



**Australian Government**

**Takeovers Panel**

**Reasons for Decision**

**International All Sports Limited 01R**

**[2009] ATP 5**

**Catchwords:**

*Review application -- proposed takeover bid - sale process - standstill - confidential information - price -sensitive information - commercially sensitive information - directors' duties - public interest - decline to make a declaration*

*International All Sports Limited - Centrebet International Limited*

*Corporations Act 2001 (Cth), sections 602, 636, 638 and 657C*

*International All Sports Limited 01 [2009] ATP 4*

*Magna Pacific (Holdings) Limited 05 [2007] ATP 16*

*Goodman Fielder Limited 02 [2003] ATP 5*

**INTRODUCTION**

1. The review Panel, Kevin McCann AM (sitting president), Hamish Douglass and Catherine Brenner declined to make a declaration of unacceptable circumstances in relation to the affairs of IAS. The review Panel agreed with the conclusion of the initial Panel that the term of the standstill arrangement appeared commercially justifiable and that Centrebet had not established that it should be released from the standstill provisions of the Confidentiality Deed.

2. In these reasons, the following definitions apply.

<b>Term</b>	<b>Meaning</b>
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 review Panel:

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

## FACTS

4. The following facts are in addition to the facts as set out in the reasons for the initial Panel's decision in *International All Sports Limited 01*.<sup>1</sup>
5. IAS submitted in the original proceedings that "at least twelve other potential bidders that also participated in the [sale] process have agreed to standstills of the same duration." In response to the review brief, IAS submitted that it had entered into standstill arrangements on identical or similar terms to Centrebet with 22 other potential bidders. Of these, three negotiated the standstill terms for nine months and for one other the standstill expired on 19 December 2008. 13 other potential bidders did not enter into standstill arrangements.
6. Only Centrebet and one other potential bidder (who was not the potential bidder whose standstill has expired) were permitted to conduct further due diligence and given access to the IAS data room.

## APPLICATION

7. By application dated 17 February 2009, Centrebet sought a review of the decision of the initial Panel in *International All Sports Limited 01*. The initial Panel declined to make a declaration of unacceptable circumstances. The President of the Panel consented to the review.
8. The initial Panel declined to make a declaration on three bases:
  - (a) given the nature of the information to be provided, the term of the standstill appeared to be commercially justifiable and should stand
  - (b) IAS had not established that there were unacceptable circumstances by reason of all the information it had access to ceasing to be price-sensitive and
  - (c) the initial Panel was not prepared to make orders permitting Centrebet's bid to proceed unless Centrebet was prepared to waive its bid condition regarding breach of the standstill arrangement.
9. The declaration and orders sought in the review application are the same as in the initial application.
10. Although review proceedings are *de novo*, Centrebet submitted that the initial Panel had erred in:
  - (a) finding that a standstill should be determined according to the nature of the information, since the standstill was entered before the information was made available
  - (b) not being satisfied that the information was no longer price-sensitive and
  - (c) deciding that it may not have made a declaration given Centrebet's response to the waiver of the bid condition.

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<sup>1</sup> [2009] ATP 4

## DISCUSSION

11. We have been provided with:
- (a) the initial application, preliminary submissions, brief, submissions and rebuttals
  - (b) the decision media release, decision email and the final reasons of the initial Panel and
  - (c) the review application, further statements provided by both parties in relation to the application and responses to our brief.

### Consideration of when application may be made

12. IAS repeated its submission that the initial application had been made out of time. Under section 657C(3)<sup>2</sup> an application must be made within two months after the circumstances have occurred or a longer period determined by the Panel. IAS submitted that the circumstances occurred, according to the application, when the restraint was imposed, namely when Centrebet withdrew from the sale process. This was 31 July 2008. The initial application was made on 2 February 2009.
13. The initial Panel took the view that the application was not out of time. It regarded the application as based on the standstill provisions and IAS's refusal to release Centrebet from them. Centrebet said as much in response to IAS's preliminary submissions to the initial Panel. The refusal occurred within two months.
14. We agree with the initial Panel that IAS's refusal to release Centrebet from the standstill provisions in the Confidentiality Deed on 1 February 2009 forms part of the circumstances, thus meeting s657C(3)(a). In any event, should it be necessary, and on the basis that power is available to us as a review Panel with the same power as the initial Panel when considering an application,<sup>3</sup> we consent to the application being made on 2 February 2009. We do not think rule 2.1(b)<sup>4</sup> limits our power.

