LEGAL AND PRACTICAL IMPLICATIONS OF AUSTRALIA'S FIRST CRIMINAL CARTEL CASE IN 100 YEARS

COMMONWEALTH DIRECTOR OF PUBLIC PROSECUTIONS v. NIPPON YUSEN KABUSHIKI KAISHA

On 3 August 2017, his Honour Justice Wigney delivered the first criminal cartel judgment under the criminal cartel provisions of the Competition and Consumer Act 2010 (Cth) (CCA) against Nippon Yusen Kabushiki Kaisha (NYK), a Japanese shipping line.

The decision is informative as it underlines the importance of compliance with Australia's cartel laws and that if Justice Wigney's approach is followed, significantly higher penalties will be imposed for criminal cartels. The decision is also important as to the extraterritorial operation of Australia's criminal cartel laws.

Key issues

- The criminal cartel provisions of the CCA have extra-territorial operation and therefore companies may be prosecuted for their actions in both Australia as well as offshore.
- The penalties for breach of the criminal cartel provisions are high and, if the approach in this case is adopted, it is likely that Australian Courts will impose penalties at the higher end of the available range, which is 10% of annual turnover.
- Cooperation at an early stage of a cartel investigation, and remorse, are likely to result in lesser penalties being imposed by an Australian Court.
- Clifford Chance can assist you to put in place procedures to ensure compliance with these provisions of the CCA.

1. INTRODUCTION

The NYK decision[1] represents the outcome of a matter investigated by the Australian Competition and Consumer Commission (**ACCC**). However, as it was a criminal matter, the proceedings were brought by the Australian Commonwealth Director of Public Prosecutions (**CDPP**).

NYK had pleaded guilty and accordingly the only question for determination by the Court was the amount of the penalty to be imposed. Based on NYK's agreed figure for annual turnover of approximately AUD1 billion relating to Australia, given the maximum penalty for one offence is 10% of annual turnover, the penalty could have been an amount of AUD100 million.

NYK submitted that, in all the circumstances, an appropriate penalty range would be a fine in the order of AUD20 million to AUD25 million. As the case was a criminal prosecution the CDPP, following the High Court decision in *Barbaro v. The Queen (2014) 253 CLR 58*, was unable to put forward a suggested penalty. The CDPP was only able to respond to the penalty submission by the defendant, by indicating whether it would be open to the Court to impose a penalty in the range submitted. The CDPP's submission in

[1] *Commonwealth Director of Public Prosecutions v. Nippon Yusen Kabushiki Kaisha [2017] FCA 876*

the circumstances was, somewhat half heartedly, that "no submission is made that a court would fall into appealable error in relation to the range of penalty suggested by NYK".

Justice Wigney imposed a penalty of AUD25 million. His Honour noted that, in the absence of NYK's early guilty plea, cooperation and remorse, the penalty would have been higher. His Honour considered that, absent these factors, he would have been inclined to impose a fine of AUD50 million. Therefore these factors led to a discount of 50%.

The NYK decision is important, not only because of its analysis of the criminal cartel provisions of the CCA, but also because it indicates that Australian courts will be likely, if they adopt Justice Wigney's approach, to impose significantly higher penalties for offences than will be applied in civil cases. Justice Wigney also noted that any suggestion of a direct correlation between the profits arising from the offence and the penalty imposed is misplaced. In his Honour's view, in a criminal penalty assessment there are many other factors to be taken into account given the seriousness of the conduct.

For additional background on the NYK decision, please also see our earlier briefing here.

2. ACCC FOCUS ON CARTEL CONDUCT

While the ACCC Chair, Rod Sims, has noted that this is the first time criminal cartel charges have been laid in Australia in a little over 100 years (that is, since a coal mining and shipping cartel prosecution in 1910), the area of cartels is a key focus for the ACCC in Australia.

Criminal cartel conduct attracts not just pecuniary penalties under the CCA, but also the possibility of jail sentences of up to 10 years per offence. ACCC Chair Rod Sims has stated:

> *"Cartel conduct is an enduring priority for the ACCC and unfortunately we continue to see too much of this activity. I fear that only jail sentences for individuals in prominent companies will send the appropriate deterrence messages."*

The ACCC Chair further noted in a recent media release dated 5 August 2017 that:

> *"We have built a substantial team of specialist criminal cartel investigators. This has been a huge investment by the ACCC. We now have a strong capacity to conduct careful and thorough criminal investigations.*
>
> *As a consequence, we have provided briefs of evidence to the Commonwealth Director of Public Prosecutions (**CDPP**) on a number of cartel-related matters. We look forward to the CDPP assessing and determining whether there is a basis for commencing prosecutions against any of the parties we have identified.*
>
> *To put this another way, our criminal cartel machine is now built, and running at its appropriate capacity. You will now see its continuing output."*

With a different form of warning, Justice Wigney concluded his judgment (at paragraph 300) with:

"Cartel conduct of the sort engaged in by NYK warrants denunciation and condign punishment. It is inimical to and destructive of the competition that underpins Australia's free market economy. It is ultimately detrimental to, or at least likely to be detrimental to, Australian businesses and consumers. The penalty imposed on NYK should send a powerful message to multinational corporations that conduct business in Australia that anti-competitive conduct will not be tolerated and will be dealt with harshly. That is so even where, as here, the decisions and conduct are engaged in overseas and as part of a global cartel."

