FEDERAL COURT OF AUSTRALIA

Commonwealth Director of Public Prosecutions v Kawasaki Kisen Kaisha Ltd [2019] FCA 1170

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| File number: |  |
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| Judge: | **WIGNEY J** |
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| Date of judgment: | 2 August 2019 |
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| Catchwords: | **CRIMINAL LAW** – sentencing – cartel conduct – giving effect to a cartel provision against s 44ZZRG(1) of the *Competition and Consumer Law Act 2010* (Cth) – where offender is a corporation – where employees of corporation not residents or citizens of Australia – where offending conduct occurred outside Australia – where offender plead guilty to a single rolled-up offence against s 44ZZRG(1) – consideration of appropriate sentence – where offender provided bulk shipping services of “roll on, roll off” cargo to Australia – where penalties imposed on offender in overseas jurisdictions – where statement of contrition made – where offender gave evidence of measures implemented to strengthen compliance – consideration of sentencing factors in s 16A(2) of the *Crimes Act 1914* (Cth) – where multiple offences committed against s 44ZZRG over many years – where sentence proceedings conducted on the basis of agreed facts – consideration of appropriate discounts for mitigating factors including plea of guilty, cooperation with law enforcement agencies and remorse – consideration of specific and general deterrence in sentencing cartel conduct – consideration of totality principle and parity with sentence imposed on co-offender. |
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| Legislation: | *Competition and Consumer Act 2010* (Cth) ss 4F, 5, 44ZZRB, 44ZZRD(1), 44ZZRD(2), 44ZZRD(4), 44ZZRG(1), 44ZZRG(2), 44ZZRG(3), 44ZZRK, 45AK, 76(1), 76(1A), Pt X ss 10.17 and 10.17A  *Crimes Act 1914* (Cth) ss 16A(1), 16A(2)(a), 16A(2)(c), 16A(2)(d), 16A(2)(e), 16A(2)(f), 16A(2)(g), 16A(2)(h), 16A(2)(j), 16A(2)(ja), 16A(2)(k), 16A(2)(m), 16A(2)(n), 16AC, Part IB  *Criminal Code Act 1995* (Cth) ss 5.3, 5.6(1)  *Criminal Procedure Act 1986* (NSW) s 91  *Evidence Act 1995* (Cth) s 191 |
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| Cases cited: | *Australian Competition and Consumer Commission v ABB Transmission and Distribution Ltd (No 2)* [2002] FCA 559; 190 ALR 169  *Australian Competition and Consumer Commission v Australia and New Zealand Banking Group Limited* [2016] FCA 1516  *Australian Competition and Consumer Commission v TPG Internet Pty Ltd* (2013) 250 CLR 640  *Australian Competition and Consumer Commission v J McPhee & Son (Australia) Pty Ltd (No 5)* [1998] FCA 310  *Australian Competition and Consumer Commission v Visa Inc* [2015] FCA 1020; 339 ALR 413  *Australian Competition and Consumer Commission v Visy Industries Holdings Pty Ltd (No 3)* [2007] FCA 1617; 244 ALR 673  *Barbaro v The Queen* (2014) 253 CLR 58  *Bui v Director of Public Prosecutions* (Cth) (2012) 244 CLR 638  *Cameron v The Queen* [2002] HCA 6; 209 CLR 339  *CMB v Attorney General for the State of New South Wales* (2015) 256 CLR 346  *Commonwealth Director of Public Prosecutions v Nippon Yusen Kabushiki Kaisha* [2017] FCA 876  *Commonwealth v Director, Fair Work Building Industry Inspectorate* [2015] HCA 46; 258 CLR 482  *Environment Protection Authority v Truegrain Pty Ltd* (2013) 85 NSWLR 125  *Direction of Public Prosecutions (Cth) v El Karhani* (1990) 21 NSWLR 370  *Elias v The Queen* [2013] HCA 31; 248 CLR 483  *Green v The Queen* [2011] HCA 49; 244 CLR 462  *Hartman v R* [2011] NSWCCA 261  *J McPhee & Son (Australia) Pty Ltd v Australian Competition and Consumer Commission* [2000] FCA 365; 172 ALR 532  *Lin v R*; *Ng v R* [2016] NSWCCA 200  *Ma v R* [2010] NSWCCA 320  *Markarian v The Queen* [2005] HCA 25; 228 CLR 357  *Matthews v The Queen* [2014] VSCA 291; 44 VR 280  *McMahon v The Queen* [2011] NSWCCA 147  *Mill v The Queen* (1988) 166 CLR 59  *Postiglione v The Queen* (1997) 189 CLR 295  *R v Adler* [2005] NSWSC 274; 53 ACSR 471  *R v Barrientos* [1999] NSWCCA 1  *R v Cartwright* (1989) 17 NSWLR 243  *R v Curtis (No 3)* [2016] NSWSC 866  *R v Daetz* [2003] NSWCCA 216; 139 A Crim R 398  *R v De Leeuw* [2015] NSWCCA 183  *R v Donald* [2013] NSWCCA 238  *R v El-Hani* [2004] NSWCCA 162  *R v Ellis* (1986) 6 NSWLR 603  *R v Gallagher* (1991) 23 NSWLR 220  *R v Gay* [2002] NSWCCA 6  *R v Geddes* (1936) 36 SR (NSW) 554  *R v Glynatsis* [2013] NSWCCA 131  *R v Hannes* [2000] NSWCCA 503; 158 FLR 359  *R v Hannigan* [2009] QCA 40; 193 A Crim R 399  *R v Knight* [2004] NSWCCA 145  *R v M* [2005] NSWCCA 224  *R v Pang* [1999] NSWCCA 4; 105 A Crim R 474  *R v Pogson* (2012) 82 NSWLR 60  *R v Richard* [2011] NSWSC 866  *R v Ronen* [2006] NSWCCA 123; 161 A Crim R 300  *R v Stanbouli* [2003] NSWCCA 355; 141 A Crim R 531  *R v Sukkar* [2006] NSWCCA 92; 172 A Crim R 151  *R v Thomson* (2000) 49 NSWLR 383  *R v Todd* [1982] 2 NSWLR 517  *R v Whitnall* (1993) 42 FCR 512  *R v Wilhelm* [2010] NSWSC 378  *R v Williams* [2005] NSWSC 315; 152 A Crim R 548  *Ryan v The Queen* [2001] HCA 21; 206 CLR 267  *Silvano v R* [2008] NSWCCA 118; 184 A Crim R 593  *Singtel Optus Pty Ltd v Australian Competition and Consumer Commission* [2012] FCAFC 20; 287 ALR 249  *SZ v R* [2007] NSWCCA 19; 168 A Crim R 249  *Tsang v Director of Public Prosecutions (Cth)* [2011] VSCA 336; 35 VR 240  *Tyler v R* [2007] NSWCCA 247  *Wang v R* [2010] NSWCCA 319  *Wong v the Queen* [2001] HCA 64; 207 CLR 584  *Xiao v R* [2018] NSWCCA 4; 96 NSWLR 1  *Zhang v R* [2011] NSWCCA 233 |
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| Solicitor for the Accused: | Gilbert + Tobin |

ORDERS

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|  | | NSD 1932 of 2017 |
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| BETWEEN: | COMMONWEALTH DIRECTOR OF PUBLIC PROSECUTIONS  Prosecutor | |
| AND: | KAWASAKI KISEN KAISHA LTD  Accused | |

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| JUDGE: | WIGNEY J |
| DATE OF ORDER: | 2 August 2019 |

THE COURT ORDERS THAT:

1. Kawasaki Kisen Kaisha Ltd is convicted of giving effect to a cartel provision contrary to s 44ZZRG(1) of the *Competition and Consumer Act 2010* (Cth).
2. Kawasaki Kisen Kaisha Ltd is fined the sum of $34.5 million.
3. Kawasaki Kisen Kaisha Ltd has 28 days to pay the fine in Order 2.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

WIGNEY J:

1. Kawasaki Kisen Kaisha Ltd (**K-Line**) is a large Japanese company which supplies global shipping services, including the shipment of “roll-on, roll-off” cargo including motor vehicles, trucks, buses and other commercial vehicles on routes to and from Australia. It ostensibly competed with other large global shipping companies who also supplied services in that market. From as early as February 1997, however, K-Line and a number of the other global shipping companies had made or entered into an arrangement or understanding which had the effect of limiting or distorting that competition. That arrangement or understanding only came to an end in September 2012 when action was taken by the Japan Fair Trade Commission and the United States Department of Justice. The Australian Competition and Consumer Commission (**ACCC**) subsequently conducted an investigation into the conduct of K-Line and the other shipping companies. That investigation culminated in the laying of criminal charges against two of the companies.
2. On 3 August 2017, one of the other parties to the arrangement or understanding, Nippon Yusen Kabushiki Kaisha (**NYK**) was convicted of intentionally giving effect to cartel provisions contrary to s 44ZZRG(1) of the *Competition and Consumer Act 2010* (Cth) (**Competition Act**). NYK was fined the sum of $25,000,000: *Commonwealth Director of Public Prosecutions v Nippon Yusen Kabushiki Kaisha* [2017] FCA 876 (**CDPP v NYK**).
3. On 5 April 2018, K-Line pleaded guilty to a single rolled-up charge of intentionally giving effect to cartel provisions contrary to s 44ZZRG of the Competition Act. That charge, which was in essentially the same terms to the charge against NYK, was in the following terms:

Between about 24 July 2009 and about 6 September 2012, in Japan and elsewhere, in connection with the transport of vehicles to Australia, Kawasaki Kisen Kaisha Ltd intentionally gave effect to cartel provisions in an arrangement or understanding with others, known as the “Respect Agreement”, in relation to the supply of ocean shipping services, knowing or believing that the arrangement or understanding contained cartel provisions.

1. The general nature or effect of the so-called **Respect Agreement** was that parties to it would not seek to alter their existing market shares or otherwise try to win existing business from each other. The parties to the Respect Agreement, in addition to K-Line and NYK, were **Mitsui** O.S.K. Lines Ltd, **Toyofuji** Shipping Co. Ltd, Nissan Motor Car Carrier Co. Ltd (**Nissan MCC**) and **Wallenius Wilhelmsen** Logistics AS. The cartel provisions in the Respect Agreement to which K-Line gave effect related to the fixing of freight rates in respect of ocean shipping services supplied to eleven major vehicle manufacturers: **Maruti** **Suzuki** India Limited, **Asian Honda** Motor Co Ltd, **Honda** Motor Company Limited, **Nissan** Motor Co. Ltd, **Suzuki** Motor Corporation, General Motors Holdings LLC, **Hino** Motors Ltd, **Mitsubishi** Fuso Truck & Bus Corporation, **Toyota** Motor Corporation, **UD Trucks** and **Isuzu** Linex Co Limited. Five shipping routes for vehicles to Australia were covered by the cartel provisions, being routes from India, Thailand, Japan, Indonesia and South Korea. The cartel provisions covered the contract years 2009, 2010, 2011 and 2012.
2. The contracts or shipments affected by K-Line’s offending conduct involved the shipping of 106,247 new vehicles to Australia. While it is not possible to determine the total value of the benefits obtained that are reasonably attributable to the conduct, K-Line derived revenue of AU$97.4 million from the commerce affected by the conduct.
3. This was, on any view, a very serious offence against Australia’s laws prohibiting cartel conduct.
4. The task for the Court is to impose a penalty that is of a severity appropriate in all the circumstances. The maximum penalty for the offence, in K-Line’s circumstances, is a fine not exceeding $100 million. While the central issue is the size of the fine that K-Line should be ordered to pay having regard to, amongst other things, the nature and circumstances of the offence and K-Line’s subjective circumstances, consideration must also be given to the issue of parity with the fine which was imposed on the co-offender, NYK.

# facts relating to the offence

1. The primary facts relating to the offence upon which K-Line is to be sentenced were not in dispute. The Commonwealth **Director** of Public Prosecutions tendered a Statement of Agreed Facts which was made for the purposes of s 191 of the *Evidence Act 1995* (Cth). The Statement of Agreed Facts is a very lengthy, detailed and comprehensive document. It is unnecessary to rehearse the facts in their entirety in these reasons. Following is a summary, albeit a fairly detailed summary. Unless otherwise noted, the facts relate to the period covered by the charge.
2. All of the facts contained in the Statement of Agreed Facts have been considered. If a particular fact is not included in the following summary, it does not follow that it has been ignored. There were some relatively minor differences between the parties in relation to some inferences that might or might not be drawn from the facts in the Statement of Agreed Facts. The areas of disagreement and the inferences that have been drawn will be noted where relevant.

## Overview of the offending conduct

1. K-Line is a Japanese company which supplies global shipping services, including the roll-on, roll-off shipment of motor vehicles, trucks, buses, commercial vehicles, agricultural equipment and construction equipment, including on routes to and from Australia.
2. From at least 1997, K-Line, NYK, Mitsui, Toyofuji, Nissan MCC and Wallenius Wilhelmsen Logistics were parties to an arrangement or understanding the general effect of which was that they would not seek to alter the existing market shares of customers’ cargo that was carried by each of them, or otherwise win existing business from each other. That conduct was referred to within some of the shipping companies as “maintaining the status quo” or giving and receiving “respect”. It is for that reason that the arrangement or understanding has been referred to generally as the “Respect Agreement”.
3. The Respect Agreement related to the supply of ocean transport services for cargo that can be either driven or rolled on and off specialised vessels. The cargo included completed passenger cars, trucks, buses, commercial vehicles, agricultural equipment and construction machinery. The Respect Agreement applied to various international shipping routes, including to and from Australia.
4. The Respect Agreement relevantly contained a cartel provision within the meaning of s 44ZZRD(2) of the Competition Act. That cartel provision had the purpose, effect or likely effect of directly or indirectly fixing, controlling or maintaining, or providing for the fixing, controlling or maintaining of the price of the services supplied or likely to be supplied, by any or all of the carriers who were party to the Respect Agreement. It may conveniently be referred to as the price fixing provision.
5. The parties to the Respect Agreement would from time to time engage in conduct which gave effect to the Respect Agreement generally and the price fixing provision specifically. That conduct included the following.
6. First, the parties would share information with one another about freight rates or proposed changes to freight rates charged or proposed to be charged to customers or potential customers for the supply of services on the routes to Australia.
7. Second, they would reach agreement about freight rates, approximate freight rates, proposed changes or approximate changes to freight rates to be charged and bids or proposed bids to customers or potential customers for the supply of services on the routes to Australia.
8. Third, they would submit bids, or decline to submit bids in accordance with the agreements that had been reached so as to fix, control or maintain prices and maintain existing market shares.
9. Fourth, they would enter into contracts with their customers for the supply of services on the routes to Australia which reflected the bids submitted to those customers.
10. The charge to which K-Line ultimately pleaded guilty involved 20 instances between 24 July 2009 and 6 September 2012 where K-Line gave effect to the price fixing provision in the Respect Agreement. Each of those instances related to contracts with specific customers in respect of routes to Australia for certain years. The following table summarises those 20 instances.

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| Customer | Route | Year |
| Maruti Suzuki | India to Australia | 2012 |
| Asian Honda | Thailand to Australia | 2010 |
| 2011 |
| Honda | Japan to Australia | 2010 |
| 2011 |
| Nissan | Japan to Australia | 2010 |
| Indonesia to Australia | 2011 |
| Thailand to Australia | 2010 |
| Suzuki | Japan to Australia | 2010 |
| 2011 |
| Thailand to Australia | 2012 |
| General Motors | South Korea to Australia | 2012 |
| Hino | Japan to Australia (small, mid-sized and large trucks) | 2010 |
| Mitsubishi Fuso | Japan to Australia | 2010 |
| Toyota | Japan to Australia | 2010 |
| Thailand to Australia | 2009-2011 |
| UD Trucks (Volvo) | Japan to Australia | 2011 |
| Isuzu | Japan to Australia | 2010 |
| 2011 |
| 2012 |

1. The specific facts relating to each of the 20 instances will be detailed later.
2. The start date for the charge, 24 July 2009, is the date that amendments to the Competition Act, then called the *Trade Practices Act 1974* (Cth), which provided criminal sanctions for cartel conduct came into effect. The end date for the charge, 6 September 2012, is the date the Respect Agreement was effectively terminated following action taken by competition authorities in Japan and the United States of America.

## K-Line

1. K-Line is a Japanese transportation company with headquarters in Tokyo, Japan. K-Line and related companies, which may conveniently be referred to as the **K-Line Group**, owns and operates different types of cargo ships, including dry bulk carriers, gas carriers, car and heavy equipment carriers and gas tankers.
2. K-Line’s business was at the relevant time divided into nine different divisions or businesses including a containership business, a port business, a logistics business, a dry bulk business, a car carrier business, a liquid natural gas carrier and tanker business, a short sea and coastal business, an offshore energy business and a heavy lifter business. In 2016, K-Line, NYK and Mitsui announced plans to merge their respective containership businesses. At that time, NYK and Mitsui also supplied roll-on, roll-off cargo services on routes to and from Australia. The resulting joint venture company, Ocean Network Express, began trading on 1 April 2018.
3. Prior to the formation of Ocean Network Express, the K-Line Group collectively employed over 8,000 employees. Around the time it pleaded guilty to the charge, the K-Line Group employed approximately 2,000 employees. K-Line’s containership business accounted for approximately 50% of K-Line’s consolidated revenues in the fiscal years ending 31 March 2014 to 31 March 2017.
4. K-Line’s car carrier business included vehicle transportation services around the world with companies located in Europe, Africa, North East Asia, South East Asia, Japan, North America, Central and South America, India, Middle East and Oceania. That business was managed by an internal division in K-Line referred to as the Car Carrier Group. As of August 2012, the Car Carrier Group had 78 employees.
5. K-Line’s Car Carrier Group operated a fleet of specialised car carrying vessels providing ocean transport services for vehicles, including cars, trucks, and machinery. The Car Carrier Group was comprised of two main groups, the Car Carrier Business Group and the Car Carrier Planning and Development Group. Both those groups were headquartered in Tokyo, Japan. The Car Carrier Business Group managed K-Line’s car shipping business around the world. It was responsible for negotiating K-Line’s agreements with customers for car shipments on all routes that operated in the area known as the trans-Pacific Ocean, which included Australia, except the cross-trade routes, which were routes which did not terminate or originate in Japan or Korea. The Car Carrier Planning and Development Group was responsible for long term strategy and business planning.
6. The most senior officer in K-Line who was directly responsible for supervising the Car Carrier Group, along with several other business units, was the Senior Managing Executive Officer. The most senior positions within the Car Carrier Group in respect of day-to-day operations were the Executive Officers and Managing Executive Officers. Executive Officers reported to Managing Executive Officers and the Managing Executive Officers reported to the Senior Managing Executive Officer.
7. The Car Carrier Business Group had a General Manager who reported to an Executive Officer and an Assistant General Manager who reported to the General Manager. The Car Carrier Business Group was divided into several “teams” each of which was responsible for a particular geographical region. Those teams relevantly included an Asia & Oceania team which was responsible for routes to and from Australia.

