DLA PIPER

A GAME CHANGER FOR COMPETITIVE M&A TRANSACTIONS?

FEDERAL COURT PASSES JUDGMENT ON BIDDING TACTICS

WHAT HAPPENED?

A mining consumables company was sold to a private equity firm. Seven hours later, the company was on-sold at a $22 million premium to a competing Australian mining consumables company well known to the private equity firm. The Federal Court found that arrangements between the private equity firm and the ultimate buyer involved cartel conduct in breach of the *Competition and Consumer Act 2010* (Cth) (CCA). The Court awarded the vendor damages equal to the premium paid by the ultimate buyer.

WHY IS THIS RELEVANT TO YOU?

Norcast S.ár.L v Bradken Limited (No 2) [2013] FCA 235 is the first case in which the new cartel provisions of the CCA have been applied and highlights the broad application of the bid-rigging provisions. In this case, an Australian company and an American private equity firm were found to have breached the CCA in relation to their conduct in a sales process conducted overseas. The decision contains some important lessons for investment banks and private equity firms involved in competitive sale processes.

KEY LESSONS

- A purchaser in a competitive sale process must not agree with another company that would otherwise compete with it for one of the parties to bid and the other not to bid.
- An investment bank or private equity firm may be party to a bid rigging arrangement, in breach of the CCA, even if it has not been directly or formally invited to bid in a sale process.
- Investment banks and private equity firms incorporated in Australia or carrying on business in Australia should assume that their foreign business dealings and arrangements with foreign entities will be subject to the CCA. In this case, the Court found that the cartel provisions in the CCA applied to arrangements involving bids made in America for a Canadian company.
- You must carefully consider the legality of any collaborative arrangements with other companies in relation to tenders and sale processes, including joint bids and arrangements for one company to acquire shares or assets on behalf of the other company. A low threshold is applied when assessing whether companies are in competition with each other and, therefore, whether the cartel provisions of the CCA may apply.
- Arrangements that are informal, unwritten or unenforceable may be in breach of the cartel provisions. Further, arrangements can be inferred from communications and conduct, so consider carefully how your conduct could be interpreted.
- Consider carefully each representation you make during a sale process. Do not make statements if there are no reasonable grounds for making them or they are false. Consider whether you need to divulge information if the circumstances are such that there is a reasonable expectation that the matter will be disclosed. For example, if you are bidding on behalf of someone, consider whether their identity should be disclose

BACKGROUND FACTS

In January 2011, Norcast S.ár.L (Norcast) initiated a sale process for its subsidiary company, Norcast Wear Solutions Inc (NWS). In deciding who to invite to bid for NWS, Norcast developed a list of potential purchasers. The list included Bradken Limited (Bradken), an Australian company.

Bradken had offered to acquire NWS in May 2006 and had continued to show interest. Bradken and NWS were two of four global competitors in the manufacture and supply of particular mining consumables, including grinding mill liners.

