



# **SESSION 4B: M&A COMPETITIVE SALE PROCESSES**

WIN In-House Counsel Day Melbourne 2017

**Thursday, 23 February 2017**

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# 1

Observations on competitive  
sale processes

When is a competitive sale process appropriate?

Competitive sale processes are appropriate for: financial sponsor owners of individual portfolio assets, for listed or unlisted companies owning a range of assets, one or more of which is to be divested, and for government's wishing to transfer publicly owned assets to the private sector.

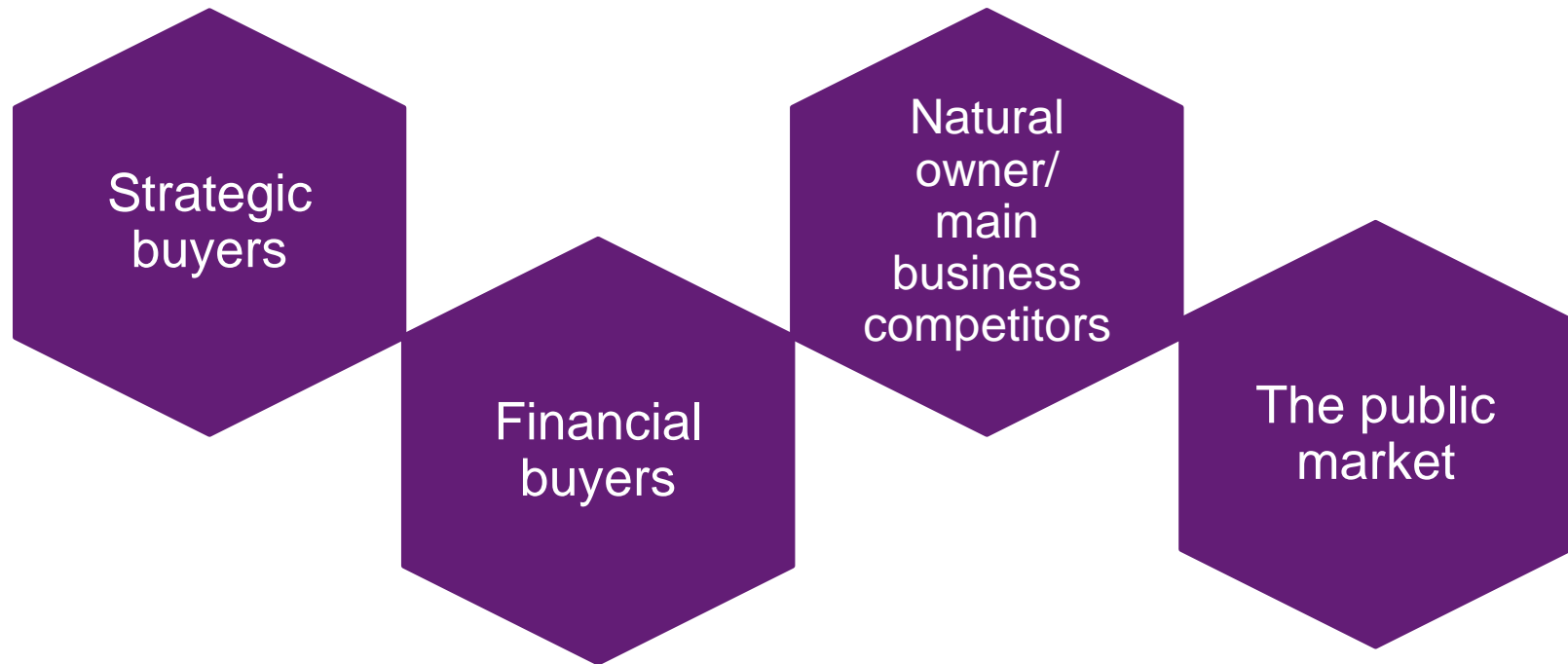
## Why undertake a competitive sale process?

Competitive sale processes should maximise price and minimise risk for the seller...

- Key drivers for a seller – price, certainty (conditionality) and risk (warranties and indemnities).
- Key drivers for a buyer – clarity of process (fairness), transparency (due diligence) and risk.

# Who is in the buyer universe?

Competitive sale processes are designed having regard to the universe of buyers. It is crucial to maximise competitive tension.