## Services on routes to Australia

1. In 2012, approximately 1.1 million new motor vehicles, including passenger motor vehicles, SUVs, light trucks and heavy vehicles, were sold in Australia. In 2012, the total value of automotive imports to Australia was AU$34.8 billion, consisting of both vehicle imports (AU$26.4 billion) and component imports (AU$8.4 billion). Automotive imports from Japan comprised the largest share of total automotive imports in 2012 (30%) with a value of AU$10,565 million, followed by Europe (AU$7,582 million), North America (AU$5,936 million), South East Asia (AU$5,075 million), Korea (AU$2,740 million) and China (AU$1,546 million).
2. Approximately 80% of sales of new passenger vehicles to private and fleet purchasers in Australia were passenger motor vehicles that had been imported into Australia.
3. Nine companies supplied roll-on, roll-off shipping services on routes to and from Australia, either by way of space chartering arrangements or by operating car carrying vessels. Those companies, who will be referred to generally as the **Carriers**, were: K-Line, NYK, Mitsui, Wallenius Wilhelmsen, Nissan MCC, **Eukor** Car Carriers Inc, **Höegh** Autoliners Holdings AS, Toyofuji and **Hyundai Glovis** Co Ltd. Toyofuji was majority owned and controlled by Toyota. Nissan MCC was originally owned and controlled by Nissan, but during the charge period was majority owned by Mitsui.
4. K-Line, Mitsui and NYK were all Japanese companies. They were referred to within the shipping industry as the “**Three Js**”.
5. During the charge period K-Line’s global share of capacity for roll-on, roll-off services, based on the number of specialised car carriers, was between 11.6% and 11.9%. Mitsui’s share of capacity was between 12.1% and 14.1% and NYK’s share was between 15.5% and 17.2%. The Three Js accordingly accounted for a significant share of the global capacity for the supply of roll-on, roll-off shipping services. By comparison, Wallenius Wilhelmsen’s share was between 8.2% and 10.5%; Eukor’s share was between 10.9% and 11.6%; Höegh’s share was between 6.3% and 8.8%; Toyofuji’s share was between 0.9% and 1%; Hyundai Glovis’ share was between 1.9% and 7%; and Nissan MCC’s chare was between 1.9% and 2.8%.

## Conference Agreements and Part X of the Competition Act

1. Part X of the Competition Act provides certain exemptions from competition laws to enable shipping lines to coordinate their liner shipping services and agree freight rates. Where parties have entered into and registered a conference agreement pursuant to Part X of the Competition Act, they are partially and conditionally exempted from the operation of the cartel provisions in the Competition Act in respect of conduct which gives effect to a provision of that conference agreement, or involves the making and levying of freight rate charges in a freight rate agreement between all of the parties to that conference agreement.
2. The Three Js were party to a registered conference agreement called the Australian and New Zealand/Eastern Shipping Conference or **ANZESC**. The other parties to ANZESC were ANL Container Shipping Line Pty Limited, ANL Singapore Pte Ltd and Orient Overseas Container Line, though none of those other companies provided roll-on, roll-off services. Nissan MCC, Willenius Wilhelmsen, Höegh, Eukor, Hyundai Glovis and Toyofuji were not parties to ANZESC.
3. The parties to ANZESC were able to agree common freight rates, referred to as conference tariffs, for the supply of shipping services on routes from Japan, Korea, China, Taiwan, Hong Kong, Borneo and the Philippines to Australia. They were required to levy those tariffs and not to offer or levy any other freight rates on the routes covered by the agreement unless the parties agreed otherwise. They were also able to charge surcharges or adjustment factors in accordance with an agreed formula.
4. The Three Js submitted bids and contracted for the supply of services on the routes from Japan to Australia as percentage discounts off tariffs which were set pursuant to ANZESC. They also applied adjustment factors in accordance with ANZESC.
5. Importantly, however, none of the instances of conduct referable to the charge to which K-Line pleaded guilty fell within the exemptions of Part X of the Competition Act.

## Relationship between Japanese vehicle manufacturers and carriers

1. Motor vehicle manufacturers required reliable, high-frequency roll-on, roll-off shipping services. In selecting carriers, the manufacturers, particularly the Japanese manufacturers, focused on the quality of services and damage rate, the consistency and frequency of the sailing schedule and the space allocations and the freight rates charged by the respective carriers. Japanese vehicle manufacturers traditionally built close and deeply integrated relationships with their carriers. K-line, for example, held planning meetings with each of its major Japanese vehicle manufacturers at which they discussed operational issues such as space allocations, vessel schedules and safety and damage concerns.
2. In Japan, many companies belonged to a ‘corporate group’, sometimes referred to as a ‘keiretsu’. The member companies typically, but not always, had small shareholdings in each other. The members of each keiretsu generally built deep relationships with each other. Although K-Line did not have any customers of the Car Carrier Group within its “keiretsu” corporate group, K-Line was a member of Toyota’s “Eihokai” suppliers’ organisation, along with NYK, Mitsui and Toyofuji.

## Market structure and characteristics

1. During the charge period, the market for ocean transport service for roll-on, roll-off cargo was characterised by high capital costs with ‘lumpy’ investment, meaning that capacity could not be smoothly adjusted in response to demand.
2. The market was also characterised by long investment lead times. That was because the length of time required to commission and build a specialised car, or car and truck vessel was approximately two to three years per vessel. Such vessels were also not generally available for short term lease or charter, though in some instances space on vessels was made available between particular carriers pursuant to space chartering arrangements.
3. In world terms, Australia is regarded as a relatively small market for motor vehicles. It is also geographically isolated from other markets, at least when compared to markets in Europe, Asia or the United States. The small size of the Australian market for motor vehicles and the substantial scale of operations necessary to offer the high frequency roll-on, roll-off shipping service desired by vehicle manufacturers meant that there were high barriers to entry to the market for the provision of services on routes to and from Australia.
4. The Three Js accounted for approximately 85% of roll-on, roll-off vessel capacity operated directly from Japan to Australia and 100% of the capacity operated from Thailand to Australia.
5. There was some degree of lawful cooperation and coordination between the Three Js in relation to scheduling and operational matters in respect of the various shipping routes to Australia. That cooperation and coordination was relevantly reflected in three agreements: the Japan-East Australia Agreement, the Thailand-Australia Agreement and the Japan-West Australia Agreement.
6. Each of the Three Js was a party to the Japan-East Australia Agreement. That agreement related to the supply of services in respect of the Japan and South Korea to south and east Australia route. The Three Js coordinated their sailing schedule, met to discuss operational issues, customer preferences and upcoming capacity requirements, and sold capacity to each other pursuant to space chartering arrangements, all in accordance with this agreement. Four sailings were provided each fortnight. On average, K-Line contributed slightly more than one third of the operated capacity on this route. NYK contributed approximately one third of the operating capacity on this route and Mitsui contributed slightly less than one third. Toyofuji had space charter arrangements with each of the Three Js that allowed it to acquire capacity on the vessels operated by the Three Js on this route.
7. K-Line and NYK operated their services from Thailand to Australia pursuant to the Thailand-Australia Agreement. Under that agreement, K-Line and NYK coordinated their sailings to offer a weekly combined schedule to which they contributed equally, met to discuss operational issues, customer preferences, requirements and upcoming capacity requirements, and sold capacity to each other pursuant to space charter arrangements.
8. The Three Js were also parties to the Japan-West Australia Agreement, which related to the Japan to north and west Australia route. Under that agreement, the Three Js coordinated their sailings to offer a regular combined schedule and met to discuss operational issues and customer preferences and requirements. In each five month period, K-Line operated three services on this route and each of NYK and Mitsui operated one service.
9. In addition to the three agreements just referred to, the Three Js entered into space chartering agreements with each other and other carriers in relation to the routes in question. The Three Js had space chartering arrangements with each other so as to meet their contractual obligations to manufacturers including on the Thailand to Australia route; Toyofuji had space charter arrangements with each of the Three Js that enabled it to acquire capacity on those carriers’ services from Japan and Thailand to Australia; and Nissan MCC had space charter arrangements with each of the Three Js that enabled it to acquire capacity on those carriers’ services from Japan, Thailand or Indonesia to Australia.
10. On the Japan to south and east Australia route, the Three Js operated a joint schedule, space chartered on one another’s vessels and called at the same ports. Between Thailand and Australia, K-Line and NYK operated a joint schedule, space chartered on one another’s vessels and called at the same ports. Between Thailand and Australia, however, Mitsui operated a different schedule to K-Line and NYK. On the route from Japan to north and west Australia, the Three Js had different schedules.
11. Some customers announced to all carriers how their business had been awarded between the carriers in relation to the number of vehicles each was carrying and, at least in relation to Asian Honda and Maruti Suzuki, also sometimes shared information about the price bid by the other carriers. The Three Js therefore had a level of visibility of which carrier was carrying which vehicles on the routes from Japan to south and east Australia, Thailand to Australia, Europe to Australia, India to Australia, and Indonesia to Australia.
12. Each of the vehicle manufacturers who dealt with the carriers was a large foreign organisation. Those vehicle manufacturers could exercise a degree of bargaining power in negotiations, including in responding to requests from carriers to increase or maintain price, or attempts by carriers to resist rate reductions. Toyota, Honda and Nissan all had shareholdings in their own carriers. In addition, Toyota’s carrier, Toyofuji, operated its own services between Japan and Australia. As a result, the vehicle manufacturers had a degree of understanding of shipping costs.
13. The majority of contracts with most Japanese vehicle manufacturers were renewed annually in March or April, in line with the Japanese financial year.
14. The demand for the relevant services fluctuated during the charge period. The global economic downturn which commenced in 2008 resulted in a period of excess capacity from 2009 to sometime in 2010 due to a sharp decline in car freight movement at the global level. That led K-Line to demolish or return over 20 vessels in order to downsize its car carrier fleet.

## K-Line’s operations in relation to Australia

1. K-Line was a foreign corporation which carried on business in Australia within the meaning of s 5 of the Competition Act.
2. K-Line’s subsidiary, K-Line (Australia) Pty Limited (**K-Line Australia**) acted as K-Line’s general agent in Australia pursuant to an agency agreement. While K-Line was responsible for providing the relevant shipping services on the relevant routes to Australia, K-Line Australia managed and operated the vessels while they were in Australian ports and provided port and landside services.
3. K-Line operated direct services on the routes from Japan and Thailand to Australia. On other routes, K-Line provided services to Australia via Singapore. In Singapore the vehicles were transferred to a vessel operated by one of the Three Js which was travelling from Thailand to Australia, either pursuant to the Thailand-Australia Agreement or K-Line’s separate space charter arrangements with Mitsui on that route. Transhipping increased transit times, cost and the risk of damage to vehicles in comparison with a direct service.

## General operation of the Respect Agreement

1. The overarching arrangement or understanding which has been referred to as the Respect Agreement was in existence from at least February 1997. The general nature and effect of the Respect Agreement, including the price fixing provision, was referred to earlier. The specific incidents where K-Line gave effect to the Respect Agreement are detailed later. Following is a description of the general operation of the Respect Agreement.
2. The relevant vehicle manufacturers usually renewed their shipping contracts annually through direct negotiations with one or more of the carriers. It was generally during the months preceding the renewal of the annual shipping contracts that communications between carriers would occur.
3. There was a “lead carrier” for most vehicle manufacturers. The lead carrier on a route was typically the carrier which had the strongest historical relationship with the manufacturer, or in some cases, the largest share of the manufacturer’s cargo. It was the lead carrier which often, but not always, took the lead in giving effect to the Respect Agreement by contacting each of the other carriers when shipping contracts were up for renewal.
4. The range of actions which the lead carrier would engage in so as to give effect to the price fixing provision in the Respect Agreement included the following.
5. First, confirming or reaching agreement with one or more of the other carriers that they did not intend to respond to a tender or request for price by one of the vehicle manufacturers, or did not intend to alter their price from a previous year.
6. Second, discussing freight rates with the other carriers, determining what it considered to be the appropriate freight rates or approximate freight rates or range of freight rates for each of the other carriers to bid to the customer, and then taking the lead in reaching agreement with each carrier about how they would respond to the customer.
7. Third, discussing with other carriers whether freight rates on a route for a particular manufacturer should either generally remain unchanged, increase by an amount or approximate amount, or decrease by an amount or approximate amount, and then seeking to reach agreement with some or all of the carriers to respond accordingly, without necessarily disclosing the actual rates at which each carrier was providing or would provide services to that customer.
8. Where no carrier had incumbent business in relation to a particular customer or route, or a new route was introduced, that business was considered to be “new business”. The carriers might then do their best to obtain as much of that business as they could in competition with each other. After a particular carrier provided services for that customer on that route for a period of time, the business would generally then be considered existing business to which the Respect Agreement would apply.
9. Sometimes the carriers would not reach any consensus about the appropriate freight rates, or the bids to be submitted, or whether ‘respect’ had been given, or whether a contract involved “new business”. Sometimes this lack of consensus was escalated to more senior management. Sometimes that resolved the dispute. There were, however, instances where the dispute could not be resolved.
10. There were also occasions where a carrier did not comply with an agreement to fix or maintain prices that had been reached pursuant to the Respect Agreement. For example, on occasion agreement was reached in relation to the freight rates to be submitted to a car manufacturer by each of the carriers, but one of the carriers would nevertheless submit rates which differed from those which had been agreed, or would engage in subsequent negotiations with the manufacturer about the rate.
11. According to one senior executive at Mitsui, NYK and Wallenius Wilhelmsen almost never failed to comply or acted inconsistently with the Respect Agreement. Mitsui, on the other hand, acted inconsistently with the Respect Agreement approximately once a year or once every two years on average, and K-Line violated the Respect Agreement generally three or four times a year, but usually only in respect of small volumes of cargo.
12. Specific instances of non-compliant conduct by K-Line will be detailed later.

## K-Line’s conduct in giving effect to the Respect Agreement – General

1. K-Line gave effect to the price fixing provision in the Respect Agreement through face-to-face and telephone discussions with manager-level employees or senior executives of the other carriers. The specific instances in which the price fixing provision was given effect to are detailed later. Following is a general description of K-Line’s approach to the price fixing provision.

### Knowledge of the Respect Agreement and antitrust laws

1. Employees at the Manager level and above, including some Executive Officers, were aware of the Respect Agreement. Some member of K-Line’s board of directors were also aware of its existence. The Car Carrier Group held a weekly meeting in which Managers reported to senior management. At those meetings, Managers or Assistant Managers responsible for each sales team presented reports. On occasion that included reports concerning conduct which gave effect to the Respect Agreement.
2. Senior employees in the Car Carrier Business Group would occasionally inform more junior employees of agreements reached with their counterparts at other carriers. At least one of the General Managers in the Car Carrier Business Group understood that the purpose of superiors reporting to more junior employees was to give effect to such agreements and ensure that K-Line acted in accordance with what had been agreed with the other carriers. Junior employees in the Car Carrier Business Group would occasionally inform their superiors of the outcomes of discussions with their counterparts at other carriers and their superiors would indicate that they approved of such discussions.
3. Most of K-Line’s officers and employees had received training in relation to antitrust law. Most K-Line employees in the Car Carrier Group were aware that communications between K-Line and other carriers in relation to freight rates and responses to tenders might contravene antitrust laws in some jurisdictions.

### Internal communications

1. The internal communication of important matters within the Car Carrier Business Group, such as contract renewals, generally occurred through the preparation and circulation of written memoranda. Most employees of the Car Carrier Business Group, however, did not generally report in writing about the communications they had with their counterparts at the other carriers which gave effect to the Respect Agreement. Those communications were instead reported orally. It was the General Manager of the Car Carrier Business Group’s view that such communications were not recorded in writing because it was known that they were improper and most likely illegal. At least some K-Line employees understood that the purpose of limiting such written communications was to make detection of communications more difficult.
2. There were occasions when a K-Line employee in the Car Carrier Business Group did report in writing on communications he or she had with a counterpart at another carrier in order to give effect to the Respect Agreement. Such reports were often marked with words to the effect of “Confidential. Dispose of after Reading”. Written records were marked in that way because of an awareness that those communications were most likely improper or illegal under competition law. It was the practice of the General Manager of the Car Carrier Business Group to delete and destroy documents which recorded communications with the other carriers.

### Communications with other carriers

1. Employees in the Car Carrier Business Group had discussions with their counterparts at the other carriers about freight rates and co-ordinating the carriers’ responses to requests for tenders in order to give effect to the price fixing provision of the Respect Agreement. Managers had primary responsibility for communications and agreeing freight rates with other carriers. Occasionally, the Manager might assign a small amount of trade to an Assistant Manager who would be responsible for communicating with the other carriers for the purpose of agreeing freight rates. The Manager was responsible for finalising the freight rate to be bid, after seeking the necessary approval from senior management including the General Manager and sometimes Executive Officer level as to the rate.
2. Where K-Line did not already carry a particular customer’s cargo on a route, the lead carrier would generally initiate a discussion with K-Line to confirm that K-Line agreed to show “respect” to that lead carrier. That would generally mean that K-Line would either not change its bid from the previous year, or else would offer a freight rate at or in a range suggested by the lead carrier. Where K-Line was the lead carrier on a route and one of the other carriers carried the customer’s cargo on the route, K-Line would generally initiate a discussion with the other carriers to confirm that they would show respect to K-Line. If both K-Line and the other carriers shipped a particular customer’s cargo on a route, discussions would generally be engaged in with the other carriers in order to attempt to maintain existing market shares in relation to the route.