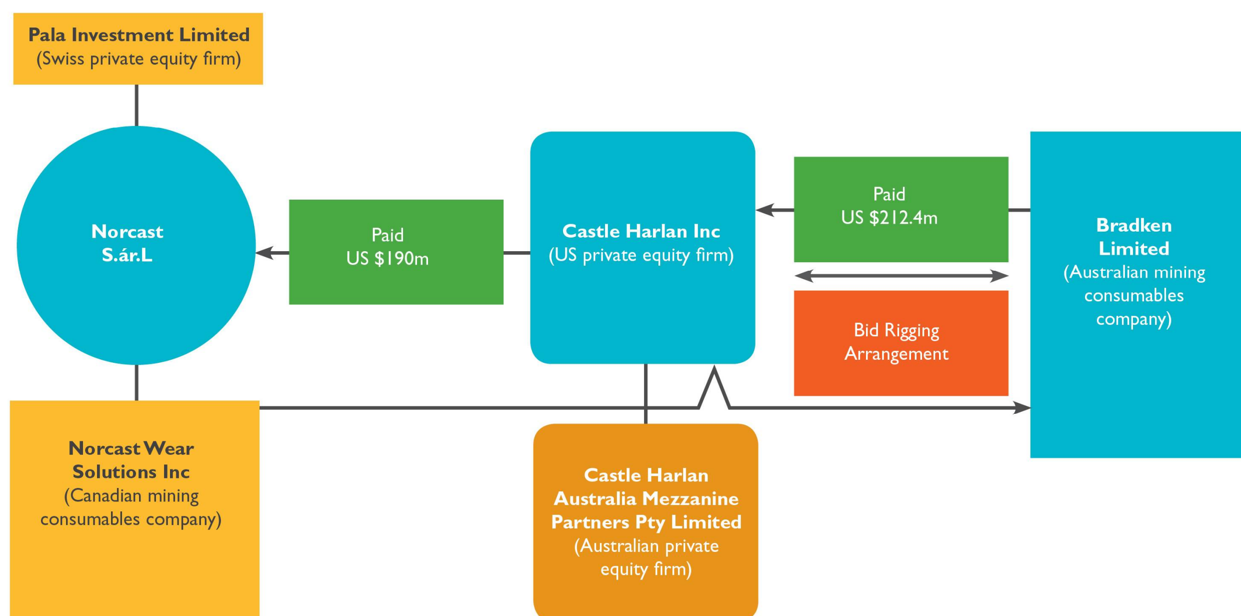
Bradken was the only competitor Norcast considered as a potential purchaser of NWS. Norcast formally invited all parties on its list of potential purchasers to bid for NWS except Bradken. It regarded Bradken as a sensitive bidder and so Norcast decided to make Bradken aware of the sale informally and wait for Bradken to express interest before including them further in the sale process.

After learning informally of the sale of NWS, Bradken assumed it had been excluded from the sale process. It approached Castle Harlan Inc (Castle Harlan), a New York-based private equity investment firm, and informed them of the sale process. Over the following months, Castle Harlan and Bradken communicated extensively about the sale process, while Castle Harlan commenced negotiations with Norcast to acquire NWS. During negotiations, Castle Harlan signed a non-disclosure agreement (NDA), pursuant to which it agreed not to disclose any information it obtained during the sale process except to its advisers. Castle Harlan also negotiated an amendment to the NDA so it did not have to disclose to Norcast the identity of its advisers. It subsequently disclosed information obtained during the sale process to Bradken, as an adviser. Norcast was unaware that Bradken had received information about NWS from Castle Harlan.

Castle Harlan ultimately offered US$190 million for NWS whilst Bradken did not make a bid. Norcast accepted Castle Harlan's bid. On the same day, Castle Harlan executed an agreement for the sale of NWS to Bradken. Bradken paid Castle Harlan US$212.4 million.

In May 2012, Norcast initiated proceedings in the Federal Court of Australia alleging that:

- Castle Harlan and Bradken contravened the cartel provisions in the CCA by entering into and giving effect to an arrangement for Castle Harlan to bid for NWS and Bradken not to bid.
- Castle Harlan and Bradken engaged in misleading and deceptive conduct during the sale process by remaining silent about their relationship and their bidding arrangement. Castle Harlan engaged in further misleading and deceptive conduct by making express statements that it did not intend to sell NWS to



Bradken and that the entity that acquired NWS would be in Castle Harlan's control.

- Mr Nicholas Greiner (Director and Chairman of Bradken's Board of Directors) and Mr Brian Hodges (Managing Director of Bradken) were involved in the contraventions.

On 25 March 2013, Justice Gordon of the Federal Court found for Norcast on each of its claims. Justice Gordon awarded damages to Norcast of US$22.4 million. This sum reflected the difference between the price Castle Harlan paid to Norcast for NWS (US$190 million) and the amount it received from Bradken (US$212.4 million). The key reasons for Justice Gordon's decision are explored below.

BID RIGGING

The CCA prohibits cartel conduct, which includes bid rigging. Justice Gordon made the following findings:

