A first of its kind Australian conviction of a Japanese company for cartel conduct shows reforms in this area of the law are starting to work and these cases can be prosecuted successfully.

Japanese shipping company, NYK, had been fixing freight rates, rigging bids and dividing markets in shipping cars en route to Australia, over a period of more than three years. The company pleaded guilty to charges relating to this conduct, was fined $25 million by the Federal Court, discounted from $50 million for its contrition and its early cooperation as well as its promise of ongoing cooperation.

This cooperation means its alleged co-conspirators in the cartel – another four foreign shipping companies – are likely to go to court over this as well.

Cartel conduct was made a criminal offence in 2009, after a long and contested debate. Some competition lawyers and academics argued that criminal treatment of cartelists was inappropriate because their conduct was not sufficiently morally reprehensible. Others were concerned about the practical burdens of administering a criminal regime.

But the successful prosecution of this first case, and the damning comments by the judge in particular, will be held up by the Australian Competition and Consumer Commission (ACCC) and many others as a vindication of the reform.

According to the judge in this case, Justice Wigney:

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… [it] should serve as a clear and present warning to others.

The ACCC has long been arguing that this conduct deserves to be treated as criminal. This argument has a fundamental economic rationale.

Cartels distort and may even destroy the competition that drives a free market economy. They deprive consumers and businesses of the benefits and opportunities that competition would otherwise deliver and so strike at the heart of a system crucial to our economic welfare.

In this case, according to the sentencing judge, the cartel freight rates may well have been passed on to Australian consumers in the form of higher prices for the imported vehicles on the relevant shipping routes.

The company in this case, NYK, derived revenue of A$54.9 million and profit of A$15.4 million from the cartel. What's more, the company's senior executives appear to have shown a flagrant defiance of the rules, in a way that may be seen as morally objectionable so as to justify treating the conduct as criminal.

To some extent the outcome also shows that criminal enforcement of anti-cartel laws can work in Australia. More than 30 countries have already criminalised this kind of activity. However, outside of the US, the enforcement record has been patchy at best and in some jurisdictions like the UK, there have been some spectacular failures.

When the Australian regime was enacted in 2009, there were many doubters. The reform required the ACCC to build its capacity to investigate and, in conjunction with the Commonwealth Director of Prosecutions (an agency with which its relations had been strained in the past), prosecute serious crime. There were particular concerns about how the CDPP would apply the ACCC's immunity policy for cartel conduct - a policy critical to the effective detection and prosecution of this activity.

It remains early days – contested trials involving accused individuals and potentially sceptical juries await. However, the ACCC can be deservedly proud of this result in its first crack at a criminal cartel prosecution

The A$25 million fine is the second largest fine imposed under our competition laws to date (the largest, a fine of A$37 million against the packaging giant Visy, still stands). The size of the fine is significant in various ways.

It was a quarter (and could have been half, had it not been for the company's cooperation) of the maximum penalty of A$100 million. This would have been 10% of NYK's annual turnover. The court's readiness to impose a fine of this magnitude shows courts are lifting the benchmark for financial penalties for anti-competitive conduct .

The news that a large Japanese company has admitted to this type of egregious law-breaking is likely to do nothing to assuage public mistrust of big business and anxiety about the consequences of a globalised economy generally. However, the NYK sentencing should at least provide some assurance that there are public institutions that can and will take action to hold corporate law-breakers to account.

But none of the NYK executives or managers responsible for the conduct were charged, just their employer. There may be several reasons for this, including their location outside of the jurisdiction and possibly also the terms of the cooperation agreement struck between the prosecutors and the company.

If Australia's criminal laws against cartel conduct are to live up to their potential in punishing but also deterring this type of conduct, individuals also need to be held to account. This will present a further challenge. However, if the handling of the proceedings against the Japanese shipping cartel is any indication, the competition cop would appear more than up to meeting it.

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