



C L I F F O R D
C H A N C E

WHAT'S MARKET?

STANDSTILL RESTRICTIONS IN PUBLIC CONTROL TRANSACTIONS

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Introduction

In agreeing to provide due diligence access to a potential bidder (**Bidder**) in connection with a control transaction concerning an ASX-listed entity (**Target**), the Target may require the Bidder to agree to a standstill restriction, which restricts the Bidder from, among other things, acquiring an interest in securities in the Target for a specified period, usually between 3 and 12 months (with periods ranging from 6 to 12 months being more typical).

A standstill provision may prevent a 'friendly' Bidder from becoming 'hostile', through the launch of a bid on terms not approved by the directors of the Target or the acquisition of a pre-bid stake which

it may seek to use to block a competing proposal in respect of the Target. A standstill provision may also serve to ensure that the Bidder does not acquire shares in the Target while in possession of material non-public information in respect of the Target or disclose such information to the market in circumstances which are not acceptable to the Target.

In all such cases, both Bidder and Target should be mindful of the extent to which standstill restrictions are commercially justifiable, having regard to the possibility of them being determined to constitute unacceptable circumstances if they are not.

Key Points

- Standstills are an accepted part of Australian M&A practice and are regarded as being a legitimate means by which a Target can provide confidential or price sensitive information to Bidders; nonetheless the terms and duration of any standstill need to be commercially justifiable.
- Typical duration for a standstill in Australia ranges from 6 to 12 months.
- Where standstills are agreed with multiple Bidders, Target boards need to carefully consider the terms of each standstill and material differences between them.

The key commercial justifications for the imposition of a standstill restriction

From the perspective of a Target, the key commercial justifications for the imposition of a standstill restriction may include:

- the protection of material information or commercially sensitive information against potential mandatory disclosure in a bidder's statement by the Bidder¹ or a target's statement by the Target²;
- managing the risk of the Target breaching the insider trading prohibitions by reason of communicating material price sensitive information to the Bidder in circumstances where the Target knows, or ought reasonably to know, that the Bidder would or would be likely to acquire or enter into an agreement to acquire Target securities³; and

- seeking to create a level playing field with respect to the competition for control of the Target in the context of a sale process concerning the Target or in circumstances where the Target believes that an auction for control may emerge.

Ultimately, a Target is entitled to disclose its confidential information to third parties, including Bidders, on such terms as it sees fit; however, in forming views about what such terms should be, Target directors should be mindful of their directors' duties, including the duty to act in good faith in the best interests of the corporation and for a proper purpose. Target directors may need to consider their duties if, for example, they are asked to authorise the Target entering into materially different standstills with different Bidders or approve the

terms of a standstill for the predominant purpose of rendering the Target takeover proof with respect to a certain Bidder for a period of time to entrench the position of those directors (or executive management) during that period.

1 Under section 636(1)(m) of the Corporations Act 2001 (Cth) (**Corporations Act**), a bidder is required to include in its bidder's statement: "*any other information that: (i) is material to the making of the decision by the holder of bid class securities whether to accept an offer under the bid; and (ii) is known to the bidder; ...*".

2 Under sections 638(1) and (1A) of the Corporations Act, a "target's statement must include all the information that holders of bid class securities and their professional advisers would reasonably require to make an informed assessment whether to accept the offer under the bid ... [but] only to the extent to which it is reasonable for investors and their professional advisers to expect to find the information in the statement and only if the information is known to any of the directors of the target."

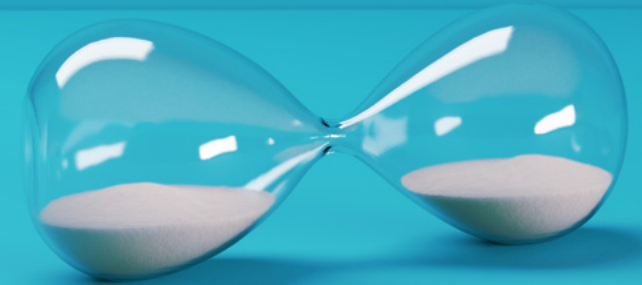
3 Section 1043A(2) of the Corporations Act.

Customary standstill restrictions and duration

While each standstill agreement is unique, the most common restrictions imposed on Bidders and their associates under such agreements include:

- acquiring or purchasing (or agreeing or offering to acquire or purchase) any securities or relevant interests in any securities of the Target;
- acquiring any other economic interest equivalent or similar to ownership in securities of the Target, whether by way of entering into any swap, derivative or otherwise;
- announcing an intention to make a takeover bid or making a takeover bid for any or all securities in the Target;
- soliciting proxies from shareholders of the Target or otherwise seeking to influence or control the management or policies of the Target, including by seeking to convene a meeting of shareholders of the Target; or
- aiding, abetting, counselling, assisting, facilitating or inducing any other person to do any of the things listed above.

