e-Competitions
National Competition Laws Bulletin

June 2013-I

The Federal Court of Australia hands down its first decision involving a bid rigging case after the entry into force of new cartel laws (Norcast/Braken)

Australie, Ententes, Ententes (appel d'offres), Pratiques concertées, Dommages et intérêts, Private enforcement, Cartel, Manufacture/Fabrication

Federal Court of Australia, 19 March 2013, 2013 FCA 235, Norcast S.ár.L v Bradken Limited (No 2)

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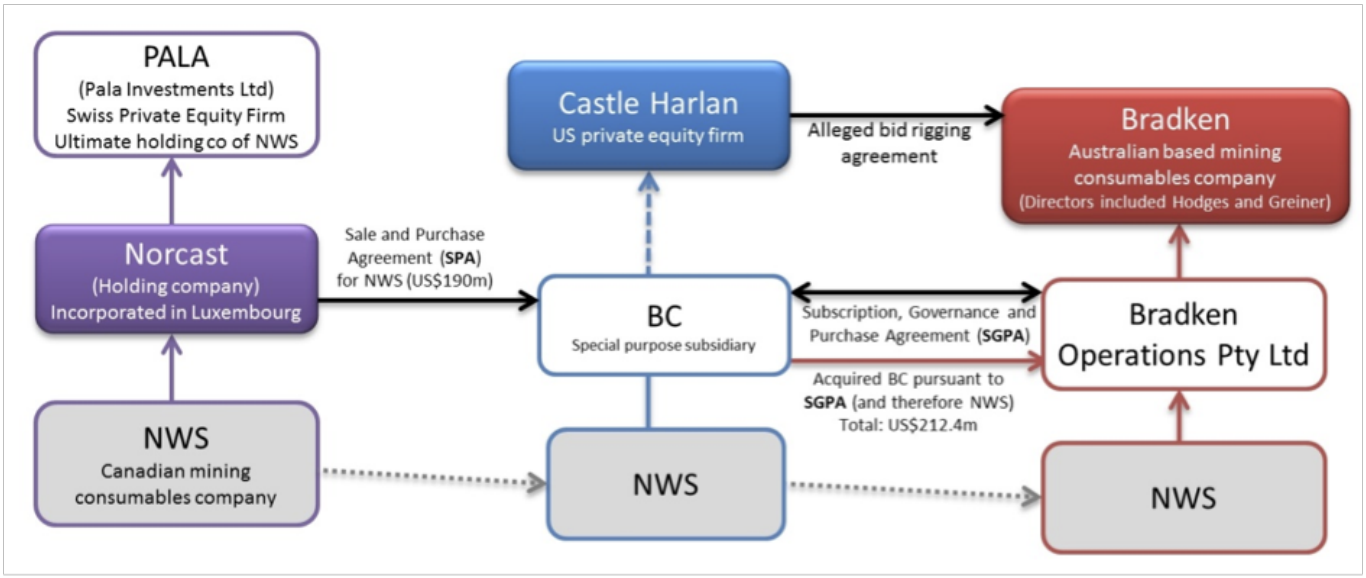
In July 2009 Australia's new cartel laws entered into force. On 19 March 2013 the Federal Court of Australia (Gordon J) handed down its first decision involving these new laws. *Norcast S.ár.L*(***Norcast***), a subsidiary of the private equity fund, Pala Investments Limited (***Pala***), alleged that Castle Harlan, Inc (***Castle Harlan***), another private equity fund, and Bradken Limited (***Bradken***) had entered into an arrangement whereby *Castle Harlan* would bid for the acquisition of *Norcast*'s subsidiary, **NWS**, and *Bradken* would not. *Castle Harlan* bid successfully for NWS and acquired it through its subsidiary, ***BC***. *Bradken* Operations Pty Ltd (*Bradken*'s subsidiary) then exercised rights, acquired pursuant to a Subscription, Governance and Purchase Agreement (SGPA), to acquire all shares in *BC* and thereby acquired NWS. The parties and details surrounding the agreement are represented in the diagram below.



