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Competition Law News

US$22.4m in damages for a bid-rigging cartel

WHAT YOU NEED TO KNOW

- The Federal Court (single judge) just handed down its first landmark decision on the bid-rigging cartel provisions of the *Competition and Consumer Act 2010* (Cth)(CCA) in *Norcast v Bradken*.
- Justice Gordon found that Bradken and Castle Harlan (CH) were *in competition* with each other for the acquisition of Norcast's shares **even though** Bradken was excluded from the bidding process for Norcast and CH would not otherwise have known about the sale of Norcast, or participated in the bid process, without the involvement of Bradken.
- Justice Gordon found that Bradken and CH engaged in a bid-rig cartel where Bradken would not bid and CH would bid to acquire shares in Norcast. Norcast was awarded damages of US$22.4m.
- The main Bradken executives involved were found to be accessories to the contravention of the CCA.
- Bradken has announced its intention to appeal the decision.
- The bid-rigging prohibitions were introduced into the CCA in 2008 as part of the Cartel Conduct Bill. The *Norcast v Bradken* decision demonstrates the potential for a very broad application of those prohibitions.

WHAT YOU NEED TO DO

- Consider very carefully any alliances and arrangements that you may have in relation to sale processes for assets and shares as these alliances or arrangements may be at risk of breaching the bid-rigging cartel provisions of the CCA if the *Norcast v Bradken* decision is upheld.

Norcast v Bradken[1] - Facts

The essential facts of the case were that:

- Norcast is incorporated in Luxembourg and was the holding company for NWS. Norcast is ultimately owned by the private equity fund, Pala Investment Limited (Pala);
- Bradken is an Australian-based mining consumables company;
- Castle Harlan (CH) is a New York-based private equity fund. CH has an interest in the private equity fund in Australia called Castle Harlan Australia Mezzanine Partners Pty Limited (CHAMP);
- Bradken and CHAMP had a long history; in 2001, CHAMP purchased Bradken. In August 2004, Bradken was listed on the ASX;
- Bradken and NWS were two of four global manufacturers for grinding mill liners (Liners) although Bradken was the sole domestic manufacturer of Liners in Australia;
- From as early as 2005/2006, Bradken pursued the idea of acquiring NWS and in May 2006, Bradken made an unsuccessful offer to acquire Norcast;
- In late 2010/early 2011 Pala decided to sell NWS but was concerned that Bradken was not a serious bidder and instead may use the information acquired from the bidding processes against NWS, and so did not include Bradken in the potential buyers list. Norcast intended Bradken to find out about the sale indirectly through its investment bankers UBS and for Bradken to approach Norcast if it was genuinely interested;
- Bradken formed the view that it had been deliberately excluded from the bid process as retaliation for Bradken's earlier anti-dumping action against Norcast/NWS;[2]

[1] *Norcast S.ar.L v Bradken Limited (No 2)* [2013] FCA 235. (*Norcast v Bradken*)

[2] In 2002 Bradken was concerned that Norcast was bidding to sell its Liners from Canada into Australia at prices which contravened the anti-dumpling legislation and was successful in acquiring a declaration that anti-dumping measures be applied to Liners exported by Norcast from Canada to Australia. At the relevant time Norcast did not sell Liners directly into Australia because of the anti-dumping measures.