Most standstill agreements have a term of between 6 and 12 months, with a Target typically seeking (but not necessarily achieving) a period at the upper end of that range to ensure that any confidential information disclosed to the Bidder has lost its commercial or competitive significance by the end of the term of the standstill agreement.



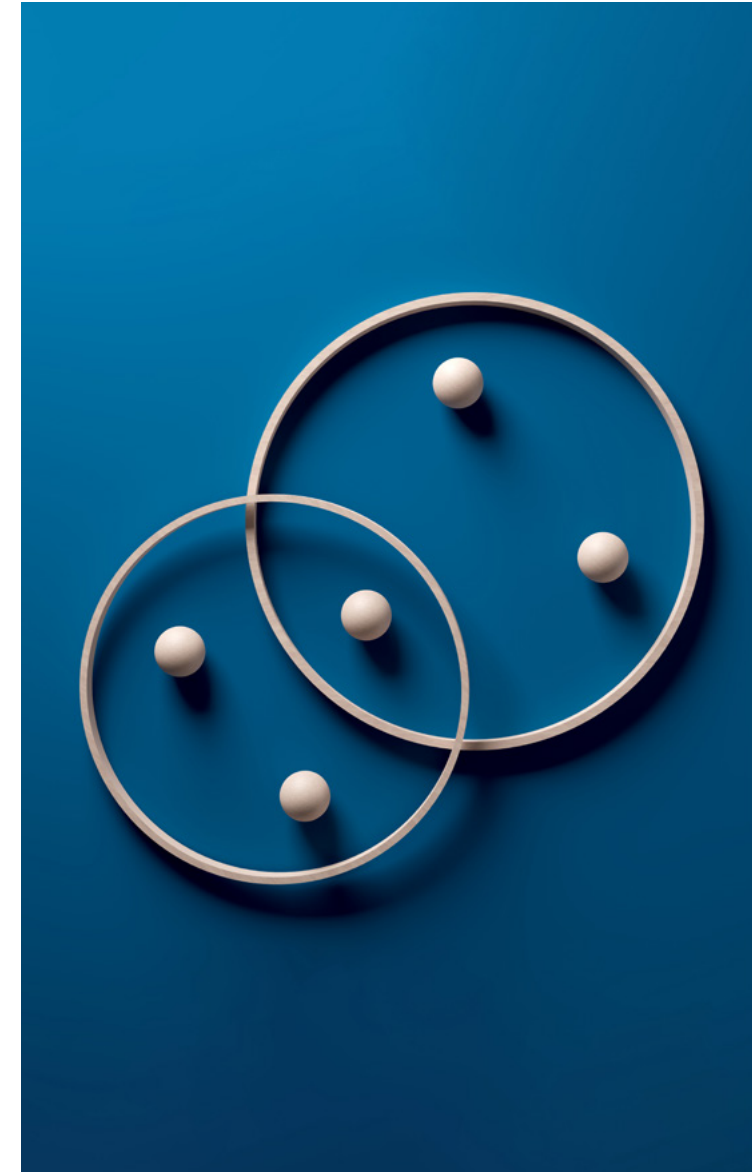
Possible carve-outs from standstill restrictions

While the specific carve-outs to any standstill restriction will be a feature of the commercial dynamics within which that standstill agreement is negotiated, possible carve-outs include an acquisition of securities which:

- results from the Bidder or any of its associates making, or publicly announcing an intention to make, a change of control proposal which is recommended by the Target board;
- occurs after:
 - the Target has entered into an implementation agreement with a third party in relation to a scheme proposal made by that third party;
 - a third party has publicly announced its intention to make a takeover bid which is recommended by the Target board;
 - a competing proposal of any kind has been announced by any person;

- a third party acquires a substantial interest in the Target; or
- the Target fails to comply with any agreed exclusivity or information access arrangements with the Bidder;
- are in the nature of de minimis acquisitions, such as up to 5% or similar non-control position;
- pursuant to rights issues or similar security issuances by the Target.