### Complaints about noncompliance by some K-Line managers

1. K-Line was not always trusted by NYK and Mitsui, whose employees were at times wary about K-Line’s compliance with the Respect Agreement. Mitsui and NYK employees discussed K-Line’s noncompliance between themselves and with K-Line directly on more than one occasion, including in respect of noncompliance in relation to Australian routes.
2. The Car Carrier Business Group General Manager was particularly distrusted by some NYK and Mitsui employees because he would sometimes compete aggressively for market share and on occasion attempt to depart from agreements reached with the other carriers. Complaints were made to K-Line on a number of occasions about that particular manager. On one occasion, a Senior Executive of NYK complained about that manager’s actions to the General Manager of Toyota’s logistics department. In 2010, the manager was threatened by an NYK employee with coordinated retaliatory action by NYK, Wallenius Wilhelmsen and Eukor if he continued to engage in conduct contrary to the Respect Agreement.

### Attempts to limit communications

1. In 2008, K-Line held a global marketing meeting at its headquarters in Tokyo. That meeting was attended by Japan-based staff at the manager level and above, together with other senior employees who were based around the world. There was discussion and debate concerning communications with competitors. Those discussions culminated in the then Senior Managing Executive Officer of the Car Carrier Business Group instructing staff that communications with competitors should continue in a careful manner and should be limited to those at the General Manager level and above. Communications continued between managers and their respective counterparts at the other carriers despite that instruction.
2. Sometime after April 2010, a Manager in one of the regional teams in the Car Carrier Business Group proposed to the Managing Executive Officer of the Car Carrier Business Group that K-Line should consider ceasing its communications with other carriers because such communications were risky for K-Line and its employees and K-Line should focus on having a strong sales force. The Managing Executive Officer subsequently discussed that proposal with other senior management of K-Line. Senior management did not agree with the proposal and communications with the other carriers accordingly continued.
3. In 2011, the Managing Executive Officer, the Executive Officer and the General Manager of the Car Carrier Business Group agreed that junior employees of K-Line should not have to communicate with their counterparts at the other carriers. The General Manager was aware that such conversations were probably illegal and he wanted to protect the more junior staff at K-Line from the consequences of being involved in such conduct. The General Manager subsequently instructed the Managers of each sales team in the Car Carrier Business Group that only the General Manager or the Executive Officer should have those communications. That instruction, however, had limited effect and communications at the manager level generally continued. On some occasions, however, NYK employees who attempted to make contact with K-Line managers after this time were told by the K-Line manager that they could no longer communicate with them.
4. In April 2012, the General Manager of the Car Carrier Planning and Development Group and Executive Officer of the Car Carrier Business Group agreed that communications with counterparts at K-Line’s competitors should be stopped. They instructed their subordinates accordingly. That instruction was followed for some period of time, though communications subsequently recommenced in respect of some routes prior to the end of the charge period.

## Specific instances of giving effect to the price fixing provision

1. The 20 specific incidents of K-Line giving effect to the price fixing provision in the Respect Agreement were summarised in the table earlier in these reasons. Following is the relevant details of each of those incidents.
2. All of the officers and employees of the carriers, including K-Line, who were involved in the communications and other conduct that comprise these specific incidents were foreign nationals. All of the relevant communications and other conduct occurred outside Australia. The vehicle manufacturers which acquired services on the relevant routes from the carriers were all foreign corporations located outside Australia.

### Maruti Suzuki – India to Australia 2012

1. In December 2011, Maruti Suzuki requested bids for the provision of shipping services for Maruti Suzuki cargo on the route from India to Australia for the period 1 May 2012 to 30 April 2013. By early January 2012, K-Line and Mitsui agreed that they should seek a freight rate increase of US$60 per unit on the route to compensate for the increase in fuel prices.
2. During January 2012 and April 2012, Maruti Suzuki engaged in negotiations with K-Line in order to resist the proposed increase of US$60 per unit to freight rates. Those negotiations ultimately resulted in K-Line submitting a revised bid which involved an increase of US$15 per unit and Maruti Suzuki indicating to K-Line that it would accept that rate increase.
3. In its negotiations with Mitsui, Maruti Suzuki informed Mitsui that K-Line and NYK were both willing to accept a rate increase of US$15. On or around 23 April 2012, a Mitsui employee called his counterpart at K-Line to ask if it was true that K-Line was going to agree to Maruti Suzuki’s $US15 proposal. The K-Line employee said “Yes”.
4. On 1 May 2012, Maruti Suzuki entered into a contract with K-Line for the provision of services for Maruti Suzuki cargo on the route from India to Australia for the period 1 May 2012 to 30 April 2013 at a freight rate of $425 per unit, which was an increase of US$15 from the previous year’s contract.
5. During the period from 1 May 2012 until 30 April 2013, K-Line provided services to Maruti Suzuki for 328 vehicles on the route from India to Australia. K-Line’s total revenue on the carriage of those vehicles was approximately AU$136,319.

### Asian Honda – Thailand to Australia 2010 and 2011

1. K-Line engaged in conduct which gave effect to the price fixing provision in the Respect Agreement in respect of services provided to Asian Honda on the route from Thailand to Australia in both 2010 and 2011.

#### 2010 contract

1. On about 18 February 2010, Asian Honda issued a request for bids for the provision of services for Asian Honda cargo on the route from Thailand to Australia for the period 1 April 2010 to 31 March 2011. K-Line had previously carried 45% of Asian Honda cargo on the Thailand to Australia route, but that had dropped to 40% in 2010.
2. Prior to submitting bids, the general manager of K-Line’s Singapore subsidiary had separate telephone conversations with his counterparts at Mitsui and NYK. During those telephone conversations, it was agreed that the Three Js would each offer the same freight rate to Asian Honda during the first round of bidding. That rate was US$44/m³, which was the same rate as the previous year.
3. As events transpired, K-Line submitted a first-round bid of US$42/m³, which was not in accordance with the agreement. That came about because K-Line’s General Manager was informed that Asian Honda was unhappy with K-Line’s service standards and that if K-Line did not offer a competitive price it would not maintain its existing market share. Mitsui and NYK, on the other hand, bid US$44/m³ in accordance with the agreement that had been reached.
4. Mitsui subsequently learnt that K-Line had undercut its bid and questioned the K-Line General Manager, who denied bidding US$42. The K-Line General Manager then agreed with his counterparts at Mitsui and NYK that they would each bid US$40 in the second round of bids.
5. K-Line ultimately submitted a second bid at US$40 in accordance with the agreement reached with NYK and Mitsui. It subsequently entered into a contract with Asian Honda for the provision of services for Asian Honda cargo on the route from Thailand to Australia for the period 1 April 2010 to 31 March 2011 at a freight rate of US$40/m³. K-Line ended up losing 5% of its market share on that route for the contract period because of service issues.
6. During the period 1 April 2010 to 31 March 2011, K-Line provided services to Asian Honda for 11,831 vehicles on the route from Thailand to Australia. K-Line’s total revenue on the carriage of those vehicles was approximately AU$5,565,514.

#### 2011 contract

1. On about 16 February 2011, Asian Honda issued a request for bids for the provision of services for Asian Honda cargo on the route from Thailand to Australia for the period 1 April 2011 to 31 March 2012.
2. Prior to 3 March 2011, a Mitsui employee spoke to his counterpart at NYK and they agreed to offer US$44/m³. The US$44/m³ price was calculated to reflect a 25% increase in oil prices. The Mitsui employee subsequently contacted his K-Line counterpart by telephone and asked if K-Line agreed to offer US$44/m³ in the first round of bids. He emphasised that K-Line should absolutely adhere to the agreed freight rate because he considered that K-Line had not adhered to the agreed bid in the previous contract period. The K-Line employee said he “understood”. The Mitsui employee considered that the Three Js had reached agreement to bid US$44/m³.
3. This process was repeated in respect of the second round of bids. K-Line, Mitsui and NYK each agreed to bid the same freight rate of US$44/m³ in order to maintain their respective market shares. In its second round of bids, however, K-Line offered Asian Honda a bid of US$44/m³, with the option of a further US$0.50/m³ discount in exchange for increasing K-Line’s market share by 5%.
4. On 15 March 2011, K-Line entered into a contract with Asian Honda for the provision of services for Asian Honda cargo on the route from Thailand to Australia for the period 1 April 2011 to 31 March 2012 at a freight rate of US$43/m³. The contract was for a 45% share of the market, which restored the 5% market share that K-Line had lost in the previous year.
5. Mitsui subsequently discovered that K-Line had undercut it in the second round of bids. Internal Mitsui communications reveal considerable displeasure about K-Line’s actions. A Mistui employee subsequently complained about K-Line’s actions to the General Manager of K-Line’s Car Carrier Business Group.
6. During the period from 1 April 2011 to 31 March 2012, K-Line provided services to Asian Honda for 2,858 vehicles on the route from Thailand to Australia. K-Line’s total revenue on the carriage of those vehicles was approximately AU$1,440,632.

### Honda – Japan to Australia 2010 and 2011

1. K-Line engaged in conduct which gave effect to the price fixing provision in the Respect Agreement in respect of services provided to Honda on the route from Japan to Australia in both 2010 and 2011.
2. Mitsui was the lead carrier in relation to Honda cargo on the route from Japan to Australia.

#### 2010 contract

1. In about February 2010, Honda issued a request for bids for the provision of services for Honda cargo on the routes from Japan to Australia for the period 1 April 2010 to 31 March 2011. Following that request, a Mitsui employee telephoned his K-Line counterpart and said words to the effect: “Let us keep the rates at the same level as those of 2009”. K-Line acquiesced to Mitsui’s request. K-Line submitted a bid to Honda at the 2009 rates in accordance with the understanding that had been reached.
2. On 1 April 2010, K-Line entered into a contract for the provision of services for Honda cargo on the routes from Japan to Australia for the period 1 April 2010 to 31 March 2011 at the same rates that had applied in the previous year.
3. During the period from 1 April 2010 to 31 March 2011, K-Line provided services to Honda for 3,122 vehicles on the routes from Japan to Australia. K-Line’s total revenue on the carriage of these vehicles was approximately AU$2,512,267.

#### 2011 contract

1. In about February 2011, Honda issued a request for bids for the provision of services for Honda cargo on the routes from Japan to Australia for the period 1 April 2011 to 31 March 2012. That included a request for bids for services which involved stopping at a new port on the south and east Australia route, Townsville. After receiving the request for bids, a K-Line employee had a conversation with his counterpart at Mitsui. During that discussion, the Mitsui employee suggested that K-Line and Mitsui should offer a discount off the conference tariff for the provision of services from Japan to Townsville which was lower than the discount they had offered for other ports on routes from Japan to south and east Australia. The K-Line employee agreed. K-Line subsequently submitted a bid to Honda which was consistent with that agreement.
2. On 1 April 2011, K-Line entered into a contract for the provision of services for Honda cargo on the route from Japan to Townsville for the period 1 April 2011 to 31 March 2012. The freight rate was a 15% discount off the conference tariff, which was less than the discount for other ports on that route.
3. During the period from 1 April 2011 to 31 March 2012, K-Line provided services to Honda for 148 vehicles on the routes from Japan to Townsville. K-Line did not provide services to Honda in relation to any other ports in Australia in this period. K-Line’s total revenue on the carriage of those vehicles was approximately AU$147,187.

### Nissan – Japan to Australia 2010 and 2011

1. Mitsui was the lead carrier in relation to Nissan cargo on the routes from Japan to Australia.
2. In about early February 2010, Nissan issued a request for bids for the provision of services for Nissan cargo on various routes for the period from 1 April 2010 to 31 March 2011, including the route from Japan to north and west Australia. K-Line subsequently engaged in discussions with Nissan during which Nissan made it clear that a freight rate reduction was non-negotiable.
3. During April 2010 a Mitsui employee initiated several discussions with his counterpart at K-Line. During those discussions, the Mitsui employee informed the K-Line employee that Mitsui was intending to accept a decrease in the freight rate and requested that K-Line decrease its freight rate for Nissan cargo on the route to the level the rates were at prior to 2008. K-Line agreed.
4. Consistent with that agreement, on about 27 April 2010, K-Line submitted a final bid to Nissan which increased the discount off the conference tariff for the route from Japan to north and west Australia from 9% to 13%. K-Line subsequently entered into a contract for the provision of services for Nissan cargo on the route from Japan to north and west Australia for the period 1 June 2010 to 31 March 2011 at that freight rate. The contract was subsequently extended until June 2011.
5. During the period from 1 June 2010 to 31 March 2011, K-Line provided services to Nissan for 1,181 vehicles on the route from Japan to north and west Australia. K-Line’s total revenue on the carriage of these vehicles was approximately AU$1,531,478.

### Nissan – Indonesia to Australia 2011 and 2012

1. K-Line engaged in conduct which gave effect to the price fixing provision in the Respect Agreement in respect of services provided to Nissan on the route from Indonesia to Australia in both 2011 and 2012.
2. Nissan MCC was originally wholly owned by Nissan. In 2009, it became a subsidiary of Mitsui, though Nissan retains a 10% interest. Nissan MCC owned and operated its own car and truck carrying vessels, but also subcontracted with other carriers as necessary. Nissan historically had delegated ocean transportation services for all routes to Nissan MCC with the understanding that Nissan MCC would then subcontract any services beyond its capacity to other carriers.

#### 2011 contract

1. In late 2010, Nissan was proposing to move part of its production of the Micra model vehicle from Thailand to Indonesia. At that time, Nissan did not ship any cars from Indonesia to Australia. Nissan MCC had previously been awarded 100% of the Nissan cargo on the route from Thailand to Australia and had entered into subcontracting arrangements with each of the Three Js because it did not operate its own vessels on that route.
2. In late December 2010, Nissan issued an initial request for quotes to K-line, Mitsui, NYK, Höegh, Wallanius Wilhelmsen and Nissan MCC for the provision of services for Nissan cargo on the route from Indonesia to Australia. That request required each of the carriers to submit proposed indicative freight rates for the provision of services on this route.
3. Following that request, on about 6 January 2011, a senior manager at Nissan MCC contacted a K-Line representative and asked K-Line to submit a freight rate of US$50/m³ for the direct shipment of vehicles from Indonesia to Australia and US$55/m³ for transhipment. The Nissan MCC General Manager also indicated that he would approach NYK and Mitsui and ask that they submit the same bids. K-Line agreed to submit the freight rates proposed by Nissan MCC. Nissan MCC subsequently submitted freight rates to Nissan for both direct shipment and transhipment based on the rates submitted to it by K-Line, Mistui and NYK.
4. On about 13 July 2011, Nissan issued a request for bids for the provision of services for Nissan cargo on the route from Indonesia to Australia for the period 1 October 2011 to 31 March 2012. In response, K-Line submitted a bid to Nissan of US$51/m³ on an all-in basis for every port. Nissan later requested that K-Line review its offer. In response, K-Line revised its offer to a base freight rate of US$49.31/m³, plus the applicable bunker adjustment factor stipulated by Nissan.
5. On 30 September 2011, K-Line entered into a contract with Nissan MCC for the provision of services for Nissan cargo on the routes from Indonesia to Australia at a freight rate of $49.31/m³ plus the applicable bunker adjustment factor stipulated by Nissan, for the period 1 October 2011 to 31 March 2012.
6. In the period from 1 October 2011 to 31 March 2012, K-Line provided services to Nissan for 258 vehicles on the route from Indonesia to Australia. K-Line’s total revenue on the carriage of those vehicles was approximately AU$127,376.

#### 2012 contract

1. On about 26 February 2010, Nissan issued a request for bids to the Three Js and Höegh for the provision of services for Nissan cargo on the route from Thailand to Australia for the period 1 April 2010 to 31 March 2011. Nissan requested that freight rates be reduced from US$41/m³ to US$40/m³. At that time, Nissan MCC had been awarded 100% of the Nissan cargo on the route from Thailand to Australia, but entered into space-chartering arrangements with the Three Js because it did not operate its own vessels on that route.
2. Following Nissan’s request, a General Manager at K-Line had a telephone conversation with his counterpart at NYK during which they agreed that K-Line and NYK would maintain existing freight rates and not offer a reduced rate as requested by Nissan. The K-Line manager also had a telephone discussion with an employee at Nissan MCC during which he indicated that K-Line would maintain the existing rate for Nissan cargo on the route from Thailand to Australia. K-Line believed that Nissan MCC would coordinate Mitsui’s bid in a way which was consistent with the agreement reached between K-Line and NYK.
3. K-Line submitted a bid to Nissan which, consistent with the agreement that had been reached, was at the existing freight rate of US$41/m³. Nissan agreed to contract with K-Line at that freight rate for the period 1 April 2010 to 31 May 2010 while negotiations continued. Ultimately K-Line agreed to reduce its freight rate to US$40.50/m³ for the period from 1 June 2010 to 31 March 2011 and entered into a contract accordingly.
4. In the period from 1 April 2010 to 31 March 2011, K-Line provided services to Nissan for 4,494 vehicles on the routes from Thailand to Australia. K-Line’s total revenue on the carriage of these vehicles was approximately AU$2,724,545.

### Suzuki – Japan to Australia 2010 and 2011

1. K-Line engaged in conduct which gave effect to the price fixing provision in the Respect Agreement in respect of services provided to Suzuki on the route from Japan to Australia in both 2010 and 2011.

#### 2010 contract

1. By early April 2010, Suzuki had issued a request for bids from the Three Js for the provision of services for Suzuki cargo on the routes from Japan to Australia for the period 1 April 2010 to 31 March 2011. Following Suzuki’s request, a representative of Mitsui had a conversation with his counterpart from K-Line during which K-Line agreed with Mitsui’s proposal that they would each maintain their existing freight rates. K-Line submitted a bid on 12 April 2010.
2. K-Line subsequently entered into a contract with Suzuki for the provision of services for Suzuki cargo on the routes from Japan to Australia for the period 1 April 2010 to 31 March 2011 at freight rates calculated by reference to a discount from the conference tariff. On the route from Japan to south and east Australia the rates employed the same discount that had applied in the previous year and on the route from Japan to north and west Australia the rates employed a greater discount than the previous year.
3. In the period from 1 April 2010 to 31 March 2011, K-Line provided services to Suzuki for 11,542 vehicles on the routes from Japan to Australia. K-Line’s total revenue on the carriage of those vehicles was approximately AU$7,473,627.