- There was a request for bids in relation to the acquisition of shares in NWS, even though neither Castle Harlan nor Bradken were formally invited to bid. Requests for bids do not need to be provided either directly or individually to the parties to the alleged bid rigging arrangement.
- The request for bids does not have to be made in Australia or relate to an Australian company. The cartel provisions simply require that there is a request for bids and the process involves a corporation incorporated in Australia or carrying on business in Australia. Bradken and Castle Harlan each carried on business in Australia and, therefore, the cartel provisions applied to their arrangement despite the request for bids being made in America in relation to a Canadian company.
- It is at least possible that Castle Harlan and Bradken would have competed with each other to acquire the shares in NWS but for the bid rigging arrangement. Castle Harlan bid to acquire NWS so that it could resell NWS at a profit and Bradken wanted to acquire NWS to create synergies with its existing operations. It did not matter that neither Castle Harlan nor Bradken were formally invited to bid for NWS and that the acquisition occurred outside Australia. Justice Gordon did not comment on the issue of Castle Harlan being aware of the request for bids for NWS only because it was alerted to it by Bradken.
- The communications between Castle Harlan and Bradken were consistent with an arrangement the purpose of which was that Castle Harlan would bid for NWS and Bradken would not bid. It did not matter that the arrangement was informal, unenforceable or that the parties were free to withdraw from it at any time.
- Even if the direct and express communications between the parties could not support the above finding, the Court could draw inferences of an arrangement from the circumstances in this matter, including Bradken's interest in the sale process, the parties' efforts in keeping Bradken's involvement with Castle Harlan a secret from Norcast, the parties' communications throughout the sale process and Bradken's ultimate acquisition of NWS at a premium.
- By giving effect to the bid-rigging arrangement, Bradken avoided Norcast's competitive sale process under which the value of NWS in terms of synergies and market share (given NWS' status as a competitor of Bradken) would have been relevant to the sale price.
- The exemption to the cartel prohibitions for provisions that provide directly or indirectly for the acquisition of shares or assets did not apply in this case because the arrangement between Castle Harlan and Bradken related to bidding for shares, not the acquisition of shares.

MISLEADING AND DECEPTIVE CONDUCT

Justice Gordon found that Castle Harlan and Bradken had also engaged in the following misleading and deceptive conduct during the NWS sale process, in breach of the Australian Consumer Law:

- Both Bradken and Castle Harlan had remained silent about the relationship and cooperation between the two companies, including the bid rigging arrangement between the parties and the intention for Castle Harlan to on-sell NWS to Bradken; and
- Castle Harlan made express statements that it did not intend to sell NWS to Bradken and that

the entity that acquired NWS would be in the control of Castle Harlan. These statements were made both orally (during a site visit) and in writing (in the final bid letter).

LIABILITY OF SENIOR EXECUTIVES

Justice Gordon held that Mr Greiner (Director and Chairman of Bradken's Board of Directors) and Mr Hodges (Managing Director of Bradken) were involved in Bradken's contraventions of the CCA on the basis that they knew the essential facts and were the architects of the conduct. In the judgment, Her Honour commented that Mr Greiner was "evasive and hostile" as a witness and did not provide satisfactory answers in court. Mr Greiner and Mr Hodges were not required to contribute to the damages to be paid to Norcast.

BUT WAIT, THERE'S STILL MORE TO COME…

- Bradken has appealed the Federal Court's decision. The appeal will examine a number of issues, particularly whether Castle Harlan and Bradken were in competition with each other for the acquisition of NWS. Bradken asserts that it believed it had been excluded from the bid process and, therefore, it was unable to bid for NWS. It also asserts that Castle Harlan would have been unlikely to be a rival bidder, since it only became aware of the sale process when alerted to it by Bradken and Bradken would not have alerted Castle Harlan if it had believed it was free to bid for NWS.
- Norcast has also initiated proceedings against Castle Harlan in the United States in relation to the same conduct. These proceedings are awaiting a hearing.

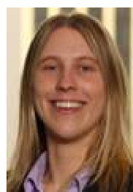
KEY CONTACTS

For further information please contact the following:

MELBOURNE

Simon Uthmeyer
Partner
T +61 3 9274 5470
simon.uthmeyer@dlapiper.com

Alec White
Senior Associate
T +61 3 9274 5144
alec.white@dlapiper.com



Nicole Smith
Senior Associate
T +61 3 9274 5071
nicole.r.smith@dlapiper.com

www.dlapiper.com

DLA Piper is a global law firm operating through various separate and distinct legal entities.

For further information, please refer to www.dlapiper.com

Copyright © 2013 DLA Piper. All rights reserved.

1201382044 | ASL | 0513

This publication is intended as a first point of reference and should not be relied on as a substitute for professional advice. Specialist legal advice should always be sought in relation to any particular circumstances and no liability will be accepted for any losses incurred by those relying solely on this publication.