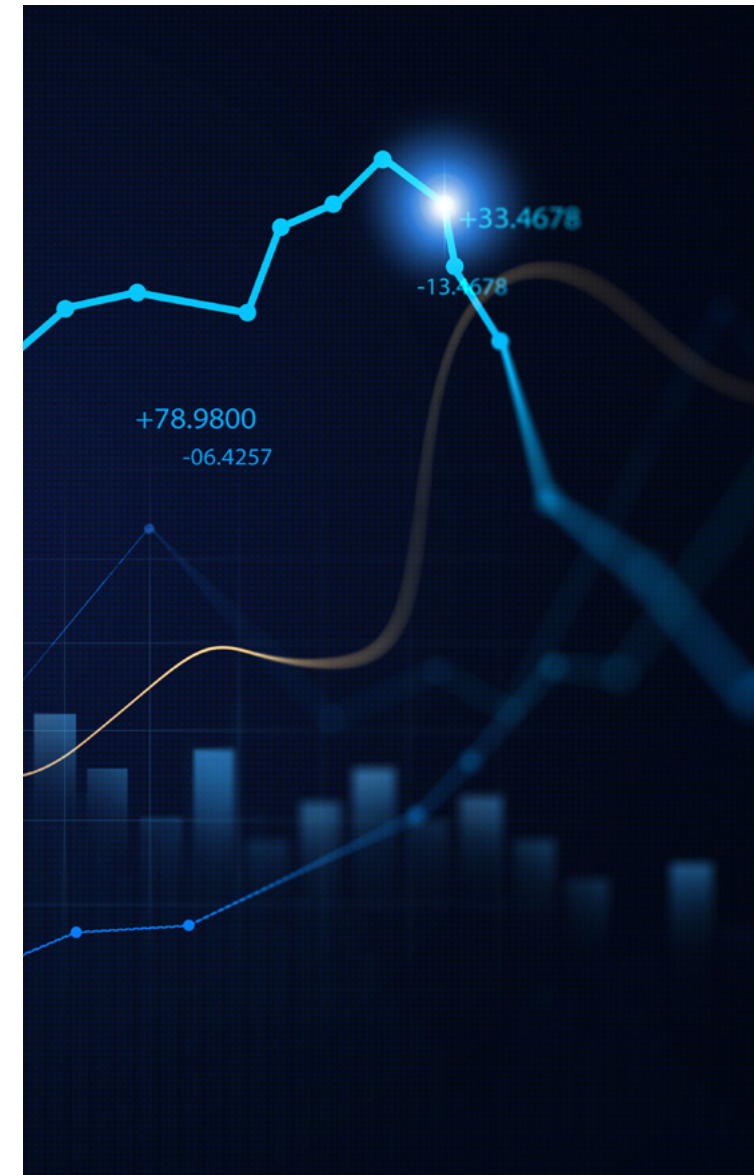
As a practical matter, the nature and extent of any carve-outs from a standstill restriction are likely to be heavily negotiated and, as the annexure of precedents shows, can become quite bespoke, reflecting the competitive landscape or a compromise between Bidder and Target to facilitate moving forward with a potential transaction.



The Takeovers Panel's perspective

Given the competitive impact and commercial significance of standstill restrictions in the context of contested control transactions, Takeovers Panel proceedings concerning them have been surprisingly rare, with the leading case being All Sports Limited and ([2009] ATP 5). However, in May 2024, there were three applications to the Takeovers Panel where consideration of a standstill clause was a key element of the matters in dispute, being applications in relation to Metallica Minerals Limited, Westgold Resources Limited and Pacific Smiles Group Limited. The Takeovers Panel has recently released the reasons for its decisions in Metallica ([2024] ATP 9) and Westgold ([2024] ATP 15). In both these matters, the Takeovers Panel made a number of observations about standstill provisions which reaffirmed the following propositions which were set down in the All Sports International decisions:

- standstills are an accepted part of market practice in Australia, particularly in circumstances where a Target is proposing to disclose confidential information to a Bidder, noting that the term of a standstill should be commercially justifiable according to the nature of the information to be provided to a Bidder;
- standstill clauses are voluntary arrangements, which are not prima facie unacceptable, and parties should not seek to rely on the Takeovers Panel intervening to re-write the terms of a standstill;
- merely because no confidential information is actually exchanged or information ceases to be fresh or is no longer price sensitive are not of themselves a reason for the Takeovers Panel to find that a standstill granted in a confidentiality deed constitutes unacceptable circumstances;
- standstills for periods extending beyond 12 months, or which are of an indefinite duration, may give rise to unacceptable circumstances although there could be facts which justify a longer term; and
- where multiple Bidders have access to confidential information, boards need to consider the equivalence of the terms of any standstills agreed with the different Bidders (including duration), however it is not necessary for the standstills to be identical. In addition, different treatment may be appropriate depending on whether the Bidders have access to the same materials (i.e. a Bidder with access to an information memorandum only may have a shorter standstill period compared to a Bidder who has access to a full data room).