- Bradken decided that there was little point in approaching Norcast directly and decided instead to approach CH to inform CH that NWS was up for sale, which it did on 28 February 2011. At that time, CH was unaware that NWS was for sale. The evidence given by Bradken was that the decision to involve CH was made because, if a private equity firm acquired NWS, Bradken was likely to have a subsequent opportunity to acquire it and Bradken had a good relationship with CH;[3]
- On 2 March 2011, CH telephoned UBS to express an interest in participating in the competitive sale process and on the same day CH was provided with a copy of the sale "teaser". CH then provided the sale "teaser" to Bradken;[4]
- On 5 March 2011, communications between Bradken and CH were that Bradken was "definitely hopeful that [CH] can bid for the business". On 8 March 2011, Bradken met with CH and Bradken's evidence of the meeting was that:
    - CH was "happy to do a transaction of any sort with Bradken and had complete faith in [Bradken]";
    - If [Bradken] brought it within a year [CH] could reuse the capital which would be a significant plus; and
    - Bradken had requested what sort of return was appropriate for CH, to which CH indicated an internal rate of return of 25% was desirable but that it could be less given what Bradken was proposing was "essentially risk free".[5]
- One of Bradken's managers (Ward) became an undisclosed "consultant" to CH in its bid for NWS and on 23 March 2011 attended CH's New York offices to read the information memorandum for the sale of NWS and reviewed documents in the data room (set up for the sales process);[6]
- On 31 March 2011, CH made an offer of US$190m for NWS, which was the highest offer received by Pala;[7] and
- CH was ultimately successful in acquiring NWS for US$190m and the sale was completed on 6 July 2011; later the same day, Bradken acquired NWS from CH for US$212.4m (made up of US$190m and other costs and expenses)[8].

Allegations and judgment

The bid-ridding allegations

Norcast alleged that Bradken and CH engaged in bid-rigging cartel conduct[9].

To satisfy the bid-rigging cartel provision of the CCA, Norcast had to firstly establish the "purpose element" – that Bradken and CH entered into a contract, arrangement or understanding with the purpose of ensuring that, in the event of a request for bids, one party bids and the other does not in relation to the acquisition of services (ie, shares in Norcast) and secondly, the "competition element" – that Bradken and CH were competitors with one another for the acquisition of NWS' shares.

Judgment

Justice Gordon found that:

1. The evidence established that Bradken and CH entered into an arrangement where CH would bid and Bradken would not (Bidding Provision), no later than 8 March 2011.

   Even if the evidence was found to be insufficient to find that an arrangement was reached then that finding is open having regard to the inferences to be drawn from the circumstances that existed.[10]

2. The arrangement contained a provision which had the "purpose"[11] of directly or indirectly ensuring that CH would bid and Bradken would not.

   Bradken's communication with CH on 5 March 2011 was critical in establishing the relevant purpose because it showed that Bradken wished CH would bid – this was Bradken's stated purpose. It is inconceivable that Bradken would state its wish for CH to bid, and that CH would have agreed to bid for NWS at Bradken's suggestion and assistance, if Bradken still reserved the right to bid for Norcast itself.[12]

3. Bradken and CH were in competition, or *likely to be* in competition, with each other for the acquisition of shares in NWS.

   Justice Gordon rejected Bradken's submission that, because neither Bradken or CH were included in the original sales process, that therefore as a matter of fact, they were not in

[3] *Norcast v Bradken* at [84]-[97].
[4] Ibid at [99].
[5] Ibid at [107].
[6] Ibid at [112]-[128].
[7] Ibid at [134].
[8] Ibid at [205]-[206] and [344].
[9] See s 44ZZRD(3)(c)(i) of the CCA.
[10] *Norcast v Bradken* at [262]-[269].
[11] The subjective, operative purposes of CH and Bradken could be imputed by their corporate principals. The purpose of the conduct is the end sought to be accomplished by the conduct.
[12] *Norcast v Bradken* at [275].

competition with each other in relation to the acquisition of shares in Norcast.

Her Honour said that the word "likely" by statutory definition "includ[es] a possibility that is not too remote"[13] and then applied that definition by stating that:

> *"Castle Harlan bid for [Norcast]. It wanted to acquire [Norcast] for resale at a profit. Bradken wanted to acquire [Norcast]…*
>
> *Absent the arrangement between them, it is at least possible that Castle Harlan and Bradken would have competed with each other in bidding for [Norcast]".*

4. The anti-overlap provisions[14] regarding the acquisition of shares in a company did not apply to the facts of the case to prevent a contravention of the cartel provisions.

