
Federal Court imposes first criminal cartel fine

7 August 2017

Authors: Murray Deakin, Ira Chaudhri, Pauline Foster

In brief

Japanese shipping company, Nippon Yusen Kabushiki Kaisha (NYK) has been convicted of criminal cartel conduct in the Federal Court of Australia and fined AUD25 million. This is the first successful criminal prosecution of cartel conduct in Australia and attracted the second-highest fine that has ever been imposed by the Federal Court for cartel conduct.

The Commonwealth Director of Public Prosecutions (CDPP) charged NYK after a detailed Australian Competition and Consumer Commission (ACCC) investigation into the matter. NYK pleaded guilty to the charge. Notwithstanding NYK's guilty plea and its full cooperation with the ACCC and CDPP, a very substantial fine was nonetheless imposed. The ACCC is continuing its investigations into the activities of the other alleged cartel participants.

In detail

On 3 August 2017, in the decision of *Commonwealth Director of Public Prosecutions v Nippon Yusen Kabushiki Kaisha* [2017] FCA 876 (*CDPP v NYK*), NYK was convicted of criminal cartel conduct and ordered to pay a fine of AUD25 million. The Federal Court judgment followed on from the guilty plea that NYK entered on 18 July 2016 for a single “rolled-up” count of intentionally giving effect to cartel provisions in an arrangement or understanding with other global shipping lines. This impacted the shipping of motor vehicles into Australia from Asia, the United States and Europe between 2009 and 2012, in contravention of section 44ZZRG(1) of the *Competition and Consumer Act (2010) Cth* (CCA). See our publication, [First criminal cartel prosecution in Australia](#) for more information.

In delivering judgment, his Honour Justice Wigney noted that while it was not possible to determine the total value of the benefits obtained that were reasonably attributable to NYK's conduct, NYK derived revenue of AUD54.9 million, and profit of AUD15.4 million from the commerce affected by the conduct. Further, he held it was likely that the anti-competitive effect of NYK's conduct resulted in higher freight rates on certain shipping routes to Australia which were ultimately passed on to Australian consumers in the form of higher prices for the imported motor vehicles.

The AUD25 million fine is the second-highest fine that has ever been imposed in the ACCC's history (the highest was against the late Richard Pratt's Visy, which was fined AUD36 million). The maximum penalty that NYK could have incurred was AUD100 million, which represents 10 per cent of NYK's AUD1 billion annual turnover in connection with Australia in the 12 month period leading up to the commencement of

the offence. His Honour Justice Wigney indicated that a fine of AUD50 million would have been imposed in this case had it not been for the significant global discount of 50 per cent which was accorded to NYK due to NYK's early plea of guilty, and past and future assistance and cooperation. More specifically, NYK:

- agreed to plead guilty to the single “rolled-up” charge at a very early stage of proceedings, and before a full brief of evidence had been served on the CDPP;
- cooperated with Australian authorities in relation to both its own offence, and the alleged offences of the other participants, including by complying with the ACCC's voluntary requests for information and documents, and facilitating interviews of a number of NYK executives who could not otherwise have been compelled to travel to Australia for interviewing;
- undertook, pursuant to section 16AC of the *Crimes Act 1914* (Cth), for employees and executives of NYK to give evidence in accordance with any witness statements made by them in any proceedings commenced by the CDPP or the ACCC, and provide additional witness statements and attend such conferences as might reasonably be requested by the CDPP or the ACCC;
- has, since the discovery of the offending conduct, made demonstrated efforts to rehabilitate its corporate culture of compliance; and
- cooperated with the ACCC in another respect which was detailed in confidential evidence, and not referred to in the reasons for judgment except to say that “that cooperation was potentially significant”.

CDPP v NYK marks the first instance of a successful criminal cartel prosecution since the introduction of the criminal cartel regime in 2009, and the first instance in over 100 years in Australia where a cartelist was convicted, sentenced and fined for a breach of the criminal law. Following the Federal Court's judgment, the ACCC Chairman, Rod Sims, has emphasised that the ACCC has heavily invested in building its team of specialist criminal cartel investigators and it now has the capacity to appropriately conduct these sorts of criminal investigations. The ACCC has also provided the CDPP with briefs of evidence on several other cartel-related matters which may lead to the CDPP commencing further prosecutions.

The takeaway

The criminal sanctions levelled against NYK by the Federal Court demonstrates that anti-competitive conduct by multinational corporations who conduct business in Australia will be treated with the appropriate severity.

However, the leniency evinced by the discounted penalty also indicates that an early admission of guilt and cooperation with the investigating authorities may have favourable implications on the sentence imposed.

Let's talk

For a deeper discussion of how these issues might affect your business, please contact:

Murray Deakin, Partner
+61(2) 8266 2448
murray.deakin@pwc.com

Tony O'Malley, Partner
+61 (2) 8266 3015
tony.omalley@pwc.com

David Fleming, Director
+61 (2) 8266 5257
david.a.fleming@pwc.com

Sylvia Ng, Director
+61 (2) 8266 0338
sylvia.ng@pwc.com

© 2017 PricewaterhouseCoopers. All rights reserved. In this document, “PwC” refers to PricewaterhouseCoopers a partnership formed in Australia, which is a member firm of PricewaterhouseCoopers International Limited, each member firm of which is a separate legal entity. This publication is a general summary. It is not legal or tax advice. Readers should not act on the basis of this publication before obtaining professional advice. PricewaterhouseCoopers is not licensed to provide financial product advice under the Corporations Act 2001 (Cth). Taxation is only one of the matters that you need to consider when making a decision on a financial product. You should consider taking advice from the holder of an Australian Financial Services License before making a decision on a financial product.