#### 2011 contract

1. In about February or March 2011, Suzuki requested bids for the provision of services for Suzuki cargo on the routes from Japan to Australia for the period 1 April 2011 to 31 March 2012. A representative of K-Line subsequently had conversations with his counterparts at Mitsui and NYK confirming that K-Line’s freight rates would remain unchanged.
2. On 1 April 2011, K-Line entered into a contract for the provision of services for Suzuki cargo on the routes from Japan to Australia for the period 1 April 2011 to 31 March 2012 at the same discounts off the conference tariff it had applied in the previous year.
3. During the period from 1 April 2011 to 31 March 2012, K-Line provided services to Suzuki for 7,145 vehicles on the routes from Japan to Australia. K-Line’s total revenue on the carriage of those vehicles was approximately AU$5,717,428.

### Suzuki – Thailand to Australia 2012 and 2013

1. In late August 2012, Suzuki issued a request for bids for the provision of services on the route from Thailand to Australia. This was a new route for Suzuki which had become necessary because Suzuki was shifting its production of the Swift model vehicle from Japan to Thailand. On about 28 August 2012, a K-Line representative had a telephone conversation and a subsequent meeting with a counterpart at NYK. NYK and K-Line agreed to submit bids to Suzuki of around US$45/m³ to US$50/m³. The K-Line employee then had a telephone conversation and subsequent meeting with his counterpart at Mitsui. The K-Line employee sought Mitsui’s agreement to a collaborative approach whereby K-Line and NYK would contract with Suzuki and share the cargo, and then sublet cargo to Mitsui. Mitsui did not agree.
2. In late August 2012, K-Line submitted freight rates to Suzuki of US$48/m³ on the route from Japan to south and east Australia and US$53/m³ on the route from Japan to north and west Australia. Those rates were consistent with the agreement that had been reached with NYK. Following feedback from Suzuki, K-Line subsequently submitted a revised proposal of US$45/m³ on the route from Japan to south and east Australia and US$48/m³ on the route from Japan to north and west Australia. K-Line eventually entered into a contract with Suzuki and supplied services on the route from Thailand to Australia at a freight rate of US$45/m³.
3. In the period from 1 January 2013 to 31 December 2013, K-Line provided services to Suzuki for 2,111 vehicles on the route from Thailand to Australia. K-Line’s total revenue on the carriage of those vehicles was approximately AU$933,508.

### General Motors – South Korea to Australia 2012 to 2014

1. Mitsui was the lead carrier in relation to General Motors cargo on the route from South Korea to Australia and typically carried all the cargo on that route.
2. In about May 2012, General Motors conducted a global tender process which included the provision of services for General Motors cargo on the route from South Korea to Australia for the period 1 January 2013 to 31 December 2014. In about June 2012, a representative of K-Line had a telephone conversation with his counterpart at Mitsui during which K-Line representative indicated that K-Line would “respect” Mitsui’s existing contract with General Motors on the South Korea to Australia route. Mitsui was subsequently chosen by General Motors as the successful carrier. K-Line did not provide any services to General Motors on the route from South Korea to Australia during the period 1 January 2013 to 31 December 2014.

### Hino – Japan to Australia 2010

1. Hino manufactured small, mid-sized and large trucks. On the route from Japan to south and east Australia NYK was historically the lead carrier in respect of large and mid-sized Hino trucks and Mitsui was the lead carrier in respect of small trucks. K-Line did not carry any Hino cargo on the route from Japan to south and east Australia. Each of the Three Js carried Hino cargo on the route from Japan to north and west Australia on a rotating basis. K-Line carried about 60% of the cargo and Mitsui and NYK both carried about 20%.

#### Small truck cargo

1. By early February 2010, Toyota, on behalf of Hino, had issued a request for bids for the provision of services for Hino small truck cargo for the period 1 April 2010 to 31 March 2011 on the routes from Japan to south and east Australia and Japan to north and west Australia. Following that request a Mitsui employee had a discussion with his counterpart at K-Line. During that discussion K-Line agreed to bid at a freight rate which, by employing a lower discount off the conference tariff, was effectively a higher rate than the rate bid by Mitsui. That was done in order to maintain Mitsui’s status as sole carrier on each route. K-Line submitted bids in accordance with that agreement.
2. K-Line entered into a contract with Hino for the provision of services for Hino cargo on the route from Japan to north and west Australia for the period 1 April 2010 to 31 March 2011 at a freight rate of 5% discount off the conference tariff for small trucks. K-Line did not carry any Hino cargo on the route from Japan to south and east Australia for the period 1 April 2010 to 31 March 2011.

#### Mid-sized and large truck cargo

1. By early February 2010, Hino had issued a request for bids for the provision of services for Hino mid-sized and large truck cargo on the route from Japan to south and east Australia for the period 1 April 2010 to 31 March 2011. Following Hino’s request, an NYK employee had a discussion with a K-Line employee. In that discussion K-Line agreed that it would bid a freight rate specified by NYK so as to “respect” NYK’s market share. K-Line submitted a bid in accordance with that agreement and NYK retained 100% of the services in respect of this route.
2. During the period from 1 April 2010 to 31 March 2011, K-Line transported one vehicle for Hino on the route from Japan to north and west Australia. K-Line’s total revenue on the carriage of this vehicle was approximately AU$1,593.

### Mitsubishi Fuso – Japan to Australia 2010

1. NYK was the lead carrier in relation to Mitsubishi Fuso cargo on the Japan to Australia route. NYK carried all of the Mitsubishi Fuso cargo on the Japan to south and east Australia route. On the route from Japan to north and west Australia, the Three Js all carried Mitsubishi Fuso cargo as part of a joint service which involved sending one vessel on the Japan to north and west Australia route per month on a five month rotational basis. The cargo was shipped on the vessel of the carrier whose turn it was in the rotation. Despite this, each of the Three Js would submit a separate bid and reach a separate agreement on freight rates with the customer.
2. In about March 2010, Mitsubishi Fuso issued a request for freight rate reductions from the Three Js on all routes, including the route from Japan to north and west Australia. On about 25 March 2010, representatives of K-Line, NYK, and Mitsui met at NYK’s Tokyo office and shared information about their proposed responses to Mitsubishi Fuso. NYK had already agreed to the rate reduction sought by Mitsubishi Fuso. K-Line had been inclined to accept the full rate reduction sought by Mitsubishi Fuso, however K-Line agreed to resist the requested freight rate reduction by limiting the additional discount it would offer Mitsubishi Fuso to 2% off the conference tariff. A representative of K-Line subsequently advised his counterpart at Mitsui that K-Line intended to offer Mitsubishi Fuso a further 4% discount. K-Line and Mitsui agreed on the reduction that each would offer Mitsubishi Fuso.
3. K-Line subsequently submitted a bid to Mitsubishi Fuso which involved a discount of an additional 6% off the conference tariff for the period from 1 April 2011 to 31 December 2011.
4. In the period from 1 January 2011 to 31 December 2011, K-Line provided services to Mitsubishi Fuso for 214 vehicles on the routes from Japan to Australia. K-Line’s total revenue on the carriage of those vehicles was approximately AU$782,164.

### Toyota – Japan to Australia 2010

1. Toyota entered into six monthly contracts for services in March and September each year. NYK was the lead carrier in relation to Toyota cargo.
2. In 2010, Toyota requested an overall freight rate reduction in order to reduce its overall global expenditure. Prior to responding to Toyota’s request for a freight rate reduction, a K-Line employee had a telephone conversation with his counterpart at NYK regarding proposed adjustments to freight rates on routes from Japan to Australia. During that conversation K-Line and NYK agreed to resist the freight rate reduction requests.
3. During the period 1 October 2010 to 31 March 2011, K-Line provided services to Toyota for 25,442 vehicles on the routes from Japan to Australia. K-Line’s total revenue on the carriage of those vehicles was approximately AU$21,945,999.

### Toyota – Thailand to Australia 2009 to 2011

1. Toyota requested NYK, K-Line and Toyofuji to provide their freight rates for the shipment of cargo from Thailand to Australia each time it renewed its six month freight contracts during the period from 2009 to 2011. Toyofuji did not operate its own vessels on this route and instead entered into space chartering arrangements with K-Line and NYK. Toyofuji’s bid to Toyota was based on an average of the rates it received from K-Line and NYK pursuant to the space chartering arrangements with an added premium.
2. After contracts for the shipment for Toyota cargo came up for renewal, but before bids were submitted to Toyota, a K-Line employee had conversations with his counterpart at Toyofuji. During those conversations, Toyofuji enquired as to the freight rate K-Line intended to submit to Toyota and K-Line told Toyofuji whether it would keep freight rates the same as in previous years, or whether it was slightly increasing or decreasing the freight rates. NYK and K-Line calculated their rates separately to one another, but employees from each company confirmed their respective bids before submitting them to Toyofuji.
3. On some occasions after bids were submitted, representatives of K-Line and NYK had further discussions during which they exchanged information about whether Toyota had accepted their existing bid or if their respective bids were too high. K-Line and NYK were thereby able to reach an understanding in relation to any freight rate adjustments that they needed to make in order to maintain existing market shares for Toyota cargo from Thailand to Australia.
4. In the period from 24 July 2009 to 31 March 2011, K-Line provided services to Toyota for 16,973 vehicles on the route from Thailand to Australia. K-Line’s total revenue on the carriage of those vehicles was approximately AU$12,513,433.

### UD Trucks (Volvo) – Japan to Australia 2011 and 2012

1. UD Trucks was a subsidiary of Volvo. Volvo Logistics conducted tenders for shipping services for UD Trucks’ cargo each year in around September or October. NYK was the sole carrier of this cargo.
2. Volvo Logistics issued a request for bids for the provision of services in relation to UD Trucks cargo on the route from Japan to Australia for the contract period from 1 October 2011 to 30 September 2012. After that request was issued, a representative of K-Line had a discussion with his counterpart at NYK. During that discussion, the NYK representative gave the K-Line representative details about NYK’s proposed bid. The K-Line representative indicated that K-Line would “respect” NYK’s market share on this route. NYK was subsequently awarded 100% of UD Trucks’ cargo on this route.
3. K-Line did not transport any UD Trucks’ cargo on the route from Japan to Australia for the period from 1 October 2011 to 30 September 2012.

### Isuzu – Japan to Australia 2010 to 2012

1. K-Line was the lead carrier in relation to Isuzu cargo on the routes from Japan to Australia. Isuzu generally commenced freight rate negotiations by first contacting K-Line.

#### 2010 contract

1. In about March 2010, Isuzu commenced freight rate negotiations with K-Line for the provision of services on the routes from Japan to south and east Australia and Japan to north and west Australia. Before settling final rates with K-Line, Isuzu made enquiries with NYK and Mitsui. K-Line informed NYK and Mitsui what rate it had submitted to Isuzu and requested NYK and Mitsui to respond to Isuzu with a higher rate. K-Line understood that NYK and Mitsui would submit bids in accordance with this request.
2. K-Line was ultimately awarded 100% of the cargo on the route from Japan to south and east Australia and entered into a contract with Isuzu for the provision of services on that route for the period 1 April 2010 to 31 March 2011.
3. During the period from 1 April 2010 to 31 March 2011, K-Line provided services to Isuzu for 5,347 vehicles on the routes from Japan to Australia. K-Line’s total revenue on the carriage of those vehicles was approximately AU$8,709,512.

#### 2011 contract

1. In about March 2011, Isuzu commenced freight rate negotiations with K-Line for the provision of services on the routes from Japan to south and east Australia and from Japan to north and west Australia for the contract period from 1 April 2011 to 31 March 2012. In about March 2011, an NYK employee received a phone call from his counterpart at K-Line requesting NYK to submit freight rates to Isuzu for the transportation of cargo from Japan to south and east Australia which were higher than the rates that K-Line had submitted to Isuzu. K-Line understood that NYK would act in accordance with that request. The K-Line employee also contacted his counterpart at Mitsui. The K-Line representative informed Mitsui of the freight rates it had submitted to Isuzu for the transportation of Isuzu cargo from Japan to south and east Australia and asked whether Mitsui would respect K-Line. The Mitsui representative agreed that it would.
2. K-Line subsequently entered into a contract with Isuzu for the provision of services for Isuzu cargo on routes from Japan to Australia for the period 1 April 2011 to 31 March 2012. It was awarded 100% of the cargo on the route from Japan to south and east Australia.
3. During the period from 1 April 2011 to 31 March 2012, K-Line provided services to Isuzu for 6,779 vehicles on the routes from Japan to Australia. K-Line’s total revenue on the carriage of those vehicles was approximately AU$12,516,615.

#### 2012 contract

1. In or around March 2012, Isuzu commenced freight rate negotiations with K-Line for the provision of services on the route from Japan to Australia for the period 1 April 2012 to 31 March 2013. The K-Line Managers responsible for those negotiations did not have any contact with their counterparts at NYK and Mitsui. K-Line and Isuzu agreed to an increase in freight rates for the transportation of Isuzu cargo on the route and entered into a contract accordingly.
2. On 31 March 2012, NYK entered into a contract with Isuzu for the provision of services for Isuzu cargo on routes from Japan to north west Australia for the period 1 April 2012 to 31 March 2013. In or around April or May 2012, a K-Line employee was contacted by his counterpart at NYK. The NYK employee indicated that Isuzu had requested price estimates from NYK in order to check the reasonableness of the price it had agreed with K-Line. The K-Line employee nominated the rates that NYK should submit to Isuzu in response to that request.
3. During the period from 1 April 2012 to 31 March 2013, K-Line provided services to Isuzu for 6,473 vehicles on the route from Japan to Australia. K-Line’s total revenue on the carriage of those vehicles was approximately AU$12,622,444.

## Action by regulators

1. On 6 September 2012, officers of the Japan Fair Trade Commission and the United States Department of Justice conducted dawn raids on the offices of K-Line and a number of other shipping companies. Those raids were the subject of substantial press coverage. K-Line ceased to give effect to the Respect Agreement following those raids, though most of the contracts it had entered into during the previous year continued in force after that date.

# ELEMENTS OF THE OFFENCE

1. The elements of the offence created by s 44ZZRG of the Competition Act were analysed in some detail in *CDPP v NYK* at [171] to [188]. It is unnecessary to repeat that detail here. It perhaps suffices to observe again that while the offence provision in s 44ZZRG itself appears beguilingly straightforward, the devil is in the detailed and complex definition of the term “cartel provision” in s 44ZZRD of the Competition Act. To fully appreciate the scope of the offence it is also necessary to have regard to other relevant definitional provisions in s 4F and s 44ZZRB of the Competition Act, as well as provisions of the ***Criminal Code*** *Act 1995* (Cth) which provide for, amongst other things, the fault elements applicable to federal criminal offences, including those in the Competition Act. It should also perhaps be added that in November 2017 the relevant offence provisions were renumbered.
2. Since K-Line committed its offence, the criminal cartel provisions in the Competition Act have been renumbered. The former s 44ZZRG is now s 45AG of the Competition Act.
3. In short and simple terms relevant to the particulars of the offence to which K-Line has pleaded guilty, the relevant elements of the offence are as follows.
4. First, a contract, arrangement or understanding contained a “cartel provision”: see s 44ZZRG(1)(a) of the Competition Act.
5. The Respect Agreement was an arrangement or understanding for the purposes of s 44ZZRG(1)(a) of the Competition Act.
6. A provision is a “cartel provision” if, relevantly: it has the purpose, or has or is likely to have the effect, of directly or indirectly, fixing, controlling or maintaining, or providing for the fixing, controlling or maintaining of the price in relation to services supplied by any or all of the parties to the contract, arrangement or understanding; and at least two of the parties to the contract, arrangement or understanding are or are likely to be, or but for any contract, arrangement or understanding would be or would be likely to be in competition with each other in relation to the supply, or likely supply of the relevant services: ss 44ZZRD(1), (2)(a), (b) and (c) and (4)(a), (b) and (c) of the Competition Act.
7. The Respect Agreement relevantly contained a cartel provision because it contained a provision which had the purpose or effect of fixing, controlling or maintaining the price for the supply of shipping services, including shipping services to Australia, which were supplied by the parties to the Respect Agreement who were in competition with each other in relation to the supply of such services.
8. Second, the accused corporation (K-Line) knew or believed that the contract, arrangement or understanding contained a cartel provision: s 44ZZRG(2) of the Competition Act; see also s 5.3 of the Criminal Code which defines the fault element of knowledge. It is implicit in K-Line’s plea of guilty that it knew that the Respect Agreement contained the price fixing provision which was a cartel provision.
9. Third, the corporation (K-Line) gave effect to the cartel provision: s 44ZZRG(1)(b) of the Competition Act.
10. K-Line gave effect to the relevant cartel provision in the 20 specific instances in which its officers or employees engaged in communications with officers or employees of other parties to the Respect Agreement, most notably, but not exclusively, NYK and Mitsui, in relation to the freight rates that the respective companies would bid in response to requests for bids by motor vehicle manufacturers for the shipping of motor vehicles to Australia.
11. Fourth, the corporation (K-Line) intended to give effect to the cartel provision: see s 5.6(1) of the Criminal Code, which provides that, where the fault element for a physical element of an offence is not specified, the fault element is intention. It is implicit in K-Line’s plea of guilty that it intended to give effect to the price fixing provision.
12. Two further aspects of the relevant statutory scheme should be noted.
13. First, the agreed facts relevant to the offence included that K-Line was a party to a conference agreement that was registered under Part X of the Competition Act. Part X of the Competition Act establishes a system for regulating international liner cargo shipping services. That system relevantly provides for the registration of conference agreements relating to those services. If the conference agreement is registered under Part X of the Competition Act, the parties are given partial and conditional exemptions from, relevantly, s 44ZZRG of the Competition Act: see ss 10.17 and 10.17A of Part X of the Competition Act.
14. As previously noted, while K-Line was a party to a conference agreement that was registered under Part X of the Competition Act, none of the conduct the subject of the charge fell within the exemptions in that Part of the Act.
15. Second, s 5 of the Competition Act provides that the provisions of, inter alia, Part IV of the Act extends to, relevantly, the engaging in conduct outside Australia by bodies corporate incorporated or carrying on business in Australia. K-Line was not incorporated in Australia, however it is an agreed fact that K-Line carried on business in Australia. It is on that basis that s 44ZZRG of the Competition Act extends to K-Line’s offending conduct. That is important because all of the offending conduct otherwise occurred outside Australia. All of the collusive arrangements and discussions, and all of the contracts that resulted from them, were engaged in or entered into overseas. None of the K-Line managers who were involved in the relevant conduct were Australian citizens or residents.