Tips and Traps

Where a potential Bidder is seeking due diligence from a Target, key negotiating tips include:

- while setting the term at an appropriate level is important, it is often more important to ensure that the exceptions to, or termination events for, the standstill are set at the right level, including ensuring that the standstill falls away if a competing proposal is announced (or even if a third party acquires a material holding in the Target);
- take care in ensuring that general commercial agreements, do not contain standstill clauses. Over the years, we have seen general commercial agreements with broad standstill provisions – while these may be open to challenge, it is better to not have this issue at all; and
- notwithstanding that a standstill may have fallen away, care is still needed with the use of confidential information provided to a Bidder which is governed by the terms of a confidentiality agreement. While Australian courts have not considered that use/purpose clauses in confidentiality agreements may result in “unintentional standstills”, as has occurred in North America, a risk remains that a Bidder may be restrained from acquiring shares in a Target if doing so would breach the use/purpose clause of the confidentiality agreement or would otherwise be prevented under insider trading laws.



Annexure: Example Standstill Restrictions

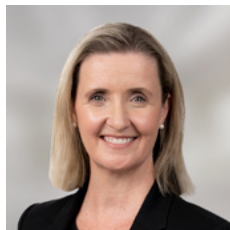
Target	Bidder	Document	Date	No acquisition of relevant interests	No acquisition of economic interests	No proxy solicitation	No takeover bid	Exceptions	Term
Newmark Property REIT	BWP Management Limited	Takeover Bid Implementation Deed (BID)	24 January 2024	✓ (other than in connection with a transaction contemplated by BID)	✓ (other than in connection with a transaction contemplated by BID)	✓ (other than in connection with a transaction contemplated by BID)	✗	Bidder offer recommender by Target. If a competing proposal becomes public, the Bidder can acquire shares in the Target, provided it is for an amount equal to or greater than the original offer price.	From date of BID until the end date (being approximately 5 months after the contract date).
United Malt Group Limited	Malteries Soufflet SAS	Process & Exclusivity Deed (P&E Deed)	28 March 2023	✓	✓	✓	✓	Bidder offer recommender by Target. Bidder making a takeover bid at or above the original offer price. Competing proposal being announced. In certain cases, if a third party announces an intention to make a takeover bid. Any third party (subject to limited exceptions) acquires voting power in, or becomes the holder of, or enters into an equity derivative transaction in respect of, more than 7.5% of the Target shares on issue.	From date of P&E Deed until the earlier of 6 months after termination of the deed, or the date the Target undergoes an insolvency event or terminates the Bidder's investigations for convenience.
Warrego Energy Limited	Beach Energy Limited	Scheme Implementation Deed (SID)	14 November 2022	✓	✓	✗	✗	Bidder offer under takeover bid made following Board recommendation of a competing proposal.	From date of contract until the earlier of termination and 6 months after the contract date.

Target	Bidder	Document	Date	No acquisition of relevant interests	No acquisition of economic interests	No proxy solicitation	No takeover bid	Exceptions	Term
Navitas Limited	BGH Consortium	Process & Confidentiality Deed (P&C Deed)	15 January 2019	✓	✓	✓	✗	<p>If a competing proposal is announced.</p> <p>Investments in index funds.</p> <p>An interest being held by an investor because it holds voting power of more than 20% of another entity (provided that it does not control that entity).</p> <p>Speaking at shareholder meetings.</p>	From date of the P&C Deed until the date that is 4 months after either party confirms it will not proceed with the proposal.
Fairfax Media Limited	Nine Entertainment Co. Holdings Limited. As both bidder and target were listed entities, a mutual standstill was agreed.	Scheme Implementation Agreement (SIA)	26 July 2018	✓	✓	✓	✗	✗	From date of SIA until end of exclusivity period (~7 months).
Investa Office Fund	Cromwell Property Group (which was based in the Process Deed with Dexus and Investa Office Fund)	Process Deed (PD)	4 April 2017	✓	✓	✓	✓	<p>The Bidder subscribing for stapled securities offered by the Target.</p> <p>If a third party has a legal, beneficial or economic interest in, or control of, 10% or more of the Target's stapled securities.</p> <p>If a competing proposal is announced.</p>	6 months from date of the PD.

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