### Use of the standstill

15. We agree with the initial Panel's view that a standstill is a legitimate way to enable a company to disclose confidential information to potential purchasers of its shares or assets.
16. Further, we agree that "*standstills also protect against the 'forced' disclosure of information under s636 if a bid is made,*"<sup>5</sup> but extend this to circumstances where forced disclosure may be required by the target under s638. IAS submitted that the question of materiality defines the disclosure obligation of a bidder but not necessarily of a target, since a target's disclosure obligation is limited to information that:

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<sup>2</sup> References are the *Corporations Act 2001* (Cth) unless otherwise indicated

<sup>3</sup> Section 657EA(4)

<sup>4</sup> Rule 2.1(b) of the Panel's *Rules for Proceedings* requires an application to include any request for a determination by the Panel under s657C(3)(b) stating why it is desirable to commence proceedings more than two months after the circumstances first occurred

<sup>5</sup> *International All Sports Limited 01* [2009] ATP 4 at 20

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- (a) a holder of the securities and their professional advisers would reasonably require (s638(1)) and
- (b) it is reasonable for investors and their professional advisers to expect to find in the target's statement (s638(1A)).

For this reason, IAS submitted that it did not need to disclose any of the price-sensitive information made available to Centrebet in its target's statement. However, Centrebet submitted that it did not have any price-sensitive information to disclose nor did it intend otherwise to make any disclosure of the information it received in the asset sale process in its bidder's statement.

- 17. Whether a distinction can be drawn between s636 and s638 need not concern us. If the information in this matter would need to be disclosed, we think it would be likely to be required in either the bidder's statement or, if not there, the target's statement.
- 18. We think that there is a public interest in enforcing standstill arrangements where they encourage business transactions through the exchange of information. Therefore, the party seeking to be released from the arrangement needs to establish that unacceptable circumstances exist by it not being released.

### Term of the standstill

- 19. We agree with the initial Panel's proposition "*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.*"<sup>6</sup> We also think that the nature of the business providing the information and the nature of the recipients of the information are factors in determining whether the term of a standstill is "*commercially justifiable*". Both IAS and Centrebet operate gaming businesses in Australia. The confidential information made available to Centrebet seemed to be of a type helpful to an operator of such a business. Thus, in this matter, we took into account the importance to a gaming business of the type of confidential information disclosed and the fact that it had been disclosed to a competitor.
- 20. We are of the view that the 12 month term of the standstill<sup>7</sup> was commercially justifiable having regard to the nature of the information, the nature of the business and recipient, and was consistent with market practice. A term that is materially longer than here may give rise to unacceptable circumstances although there could be facts which justify a longer term. Nevertheless, boards proposing to enter into confidentiality and standstill arrangements need to consider carefully the term of the standstill and the restraint that it imposes.
- 21. In this matter, of the 23 potential bidders that entered into standstill arrangements with IAS, four negotiated shorter standstill terms. Of the four potential bidders, three negotiated terms of nine months and one negotiated a term expiring on 19 December 2008. We do not believe that it is necessary for a company to negotiate identical standstill arrangements relating to the same sale process.<sup>8</sup> However,

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<sup>6</sup> *International All Sports Limited 01* [2009] ATP 4 at 23

<sup>7</sup> 12 months from the date Centrebet withdrew from the sale process

<sup>8</sup> *Goodman Fielder Limited 02* [2003] ATP 5 at 90

material variances between release dates may give rise to considerations about whether the release of some parties and not others gives rise to unacceptable circumstances.

