

Full Steam Ahead – Criminal Cartel Charges Roll On... in Australian Roll On/Roll Off Cargo Proceedings

Kawasaki Kisen Kaisha (known as K-Line), a Japanese-based shipping company, has been charged with alleged criminal cartel conduct "concerning the international shipping of cars, trucks, and buses to Australia between July 2009 and September 2012."¹ The charges follow an ACCC investigation and are being prosecuted by the Commonwealth Director of Public Prosecutions.

This is the second time criminal charges have been brought in relation to the alleged "Ro-Ro Cartel", which was covered by Clifford Chance in our briefing note in August 2016.² The allegations of cartel conduct involve global shipping companies fixing prices, allocating customers and shipping routes, and rigging bids in connection with the sale of international ocean shipments of "roll-on, roll-off cargo" to and from countries including the United States, Japan and Australia.

Fresh charges

K-Line is headquartered in Tokyo with an Australian subsidiary, K-Line (Australia) Pty Ltd. The prosecution against K-Line was before the Downing Centre Local Court in Sydney for its first mention on 15 November 2016 with reports indicating that K-Line will be contesting the charges.

Due to procedural requirements, the K-Line charges have commenced in

the State Court jurisdiction in New South Wales and will remain there until K-Line is committed for trial or sentence.

The Australian proceedings against NYK and now K-Line have followed successful cartel prosecutions of executives of the companies in the United States and Japan. The position K-Line will take in response to the Australian charges will be of keen interest, particularly given three of the company's former executives, Hiroshige Tanioka, Takashi Yamaguchi and Toru Otda pleaded guilty to a conspiracy in the United States. Under the US provisions, individuals face a maximum sentence of 10 years imprisonment and a USD 1 million fine, with statutory scope to increase a financial penalty in certain circumstances. Tanioka and Otda each received 18 months imprisonment, whilst Yamaguchi received a sentence of 14 months imprisonment. In accordance with their plea agreements, each executive

Key issues

- A second shipping company has been charged with alleged criminal cartel conduct in Australia - only the second time such charges have been brought under Australia's criminal cartel provisions
- The proceedings in Australia follow other investigations involving the company in overseas jurisdictions, including the successful prosecution in the US of three executives which have resulted in prison and fines
- Sentencing of the first shipping company has yet to take place but will be watched with keen interest. Financial penalties could be substantial.

also agreed to pay a USD20,000 fine and to assist the Department of Justice in their ongoing investigations in relation to the ocean shipping industry.³ The Department of Justice noted that Tanioka's sentence was the first to be imposed against an individual in the antitrust division's

ocean shipping investigation, with previous successes being against companies.⁴

The Australian charges will focus on shipping routes to Australia and have been made against the company. There have been no charges against individuals in connection with either company at this stage.

One successful prosecution – but no penalties yet

NYK was the first company to be charged by the Australian investigators under Australia's criminal cartel provisions, which fall under section 44ZZRG of the *Competition and Consumer Act 2010* (Cth) (CCA). NYK pleaded guilty almost immediately after the charge was laid and was directly indicted into the Federal Court as a result of its early indication of cooperation. NYK will be sentenced in the Federal Court on 11 and 12 April 2017.

The penalty imposed on NYK could be substantial. The offence is punishable by the greater of (a) AUD 10 million, (b) three times the total benefits that have been obtained and are reasonably attributable to the commission of the offence, or (c) if the total value of the benefits cannot be determined, 10% of the corporation's annual turnover connected with Australia.

The sentencing proceedings of NYK will provide a stark example of the differences between ACCC civil penalty proceedings and criminal sentencing proceedings, due to the limitations imposed by the High Court of Australia decision of *Barbaro*⁵ on the submissions a criminal prosecutor can make on sentence. The impact of this decision in civil penalty

proceedings was determined by a subsequent High Court decision of *CFMEU*⁶. In *Barbaro* the High Court held that the prosecution cannot nominate a desired sentencing range or outcome to be applied in criminal proceedings. In the *CFMEU* decision, the High Court held in relation to civil penalty proceedings, that due to the different nature of civil penalties, courts were not precluded from considering agreed positions as to penalties and if after consideration they are deemed appropriate, imposing a penalty that has been agreed between the parties.

Historically, agreed civil penalty submissions have been used by the ACCC in sentencing submissions where the parties have negotiated a desired outcome. It had also been common practice, until the decision in *Barbaro*, that in criminal proceedings, the prosecution would nominate a range of available penalties based on previous decisions for the court to consider. While the *CFMEU* decision supported the ACCC's standard practice in relation to submissions for civil penalty proceedings, its hands remain tied in criminal sentencing proceedings which are conducted by the Commonwealth Director of Public Prosecutions. This will likely impact the ultimate result in NYK, in what is an already difficult sentencing exercise as it is the first time a criminal penalty will be imposed in respect of a criminal cartel offence. While the provisions governing sentencing in Commonwealth criminal matters⁷ require the court to have regard to a range of factors such as cooperation, sentencing is ultimately a matter for the court and not for the parties to negotiate.

The ACCC's inability to demonstrate any concrete benefits during pre-charge negotiations that resulted from

an early guilty plea, and the restraints imposed by *Barbaro* may be a possible reason for the reports of K-Line's likely position in relation to the criminal charges against it. It remains to be seen whether K-Line will fully contest the charges and whether the matter will first proceed to a committal hearing (a procedural feature available in NSW) or whether committal will be waived and the matter proceed straight to a trial. The next steps will be watched with interest given it will be the first time anti-competition law and criminal law have intersected in Australia in relation to alleged cartel conduct requiring the need for expertise in both areas.

¹ See ACCC media release dated 15 November 2016 <http://www.accc.gov.au/media-release/criminal-cartel-charges-laid-against-k-line>

² See Clifford Chance client briefing dated 1 August 2016 https://www.cliffordchance.com/briefings/2016/08/accc_proceedingsbroughtagainstnykinshipping.html

³ See media releases from the United States Department of Justice dated 30 January 2015 <https://www.justice.gov/opa/pr/ocean-shipping-executive-pleads-guilty-price-fixing-ocean-shipping-services-cars-and-trucks>, 6 February 2015 <https://www.justice.gov/opa/pr/second-ocean-shipping-executive-pleads-guilty-price-fixing-ocean-shipping-services-cars-and>, 26 March 2015 <https://www.justice.gov/opa/pr/fourth-ocean-shipping-executive-pleads-guilty-price-fixing-ocean-shipping-services-cars-and> (*readers will note the fourth executive to plead was an NYK executive*)

⁴ See media release from the United States Department of Justice dated 30 January 2015 <https://www.justice.gov/opa/pr/ocean-shipping-executive-pleads-guilty-price-fixing-ocean-shipping-services-cars-and-trucks>

⁵ *Barbaro v The Queen* [2014] HCA 2

⁶ *Commonwealth of Australia v Director, Fair Work Building Industry Inspectorate; Construction, Forestry, Mining and Energy Union v Director, Fair Work Building Industry Inspectorate* [2015] HCA 46

⁷ See s 16A(2) *Crimes Act 1914* (Cth)

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