set out above in relation to the other constraints on target directors, the Panel considers this is a reasonable position for a target board."*¹⁰

Term of the standstill

23. We consider that, in order to not give rise to unacceptable circumstances, the term of a standstill should be commercially justifiable according to the nature of the information to be provided under it. It is reasonable for parties to agree a fixed end date for a standstill to give commercial certainty to their contractual arrangements. That end date therefore needs to be based on the information to be provided.
24. In this case, the standstill applied for a period commencing on the date of the agreement and ending on the date 12 months after Centrebet withdrew from the sale process. The information IAS was to provide (and ultimately provided) to Centrebet included IAS management profit and loss, and income, forecasts for periods up to the financial year ending 30 June 2010. The forecasted periods extend well beyond the term of the standstill. Having regard to the information to be (and actually) provided to Centrebet, the term of the standstill appeared in our view to be commercially justifiable.
25. We consider it relevant that a standstill for 6 to 12 months from a relevant time (for example, withdrawal from the sale process) is consistent with market practice.¹¹
26. Centrebet submitted that it was prevented from making a bid for 24 months, which is the term of the confidentiality provisions. While such provisions may have that result in some cases, IAS submitted here that the term of the standstill was 12 months from the date Centrebet withdrew from the sale process.¹² Moreover, this application has been brought within the standstill period (ie within the 12 months), so that is what we have concerned ourselves with.

⁹ *Goodman Fielder Limited 02* [2003] ATP 5

¹⁰ *Goodman Fielder Limited 02* [2003] ATP 5 at [90]

¹¹ We note also that in *Skywest Limited 03* [2004] ATP 17, the Panel considered whether a standstill should apply where information had been obtained during the acquisition by the potential bidder of a pre-bid stake and that information was not disclosed in the bidder's statement. The Panel there considered it appropriate for a standstill to apply for up to 8 months.

¹² IAS rebuttal submissions, paragraph [4.1]

Price-sensitive information

27. Notwithstanding our finding above, we also considered whether it may give rise to unacceptable circumstances for IAS to continue to enforce the standstill if all the information provided to Centrebet has ceased to be price-sensitive. We restricted our consideration to price-sensitive information, and not more broadly confidential information. This deals with the test in s1043A and is enough to deal with the test in s636. If we are not satisfied that all of the information that appeared to be price-sensitive has ceased to be price-sensitive, we think it is unnecessary for us to consider whether other information provided is required to be disclosed under the test in s636.
28. IAS submitted that it had provided Centrebet with the following information in relation to its IASbet business, comprising IASbet.com and Canbet.com.au, which was price-sensitive:
 - (a) forecast profit and loss summaries for the financial years ending 30 June 2009 and 2010
 - (b) products and marketing information, which provided details of turnover broken down and analysed by sporting event, pricing customer base, number of bets taken, customer acquisition strategies, customer retention strategies and customer economics
 - (c) forecast income statements for the financial years ending 30 June 2009 and 2010 and
 - (d) top 500 customer list for 2007 and 2008.
29. It also submitted that Centrebet and its advisers logged into the data room 113 times and viewed documents in 524 instances, as well as having at least 20 phone conversations and two long meetings with IAS's senior management.
30. Centrebet submitted that the forecasts provided by IAS were not price-sensitive because a reasonable investor would not expect those forecasts to have a material effect on the price or value of IAS shares. We were not satisfied that this is necessarily the case. We note that Centrebet acknowledged in rebuttals that "*in the normal course, management forecasts based on sound assumptions would be, prima facie, price-sensitive at the time they were prepared and for a limited period of time thereafter, depending on the subsequent disclosure and material events that subsequently occur*". The forecasts in this case go out to 30 June 2010. The fact that time has passed and material events have occurred since the preparation of the 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. Moreover they may also not be immaterial in the sense that they are material to the holder of bid class securities in deciding whether to accept an offer. In any forecast, there will be valuable data embedded.
31. In this case, over 10 months elapsed and there have been significant changes in the economic climate since the preparation of the forecasts. But, the forecasts are not necessarily rendered immaterial because their conclusions may no longer be accurate. 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.

32. Centrebet submitted that the forecasts were inherently unreliable because the actual results for the financial year ended 30 June 2008 varied materially from IAS's forecasts for that period. IAS refuted this submission. Centrebet also submitted that the economy had dramatically changed. IAS submitted that the Australian wagering industry operates in a counter-cyclical nature to the economy.
33. We did not need to form a view on the accuracy of the forecasts. We do not think that it follows that forecasts are necessarily unreliable, and thus not price-sensitive, as a consequence of variances between the forecast and the actual results for part of the period.
34. Centrebet submitted that the forecasts were out of date because actual results in relation to the first half of the financial year ending 30 June 2009 were available. While this may render that part of the forecasts less useful, it is not conclusive of whether the information in relation to the period to 30 June 2010 is price-sensitive.
35. Centrebet submitted that the forecasts were limited in scope and content as they only related to the IASbet business. IAS submitted that the IAS businesses excluded from the forecasts represented only 2% of IAS as a whole. We agree that the exclusion of such a small proportion of the IAS group would not, of itself, mean that the forecasts ceased to be price-sensitive.
36. We think that the forecasts were price-sensitive at the time they were given to Centrebet and we are not satisfied that the forecasts or all of the information contained in them have ceased to be price-sensitive.
37. Because we were not satisfied that all of the information provided to Centrebet ceased to be price-sensitive, this also was enough for us to decline to make a declaration.

Condition 3

38. We asked Centrebet whether it would undertake to waive (or at least not rely on) condition 3 to its bid if we made a declaration and orders such that the proposed bid could proceed. Centrebet was not prepared to do so. Centrebet responded that it would provide that undertaking if the Panel made a declaration and orders in the same or substantially similar form to that sought in its application or such that the proposed bid can proceed and IAS is restrained from taking any action against Centrebet for any alleged breach of the Confidentiality Deed as a result of its proposed bid.
39. Assuming we were to make orders that would allow Centrebet's bid to proceed, we are not prepared to allow Centrebet an option to walk away from its proposed bid because the orders are not on the precise terms it desires. Having asked the Panel for orders that would allow its bid to proceed, Centrebet must, if such orders were made, proceed with the bid. For this reason as well, we declined to make a declaration.

DECISION

40. For the reasons above, we declined to make a declaration of unacceptable circumstances.
41. We consider that it is not against the public interest to decline to make a declaration.
42. Given that we did not make a declaration, we did not consider the question of orders, including as to costs.

Teresa Handicott
President of the Sitting Panel
Decision dated 13 February 2009
Reasons published 20 February 2009