Justice Gordon held that *Castle Harlan* and *Bradken* had entered into a bid rigging agreement and that *Norcast* had suffered loss amounting to US$22.4m. This was the difference between the amount for which it had sold NWS (approx. US$190m) and the amount for which *Bradken* acquired NWS from *Castle Harlan* (approx. US$212.4m) [1].

Issues

This case raised a number of interesting and complex issues. In addition to determining whether there was a bid rigging arrangement, the case required consideration of the extraterritorial scope of Australia's competition legislation and the breadth of the anti-overlap provision that applies in the case of acquisitions.

The Law

Australia's cartel laws are contained in Part IV – Division 1 of the *Competition and Consumer Act 2010* (**CCA**). They prohibit parties making or giving effect to a 'contract, arrangement or understanding' containing a cartel provision (Part IV, Division 1). In the case of bid rigging, a provision in an agreement is a 'cartel provision' if (s 44ZZRD(3)(c)) :

- it has the purpose of directly or indirectly ensuring that, 'in the event of a request for bids in relation to the supply or acquisition of services … one or more parties to the contract, arrangement or understanding bid, but one or more other parties do not' ; [2] (the '**purpose condition**') and

- at least two parties to the contract, arrangement or understanding are, or are likely to be, in competition in relation to the supply or acquisition of goods or services, or would be in competition but for the contract, arrangement or understanding (the '**competition condition**').

They will not, however, apply to a contract, arrangement or understanding 'in so far as the cartel provision provides directly or indirectly for the acquisition of : (a) any shares in the body capital of a body corporate ; or (b) any assets of a person.' (section 44ZZRU)

Cartel conduct constitutes a criminal offence and is also subject to civil penalties. In addition, parties who suffer loss as a result can seek damages (section 82). Where the conduct involved takes place outside Australia, as in this case, Ministerial consent is required before such conduct can be relied upon for an award of damages (section 5). Ministerial consent must be given unless the law of the country in which the conduct occurred required or specifically authorised the conduct and it is not in the national interest that consent be given.

Cartel conduct

A determination that cartel conduct occurred in this case depended upon making two findings. First, that *Bradken* and *Castle Harlan* had made or given effect to contract, arrangement or understanding in relation to the bidding for NWS ('bidding agreement'). Second, that this bidding agreement contained a cartel provision ; that is, a provision satisfying both the 'purpose condition' and the 'competition condition'.

Bidding agreement

The Court held that the form and content of communications between *Castle Harlan* and *Bradken* were 'consistent only with an arrangement whereby *Castle Harlan* would bid, and *Bradken* would not bid, for NSW' [3]. It did not matter whether or not the parties had committed to an on-sale of NWS by *Castle Harlan* to *Bradken* [4]. Gordon J summarised the legal principles relevant to establishing a contract, arrangement or understanding [5] noting, in particular, that there must be 'evidence of a consensus or meeting of the minds of the parties, under which one party or both of them must assume an obligation or give an assurance or undertaking that it will act in a certain way' [6]. This need not be enforceable at law, but *mere* hope or expectation that a party will act in a certain way is not itself sufficient. Importantly, the necessary 'meeting of the minds may be proved by independent facts and from inferences drawn from primary facts' [7].

In the present case, there was a bid rigging arrangement, notwithstanding that it was informal and unenforceable and that either party 'could withdraw from it or even act inconsistently with it'. This agreement was entered into and given effect to by *Castle Harlan* and *Bradken* [8].

Purpose condition

It was necessary in this case for *Norcast* to demonstrate that the bidding agreement contained a provision having the purpose of directly, or indirectly, ensuring that, in the event of a request for bids, one party would bid but the other would not.

