
First criminal cartel prosecution in Australia

21 July 2016

In brief

Japanese shipping company, Nippon Yusen Kabushiki Kaisha (NYK) has pleaded guilty to criminal cartel conduct in the Federal Court of Australia. It is the first case in Australia where criminal charges have been laid against a corporation since the criminal cartel regime was introduced into the *Competition and Consumer Act 2010* (Cth) (Act) in 2009.

The charge was laid by the Commonwealth Director of Public Prosecutions (CDPP), following an investigation by the Australian Competition and Consumer Commission (ACCC).

The matter against NYK will now proceed to sentencing, with a directions hearing scheduled on 12 September 2016.

The ACCC has indicated in its subsequent media release that its investigations into other alleged cartel participants is continuing.

In detail

On 18 July 2016, NYK pleaded guilty to one count of an indictment that NYK gave effect to a cartel provision in breach of section 44ZZRG(1) of the Act. It is the first charge laid under the criminal cartel regime under the Act.

The charge pertains to the giving effect to cartel provisions in an arrangement or understanding with others in relation to the supply of ocean shipping services – specifically, in relation to the transportation of vehicles to Australia across a number of shipping routes between July 2009 and 2012.

There will now be a sentencing hearing, where NYK faces a maximum fine of the greater of:

- \$10 million,
- three times the total benefits it obtained which are reasonably attributable to the commission of the offence, or
- if the total value of those benefits cannot be determined, 10 per cent of the company's annual turnover during a 12 month period.

Earlier prosecutions

The ACCC's investigations have no doubt been triggered by earlier international investigations and prosecutions in the shipping and cargo industries. Regulators have increasingly been willing to cooperate and share intelligence in order to combat cartel and other anticompetitive behaviour that impact their own jurisdictions.

NYK has been the subject of prosecutions for cartel conduct in other overseas jurisdictions. The United States Department of Justice succeeded in its case against NYK, after the company pleaded guilty to price-fixing and bid-rigging conduct relating to its international roll-on, roll-off vehicle cargo. This resulted in a fine of US\$59.4 million imposed against NYK and a 15 months jail sentence for one executive for his involvement.

The Japanese Fair Trade Commission has also successfully prosecuted NYK for participating in an agreement in relation to fixing or maintain freight rates on shipping routes to various destinations, including Australia. NYK was fined ¥13 billion.

The takeaway

The ACCC has indicated that its investigations are continuing in relation to the other cartel participants. It remains to be seen whether or not more criminal charges will be laid by the CDPP.

The ACCC has stated in its Compliance and Enforcement Priorities that detecting and deterring cartel conduct continues to be a major focus. Earlier this year, the ACCC's Chairman stated the Commission had around twenty cartel investigations under way at any one time and predicted one or two criminal prosecutions this year, and some "important civil proceedings".

Let's talk

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

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

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

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

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