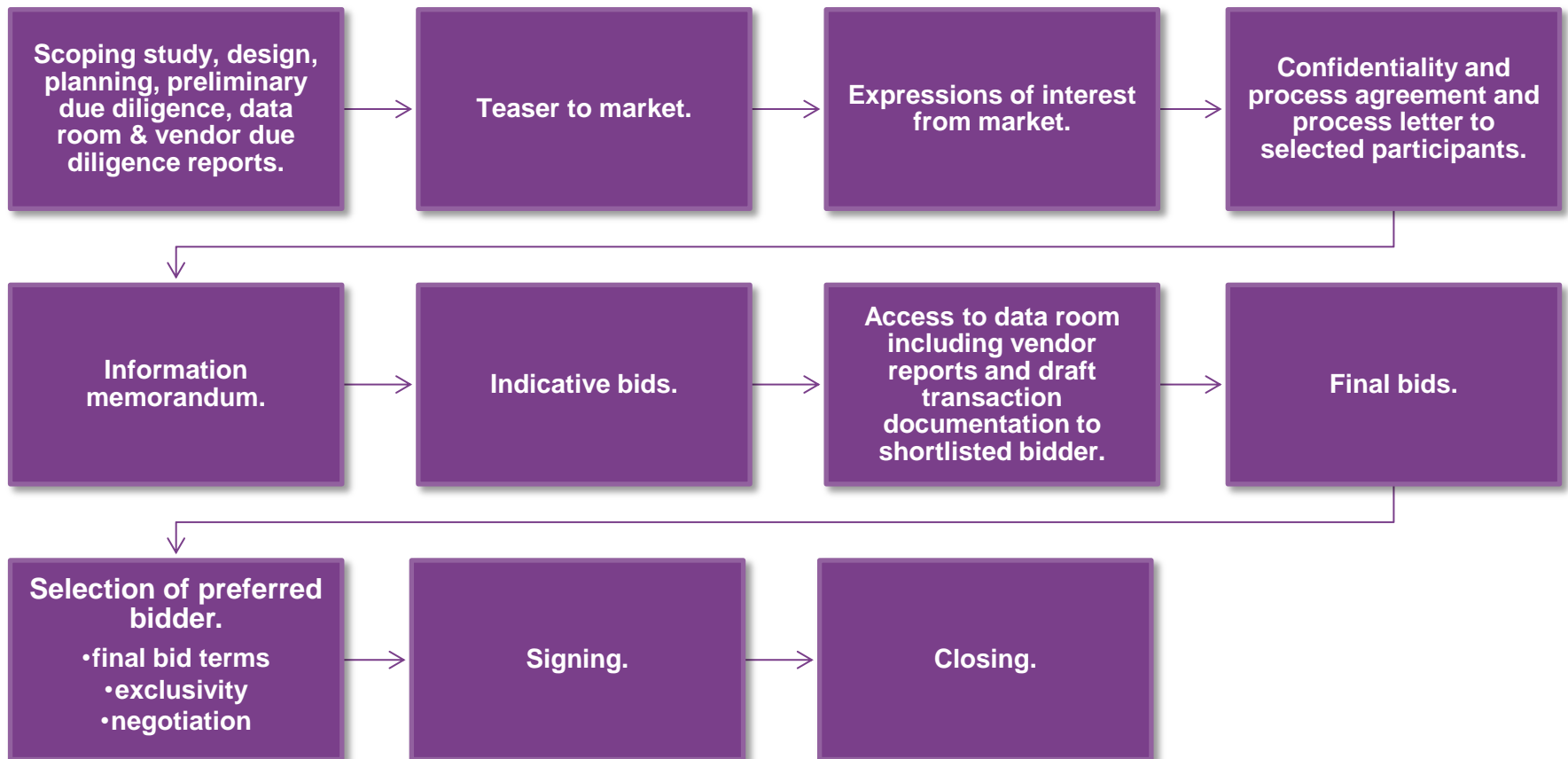
# What are some of the key legal issues?

Typical legal issues in designing competitive sale processes include:

- Anticipating and minimising conditions – FIRB, ACCC, MAC, Finance.
- Anticipating and minimising warranties and indemnities – accounts, information, environmental.
- Structuring due diligence – data room / vendor DD reports.
- Anticipating and planning for separation, restructuring and transitional issues.
- Business specific issues – anticipating what will be key to address in the case of a buyer.
- In the case of privatisations or publicly owned assets, probity.

# How does the process work?

Typical competitive sale processes involve a number of stages:





# What are some particular issues for buyer and seller In-house Counsel?

One important area that can be productive of dispute is the process...

- The process letter – flexibility.
- A process contract – BAFO or something looser.
- Exclusivity – a veil of tears.
- Highest bid – [AACo v AMP Life](#).
- When is a contract a contract – [MYOB case](#).
- Remembering [Masters v Cameron](#).

# What about bid rigging?

The cartel provisions are relevant to buyers.....