One issue of contention was whether or not there had been a relevant 'request for bids'. *Bradken* alleged that no such request existed because, although *Norcast* initiated a sale process for NWS, it targeted specific potential bidders and did not directly approach *Bradken*, which believed it had been excluded from the sale process. Gordon J rejected this claim, holding that it was not necessary for a 'request for bids' to be directed to the parties to the alleged bidding agreement [9] and that the bid rigging prohibition is not restricted to 'bidders or potential bidders … *within the scope of that process*' [10].

Bradken further claimed that, even if there was a request for bids, it did not occur in Australia and

did not relate to the supply or acquisition of goods or services in Australia and that this was a necessary condition. This too was rejected, Gordon J noting that, unlike other competition provisions in the Act, no such territorial limitation can be found in s 44ZZRD and should not be implied [11].

Having concluded that there was a relevant request for bids Gordon J considered whether the bid rigging arrangement contained a provision having the purpose of directly or indirectly ensuring that one party would bid but the other would not.

Bradken submitted that the purpose condition 'required that the Court must find that the operative, subjective purpose of the parties to the Bid Rigging Arrangement was to ensure that, in the event of a request for bids, one party bid but the other did not' [12] and that neither *Bradken* nor *Castle Harlan* had this subjective purpose because both Hodges and Greiner (the relevant directors of *Bradken*) believed *Bradken* had been excluded from the bidding process. Gordon J accepted that the purpose condition 'directs the Court to consider the subjective, operative purpose of the parties to the relevant arrangement', but held that this purpose 'may be inferred ... from the nature of the arrangement, the circumstances in which it was made and its likely effect' [13]. In the case of *Bradken*, the operative purposes to be considered were those of Hodges and Greiner which could be imputed to their corporate principle [14]. Gordon J rejected the contention that 'Hodges and Greiner did not have a purpose of ensuring that *Bradken* would not bid, but instead *Castle Harlan* would bid, for NWS' [15] and that any belief that *Bradken* had been excluded from the sale process was not inconsistent with that purpose [16].

Competition condition

It was also necessary in this case to establish that *Bradken* and *Castle Harlan* were in competition with each other, or likely to be in competition with each other, but for the understanding between them, in relation to the acquisition of shares in NWS. Gordon J held that 'likely' means 'a possibility that is not remote' [17].

Bradken submitted that, as it was not included in the sale process, it was not in competition with *Castle Harlan* for the acquisition of NWS and that, even if it was, that the competition condition required that competition be in respect of a market in Australia and that this was not the case here. Justice Gordon rejected both contentions [18].

In relation to *Bradken*'s first submission, Gordon J noted that *Bradken* wanted to acquire NWS and, absent their arrangement with *Castle Harlan* 'it is *at least possible* that *Castle Harlan* and *Bradken* would have competed with each other in bidding for NWS' [19]. (emphasis added)

Gordon J also rejected the claim that the parties needed to be in competition or potential competition in respect of a market in Australia. No such limitation is contained in the provision and Gordon J held that no such limitation should be implied [20].

Anti-overlap

Section 44ZZRU of CCA provides for anti-overlap between the cartel and merger provisions of the legislation to ensure acquisitions are subject to the merger and not the cartel provisions of the CCA. It does so in a way that 'expressly provides for the primacy of the prohibition against a contract,

arrangement or understanding containing a cartel provision' and then carves out the overlap [21]. Gordon noted that it applies only to contracts, arrangements and understandings *in so far*as the 'cartel provision provides directly or indirectly for the acquisition of shares in the capital of a company' [22] and so continues to apply to balance of the agreement.

In this case the cartel provision provided that '*Castle Harlan* would bid for the NWS shares and *Bradken* would not bid' [23]. The provisions relating to the acquisition of NWS were contained in the relevant sale agreements which were separate from the bid rigging provision [24]. Consequently, as the cartel provision in this case did not directly or indirectly effect any acquisition, section 44ZZRU did not preclude the operation of the cartel laws.