22. We were concerned about the different standstill periods applicable to each potential bidder, and the number of potential bidders who had been restrained under the standstill arrangements. We considered whether it was reasonable to hold Centrebet to its standstill arrangement when another potential bidder's standstill period had already expired. In this instance, the potential bidder who had been released was only provided with the information memorandum and did not gain access to the data room which contained material commercially sensitive information. Given that Centrebet was provided full access to the data room we did not think that holding Centrebet to a longer, but reasonable, period was unacceptable. Had that not been the case it would have been more difficult for IAS to insist on the standstill.

### **Sensitive information**

23. Although we have found the term of the standstill to be commercially justifiable in this matter, like the initial Panel we are of the view that, in some circumstances, it may also be necessary to consider the nature of the information provided under a standstill having regard to its term.
24. The initial Panel's reasoning was that *"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."* Having reached that decision it did not need to consider commercially sensitive information that may not be price-sensitive. 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.<sup>9</sup> However, we are of the view that price-sensitive information is not the end of the inquiry. The making available of commercially sensitive information may also be a reason to rely on a standstill. Of course, if the information made available was no more than is already in the public domain, for example all the information made available was simply ASX announcements, then that might be a reason for releasing a party from the standstill to make a bid. That is not the situation here.
25. We are of the view that, in addition to assessing whether the information provided under a standstill is price-sensitive, regard should also be had to the commercial sensitivity of any non public information provided. We think that target companies should be able to rely on the protection of a standstill where the information provided is commercially sensitive. We acknowledge that this is broader than being able to rely on a standstill for price-sensitive information only. However, we think that this is justified because boards have a legitimate interest in the protection of commercially sensitive information and in allowing due diligence to be undertaken. For example, in this matter the customer lists may not be price-sensitive but could be damaging to the interests of IAS in the hands of a competitor. One further reason we

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<sup>9</sup> Neither party provided the actual documents to the Panel

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would extend the protection this far is that the information in this matter appeared likely to have helped Centrebet with its assessment of whether to bid for IAS.

26. IAS submitted that it had provided Centrebet with access to its data room and that Centrebet and its advisers logged into the data room 113 times and viewed documents in 524 instances.
27. We were satisfied that IAS provided commercially sensitive information to Centrebet and regardless of whether Centrebet was in possession of price-sensitive information that would require disclosure by either Centrebet or IAS in their respective bidder's statement or target's statements, we were of the opinion that it was necessary to ascertain whether Centrebet had been provided with commercially sensitive information which was protected by the standstill arrangement. We were so satisfied.
28. Accordingly, Centrebet not being released from the standstill arrangement does not give rise to unacceptable circumstances.

### Fiduciary duties

29. We do not want to be prescriptive about the terms of a standstill arrangement and would leave the consideration of a particular arrangement (or release from that arrangement) to each Panel in light of the particular circumstances of that application.
30. We consider that negotiation of standstill arrangements is an issue for directors, who must be cognisant of their director's duties. We also consider that a target's board is best placed to assess the value of the consideration and the terms of a proposed offer, and determine whether or not to release a potential bidder from its standstill to allow it to make a bid.
31. In this matter, without material to suggest that the directors of IAS had not discharged their duties, we are reluctant to second guess their decision not to release Centrebet from its standstill, particularly as Centrebet has not first established a basis on which it should be released.<sup>10</sup>

## DECISION

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

### Kevin McCann AM

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<sup>10</sup> We also note that in *Magna Pacific (Holdings) Limited 05* [2007] ATP 16 at 11, that Panel noted that the purposes behind a placement of shares was an issue of directors duties and as such did not raise issues of consideration by the Panel. That Panel went on to specify that the appropriate forum to raise issues of directors' duties was a court.

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**President of the Sitting Panel  
Decision dated 3 March 2009  
Reasons published 6 March 2009**