# MAXIMUM PENALTY

1. The penalty for an offence against s 44ZZRG(1) is set out in s 44ZZRG(3) of the Competition Act.
2. In simple terms, the maximum penalty is the greater of three amounts: first, the sum of $10,000,000; second, an amount consisting of three times the total benefits that were obtained from the commission of the offence, if those benefits can be determined; third, if the benefits cannot be determined, an amount consisting of 10% of the corporation’s annual turnover during the 12 month period ending at the end of the month in which the corporation committed, or began committing, the offence. The expression “annual turnover” is defined in s 44ZZRB of the Competition Act as the sum of the values of all the supplies that the corporation, or any related corporation, made or was likely to have made during the relevant 12 month period, other than certain specific types of supplies, including supplies that are not connected with Australia.
3. It was common ground that the total value of the benefits obtained by K-Line which were reasonably attributable to the commission of the offence could not be determined.
4. It was an agreed fact for the purpose of this proceeding that K-Line’s annual turnover, as defined, in the relevant 12 month period from 23 July 2008 to 24 July 2009, was approximately AU$1 billion. That figure was based on various estimates and assumptions by K-Line. The Director accepted that the annual turnover calculated by K-Line provided an appropriate basis for the calculation of the maximum penalty pursuant to s 44ZZRG(3) of the Competition Act.
5. The maximum penalty in respect of the offence committed by K-Line is accordingly $100 million.

# AGREED FACTS IN RELATION TO COOPERATION

1. The Director tendered a statement of agreed facts relating to K-Line’s assistance and cooperation with the ACCC in relation to the ACCC’s investigation of its participation in the relevant cartel and the circumstances in which K-Line came to plead guilty to the indictment presented by the Director in this Court. The agreed facts in relation to this aspect of the matter were again lengthy and detailed. Following is a summary. It should again be noted that all of the facts contained in the statement of agreed facts relating to cooperation have been considered. If a particular fact is not included in the following summary, it does not follow that it has been ignored.
2. Both the Director and K-Line made detailed submissions concerning the extent and proper characterisation of K-Line’s cooperation. Some of the submissions concerned the comparison between the cooperation provided by K-Line and the cooperation provided by NYK. Those submissions will be addressed in detail later. The statement of agreed facts concerning cooperation also contained some comparisons between the cooperation provided by K-Line and NYK. Those parts of the statement will also be addressed later.
3. While the statement of agreed facts concerning K-Line’s cooperation was lengthy and detailed, the rather general and anodyne nature of some of the facts recited in it made it difficult to assess the real value of the assistance provided. In particular, while there are repeated references to the provision of information and documents and the making of admissions, it is difficult to assess the real value of that material in the absence of further details; for example, whether the information was not otherwise known to or ascertainable by the ACCC, or whether the admissions concerned essentially transactional or non-contentious matters as opposed to matters that the ACCC would not have been otherwise able to prove by direct evidence. The difficulties in that regard were exacerbated by the fact that there was no evidence from an officer of the ACCC concerning his or her assessment of the value of the assistance and cooperation provided by K-Line. This issue will be addressed in more detail later.

## Initial contact with the ACCC

1. On 7 September 2012, the day after raids by the Japanese Fair Trade Commission and the United States Department of Justice on the offices of a number of international shipping companies, including K-Line, the ACCC sent a facsimile to the General Counsel and Company Secretary of K-Line Australia. That facsimile came to K-Line’s attention on 10 September 2012.
2. On 11 September 2012, K-Line approached the ACCC for an immunity marker under the ACCC’s *Immunity Policy for Cartel Conduct 2009*. Immunity was not available to K-Line, however, as it was the second shipping company to seek immunity.
3. On 26 October 2012, K-Line, via its Australian legal representatives, contacted the ACCC to indicate that K-Line would be seeking to cooperate with the ACCC.
4. On 13 May 2013, K-Line submitted to the ACCC an application for leniency under the ACCC’s *Cooperation Policy for Enforcement Matters*.
5. As events transpired, the leniency application did not identify or include any of the instances of cartel conduct which ended up being the subject of the indictment.

## Waivers

1. On 30 September 2013, the ACCC sought a waiver from K-Line to enable the ACCC to exchange information with other competition regulators to which K-Line had made an application for immunity or leniency.
2. On 21 October 2013, K-Line gave its consent to the ACCC to disclose to the Japan Fair Trade Commission any information that K-Line had provided to the ACCC. K-Line did not, however, consent to the Japan Fair Trade Commission disclosing to the ACCC information which had been provided by K-Line. The ACCC was accordingly unable to obtain that information from the Japan Fair Trade Commission.
3. On 8 November 2013, the ACCC again asked for K-Line to provide waivers in respect of the confidentiality of information that K-Line had provided to other regulators, including the United States Department of Justice.
4. On 29 November 2013, K-Line informed the ACCC that it did not see the reason for the ACCC’s request for consent to discuss its leniency application with competition regulators in Canada, the United States or New Zealand and requested the ACCC to explain the basis of its requests for waivers. K-Line also reiterated that it would not provide a waiver for the Japan Fair Trade Commission to share information with the ACCC. It stated, in that regard, that the Japan Fair Trade Commission had not approached K-Line with such a request and that K-Line considered that the appropriate course was to await such an approach in accordance with local requirements in Japan.
5. K-Line did not at any stage provide the full waivers as requested by the ACCC.

## Provision of information and admissions

1. Having regard to K-Line’s offer to cooperate, on 22 July 2013, the ACCC sought detailed information from K-Line concerning its operations in Australia, including its relationship with K-Line Australia, information about K-Line’s customers and contracts, and information and documents about any conference agreements. K-Line responded on 16 and 19 August 2013 and provided details of its Australian operations and relationship with K-Line Australia. It also provided copies of agency agreements, information about K-Line’s major customers and routes and information on amounts invoiced and vehicles transported by K-Line for 10 different manufacturers. K-Line also informed the ACCC that there were no conference agreements registered pursuant to Part X of the Competition Act to which K-Line or K-Line Australia was a party.
2. On 30 September 2013, the ACCC requested further information from K-Line. The ACCC also identified five registered conference agreements under Part X of the Competition Act to which K-Line was a party and requested information in relation to each of those agreements.
3. K-Line responded to the ACCC’s requests on 21 October 2013. K-Line confirmed the existence of the five registered conference agreements identified by the ACCC.
4. On 8 November 2013, the ACCC requested that K-Line investigate whether it may have engaged in cartel conduct.
5. On 29 November 2013, K-Line responded to the ACCC’s request. In its response, K-Line reported the outcome of its internal investigations to the ACCC by providing a table containing a high-level summary of the interactions regarding its customers and instances which had been identified by the ACCC in its request, as well as additional interactions involving those customers. The summary table provided by K-Line identified conduct of K-Line as well as that of other shipping companies, including NYK and Mitsui. It included admissions regarding conduct that was potentially in contravention of the Competition Act. It also included some, but not all, of the information which had been sought by the ACCC. The information which K-Line provided included high-level particulars as to time and the nature of discussions between the shipping companies, but did not include the names of the employees involved in those discussions.
6. On 19 March 2014, K-Line sent the ACCC links to media releases on the Japan Fair Trade Commission and K-Line websites outlining the cease and desist orders and surcharge payment orders that had been issued by the Japan Fair Trade Commission against K-Line and other shipping companies in relation to violations of the Anti-Monopoly Act in Japan.
7. On 2 June 2014, the ACCC sought further details in respect of conduct identified in K-Line’s investigation report of 29 November 2013, including any supporting documentation. It also requested that K-Line conduct further internal investigations for identified customers and explained how waivers would assist its investigation. The ACCC also indicated that it would like to interview K-Line employees and requested that K-Line advise whether K-Line’s employees could be made available for interview.
8. On 1 August 2014, K-Line provided the ACCC with a report containing the outcome of its further internal investigations. In that report, K-Line provided additional information in chronological table form in relation to its conduct, as well as the conduct of NYK and Mitsui, in relation to negotiations with various car manufacturers during relevant timeframes, including particulars as to time, the names of employees involved and the nature of the discussions.
9. The admissions made by K-Line in its reports to the ACCC lent support to 16 of the 20 instances of conduct by which K-Line gave effect to the cartel provision which in due course became the subject matter of the charge to which K-Line plead guilty. The admissions were consistent with five of those instances. Two of the instances were previously unknown to the ACCC. The admissions also provided the basis for the ACCC to identify and pursue other sources of evidence.
10. On 1 October 2014, K-Line sent the ACCC links to media releases on the United States Department of Justice and K-Line websites in relation to K-Line agreeing to plead guilty to an offence of participating in a combination and conspiracy to suppress and eliminate competition in international ocean shipping services for roll-on, roll-off cargo, to and from the United States and elsewhere.

## Provision of documents

1. On 22 December 2014, the ACCC requested K-Line to provide transaction documents relevant to the conduct which K-Line had identified in the chronological table it provided to the ACCC on 1 August 2014. K-Line provided transaction documents pursuant to that request, including documents translated from Japanese to English, in January and March 2015.
2. The ACCC also requested detailed organisational charts of K-Line’s Car Carrier Division for employees at or above manager level for the period from 2008 to 2012. In late December 2014, K-Line provided 29 organisational charts in response to that request.
3. In January 2015, the ACCC requested that K-Line provide copies of K-Line’s correspondence with the Japan Fair Trade Commission in respect of routes to and from Australia. In January and February 2015, K-Line’s Australian solicitors provided 156 documents to the ACCC in response to that request, including some translated documents. Further information and assistance was given to enable the ACCC to locate, “navigate” and categorise the documents that had been provided by K-Line. In May 2015, the ACCC requested K-Line to provide further translations of some of the documents, as well as copies of attachments to emails.
4. Following further correspondence in June 2015, K-Line eventually provided the requested documents in tranches as translations became available during July 2015. The ACCC nevertheless had to engage the services of a Japanese translator to translate some of the documents in a timely fashion. K-Line also provided copies of documents extracted from an email archive search in Japan and the United States.
5. The ACCC made a further request to K-Line for business records on 18 August 2015. Documents were provided in response to that request in mid-September 2015. K-Line also advised that there were no business records for certain requests for quotes or the outcomes of such requests because such requests were made by telephone or in meetings rather than in writing.
6. On 18 August 2017, the ACCC requested further business records and information from K-Line. K-Line did not provide any documents in response to that further request.

## Requests to interview employees

1. On 2 June 2014, the ACCC sent a letter to K-Line’s Australian solicitors requesting that K-Line make certain of its Japanese employees relevant to the alleged conduct available for interview by the ACCC in Australia in June or July 2014. That request was repeated in a meeting between the ACCC and K-Line’s Australian solicitors on 9 December 2014. The ACCC identified the four employees it would first like to interview and a further four employees who it would possibly seek to interview in the next phase. It also indicated how it wanted the interviews to proceed and requested copies of the employees’ resumes and information about their reporting lines.
2. On 27 December 2014, K-Line informed the ACCC that some of the requested interviewees would not be able to attend an interview in Australia due to criminal procedures in the United States. K-Line indicated that it was prepared to consider requesting those individuals to answer a written questionnaire from the ACCC via their legal representatives.
3. In subsequent correspondence, K-Line inquired whether the ACCC would provide the employees with immunity from criminal and civil proceedings, including civil penalty proceedings. In response, the ACCC advised that civil and criminal immunity was not available, but agreed that any statement made by the employees would not be used in evidence or to assist in criminal proceedings against the interviewee. The ACCC also noted that it was not in a position to provide any assurances as to the use of a statement against any other person in any criminal proceedings as that was a matter for the Director.
4. On 22 April 2015, K-Line’s solicitors informed the ACCC that K-Line had approached the potential interviewees but that the interviewees had a number of concerns about proceedings against them. K-Line expressed the view that they would require some assurances if it was to persuade them to travel to Australia to provide evidence.
5. In June 2015, K-Line’s Australian solicitors confirmed that three interviewees would be made available for interview in Sydney in late July and August 2015. None of those employees were citizens or residents of Australia and therefore could not have been compelled by the ACCC to travel to Australia to attend interviews.
6. In late July 2015, K-Line informed the ACCC that it was no longer prepared to proceed with the interviews of the individuals. The ACCC and K-Line were unable to agree on the terms and conditions upon which the interviews would be conducted, including whether the employees would have to be independently legally represented.
7. In August 2015, K-Line and its legal representatives proposed videoconferences or in-person interviews at the Australian embassy in Japan as an alternative to employees attending interviews in Australia. The ACCC responded that that was not an available option.
8. On 2 September 2015, the ACCC contacted the prospective interviewees and requested interviews through their independent legal advisers in the United States, as opposed to through K-Line. On 7 September 2015, K-Line contacted the ACCC and advised it that those individuals were separately represented for the purposes of the United States proceedings only.
9. In July 2016, officers of the ACCC interviewed and obtained a witness statement from a K-Line employee located in the United States. The ACCC made arrangements for this interview directly with the individual, through his independent counsel in the United States. The same occurred in February 2017 in respect of a different K-Line employee, who was again interviewed in the United States by ACCC officers in the company of his independent legal counsel. In each case, K-Line had agreed to pay for independent legal counsel to attend the interview and advise the employee, though the ACCC was not aware of K-Line’s role in that arrangement at the time of the interviews.
10. In November 2017, a third employee was interviewed by the ACCC and provided a witness statement. That interview occurred in Australia. K-Line secured independent legal representation for that employee and facilitated and paid for his travel to Australia to participate in the interview.
11. The three K-Line witnesses interviewed by the ACCC each made relevant admissions on an induced basis. Each of the three witnesses was provided with assurances that the ACCC would not commence civil proceedings in its own right against the witnesses, that the ACCC would not recommend to the Director that criminal proceedings be commenced against the individual, and that any sworn witness statement would be not used in any criminal or civil proceedings against the individual.

## Information concerning turnover

1. On 2 October 2015, the ACCC requested K-Line to provide turnover figures, excluding any supplies not connected with Australia, for K-Line, K-Line Australia and any other related entity. While there were various communications between the ACCC and K-Line or its Australian solicitors in relation to that request throughout the balance of 2015, K-Line never provided the turnover figures requested by the ACCC. K-Line provided the ACCC with an estimate of annual turnover in September 2017.

## Guilty plea

1. Between about August 2015 and December 2015, various communications occurred between the ACCC and K-Line’s Australian legal representatives concerning potential proceedings against K-Line, including the nature of those proceedings and their possible resolution. In March 2016, K-Line made written representations to the Director as to why the matter should proceed by way of civil penalty proceedings as opposed to criminal proceedings. On 10 August 2016 the Director advised that it did not accept that criminal proceedings were not appropriate.
2. Criminal proceedings were commenced against K-Line by the service of a Local Court of New South Wales Court Attendance Notice on 31 October 2016.
3. The Director’s office and the ACCC compiled a brief of evidence which was served on K-Line on 13 December 2016. The brief was supplemented on 6 February 2017 and at various other times throughout 2017. K-Line sought further particulars on 17 March 2017. Some further particulars were provided on 19 June 2017.
4. On 24 April 2017, K-Line made an application in the Local Court pursuant to s 91 of the *Criminal Procedure Act 1986* (NSW), seeking a direction that nine prosecution witnesses, each of whom was a resident in Japan, be required to attend and give evidence at the committal proceedings. The application was heard over two days in June 2017. On 4 July 2017, the magistrate dismissed that application and the matter was set down for a committal hearing on 19 and 20 October 2017.
5. On 18 October 2017, K-Line waived its right to committal and on 19 October 2017 K-Line was committed for trial to this Court.
6. The Director presented an indictment in this Court on 15 November 2017. That indictment contained 39 separate counts each for an offence under s 44ZZRG of the Competition Act. K-Line indicated that it would plead not guilty to the counts in the indictment and, on 11 December 2017, the matter was listed for trial to commence on 30 July 2018 with an estimate of 16 weeks.
7. The Director served a Notice of Prosecution Case and a copy of the brief of evidence on 5 February 2018 and the Outline of Prosecution Case on 6 February 2018. Those documents were in substantially the same form as the consolidated brief of evidence in the Local Court.
8. On 2 March 2018, K-Line indicated that it would enter a plea of guilty to a single rolled-up charge and, on 5 March 2018, the Court was advised that the matter would proceed by way of a plea of guilty and sentencing hearing.
9. A plea of guilty to an amended indictment containing a single “rolled-up” charge under s 44ZZRG of the Competition Act was entered on 5 April 2018.

# PENALTIES IMPOSED ON K-LINE IN OVERSEAS JURisdictions

1. The Director tendered a statement of agreed facts in respect of penalties imposed on K-Line in overseas jurisdictions. Following is a summary of those facts. The relevance of the imposition of those penalties and the appropriate weight to be given to them in the exercise of the sentencing discretion is addressed later.

## Japan

1. On 18 March 2014, the Japan Fair Trade Commission found that K-Line and other carriers including NYK and Wallenius Wilhelmsen had illegally coordinated their responses to requests for prices from customers in breach of the Anti-Monopoly Act. K-Line was issued with an administrative surcharge payment order in the amount of ¥5,698,390,000 (approximately AU$68.3 million) in respect of that conduct. That amount included an amount of ¥1,062,960,000 (approximately AU$12.9 million) which was referrable to coordination in respect of the carriage of vehicles from Japan to south and east Australia. The quantum of the surcharge payment order was based on a proportion of the value of freight services supplied by K-Line in respect of vehicles on that route.
2. The orders made by the Japan Fair Trade Commission on 18 March 2014 included a cease and desist order issued to K-Line in relation to routes including routes to Australia. As the name of that order would suggest, it required K-Line to undertake not to engage in the impugned conduct and take certain steps to ensure that it was not repeated.