- *Norcast v Bradken*

## *Norcast SárL v Bradken Limited (No 2) (2013) 302 ALR 486;* [2013] FCA 235

- Norcast and Bradken were global competitors in the manufacture and supply of grinding mill liners.
- Norcast was owned by a financial sponsor, Pala.
- Over several years Bradken had expressed interest in acquiring Norcast and had made various approaches.
- In 2011, Pala initiated a sale process for Norcast.
- Most potential bidders were approached directly. Bradken was a special case. Based on previous approaches, Pala was unsure of Bradken's genuine interest. It was concerned that inviting Bradken into the process may encourage or facilitate a competitive fishing expedition. Tactically, it wanted to test Bradken's interest by having Bradken seek to become involved in the sale process. To have it make the first move.

## *Norcast SárL v Bradken Limited (No 2) (2013) 302 ALR 486;* [2013] FCA 235

- Bradken was made aware of the sale process indirectly but deliberately, through intermediaries.
- But it did not make the first move. Its evidence was that it believed it was being deliberately excluded from the sale process and, therefore, it procured Castle Harlan, one of its own former financial sponsor owners, to bid effectively as an agent for an undisclosed principal.
- On 6 July 2011, Castle Harlan purchased Norcast for \$190M.
- On 6 July 2011, seven hours later, Bradken bought Norcast from Castle Harlan for \$212M.
- Norcast sued.

## *Norcast SárL v Bradken Limited (No 2) (2013) 302 ALR 486; [2013] FCA 235*

- Bradken breached the cartel provisions of the CCA because it agreed with Castle Harlan it would not bid and that Castle Harlan would bid and, but for that agreement, Bradken and Castle Harlan would likely compete with each other and bid for Norcast. A broad reading of the cartel provisions was applied.
- Bradken breached the misleading and deceptive conduct provisions of the CCA because in taking 'deliberate and deceptive steps' to prevent disclosure of the facts that: (i) it had agreed with Castle Harlan that Castle Harlan would bid and it would not, (ii) it would purchase Norcast from Castle Harlan in a 'back to back sale', and (iii) it had been cooperating with Castle Harlan for several months, Bradken had represented by its silence that it was not involved in Castle Harlan's acquisition of Norcast.

# What is the most challenging aspect for a buyer's General Counsel?

In a genuinely competitive process, the critical task of the general counsel is to assess risk, make judgments and, by these means, assist the business development team to 'price in' risk. Where price is relatively equal, the extent of the mark-up can determine success or failure. This can be really uncomfortable! But there are a number of mitigants.

The sale contract:

- Approaches to conditions.
- Approaches to limitations, warranties and indemnities.
- Covenants.
- Simultaneous signing and closing.
- Earn outs.
- Insurance.

# When to treat buyers differently

Confidentiality and the black box:

- Strategic compared to financial.
- Approaches to competitive information, particularly pricing.
- The importance of the no solicit, no poach and no approach provisions of the confidentiality agreement.

# 2

## M&A trends in the technology sector



# What about the public market?

The dual track is back....

- Why was there a hiatus?
- Oz Forez.
- Healthscope.
- The bought deal.
- Market risk.

# How does a dual track differ?

## Dual track mechanics...

- Common or divergent diligence.
- The use of the prospectus.
- Separate teams and confidentiality.
- Deal certainty versus market risk.

# What other soft... or hard... issues are there?

There are numerous other non-legal issues to consider...

- Directors duties. The role of management and dynamics depending on the nature of the buyer. GN 19.
- The pre-emptive approach by the 'natural' owner.
- The unsolicited, topping bid.
- Rejection.

# 3

## Tax considerations in M&A

# Tax

Tax, including GST and stamp duty, is another important consideration. Tax outcomes can materially impact the bid price.

- Corporate tax.
- Stamp duty/ landholder duty.
- GST-free exemption for 'going concern' sales.

The Government has announced the going concern exemption will be replaced with a 'reverse charge.' This may have adverse stamp duty implications and is the subject of on-going consultations.

## 'Golden Rules'

# Golden Rules

- **Structure early!** You may need to move fast and if so, you do not want to wait to set up a company, get tax registrations, etc
- **Pre-empt the vendors' preferences!** – Everyone wants to achieve the CGT discount – best game in town b/c the tax rate is less than anything else. Typically triggers a share sale not an asset sale
- **Beware of new tax rules!** New anti-avoidance provisions, new CGT withholding provisions for Australian land (need to prove Australian residency or otherwise the Purchaser must withhold 10%)
- **Cross border creates complexities and opportunities!** Consider thin capitalisation, withholding tax, transfer pricing, etc