3. BACKGROUND ON THE NYK DECISION

NYK had pleaded guilty to a single charge under section 44ZZRG(1) of the CCA from the CDPP. The charge related to conduct occurring during the period between 24 July 2009 and approximately 6 September 2012, in Japan and elsewhere, in connection with the transport of vehicles to Australia. In Australia, NYK operated a local subsidiary which arranged ancillary services such as berthing, stevedoring and other port and landside services for vessels in Australia. NYK Australia carried out that work on instructions from NYK's head office in Japan, but there appears to have been no evidence that this local company was aware of the anti-competitive purpose of these instructions.

The charge was based on NYK having knowingly given effect to cartel provisions in an arrangement with five other shipping lines, knowing or believing that the arrangement or understanding contained cartel provisions contrary to the relevant provision of the CCA.

NYK agreed a Statement of Agreed Facts (**SOAF**) with the CDPP, so that the facts in relation to the allegation were largely undisputed. It was admitted by NYK that from at least February 1997, NYK and a number of other shipping companies, had arrived at an understanding to the effect that, "as a general proposition, they would not seek to alter the existing market shares or otherwise win existing businesses from each other". That overarching arrangement or understanding was generally referred to as "maintaining the status quo" or giving and receiving "respect" - it was therefore referred to as the "Respect Agreement" in the judgment.

Based on the SOAF, Justice Wigney found that over the three year period covered by the charge period NYK was involved in shipping 69,348 new vehicles to Australia, with a revenue of AUD54.9million and a profit of AUD15.4 million. His Honour noted that it was likely that the anti-competitive effect of the offending conduct was to create higher freight rates on the shipping routes to Australia and that these higher freight rates were passed through to Australian consumers in the form of higher prices for imported cars and trucks. This was a very serious offence against Australia's laws prohibiting cartel conduct.

Of course, Australia is not the only jurisdiction in which a penalty has been imposed for this conduct. In 2014 the Japan Fair Trade Commission (**JFTC**) issued surcharge orders against NYK for approximately AUD157 million, of which approximately AUD20 million was for coordination on the Oceania Route, of which 87% related to shipping to Australia.

Further in December 2014, NYK agreed to plead guilty and pay a criminal fine of USD54.4 million to the US Department of Justice (**DoJ**). An executive of

NYK's Car Carrier Group also pleaded guilty and paid a fine of USD20,000.00 and was sentenced to 15 months imprisonment.

Further fines were imposed in South Africa of approximately AUD10,202,582, Chile has sought a fine of approximately USD25 million and China fined other carriers Wallenius Wilhelmsen, Eukor, K-Line, Mitsui and three other shipping lines a total of USD65 million, although NYK was not fined as it was the immunity applicant in China.

4. CO-OPERATION BY NYK

In September 2012, NYK was raided by the JFTC and the DoJ. By October 2012 NYK, after having been approached by the ACCC based on media reports of the JFTC and DoJ actions, contacted the ACCC to offer cooperation.

In addition to being the first criminal prosecution of its kind, the judgment provides a case study example of the benefits of cooperation with authorities and its effect on penalty in a criminal prosecution in Australia. It also provides real guidance as to how a corporation can make use of a formal undertaking to cooperate with authorities and provide future assistance against others in a criminal cartel context.

In this particular factual circumstance, full cooperation meant, in addition to agreeing the SOAF:

- making NYK executives available to the ACCC for interview, where they would not have been otherwise compelled to attend as they were based outside Australia;
- providing materials in relation to their own offending and also the offending of others, in circumstances where detection of other cartel conduct is notoriously difficult;
- NYK also provided an undertaking to the ACCC to provide future assistance in relation to further investigations into the cartel, including that employees and executives of the company will give evidence (including in person) in accordance with any witness statements made by them in any proceedings commenced by the CDPP or the ACCC. They also undertook to provide NYK employees for additional witness statements and to attend conferences where reasonably requested.

As a result of this cooperation, the ACCC and CDPP did not have to prepare a full brief of evidence, which saved the ACCC considerable time and money, and saved both parties additional court costs.