## United States of America

1. On 26 September 2014, K-Line agreed to plead guilty and pay a criminal fine of US$67.7 million (approximately AU$77.3 million as at the date of penalty) in the United States in relation to its participation in a combination and conspiracy to suppress and eliminate competition by allocating customers and routes, rigging bids, and fixing prices for international ocean shipping services for roll-on, roll-off cargo, such as cars and trucks, to and from the United States and elsewhere.
2. Three K-Line employees who had been senior managers in the Car Carrier Business Group pleaded guilty to participating in the same conspiracy in January, February and March 2015 respectively. Two of the employees were sentenced to 18 months’ imprisonment and one was sentenced to 14 months imprisonment. Each of the employees was ordered to pay a criminal fine of US$20,000.

## European Union

1. On 21 February 2018, the European Commission fined four maritime car carriers, including K-Line, a total of €395 million (approximately AU$619.9 million as at the date of penalty) for participating in a cartel concerning intercontinental maritime transport of vehicles in breach of European Union antitrust rules. K-Line’s fine was €39.1 million (approximately AU$61.4 million as at the date of penalty).

## South Korea

1. In August 2017, the South Korean Fair Trade Commission issued a total fine of 43 billion won (approximately AU$47.68 million as at the date of penalty) on nine international shipping companies, including K-Line, following allegations that the shippers colluded to segment the market for ocean shipping services for “RoRo” cargo between 2002 and 2012. K-Line was initially fined 12.824 billion won (approximately AU$14.22 million as at the date of penalty). As at the date of the sentence hearing, the final fine was still to be determined as one instance of conduct was the subject of appeal proceedings.

## Chile

1. On 28 January 2015, the Fiscalia Nacional Economica filed a claim in the Chilean Competition Court against Mitsui, K-Line, NYK, Eukor and two Chilean companies for colluding in multiple bidding processes conducted between car manufacturers and car importers, for the shipment of automobiles into Chile from ports originating in Europe, America and Asia, between 2000 and 2012. Substantial fines were sought by the regulator. Those proceedings had not been finalised as at the date of the sentence hearing.

## China

1. On 28 December 2015, China’s National Development and Reform Commission fined eight carriers for anti-competitive behaviour across five shipping routes, including between China and Europe. K-Line was fined 23,980,869 yuan (approximately AU$5.1 million as at the date of penalty).

## South Africa

1. On 6 March 2017, the Competition Commission of South Africa referred K-Line, along with Mitsui, NYK and Wallenius Wilhelmsen, for prosecution to the Competition Tribunal of South Africa for price fixing, market division and collusive tendering involving the transportation of Toyota vehicles from South Africa to Europe, North Africa (Mediterranean Coast) and the Caribbean Islands via Europe, West Africa, East Africa and Latin America by sea. On 15 August 2018, K-Line signed a consent agreement admitting to having engaged in eight instances of prohibited practices in respect of tenders issued by several automotive manufacturers in relation to the transportation of motor vehicles by sea to or from South Africa. K-Line has agreed to pay a cumulative administrative penalty of R98,928,170.05 (approximately AU$9.71 million). Those proceedings had not been finalised as at the date of the sentence hearing in this matter.

## Mexico

1. On 9 June 2017, the Federal Economic Competition Commission fined carriers, including K-Line, a total of 581.66 million pesos (approximately AU$42.4 million as at the date of penalty) for committing absolute monopolistic practice by agreeing and implementing agreements to divide the market of maritime transportation of motor vehicles among themselves. Of this total, K-Line and one of its subsidiaries was fined 115 million pesos (approximately AU$8.38 million as at the date of penalty). The final quantum of the fine was the subject of appeal proceedings which had not been finalised as at the date of the sentence hearing in this matter.

# Evidence ADDUCED BY K-LINE

1. K-Line adduced affidavit evidence from two senior officers: Mr Yukikazu **Myochin**, who was a director and senior managing executive officer of K-Line, and Mr Yutaka **Manabe**, who was the general manager of the Corporate Legal Risk & Compliance Group at K-Line.
2. Mr Myochin had been employed by K-Line since 1984 and had worked in many different positions. He was appointed a director in 2016. In 2018 he was appointed Chief Compliance Officer. That position was first established in 2015 for the purpose of strengthening the authority and implementation of compliance measures, including compliance with antitrust laws. He was also responsible for K-Line’s Legal Group, which included responsibility for ensuring that K-Line’s activities complied with local and international laws, and the Corporate Legal Risk & Compliance Group, which was responsible for developing, implementing and enforcing measures related to compliance. The Corporate Legal Risk & Compliance Group included the Fair Trade Promotion Team, which was responsible for K-Line’s day-to-day compliance with competition law obligations.
3. Mr Myochin’s evidence included a statement of contrition in the following terms:

K-Line is committed to ensuring strict compliance with all applicable laws and regulations, including the requirements of Australian competition laws. K-Line is deeply apologetic that it has contravened Australia’s competition laws, and has pleaded guilty to the offence. The company sincerely regrets the concern its conduct has caused customers, shareholders, and other stakeholders. The company remains committed to ensuring that this conduct never happens again and has implemented a number of measures directed to achieving this.

It is the responsibility of senior management, through activities including review, deliberation, determination and direction with regard to compliance related issues, to foster, enhance and ensure awareness of compliance within the K-Line Group. I believe all employees within K-Line now well understand the message from senior management that the company will never permit any sales or profit to be gained through non-compliant conduct. This is a matter of utmost important to K-Line.

1. Mr Myochin’s evidence included his recollection of competition law compliance measures that were implemented by K-Line in the years following the Japan Fair Trade Commission raid which occurred in September 2012. Those measures included the implementation of various guidebooks and policy statements and communications issued to employees by the President and Chief Executive Officer, particularly during November each year. K-Line had designated November as “Compliance Month”.
2. Mr Myochin also gave evidence about K-Line’s rehabilitation. His evidence included the following statement:

As a result of the continuous comments by senior management that K-Line will never tolerate any activities incompliant with competition laws, together with the measures K-Line has implemented since the JFTC raid, I believe that competition law compliance is now pervasive in the company. Employees are well aware of the importance of competition law compliance and the seriousness with which cartel conduct is regarded, particularly given the severe consequences that K-Line and individuals have suffered as a result of the conduct that occurred in the Car Carrier Group, including substantial fines imposed on K-Line in a number of jurisdictions, the imprisonment of individuals in the United States, as well as the risks associated with undermining K-Lines social standing and credibility, including undermining customer trust and confidence in K-Line and within society more generally.

1. Mr Myochin expressed the view that it was very unlikely that “such conduct” will occur again in K-Line and that thorough and appropriate observance of K-Line’s rules regarding contact with competitors is likely to eliminate the risk of the conduct recurring.
2. Like Mr Myochin, Mr Manabe had been employed by K-Line for a very long time. He commenced employment with K-Line in 1983 and had occupied many different positions. He was appointed General Manager of the Corporate Legal Risk & Compliance Group in 2015. Prior to that he was the General Manager of the Legal Group and the General Manager of the Corporate Legal Risk Management Division. Mr Manabe gave detailed evidence concerning the various teams and sub-teams within the Corporate Legal Risk & Compliance Group and their respective duties and responsibilities. It is unnecessary to recite that evidence in detail.
3. Mr Manabe had been General Manager of the Legal Group for only around five days at the time of the Japan Fair Trade Commission raids in September 2012. He gave detailed evidence about K-Line’s initial responses to the raid and the subsequent action taken by the Japan Fair Trade Commission. More significantly, he gave detailed evidence concerning the measures implemented by K-Line to strengthen compliance following the raids.
4. The measures taken to strengthen compliance included, in summary: changes to senior management, including within the Car Carrier Group; the establishment of the Corporate Legal Risk & Compliance Group in 2013 and the position of Chief Compliance Officer in 2015; the implementation of strict guidelines in October 2012 regarding the participation and attendance at meetings and social gatherings with competitors; the creation of a detailed guidebook for compliance with the Anti-Monopoly Act; the establishment of a practice of requiring employees to pledge that they will comply with competition laws to K-Line; the establishment of a “hotline” system whereby employees, including employees of all foreign K-Line Group companies, can report any potential violations of competition laws; the continuing enhancement of K-Line’s competition law training program through the provision of small group training sessions; the implementation of a Global Compliance Policy for the K-Line Group, which included a specific competition law policy; and the adoption of guidelines to audit compliance within K-Line, including the utilisation of technology to identify and review email correspondence that could raise potential competition law risks.
5. Mr Manabe’s evidence included his observations of what he referred to as a “cultural change” concerning compliance since the 2012 raid. His evidence in that regard was as follows:

As a result of the various measures K-Line has implemented since the JFTC raid, I have personally observed a noticeable change in the day to day behaviour of employees in respect of their attitudes towards compliance and the need to comply with competition laws. I am confident that the strengthened compliance measures implemented following the JFTC raid are working and employees are well aware of their obligations under relevant antitrust laws.

I am aware that there has been an exponential increase in the number [sic] employees seeking consultations with me and members of my team for advice or guidance on how to act in particular situations to ensure they do not engage in any potentially problematic conduct. I consider this increase in consultations reflects the raised awareness among employees of both the existence of competition laws and the importance of compliance. I also consider it reflects a cultural change within the company of employees proactively taking steps to ensure they comply with competition laws.

1. Mr Myochin and Mr Manabe were not cross-examined and their evidence was not challenged.

# The Appropriate Sentence

1. As a corporation convicted of a federal offence, K-Line is to be sentenced in accordance with Part IB of the ***Crimes Act*** *1914* (Cth). The relevant provisions of Part IB and the applicable sentencing principles were considered at length in *CDPP v NYK*. Given the obvious connection between the offences committed by K-Line and NYK and the similarity of the key features of their offending behaviour, the following discussion repeats or reiterates much of what was said in *CDPP v NYK*. Where appropriate, however, relevant distinguishing facts or features will be highlighted. As will be seen, one of the key issues concerns parity between the sentence to be imposed on K-Line and the sentence that was imposed on NYK.
2. The overarching principle in Part IB of the Crimes Act is that any sentence imposed by the Court must be of a “severity appropriate in all the circumstances of the offence”: s 16A(1) of the Crimes Act.
3. The Court must take into account the matters set out in s 16A(2) of the Crimes Act so far as they are relevant and known to the Court. The “checklist” in s 16A(2) of the Crimes Act does not exclude other relevant considerations: *Direction of Public Prosecutions (Cth) v El Karhani* (1990) 21 NSWLR 370 at 377-8; *Bui v Director of Public Prosecutions* (Cth) (2012) 244 CLR 638 at [18]. The list of matters in s 16A(2) of the Crimes Act relevantly includes: the nature and circumstances of the offence; if the offence forms part of a course of conduct, that course of conduct; the circumstances of any victim and any injury, loss or damage arising from the offence; the degree to which the offender has shown contrition for the offence; if the offender has pleaded guilty, that fact; the degree to which the offender has cooperated with law enforcement agencies in the investigation of the offence and other offences; the deterrent effect of any sentence on the offender or any other person; the need to ensure that the person is adequately punished for the offence; the character and antecedents of the offender; and the prospect of rehabilitation of the offender.
4. What follows is a detailed consideration of the relevant s 16A(2) factors in the Crimes Act and other matters insofar as they are relevant to the offence committed by K-Line and K-Line’s particular circumstances.

## The nature and circumstances of the offence: s 16A(2)(a) of the Crimes Act

1. The offence committed by K-Line was a very serious offence which requires condign punishment. K-Line did not contend otherwise. A number of features of the offence and the offending conduct compel that conclusion.

### Course of conduct – a “rolled-up” offence

1. K-Line has pleaded guilty to a single offence against s 44ZZRG(1) of the Competition Act. In reality, however, the particulars and agreed facts reveal that K-Line committed multiple offences against s 44ZZRG(1) of the Competition Act over a period of over three years. A separate offence against s 44ZZRG(1) of the Competition Act is committed each time a corporation engages in conduct which gives effect to a cartel provision. The particulars and agreed facts disclose that K-Line engaged in conduct which gave effect to a cartel provision, or cartel provisions, on 20 separate occasions. On each of those occasions K-Line employees communicated and colluded with their counterparts at other carriers prior to, or during, the annual contract negotiations with the various vehicle manufacturers. Each of those occasions could have been charged as a separate offence.
2. It is, however, permissible for the Director to present an indictment containing a “rolled-up” charge on a plea of guilty for a federal offence. A “rolled-up” charge is a charge in which more than one contravention of the relevant offence provision, or more than one episode of criminality, is particularised as part of the charge. A rolled-up charge would, but for the plea of guilty and consent of the accused, be liable to be quashed on the basis that it would offend the rule against duplicity: see *Environment Protection Authority v Truegrain Pty Ltd* (2013) 85 NSWLR 125 at [31]-[52].
3. In sentencing a rolled-up charge, the Court is required to assess the criminality of an offender’s conduct as particularised. The issue for the Court on sentence is the criminality disclosed by the offence, not the number of charges: *R v Knight* [2004] NSWCCA 145 at [25]-[26]. The more contraventions or episodes of criminality that form part of the rolled-up charge, the more objectively serious the offence is likely to be: ***R v Richard*** [2011] NSWSC 866 at [65(f)]; *R v Glynatsis* [2013] NSWCCA 131; 230 A Crim R 99 at [66]; *R v De Leeuw* [2015] NSWCCA 183 at [116]. That said, the maximum penalty for the rolled-up charge is the maximum penalty for one offence, not the aggregate of the penalties for what could have been charged as separate offences: *R v Richard* at [105]; *R v Donald* [2013] NSWCCA 238 at [85].

### The maximum penalty

1. As has already been noted, the maximum penalty for the one offence committed by K-Line is $100 million.
2. The maximum penalty is generally considered to be a “guidepost” or “yardstick” that bears on the ultimate discretionary determination of the sentence for the offence because it represents the legislature’s assessment of the seriousness of the offence: ***Elias*** *v The Queen* [2013] HCA 31; 248 CLR 483 at [27]. It is, however, but one of the many factors that must be taken into account in arriving at an appropriate sentence. In some cases, the maximum penalty may afford only slight assistance, and in others it will afford no real assistance at all: *R v Geddes* (1936) 36 SR (NSW) 554 at 555-556; referred to with approval by McHugh J in ***Markarian*** *v The Queen* [2005] HCA 25; 228 CLR 357 at [65]. It would be “wrong to suggest that the court is constrained, by reason of the maximum penalty, to impose an inappropriately severe sentence on an offender for the offence for which he or she has been convicted”: *Elias* at [27].
3. The maximum penalty for an offence against s 44ZZRG(1) of the Competition Act is also somewhat unusual. Most offence provisions specify a single maximum penalty. As has been seen, s 44ZZRG(3) of the Competition Act provides alternative maximum penalties. The maximum penalty in K-Line’s case is based on its annual turnover, as defined, because it is common ground that the Court cannot determine the total value of the benefits obtained by one or more persons that are reasonably attributable to the commission of the offence.
4. One can readily comprehend why the legislature chose to include a maximum penalty for cartel offences which may be based on the offending corporation’s annual turnover. Specific deterrence is a major consideration in determining the appropriate size of the fine to impose in relation to a cartel offence. The fine should be such as to ensure that the penalty is not to be regarded by the offender or others as an acceptable cost of doing business. The sum required to achieve that objective will generally be larger where the offending corporation is a very large corporation, as may be reflected in its annual turnover. That said, in some cases a maximum penalty based on the offending corporation’s annual turnover may not provide a realistic guide to the objective seriousness of the offending conduct or criminality involved in the offence. It is, for example, possible to imagine a case where a large corporation with a very high annual turnover committed a single relatively minor offence against s 44ZZRG of the Competition Act.

### Cartel offences generally

1. The conduct engaged in by K-Line only became liable to a criminal sanction on and from 24 July 2009. That accounts for the start date of the period in the charge. Prior to that date, conduct of the sort engaged in by K-Line was only capable of attracting civil sanctions, including pecuniary penalties. The civil penalty regime continues to apply in respect of cartel conduct. The cognate civil penalty provision in relation to giving effect to a cartel provision, s 44ZZRK (since 2017, s 45AK), is in essentially the same terms as s 44ZZRG, other than that s 44ZZRG of the Competition Act includes relevant “fault elements” provided by the Criminal Code. Curiously, the maximum pecuniary penalty payable by a corporation for contravening s 44ZZRK was effectively the same as the maximum fine payable by a corporation which had been convicted of an offence against s 44ZZRG of the Competition Act: see ss 76(1) and (1A) of the Competition Act. It would seem that the only real difference is that a criminal conviction attracts opprobrium and societal condemnation in a way that the imposition of a civil penalty cannot: Commonwealth of Australia, *The Review of the Competition Law Provisions of the Trade Practices Act* (the “Dawson Inquiry”), Chapter 10: Penalties and other remedies, Canberra, April 2003.
2. The Director submitted that cartel conduct was intrinsically serious. The Director relied, in that regard, on relevant extrinsic material, including an extract from the Minister’s Second Reading Speech in respect of the Bill which criminalised cartel conduct in the Competition Act. Reference was also made to general statements that have been made in civil penalty cases concerning cartel conduct, including *Australian Competition and Consumer Commission v* ***ABB Transmission*** *and Distribution Ltd (No 2)* [2002] FCA 559; 190 ALR 169 at [5], [13]-[15], and *Australian Competition and Consumer Commission v* ***Visy*** *Industries Holdings Pty Ltd (No 3)* [2007] FCA 1617; 244 ALR 673 at [306]-[307].
3. In *Visy*, Heerey J said (at [306]-[307]):

Cartel behaviour of the kind with which this case is concerned is extremely destructive of the competition on which the prosperity of a free market economy depends. Often the profits can be immense, and the risk of detection slight. Of its nature, cartel behaviour is likely to occur in secret and between parties who seek mutual benefit…

Price fixing and market sharing are not offences committed by accident, or in a fit of passion. The law, and the way it is enforced, should convey to those disposed to engage in cartel behaviour that the consequences of discovery are likely to outweigh the benefits, and by a large margin.