Extraterritorial application

Section 5 of the CCA applies the competition law provisions to conduct engaged in outside Australia by certain persons, including bodies corporate carrying on business in Australia. A company 'may be found to carry on business in Australia even though the bulk of its activities are conducted elsewhere … and that it conducts its activities in Australia by reason of its control over or connection with an Australian company …. ' [25]. Gordon J held that *Bradken* was incorporated and carried on business in Australia and held that *Castle Harlan*, while incorporated in the United States, carried on business in Australia for purposes of this provision. Consequently, the cartel laws extended to the bid rigging conduct which occurred outside Australia.

Additionally, before conduct occurring outside Australia can be relied upon for purposes of a private damages action Ministerial consent must be obtained. Gordon J held that it was not necessary for such consent to be received prior to the hearing of the proceeding [26], but it must be, and was in this case, obtained prior to judgment.

Damages and accessorial liability

Damages for loss suffered as a result of cartel conduct may be claimed against the party in direct contravention (here *Bradken*) and against any other person involved in the contravention (section 82). Justice Gordon held that *Bradken* directors, Greiner and Hodges, were involved in both *Castle Harlan*'s and *Bradken*'s contraventions of the cartel provisions.

Gordon J noted that a finding of accessorial liability depended upon finding a primary contravention, which was established in this case. A person is involved in a contravention if, among other things, they have been 'in any way, directly or indirectly, knowingly concerned in, or party to, the contravention' (section 75B(1)(c)). This requires a person (including a body corporate) to have intentionally participated in the contravention and requires 'actual, not constructive, knowledge of the essential matters that make up the contravention' [27]. However, it does not require proof that the person knew their participation was in breach of the CCA and 'where there is a combination of suspicious circumstances and a failure to make enquiry, it may be possible to infer knowledge … ' [28]. In this case, Gordon J rejected claims that Hodges and Greiner did not knowingly or intentionally participate in any contravention [29].

On the issue of the level of damages available, Gordon J noted that, if the Court finds damage has occurred 'it must do its best to quantify the loss even if a degree of speculation and guess work is

involved' and that 'loss or damage includes economic or financial loss as well consequential loss which is a direct result of the conduct in question' [30]. In this case, Gordon J assessed damages 'at the difference between the US$212.4 million including costs and expenses which *Bradken* did in fact pay to acquire NWS and the US$190 million *Norcast* received from *Castle Harlan*' [31].

Conclusion

This decision represents the first attempt to clarify the meaning and scope of Australia's bid rigging laws. Notably, Gordon J repeatedly rejected attempts to narrowly confine the scope of the provisions, particularly in relation to their territorial scope.

Bradken filed an appeal on 18 April 2013 [32]. It is suggested that one key issue on appeal will be the meaning of 'in competition or likely to be in competition' for purposes of establishing the essential 'competition condition'. After stating that 'likely' meant 'a possibility that is not remote', Gordon J held that it was 'at least possible' that the parties would have been in competition for NWS absent the cartel agreement. The facts suggest *Bradken* informed *Castle Harlan* of the sale process because they believed they had been excluded from that process ; this would suggest that the likelihood of *Castle Harlan* and *Bradken* competing for NWS absent the agreement was extremely remote.

Regardless of the outcome, the ground-breaking nature of this decision means that the appeal will be watched closely by business and the competition law community to provide further clarification as to the scope of the Australian cartel laws.

NB Regarding this case, see also :

Brent Fisse, *The Federal Court of Australia issues its first decision on cartel liability under the Competition and Consumer Act 2010 : a wake up call to those doing private equity deals (Norcast v Bradken)*, 19 mars 2013, e-Competitions, n°51500

[1] The same facts gave rise to a claim of misleading or deceptive conduct, which is also prohibited under the *Competition and Consumer Act 2010*. This claim was also successful but will not be discussed further in this note.