The SOAF has some possible additional benefits for NYK, as it provides a means of establishing specific facts. Having that agreed factual basis may ameliorate some of the risk associated with follow-on class actions. However, NYK's guilty plea increases the likelihood that such class actions may be commenced in Australia.

Given NYK's cooperation, the proposed charges, initially identified as being for at least 20 separate occasions of cartel conduct, were "rolled up" into one charge. This in itself reduced the maximum penalty for the conduct.

5. CLAIMS AGAINST INDIVIDUALS

The offending conduct was said to involve senior members of NYK as well as of other companies. There appears to have been no charges brought against

any individuals in Australia, although the actions of certain individuals were referred to in the judgment. This is possibly because, as Justice Wigney noted, while section 44ZZRG of the CCA had extraterritorial operation, all of the offending conduct occurred outside of Australia. Based on the SOAF Justice Wigney noted:

"All of the collusive arrangements and discussions, and all of the contracts that resulted from them, were engaged in overseas. It would appear that none of the NYK managers who were involved in conduct were Australian citizens or residents. Section 5 of the [CCA] provides that the provision of, inter alia, Part IV of the [CCA] extend to, relevantly, the engaging in conduct outside Australia by bodies corporate incorporated or carrying on business in Australia. NYK was not incorporated in Australia, however it is an agreed fact that NYK carried on business in Australia. It is on that basis that s44ZZRG extends to NYK's offending conduct, occurring as it did outside Australia.

In other circumstances, where there is action taken in Australia by individuals in breach of the cartel provisions, it would seem very likely that those individuals would be prosecuted as well.

6. ANALYSIS OF PENALTY ASSESSMENT

Justice Wigney approached this matter from a particular perspective, noting the Second Reading Speech to the July 2009 amendments to then *Trade Practices Act 1974 (Cth)*, and explained the rationale for criminalising cartel conduct:

> *"Competition is the primary means of ensuring that consumers get the best product or service for the lowest price possible. Competition enhances Australia's welfare generally, because the efficiencies it creates lead to improved productivity and ultimately increased standards of living.*
>
> *Cartels are widely condemned as the most egregious forms of anti-competitive behaviour. At its heart, a cartel is an agreement between competitors not to compete. Cartel conduct harms consumers, businesses and the economy by increasing prices, reducing choice and distorting innovation processes."*

While negotiations saw the parties agree to a quantum of "benefits" for the purpose of sentencing, the fact that these were criminal proceedings meant that the parties could not make an agreed penalty submission due to the *Barbaro (2014)* considerations mentioned earlier.

The Court heard of NYK's contrition and compliance since the raids in the US and Japan in September 2012. NYK had undertaken internal investigations, accepted resignations from top officers and cut the salaries of others. It established a Compliance Executive Committee and also conducts regular audits to ensure compliance with relevant obligations. His Honour indicated that this evidence established there was "no doubt" NYK had strengthened its compliance culture.

The CCA permits three alternative penalty options for cartel conduct. 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 (as defined in section 44ZZRB) in Australia. The Court concluded that the total value of the benefits

obtained by NYK reasonably attributable to the commission of the offence (ie, as necessary for "option (b)") could not be determined. This is because "benefit" would not necessarily attach only to a calculation of profit but to any intangible benefits such as reputation or goodwill. A benefit could also be obtained by a third party who is not the offender in question. It is likely this issue will be significant in future cases, given the difficulty of quantifying the full range of direct and indirect advantages achieved from criminal conduct when applying this broad definition of benefit.

Conveniently, it was agreed between NYK and the CDPP that NYK's annual turnover for the 12 months prior to the commencement of the offence was approximately AUD1 billion. The maximum penalty NYK could be liable for under "option (c)" was therefore AUD100 million. His Honour considered this was the maximum penalty he could impose on NYK.

An officer of the ACCC gave evidence that NYK had provided "full, frank and truthful disclosure and cooperated fully" and that the cooperation had been "significant and valuable". Without this early plea and cooperation (including a promise of future cooperation), his Honour indicated the penalty imposed would have been AUD50 million. According to Justice Wigney, the final penalty of AUD25 million aimed to "send a powerful message to multinational corporations that conduct business in Australia that anti-competitive conduct will not be tolerated and will be dealt with harshly".

Practically, the result is an even stronger reminder of the importance of ensuring your company's internal compliance is monitored and taking proactive action to report suspected cartel conduct under the ACCC's immunity policy, if available, or to otherwise fully cooperate if investigated, depending on the particular facts involved.

Criminal cartels are generally considered the most serious examples of cartel conduct requiring a penalty reflecting the higher punitive objective under a criminal prosecution and will ordinarily be expected to attract penalties towards the maximum range absent the significant cooperation as seen in these circumstances involving NYK.

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