1. It may readily be accepted that cartel conduct must generally be approached by the Court on the basis that it involves serious anti-competitive conduct which must be emphatically deterred by the imposition of appropriately stern penalties. It may equally be accepted that offences against s 44ZZRG(1) of the Competition Act specifically are objectively very serious. That is reflected in the maximum penalty for the offence, which is at least $10 million and may be considerably more in cases where the benefit derived from the offence was large, or the offender itself was a very large corporation with a high turnover. As is the case with sentencing for any offence, however, ultimately it is a matter for the Court to consider the nature and objective seriousness of the particular case at hand.
2. The Director relied on the list of factors that have been identified as being relevant to the imposition of civil penalties for cartel and other anti-competitive conduct. Those factors were summarised in the following terms in *Australian Competition and Consumer Commission v Australia and New Zealand Banking Group Limited* (**ACCC v ANZ**) [2016] FCA 1516 at [86]-[89]:

In general terms, the factors that may be relevant when fixing a pecuniary penalty may conveniently be categorised according to whether they relate to the objective nature and serious of the offending conduct, or concern the particular circumstances of the contravenor in question (what sentencing judges commonly refer to as the offender’s “subjectives” or the “subjective circumstances”).

The factors relating to the objective seriousness of the contravention include: the extent to which the contravention was the result of deliberate, covert or reckless conduct, as opposed to negligence or carelessness; whether the contravention comprised isolated conduct, or was systematic or occurred over a period of time; if the contravenor is a corporation, the seniority of the officers responsible for the contravention; the existence, within the corporation, of compliance systems and whether there was a culture of compliance at the corporation; the impact or consequences of the contravention on the market or innocent third parties; and the extent of any profit or benefit derived as a result of the contravention.

The factors that concern the particular circumstances of the contravenor (where the contravenor is a corporation) generally include: the size and financial position of the contravening company; whether the company has been found to have engaged in similar conduct in the past; whether the company has improved or modified its compliance systems since the contravention; whether the company (through its senior officers) has demonstrated contrition and remorse; whether the company had disgorged any profit or benefit received as a result of the contravention, or made reparation; whether the company has cooperated with and assisted the relevant regulatory authority in the investigation and prosecution of the contravention; and whether the company has suffered any extra-curial punishment or detriment arising from the finding that it had contravened the law.

The size of the contravening corporation does not of itself justify a higher penalty than might otherwise be imposed: *Australian Competition and Consumer Commission v Coles Supermarkets Australia Pty Ltd* [2015] FCA 330; (2015) 327 ALR 540 at 559-561 [89]-[92]. The size of the corporation may, however, be particularly relevant in determining the size of the pecuniary penalty that would operate as an effective deterrent. The sum required to achieve that object will generally be larger where the company has vast resources: *Australian Competition and Consumer Commission v Leahy Petroleum Pty Ltd (No 3)* [2005] FCA 265; (2005) 215 ALR 301 at 309 [39]; *Australian Competition and Consumer Commission v Apple Pty Limited* [2012] FCA 646 at [38].

1. There is no reason to suppose that the factors identified in the civil penalty context would not be equally applicable in the criminal sentencing context. While there can be no doubt that there are differences between civil penalty and criminal proceedings (cf. *Commonwealth v Director, Fair Work Building Industry Inspectorate* [2015] HCA 46; 258 CLR 482 at [51]-[61]), the task of appraising the nature and seriousness of particular contravening conduct in a civil penalty proceeding is very similar to the task of appraising the seriousness of an offence for the purpose of imposing a criminal sentence.
2. There is, in any event, nothing particularly novel or unique in the factors referred to in the civil penalty cases. Indeed, most of the factors are simply matters of commonsense. Most of them are, in any event, replicated, in one way or another, in the list of relevant considerations in s 16A(2) of the Crimes Act. The list of factors that has been developed in the civil penalty context should also not be treated as a rigid catalogue or checklist of matters to be applied in each case. The overriding principle is that the Court should weigh all relevant circumstances.
3. The particular factors that would appear to be relevant to the objective seriousness of the offence committed by K-Line include: the duration and scale of the offending conduct; the extent to which the conduct was deliberate, systematic and covert; and, as already noted, the fact that the offence involved a lengthy course of conduct.

### The duration and scale of the offending conduct

1. The following points may be made concerning the duration and scope of K-Line’s offending conduct.
2. First, the offence period itself spanned a period of more than three years. That of itself is highly significant.
3. Second, the lengthy duration of the offence cannot be considered in complete isolation. The Respect Agreement, including the relevant cartel provisions, had been on-foot since February 1997. The commencement date of the offence is somewhat artificial and simply represents the commencement of the criminalisation of cartel conduct in Australia. While K-Line cannot be punished for its conduct prior to 24 July 2009, and that conduct cannot serve to aggravate K-Line’s offence, it is nevertheless relevant to consider that the offence occurred in the context of an extremely longstanding global cartel. The offence did not occur in isolation and was certainly not a spur of the moment or one-off offence.
4. Third, the scope of the offending conduct was substantial. It occurred in a market for services that were and are of considerable economic importance to Australia: the supply of ocean transport services for “roll-on, roll-off” cargo, mainly motor vehicles and trucks, on international routes including to and from Australia. The cartel conduct involved many of the major global suppliers of those services. K-Line had the third largest global capacity of all of the carriers, behind NYK and Mitsui, amounting to between 11.6% to 11.9% of global capacity. All of the main carriers on the shipping routes to Australia that are the subject of the charge were parties to the cartel. Collectively, the Three Js, K-Line and the other two major Japanese shipping companies, accounted for 85% of all vehicle shipping capacity from Japan to Australia and 100% of the capacity from Thailand to Australia.
5. There could be little doubt that the anti-competitive conduct the subject of the charge had the capacity to substantially limit or distort the competitive setting of freight rates on the relevant routes to Australia, the likely result being that the rates were higher than they would have been in a competitive market. K-Line alone shipped a total of 106,247 vehicles to Australia pursuant to contracts affected by the conduct the subject of the charge. K-Line’s estimated revenue from those shipments was around AU$97.4 million.
6. In its submissions, K-Line highlighted one particular feature of its giving effect to the cartel provision in the Respect Agreement which it contended should be considered in assessing the nature and seriousness of its offending behaviour. It also submitted that this feature of its conduct relevantly distinguished and made its conduct less serious than the corresponding conduct of NYK. That feature might colloquially, but nonetheless accurately, be referred to as “cheating” on the cartel.
7. K-Line contended that the agreed facts revealed that K-Line’s participation in the cartel was less enthusiastic, less extensive and less rigorous than NYK’s participation. It also contended that it was, from time to time, a “disruptive presence” in the cartel and that it “engaged in competitive conduct” which “undermined the cartel”. It emphasised, in that regard, that the agreed facts revealed that, in seven of the 20 particularised instances of K-Line giving effect to the cartel provision, it bid less than the rate that had first been communicated or agreed with one or more of the other carriers. K-Line also contended that the facts showed that some of its officers were not always trusted by the other carriers to implement agreements reached in respect of the freight rates that were to be submitted to the vehicle manufacturers.
8. It may be accepted that on several occasions K-Line employees effectively cheated on agreements that had been reached with their counterparts at the other carriers and submitted bids that were not in accordance with the agreed position. It may equally be accepted that some of the officers of the other carriers distrusted some of the K-Line employees who were involved in the discussions which gave effect to the price fixing provision of the Respect Agreement. It does not necessarily follow, however, that the seriousness of K-Line’s offending conduct was mitigated in any significant or material respect. That is so for a number of reasons.
9. First, as was pointed out in *CDPP v NYK* at [231], cheating by one or more of the cartelists is a common feature of most cartels. That is because it is essentially economically rational behaviour. Cartelists seek to maximise their profits by their anti-competitive behaviour. It is economically rational for individual cartelists to then seek to maximise their profits further still be cheating on the cartel. They do so for their own self-interest, not for some altruistic purpose of benefiting the consumer, or restoring competition to the relevant market. While it could perhaps be said that the individual cartelist who cheats on a cartel is engaging in competitive conduct, in the sense that despite the cartel they are seeking to win business from their fellow cartelists, it would perhaps be more accurate to characterise the conduct as further exploiting an anti-competitive environment which was created by the cartel in the first place. The cheating cartelist seeks to take further advantage of an already distorted or compromised competitive environment.
10. Second, K-Line’s cheating in the instances relied on by it did not always result in lower freight rates. On occasion, K-Line would submit a lower price than first agreed, but then ultimately submit a bid in accordance with the agreed position. On a number of occasions K-Line’s undercutting of the agreed position was also relatively small or minor. On other occasions the cheating was ineffective. The main point, however, is that what K-Line was undercutting on each occasion was a rate which had been artificially set by the collusion between it and the other carriers. It was not a truly competitive rate.
11. Third, the instances of cheating relied on by K-Line were in any event fairly isolated and minor instances in the context of the operation of a cartel over a period exceeding three years.
12. Fourth, the cheating did not represent a corporate position taken by K-Line. It was, for the most part, the result of the actions of individual employees whose actions may not necessarily have been approved by senior management.
13. Fifth, it is at best doubtful that the facts reveal that K-Line’s corporate participation in the cartel was less enthusiastic, less extensive and less rigorous than NYK, or indeed any of the other participants in the cartel. Nor can it be accepted that K-Line was an “outlying participant” in the cartel. NYK did not withdraw from the cartel until the Japan Fair Trade Commission effectively put an end to it. The fact that on some occasions individual employees sought to exploit the cartel does not mean that its participation in the cartel was any less enthusiastic, extensive or rigorous than any of the other participants. Nor does the fact that some employees of the other participants may have distrusted certain K-Line employees and believed that K-Line had on occasion cheated on the cartel. The level of distrust, or the instances of cheating, were plainly not significant enough to put an end to the cartel or K-Line’s participation in it.
14. Finally, K-Line sought to characterise steps taken by some K-Line officers to reduce or limit the communications with K-Line’s competitors as attempts to put an end to the cartel. Considered in their proper context, however, most of the steps taken by the K-Line officers are better characterised as steps taken to avoid or limit the risk of the exposure or detection of the cartel. The attempt to limit the communications to senior executives, for example, appears to have been motivated by a desire to avoid detection, or to avoid exposing more junior employees to potential punishment, rather than a desire to end the cartel. In any event, the fact remains that K-Line continued to participate in the cartel, and its officers and employees continued to give effect to it, up until the point in time when the Japanese and United States competition authorities put an end to it.
15. The extent to which the facts relating to cheating and distrust relevantly distinguish K-Line’s offending behaviour from NYK’s offending behaviour is considered later in the context of the parity principle. For present purposes, it suffices to note that, the instances of cheating relied on by K-Line do not significantly or materially reduce the seriousness of the offending conduct. Nor is K-Line’s cheating to be considered a material mitigating circumstance.

### The extent to which the conduct was deliberate, systematic and covert

1. Cartels, by their very nature, are generally likely to involve deliberate conduct and to require a significant degree of planning and deliberation. They are also likely to be covert and involve conduct intended to avoid detection by regulatory authorities. The cartel in this matter was no exception.
2. The facts reveal that the cartel, as evidenced by the conduct of K-Line and some of the other carriers in giving effect to the Respect Agreement over many years, was systematic, well-orchestrated and involved a high level of planning and coordination. The central feature of the cartel was the well-developed system or practice whereby the relevant managers of the carriers who were parties to the cartel, including on occasion senior officers in the Car Carrier Group at K-Line, would communicate with their counterparts in advance of and during each bidding and contract negotiation cycle. Those communications were ordinarily commenced by the lead carrier for the particular vehicle manufacturer or the route in question. Knowledge of the communications and the outcome of them was widespread at K-Line, including at the most senior levels of the Car Carrier Group and in some instances at board level.
3. There could also be little doubt that K-Line’s actions in giving effect to the Respect Agreement were conducted in a covert and surreptitious manner. While the Respect Agreement and the processes involved in giving effect to it appear to have been well-known in the Car Carrier Group at K-Line, and indeed appear to have been part of its corporate culture, steps were taken, including by senior management, to ensure that the collusive conduct would not be readily apparent to those who might seek to put an end to it. There could be little doubt that those steps were taken because it was known that the Respect Agreement and the communications which occurred with K-Line’s competitors were improper and unlawful. K-Line staff had received training in relation to anti-trust laws in 2009 and 2010.
4. The covert nature of the actions taken to give effect to the cartel provision of the Respect Agreement is best demonstrated by the general practice of K-Line officers not reporting or recording in writing the communications they had with their competitor’s counterparts. If it was necessary to report those communications, it was generally done orally. If written reports were prepared, they were generally marked with words to the effect of “Confidential. Dispose of after Reading”. Consistent with that notation, it was the general practice of K-Line employees to delete or destroy any written reports of the cartel communications. Steps were also taken at various times to attempt to limit the communications with the other carriers to more senior staff within K-Line. It may readily be inferred that those steps were taken, at least in part, with a view to avoiding the risk of detection.

### Seniority of employees, corporate culture and compliance programs

1. There could be little doubt that the conduct which involved giving effect to the Respect Agreement was engaged in by, or at least known and authorised by, senior managers within the Car Carrier Business Group at K-Line. There are also clear indications that senior executive officers outside the Car Carrier Business Group were involved in, or at least knew about, the Respect Agreement and the steps taken by managers within the Car Carrier Business Group to give effect to that agreement. This all occurred in circumstances where relevant K-Line staff had been given training in anti-trust laws and there were, at least ostensibly, some guidelines or structures which were supposed to ensure compliance with such laws.
2. It could fairly be concluded that the corporate culture at K-Line must have been conducive to its participation in the Respect Agreement and its conduct in giving effect to it.

### The profit or benefit attributable to the conduct

1. It is not possible to determine or quantify the profit or benefit derived by K-Line, or other persons, from the offending conduct. The revenue received by K-Line from the contracts that were in some way affected by the specific incidents of giving effect to the Respect Agreement was estimated by K-Line to be AU$97.4 million. The profit earned from those contracts was not agreed or in evidence. Even if it was, it could not be concluded that the profit was wholly attributable to the cartel.
2. It may, however, readily be inferred that K-Line’s participation in the Respect Agreement, and its conduct in giving effect to it was, or was at least believed to be, profitable or beneficial for K-Line. It may also be inferred that the Respect Agreement and the conduct that occurred pursuant to it enabled K-Line at times to obtain contracts at freight rates that were higher than would have been the case in a competitive market and to maintain a market share that it might not have been able to maintain had it genuinely competed with the other participants in the cartel. That was the very purpose of the Respect Agreement. It may readily be inferred that K-Line continued to give effect to the agreement because it was achieving that end.
3. While it may not be possible to quantify the profit or benefit to K-Line arising from the Respect Agreement, it can nonetheless be inferred that it must have been, or perceived to have been, sufficient to outweigh the risk of detection and subsequent punishment.
4. It may also be inferred that the offending conduct may have given rise to less direct and tangible benefits to K-Line, including benefits derived from the increased certainty arising from stable market shares and customer allocations and the absence of any, or any aggressive, price competition.

## Course of conduct: s 16A(2)(c) of the Crimes Act

1. The rolled-up nature of the charge reflects the fact that the offence involved an ongoing course of conduct between 24 July 2009 and about 6 September 2012. That course of conduct consisted of a series of criminal acts of the same or similar character. The principles to apply when sentencing for a rolled-up charge were considered earlier.

## Personal circumstances of any victim, injury, loss or damage resulting from the offence: ss 16A(2)(d) and (e) of the Crimes Act

1. The only direct victims of K-Line’s offending conduct were perhaps the foreign owned vehicle manufacturers who, it may be inferred, on occasion paid higher freight rates as a result of the collusive behaviour of the carriers, including K-Line. It is not possible to quantify the amount of any loss or damage suffered by the vehicle manufacturers. The vehicle manufacturers were also all very large foreign corporations and any direct loss or damage suffered by them had little if any connection with Australia.
2. Can it be concluded, however, that the motor vehicle manufacturers passed on, or would most likely have passed on, at least some of the effect of any higher freight rates which resulted from the cartel to Australian buyers of the motor vehicles that were transported at those higher freight rates? Would the impact of the cartel have been felt in some way by Australian consumers? There was no direct evidence that higher freight rates were directly passed on in the form of higher priced motor vehicles. Is that, however, an inference that can and should be drawn?
3. K-Line contended that no such inference could be drawn. It submitted that consumers do not pay the freight costs of shipping the motor vehicle that they buy to Australia. That is obviously correct. The question, however, is whether the price that the Australian consumer paid for a motor vehicle was or may have beed affected by increased freight rates. K-Line submitted that the factors that may drive the price of a motor vehicle are undoubtedly complex and multi-faceted and that pricing will be driven to a significant extent by market forces which do not necessarily simply track small changes in input costs. In K-Line’s submission, additional freight costs might have been absorbed by the motor vehicle manufacturers or passed on in different markets.
4. There is some force in K-Line’s submissions in that regard. It certainly cannot be inferred that any higher freight rates that were the product of the cartel were directly passed on to Australian consumers. Nor could it necessarily be inferred that any increased costs were or would most likely have been passed on to Australian consumers in full. The position is unlikely to have been that simple. That said, it is difficult to accept that the higher cost of shipping motor vehicles to Australia would have been completely absorbed by the motor vehicle manufacturers, or indeed by the wholesalers and Australian motor vehicle retailers. The likelihood is that some portion of the higher shipping costs would have been indirectly passed on to Australian consumers in some way, even if not in the form of higher retail prices. It certainly can be concluded, at the very least, that there was a risk that Australian consumers would be impacted in some way by the cartel behaviour. It should also be noted, in this context, that at the relevant time the vast majority of new motor vehicles that were purchased by Australian consumers were imported vehicles.
5. Even if it could not be inferred that any higher freight rates were or would have been passed on to Australian consumers, it would in any event be wrong to approach this offence as if it was a victimless offence, simply because no specific individual or quantified loss can be identified. The cartel offence in s 44ZZRG(1) is part of a suite of provisions in the Competition Act that are designed to protect the integrity of Australia’s markets and economic system. Australia’s market-based economic system is based on the philosophy that private enterprise and competition will foster productivity, efficiencies and innovation for the greater good of the community. Cartel conduct, like other anti-competitive behaviour, is inimical to and destructive of our markets and economic system. It leads to a loss in public confidence in our markets and economic system, which can itself potentially harm the economy. That is so even where the conduct is eventually uncovered and punished, as it was here.

