

K-LINE RECEIVES A RECORD \$34.5M FINE FOR CRIMINAL CARTEL CONDUCT

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Legal Briefings - By **Annalisa Heger and Damien Devnarain**

Kawasaki Kisen Kaisha Ltd (**K-Line**) has received the largest criminal fine imposed under the Competition and Consumer Act, after pleading guilty to criminal cartel conduct in 2018.

Justice Wigney of the Federal Court stated that the penalty “*should send a powerful message to multinational corporations*” and that “*anti-competitive conduct will not be tolerated*”. It is only the second sentencing decision in a criminal cartel case in Australia – one of the other shipping companies party to the agreement, Nippon Yusen Kabushiki Kaisha (**NYK**), also faced criminal cartel charges and was fined \$25 million in 2017.

BACKGROUND TO THE OFFENCE

K-Line is a large Japanese shipping company and its services include the shipment of ‘roll on, roll off’ cargo such as cars, trucks, buses and other vehicles to Australia. K-Line and a number of other competitor shipping companies entered into a world-wide agreement that they would seek to maintain the status quo by not altering their existing market shares or otherwise winning business from one another (referred to as the ‘Respect Agreement’). In giving effect to the Respect Agreement, the shipping companies agreed on freight prices for customers for routes to Australia and conferred on participation and pricing when bidding for future contracts.

The conduct occurred from 1997 to 2012, although the charges only related to conduct from 2009 to 2012; the start of the period coinciding with the introduction of the criminal cartel offence in Australia. K-Line sought immunity from prosecution, but this was unavailable as K-Line was not the ‘first in’ to notify the alleged cartel to the ACCC.

DETERMINATION OF THE FINE

In determining the amount of the fine, Wigney J balanced a number of competing factors. In its favour:

- K-Line had pleaded guilty and cooperated with the ACCC; and
- K-Line had undertaken initiatives to change its corporate culture and facilitate compliance, and had demonstrated rehabilitation and remorse.

However, a number of factors suggested that a harsher fine should be imposed:

- the serious nature of cartel offences;
- the shipping market was economically essential for Australia and there was a risk that consumers may have been affected by the conduct; and
- it was a deliberate, systematic and longstanding global cartel.

Justice Wigney ultimately held that a fine of \$34.5 million was appropriate. But for K-Line's guilty plea and cooperation, K-Line would have received a fine of \$48 million.

KEY TAKEAWAYS

- Agreements between competitors create a risk of breaking the law where they fix prices, restrict supply, allocate markets or amount to bid rigging. Both making and giving effect to such agreements are prohibited by Australian competition law;
- Companies should be mindful of the importance of ongoing reviews of business activities for compliance with competition law;
- Courts are willing to impose harsh penalties on cartel members given the destructive impact of cartels on competition and the Australian economy;
- Courts will impose these penalties even when the conduct was part of a global cartel and

decisions took place overseas;

- The ACCC is an active regulator that will continue to scrutinise suspected cartel conduct and pursue legal action against cartel members; and
- The ACCC operates a 'first in' immunity and cooperation policy which confers full protection from prosecution and penalty to the first eligible cartel participant to report its involvement in a cartel. The immunity applicant must cooperate with the ACCC's investigation and prosecution of other cartel members.

KEY CONTACTS

If you have any questions, or would like to know how this might affect your business, phone, or email these key contacts.



ANDREW EASTWOOD
PARTNER, SYDNEY

+61 2 9225 5442
Andrew.Eastwood@hsf.com



CHRISTINE WONG
PARTNER, SYDNEY

+61 2 9225 5475
Christine.Wong@hsf.com

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