   Justice Gordon found that the Bidding Provision did not provide directly or indirectly for the acquisition of any shares because the acquisition of shares did not occur in the factual circumstances until *after* CH was successful in its bid for Norcast at which point the Bidding Provision was already complete.

Observations on the judgment

Likely to be in competition

Justice Gordon's approach in relation to whether two parties are "in competition or **likely to be** in competition" for the acquisition of services sufficient to engage in the cartel provisions of the CCA was consistent with the low threshold applied by the Court in other cases.[15]

Her Honour essentially applied a "but for" test by asking "absent the arrangement between Bradken and CH" whether competition between CH and Bradken for shares in Norcast was "**possible**". Her Honour then applied this test *ex-post* and found that given CH did in fact bid and Bradken always wanted to acquire NWS that the answer was "Yes".

Whilst it was clear that Bradken wanted to acquire NWS, the Judge had to conclude that it was "*possible and not too remote*", that despite Bradken's strong belief that it had been excluded from the bid process by Pala, the vendor, absent the arrangement with CH, Bradken would have tried to bid for NWS.

What is even more problematic is the question of whether CH would possibly have been in competition with Bradken when prior to Bradken's communication with CH, CH did not even know that NWS was for sale. At this point (ie, *ex-ante* rather *ex-post*), the possibility that CH would compete with Bradken must be **very** remote. Justice Gordon does not address this question in her judgment.

Tellingly, also, Justice Gordon does not identify any point in time at which Bradken was realistically contemplating making a bid for Norcast **concurrently** with CH doing so. The facts seem to disclose that by the time Bradken alerted CH to the possibility of acquiring Norcast, Bradken knew, or at least assumed, that it had been excluded from bidding by the vendor.

Purpose

The Judge had to infer the existence of an "understanding" that Bradken would not bid against CH. The Judge found that given CH's intention was to acquire and resell Norcast to Bradken[16] it would not have proceeded with its bid unless it had an assurance that Bradken would not bid against it. This inference was supported by the direct evidence that CH considered the arrangement by which it would acquire NWS and then sell it to Bradken as "essentially risk free".[17]

Anti-overlap provisions

Justice Gordon's reasoning, as to why the "anti-overlap" provision which provides that the bid-rigging prohibition does not apply to a provision *in so far as* that provision provides for the acquisition of shares or assets, is consistent with the authorities.[18] Essentially, if one party "agrees" with another that it would not bid in a sale process and the other would, that "agreement" does not directly or indirectly involve the acquisition of shares in a company because that acquisition of shares in a company does not occur, and cannot occur, until that other party is in fact successful in acquiring the shares.

Issues on Appeal

As the first judgment under the bid-rigging prohibitions in the CCA, the parties will explore many points on appeal. Critically, the judgment fails to grapple persuasively with what was really going on. Had it not been for Bradken reaching out to CH (after Bradken had determined that it was realistically not able to bid), it is hard to see how one could find that there was even a possibility that CH would bid for NWS. That is, asking the question as at the commencement of the chain of events the prospects of CH bidding for Norcast must be considered to have been remote. The Full Federal Court will have to consider at what point in time one must ask and answer the question – but for the arrangement would the parties have been in competition with each other?

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[13] See s 44ZZRB of the CCA.

[14] S 44ZZRU of the CCA provides that the cartel offence provisions are not engaged if the cartel provision in the contract, arrangement or understanding provides directly or indirectly for the acquisition of any shares in the capital of a body corporate or any assets of a person.

[15] For example in *Tillmans Butcheries Pty Ltd v Australasian Meat Industry Employees' Union* (1979) 42 FLR 331 as per Bowen CJ at 339 and as per Deane J at 346.

[16] *Norcast v Bradken* at [107].

[17] Ibid.

[18] For example, *Visy Paper Pty Ltd v Australian Competition and Consumer Commission* [2003] HCA 59 and *SST Consulting Services Pty Ltd v Rieson* [2006] HCA 31.

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