

NEW RECORD CARTEL PENALTIES IN AUSTRALIA.

NEW RECORD CARTEL PENALTIES IN AUSTRALIA IS REFLECTIVE OF THE ACCC'S AND AUSTRALIAN COURTS TOUGHER STANCE AGAINST HARD CORE CARTELS

The Australian Competition & Consumer Commission (ACCC) has succeeded in its appeal from an initial penalty of AUD9.5 million imposed by the Federal Court against Japanese corporation Yazaki Corporation for cartel conduct.

The ACCC had appealed the decision on the basis that the penalties were insufficient given the nature of the hard-core cartel conduct that had occurred and sought a penalty between AUD42 million and AUD55 million. On 16 May 2018, the Full Federal Court agreed, upholding the ACCC's appeal on penalty and ordered that the fine be increased to an Australian record penalty of AUD46 million.

The Full Court decision is important for the ACCC's harder line on cartels and penalties for contraventions of Australian competition laws. ACCC Chairman Rod Sims has stated:

"If penalties don't match the serious nature of the conduct, we run the risk that big businesses will simply view the penalties for breaking Australia's competition laws as no more than a cost of doing business".¹

BACKGROUND

On 30 May 2017, the ACCC appealed against the Federal Court trial judge's decision noting that the penalty was "insufficient to adequately deter Yazaki or other businesses from engaging in cartel conduct in the future". The cartel conduct was alleged to have been between two Japanese corporations, Yazaki Corporation and Sumitomo Electric Industries Ltd, and their Australian subsidiaries, Australian Arrow Pty Ltd and SEWS Australia Pty Ltd, which supplied wire harnesses, which distribute electric signals in motor vehicles. The ACCC pursued the cartel participant for civil penalties for breaches of the Competition and Consumer Act 2010 (CCA).

On 16 May 2018, the Full Federal Court increased the penalty ordered against Yazaki to AUD46 million – the highest penalty amount ever imposed under the CCA. The increase in penalty was based on the Full Court's interpretation of the CCA, that the annual turnover of "the body corporate" referred to in the legislation applies to the whole group, not simply the subsidiary directly involved in the contravention. With this increased turnover the maximum

Key issues

- ACCC pursued the appeal as it believed that the initial penalty was insufficient given the seriousness of Yazaki's conduct
- ACCC succeeded in arguing that the relevant turnover was for the relevant group in Australia and therefore the maximum penalty was higher at approximately AUD87 million
- Looking at the course of conduct and the factors that Courts should take into account in assessing penalty (which included that Yazaki did not have a compliance program in place at the relevant time), the Full Federal Court found that the overall penalty should be significantly higher
- The AUD46 million penalty (from AUD9.5 million) demonstrates a tougher line that the ACCC and Courts will take in relation to deliberate anti-competitive conduct and in particular hard-core cartel conduct
- The Full Federal Court's decision in Yazaki shows the ACCC's view as to the need for stronger penalties has been accepted by the Courts. It is also a significant warning that international companies carrying on business in Australia need to ensure they comply with Australian competition laws or face significant penalties, or in the case of cartels, possible criminal sanctions.

¹ <https://www.accc.gov.au/media-release/accc-appeals-yazaki-corporation-penalty-decision>

penalty was AUD87,411,359 and applying the principles applied by the trial judge, as well as finding that there were additional contraventions that were not part of the same course of conduct, the Full Court determined an appropriate penalty was AUD46 million.

The ACCC Chairman Rod Sims stated in the ACCC's Media Release² that:

"Cartel conduct is illegal because it not only cheats consumers and other businesses, it also restricts healthy economic growth. For this reason, it is of considerable importance that penalties imposed by the Courts are large enough to act as a sufficient deterrent to prevent companies and their employees contravening Australia's competition laws. The ACCC is continuing to seek penalties which are high enough to deter anti-competitive conduct, particularly by large national and multinational corporations."

AUSTRALIA'S PENALTIES IN THE INTERNATIONAL SPOTLIGHT

The decision comes after the ACCC declared on 26 March 2018, that it would "re-think its approach to penalties for breaches of the competition law"³. This announcement accompanied the launch of a report by the Organisation for Economic Co-operation and Development (OECD), which considered the penalties imposed for breaches of competition laws in Australia together with the EU, the UK, Germany, Japan, Korea and the USA⁴. The diversity of jurisdictions analysed provided a "valuable mix of characteristics that reflect the variety of competition law regimes across the world and illustrate the breadth of approaches in different legal systems".

With the ACCC currently reflecting on the OECD's report, including the possibility of developing penalty guidelines, the Full Court decision will likely increase its appetite to push for larger penalties.

ACCC CARTEL ENFORCEMENT INCREASES

Under the relevant legislation, the ACCC can pursue cartel participants both criminally and civilly. Whilst the record breaking penalty relates to civil penalties, the ACCC are also pursuing other criminal cartel cases that in Australia are brought by the Commonwealth Director of Public Prosecutions (CDPP). On 18 July 2016, one of the cartel participants, Japanese shipping company NYK, pleaded guilty to charges of criminal cartel conduct and was subsequently convicted and fined AUD25 million on 3 August 2017.⁵ See our Briefing [here](#).

K-Line was the second Japanese shipping company, after NYK, to plead guilty to charges of criminal cartel conduct in the Federal Court of Australia on 5 April 2018. K-Line's sentencing, scheduled to be heard in the Federal Court on 15 and 16 November 2018 will be watched with significant interest as it will highlight any disparity in penalties imposed for criminal conduct of the same nature. This is likely to be a difficult sentencing exercise for the CDPP as,

² <https://www.accc.gov.au/media-release/record-46-million-in-penalties-for-yazaki-cartel>

³ <https://www.accc.gov.au/media-release/oecd-finds-australian-competition-law-penalties-are-significantly-lower>

⁴ Pecuniary Penalties for Competition Law Infringements in Australia 2018 - <http://www.oecd.org/daf/competition/pecuniary-penalties-competition-law-infringements-australia-2018.htm>

⁵ ACCC media release, 5 April 2018, "Second Shipping Company Pleads Guilty to Criminal Cartel Conduct" release number: 62/18: <https://www.accc.gov.au/media-release/second-shipping-company-pleads-guilty-to-criminal-cartel-conduct>

unlike in civil penalty proceedings, submissions on sentencing range cannot be received by the Court.

On 15 February 2018, the CDPP brought criminal charges against The Country Care Group Pty Ltd, its Managing Director and a former employee. It is the first criminal prosecution of an Australian corporation under the CCA and it is the first time that individuals have been prosecuted under the criminal cartel provisions. The charges relate to alleged cartel conduct involving assistance technology products and rehabilitation and aged care services. These charges have been filed in the Magistrate's Court in Victoria. If the Magistrate determines there is sufficient evidence that the trial should proceed, it is likely to end up in the Federal Court of Australia.

THE FULL FEDERAL COURT DECISION IN YAZAKI IS INDICATIVE OF THE SERIOUSNESS THAT AUSTRALIAN COURTS ARE TREATING PENALTIES FOR HARD CORE CARTEL CONDUCT

The Full Federal Court's decision in Yazaki shows the ACCC's view as to the need for stronger penalties has been accepted by the Courts. It is also a significant warning that international companies carrying on business in Australia need to ensure they comply with Australian competition laws or face significant penalties, or in the case of cartels, possible criminal sanctions.

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