[2] The bid rigging prohibition captures a wider range of bid rigging conduct than this, but this was the alleged purpose in this case. Gordon J also noted that shares were 'services' for the purposes of the provision because of the broad definition of services contained in s 4 of the CCA, which includes rights, benefits and privileges. This was not contested by the parties : *Norcast S.ár.L v Bradken Limited* (No 2) [2013] FCA 235 at [238-240].

[3] See *Norcast S.ár.L v Bradken Limited* (No 2) [2013] FCA 235 at [104].

[4] See *Norcast S.ár.L v Bradken Limited* (No 2) [2013] FCA 235 at [262].

[5] See *Norcast S.ár.L v Bradken Limited* (No 2) [2013] FCA 235 at [from 263].

[6] See *Norcast S.ár.L v Bradken Limited* (No 2) [2013] FCA 235 at [263].

[7] See *Norcast S.ár.L v Bradken Limited* (No 2) [2013] FCA 235 at [263].

[8] See *Norcast S.ár.L v Bradken Limited* (No 2) [2013] FCA 235 at [265].

[9] See *Norcast S.ár.L v Bradken Limited* (No 2) [2013] FCA 235 at [220].

[10] See *Norcast S.ár.L v Bradken Limited* (No 2) [2013] FCA 235 at [221]. Emphasis in original.

[11] See *Norcast S.ár.L v Bradken Limited* (No 2) [2013] FCA 235 at [229]. The applicability of the provision to conduct outside Australia is, therefore, governed by s 5 of the CCA which addresses the Act's extraterritorial scope (discussed below).

[12] See *Norcast S.ár.L v Bradken Limited* (No 2) [2013] FCA 235 at [271].

[13] See *Norcast S.ár.L v Bradken Limited* (No 2) [2013] FCA 235 at [273].

[14] See *Norcast S.ár.L v Bradken Limited* (No 2) [2013] FCA 235 at [274].

[15] See *Norcast S.ár.L v Bradken Limited* (No 2) [2013] FCA 235 at [275].

[16] See *Norcast S.ár.L v Bradken Limited* (No 2) [2013] FCA 235 at [275].

[17] See *Norcast S.ár.L v Bradken Limited* (No 2) [2013] FCA 235 at [259] referring to section 44ZZRB.

[18] See *Norcast S.ár.L v Bradken Limited* (No 2) [2013] FCA 235 at [258].

[19] See *Norcast S.ár.L v Bradken Limited* (No 2) [2013] FCA 235 at [260].

[20] See *Norcast S.ár.L v Bradken Limited* (No 2) [2013] FCA 235 at [261].

[21] See *Norcast S.ár.L v Bradken Limited* (No 2) [2013] FCA 235 at [281].

[22] See *Norcast S.ár.L v Bradken Limited* (No 2) [2013] FCA 235 at [281].

[23] See *Norcast S.ár.L v Bradken Limited* (No 2) [2013] FCA 235 at [284].

[24] See *Norcast S.ár.L v Bradken Limited* (No 2) [2013] FCA 235 at [284].

[25] See *Norcast S.ár.L v Bradken Limited* (No 2) [2013] FCA 235 at [38].

[26] See *Norcast S.ár.L v Bradken Limited* (No 2) [2013] FCA 235 at [231].

[27] See *Norcast S.ár.L v Bradken Limited* (No 2) [2013] FCA 235 at [289].

[28] See *Norcast S.ár.L v Bradken Limited* (No 2) [2013] FCA 235 at [289].

[29] See *Norcast S.ár.L v Bradken Limited* (No 2) [2013] FCA 235 at [293].

[30] See *Norcast S.ár.L v Bradken Limited* (No 2) [2013] FCA 235 at [293].

[31] See *Norcast S.ár.L v Bradken Limited* (No 2) [2013] FCA 235 at [303].

[32] The callover date for the appeal is currently listed for 16 July 2013.

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