## The degree to which the offender has shown contrition; prospects of rehabilitation: ss 16A(2)(f) and (n) of the Crimes Act

1. The evidence of Mr Myochin, together with K-Line’s plea of guilty, demonstrates that K-Line is genuinely contrite in respect of its offending conduct. Other considerations arising from K-Line’s guilty plea will be addressed separately.
2. The evidence of Mr Myochin and Mr Manabe also demonstrates that K-Line’s prospects of rehabilitation are very good. Since the offending conduct was uncovered in 2012, K-Line has taken considerable steps to change its corporate culture in relation to compliance and has established appropriate anti-trust compliance structures, guidelines and systems so as to prevent the repetition of any similar anti-competitive conduct.

## Plea of guilty: s 16A(2)(g) of the Crimes Act

1. K-Line entered a plea of guilty, though by no means at the earliest possible opportunity.
2. As the facts referred to earlier indicate, K-Line was charged on 31 October 2016. K-Line contested the charges at the committal stage in the Local Court, including by applying for leave to cross-examine a number of prosecution witnesses at the committal proceedings. That remained the case for about a year until K-Line eventually waived committal on 18 October 2017. On 19 October 2017 K-Line was committed for trial in this Court. On 15 November 2017 the Director filed an indictment in this Court. That indictment contained 39 counts under s 44ZZRG(1) of the Competition Act. At a case management hearing on 11 December 2017 the Court listed the matter for trial to commence on 30 July 2018 with an estimate of 16 weeks. The Director subsequently filed and served a Notice of Prosecution Case and the brief of evidence. It was not until 5 March 2018 that the Court was advised that there would be a guilty plea. A guilty plea was formally entered on 5 April 2018. It may readily be inferred that the rolled-up nature of the charge that K-Line eventually pleaded guilty to was the product of plea discussions and negotiations between the parties.
3. Despite the fact that K-Line did not plead guilty at the earliest possible opportunity, it may nevertheless be accepted that its plea demonstrates remorse, acceptance of responsibility and a willingness on its part to facilitate the course of justice.
4. The Director accepted that the plea should not be considered “late” as it was entered prior to the commencement of the trial. It was, however, submitted that the extent to which K-Line’s plea of guilty demonstrated contrition and a subjective willingness to facilitate the course of justice must be considered in light of the fact that there was a strong prosecution case. There are, however, difficulties with that submission.
5. It may generally be accepted that the strength of the prosecution case may be taken into account in assessing the subjective value of a guilty plea. If there is a very strong prosecution case, for example, the Court may conclude that the guilty plea was simply a “recognition of the inevitable” rather than a plea motivated by contrition or a genuine willingness to facilitate the course of justice: ***Tyler*** *v R* [2007] NSWCCA 247 at [114]; ***Zhang*** *v R* [2011] NSWCCA 233 at [18].
6. The difficulty here, however, is that the Court is in no real position to assess the strength or otherwise of the Crown case. The sentence proceedings were conducted on the basis of agreed facts. The Court was not provided with the prosecution brief of evidence or any evidence or agreed facts in relation to the nature of the brief, including the witnesses who would be called, or the nature of the documents that would be tendered, or even whether the prosecution case in respect of the key elements of the offence was supported by direct evidence or depended on the drawing of inferences. K-Line did not agree or concede that the case against it was strong. It may also be observed in this context that the relevant offence provisions are such that even an otherwise straightforward case involving allegations of giving effect to a cartel provision is likely to involve considerable difficulty and complexity.
7. It follows that it cannot be concluded that K-Line’s plea of guilty was one which was entered in the face of a strong Crown case, let alone that it was a recognition of the inevitable.
8. The Court is also not confined to considering the subjective aspects of a plea of guilty. It is now accepted that in sentencing federal offences, the Court is entitled to take into account what has been typically described as the “utilitarian value” of a plea of guilty: the objective value or benefit that flows from the plea, as distinct from more subjective considerations such as the demonstration of remorse, contrition and a willingness on the part of the offender to facilitate the course of justice: ***Xiao*** *v R* [2018] NSWCCA 4; 96 NSWLR 1.
9. There could be little doubt that K-Line’s guilty plea had a high utilitarian value. It ultimately resulted in a significant saving of Court time as well as the considerable expense that the Director and the ACCC would undoubtedly have incurred in conducting what would almost certainly have been a lengthy and complex trial. The Director conceded as much. The Director submitted, however, that the utilitarian value of the plea was materially reduced in view of the considerable steps that were necessarily taken by the ACCC and the Director’s office during the 18-month period following the laying of the charge and the time K-Line eventually entered a plea of guilty in this Court.
10. There is some merit in the Director’s submission concerning the timing of the plea. The timing of the entry of a plea of guilty is a relevant and potentially significant factor in determining the extent of any discount or reduction in the sentence that would otherwise have been imposed. That is so whether the timing of the plea is considered in the context of subjective considerations such as the willingness of the offender to facilitate the course of justice (see for example *Cameron v The Queen* [2002] HCA 6; 209 CLR 339 at [22]) or in the context of the utilitarian value of the plea (see for example *Xiao* at [369]). It is accordingly relevant to have regard to the fact that K-Line’s plea of guilty was only entered after a lengthy period during which committal proceedings were contested in the Local Court and after the matter was listed for trial in this Court.
11. There is no doubt that K-Line is entitled to a discount or reduction of the fine because of its plea of guilty. The Court may specifically quantify the discount, but is not obliged to do so as long as the guilty plea is taken into account: *Markarian* at [24]; *Tyler* at [112]; *Xiao* at [280]. State court guideline judgments, such as *R v Thomson* (2000) 49 NSWLR 383 do not apply to the sentencing of federal offenders: *Wong v the Queen* [2001] HCA 64; 207 CLR 584.
12. The appropriate discount to apply in K-Line’s case is addressed later.

## Degree of cooperation with law enforcement agencies in the investigation of the offence and other offences; future cooperation: ss 16A(2)(h) and s 16AC of the Crimes Act

1. Section 16A(2)(h) of the Crimes Act is expressed in the past tense and may be taken to essentially refer to cooperation with or assistance provided to law enforcement agencies up to the point in time that the offender is sentenced. That interpretation is reinforced by the terms of s 16AC of the Crimes Act which, because it refers to undertakings by the offender to cooperate with law enforcement agencies in proceedings, and makes provision for the Director to appeal if the offender does not cooperate in accordance with the undertaking, must relate to cooperation that is to occur after the sentence is imposed. K-Line has not given any undertaking to cooperate in terms of s 16AC of the Crimes Act.
2. It is common ground that K-Line has provided some assistance to law enforcement agencies, in particular the ACCC, in relation to the ACCC’s investigation into K-Line’s participation in the Respect Agreement and the conduct engaged in to give effect to cartel provisions in that arrangement or understanding. There was, however, considerable disagreement as to the degree and proper characterisation of that cooperation.
3. Matters which may be relevant to an assessment of the degree to which an offender has provided cooperation to law enforcement agencies include: the effectiveness of the cooperation and its practical value to law enforcement agencies (*Ma v R* [2010] NSWCCA 320 at [28]; *Zhang* at [33]; *R v* ***Sukkar*** [2006] NSWCCA 92; 172 A Crim R 151 at [53]; *R v* ***El-Hani*** [2004] NSWCCA 162 at [73]; *R v* ***Barrientos*** [1999] NSWCCA 1 at [47]; *R v* ***Gallagher*** (1991) 23 NSWLR 220 at 232-233); the extent to which the offender has disclosed everything of relevance and not tailored the disclosure to material already known (***Wang*** *v R* [2010] NSWCCA 319 at [36]; *R v* ***Cartwright*** (1989) 17 NSWLR 243 at 252-255); the extent to which the cooperation relates to offences which are otherwise difficult to detect and investigate (*Hartman v R* [2011] NSWCCA 261 at [96]); the extent to which the cooperation disclosed the offender’s guilt in respect of other offences (*R v Ellis* (1986) 6 NSWLR 603 at 604; *Ryan v The Queen* [2001] HCA 21; 206 CLR 267 at [15]); the motive for the cooperation, including whether it was motivated by genuine contrition rather than self-interest (*Wang* at [36]); and whether the offender’s cooperation caused others to cooperate (*Lin v R*; *Ng v R* [2016] NSWCCA 200 at [10]).
4. Cooperation which is ineffective or provides little practical value must nevertheless still be considered (*R v Stanbouli* [2003] NSWCCA 355; 141 A Crim R 531 at [52]) because it might provide some evidence of contrition (*Sukkar* at [53]; *Wang* at [36]), might be of some intelligence value (*Barrientos* at [48]); and should in any event otherwise be encouraged in the public interest (*Wang* at [36]; *Cartwright* at 252-255).
5. The authorities concerning cooperation in the sentencing context routinely refer to a “discount” for cooperation. There is, however, no obligation for the sentencing court to separately quantify a discount for cooperation: indeed, it may be impossible or inappropriate to specify a separate discount where cooperation forms part of a complex of interrelated considerations relating to the plea of guilty, contrition and rehabilitation: *Gallagher* at 227-228; *El-Hani* at [68].
6. There is also no fixed tariff or range for a discount for cooperation: *R v* ***Pang*** [1999] NSWCCA 4; 105 A Crim R 474 at [13]. That said, the authorities are replete with statements about the usual or “customary” range, which is typically said to be between 20% and 50%: see for example *R v M* [2005] NSWCCA 224 at [21]-[22]; *Sukkar* at [3], [5], [50], [54], [56]; *Pang* at [13]. It has been said that a discount exceeding 50% should be reserved for an exceptional case: ***SZ*** *v R* [2007] NSWCCA 19; 168 A Crim R 249 at [3], [53]. It should be noted, however, that the cases which discuss the range of discounts for assistance and cooperation almost invariably involve circumstances where the offender has implicated a co-offender or co-offenders and many have reason to fear retribution or harm arising from those circumstances. The cases also consider circumstances such as having to serve a period of incarceration in protective custody because of the assistance provided. Those circumstances obviously do not apply to the circumstances of this case.
7. After applying the relevant principles to the facts of the case and arriving at a discount, the sentencing judge is required to “stand back” and consider whether the resulting sentence is just and reasonable, not only to the offender but also the community at large: *SZ* at [5].
8. The agreed facts in relation to K-Line’s cooperation were set out at length earlier.
9. The Director submitted that the agreed facts reveal that while K-Line provided “some cooperation”, that cooperation was provided “reluctantly and somewhat tardily”. In support of that submission, the Director emphasised that: K-Line did not provide full waivers to enable the sharing of confidential information between the competition authorities or regulators in different jurisdictions; K-Line did not provide turnover figures as requested by the ACCC; there was delay, sometimes considerable delay, in K-Line’s provision of complete copies of the documents requested by the ACCC and English translations of some of the documents; the information that K-Line provided did not add significantly to the material available to the ACCC, rather it “lent support” to that material; the information did not lead to new investigations or prosecutions of other offenders; K-Line did not fully cooperate or assist in providing the ACCC with access in Australia to certain witnesses that the ACCC had indicated that it wished to interview; K-Line’s application for leniency did not identify any of the instances of the cartel conduct that were the subject of the charge; and generally that K-Line did not actively assist the investigation, but was responsive and at times reluctantly so.
10. The Director also submitted that K-Line’s cooperation was substantially less than the cooperation provided by NYK.
11. For its part, K-Line submitted that the Director’s assessment of its cooperation as being reluctant and tardy was flawed and that the agreed facts revealed that its cooperation was in fact “high level” cooperation. In support of that submission, K-Line emphasised that: it was the second shipping company to seek immunity in Australia; it indicated at the first opportunity that it would be seeking to cooperate with the ACCC, notwithstanding that an immunity marker was not available to it; it provided extensive information to the ACCC about its operations and internal investigations into the cartel conduct, usually within weeks of the ACCC’s requests; it made “admissions” which “lent support” to 16 of the specific 20 instances of conduct and revealed two instances not previously known to the ACCC; it arranged and funded independent legal representation for the employees of K-Line who were eventually interviewed by the ACCC and paid other expenses associated with those interviews; and that even though it did not provide waivers in relation to the information provided to the Japan Fair Trade Commission, it nonetheless provided documents relating to Australian routes that it had provided to the Japan Fair Trade Commission.
12. K-Line also submitted that it would be erroneous to approach the assessment or characterisation of its cooperation only by comparison with the assistance provided by NYK. It would also be erroneous to approach the assessment of the discount that should be given to it for its cooperation by using the discount of 40% given to NYK in relation to its past cooperation and guilty plea as a starting point.
13. There is considerable merit in K-Line’s submission that the Court should not assess its cooperation and assistance by simply comparing and contrasting it with the assistance and cooperation provided by NYK. A comparison between the assistance provided by K-Line and NYK may, however, be relevant to a certain extent in considering the issue of parity. That issue is considered later.
14. Putting any comparison with NYK’s cooperation to one side, it is in some respects difficult for the Court to assess and properly characterise the cooperation provided by K-Line. It is equally difficult to resolve the issues raised by the competing submissions. That is because the material put before the Court to assess the cooperation provided by K-Line was restricted to a statement of facts which appears to have been the product of detailed discussion and agreement between the respective legal teams. The result is a lengthy and detailed document which has no doubt been carefully crafted as a result of the negotiations, but which is nonetheless rather unhelpful in a number of important respects. The Court is left in the rather unenviable position of having to decipher and draw inferences and conclusions from that rather bland and sanitised document.
15. As has already been noted, the factors relevant to the assessment of the cooperation include the effectiveness and practical value of the cooperation to the relevant investigative agency, the extent to which the cooperation exposed the offender’s guilt and the extent to which the cooperation may have involved, or been tailored to involve, the provision of information already known or likely to be known to the investigators. Often, but not always, the Court is assisted in its consideration of those sorts of matters by evidence from an officer of the investigative agency in question. Often that officer will provide the agency’s assessment of the value and effectiveness of the cooperation, including the extent to which the information provided was already known to, or readily ascertainable by, the agency and the extent to which the information exposed the guilt of the offender. For reasons that only the Director, K-Line and their legal representatives know, the Director did not adduce any evidence from an officer of the ACCC in relation to K-Line’s cooperation.
16. There is no doubt that K-Line provided information and documents to the ACCC in response to the ACCC’s requests. It is, however, extremely difficult to assess the nature and quality of the information and documentation that was provided and the extent to which it provided effective and valuable assistance in the absence of either evidence from the ACCC about that issue, or in the absence of further detail about the nature, quality and extent of the information and documents.
17. The difficulty is even more acute when it comes to assessing what were said to have been admissions made by K-Line. The agreed facts suggest that the admissions were contained in a “high level summary table” and a “chronological table” which provided “additional information in relation to [K-Line’s] conduct, and the conduct of NYK and [Mitsui], in relation to negotiations with various car manufacturers during relevant timeframes, including particulars as to time, the names of employees involved and the nature of the discussions”. But what practical value did the admissions apparently contained in these tables give to the ACCC’s investigations? To what extent did the admissions expose K-Line’s guilt? To what extent did the table include information that was already known to the ACCC, or information that was otherwise readily ascertainable?
18. All that is known in relation to those issues is that the admissions “lent support to 16 of the 20 instances”; that “two of these instances were previously unknown to the ACCC”; that the admissions “provided the basis for the ACCC to identify and pursue other sources of evidence”; and that the admissions were “consistent with five of the 20 instances of conduct”. Those rather bland and potentially ambiguous statements do not greatly assist. They certainly indicate that the admissions were of some assistance or value to the ACCC. The expressions “lent support to” and “consistent with” would tend to suggest that the ACCC already had some information or evidence about the matters admitted, though even that is somewhat unclear. The statement that the information provided the basis for the ACCC to pursue other sources of evidence would tend to suggest that the admissions were not particularly comprehensive or decisive. That, of course, is entirely consistent with the fact that K-Line continued to maintain its not guilty plea for some considerable time after it was charged. Plainly the admissions did not completely expose K-Line’s guilt. In K-Line’s favour, however, it is clear that the admissions did relate to some conduct which was previously unknown to the ACCC.
19. In all the circumstances, it is not really possible, and, in any event, not particularly useful, to attempt to sum up the character and degree of the assistance and cooperation provided by K-Line in one word or one sentence. On balance, however, the following findings can be made concerning the cooperation and assistance provided by K-Line.
20. First, K-Line provided information and documents to the ACCC that it otherwise was not required to provide and could not have been compelled to provide. The information included some admissions.
21. Second, the information and documents that K-Line provided to the ACCC were of some value and practical assistance to the ACCC’s investigation. Some of the information comprised “high-level” summaries or general information and some of the documentation was transactional and may not have added significantly to the material otherwise available to the ACCC. The precise extent of the practical assistance provided by the provision of information and documents is difficult to determine, but it could fairly be said to be significant, though not necessarily substantial.
22. Third, K-Line made some admissions which were of some value and practical assistance to the ACCC investigation, particularly insofar as they related to particular incidents of giving effect to the Respect Agreement that were not previously known to the ACCC. The admissions “lent support” to material that appeared to be otherwise available to the ACCC in relation to the majority of specific incidents of giving effect to the Respect Agreement. On the limited facts provided by the parties, however, it cannot be concluded that the admissions were “substantive” as claimed by K-Line. The admissions were, however, of some significance.
23. Fourth, it would, as the Director submitted, be fair to characterise the provision of information, documents and admissions by K-Line as essentially responsive, rather than active. It would also be fair to say that the assistance was at times reluctant. The provision of information and summaries was also, for the most part, not timely and involved significant delays.
24. Fifth, while some of the information provided by K-Line related to the activities of other carriers, it cannot be concluded that it led to any new investigations or materially assisted the ACCC in investigating or prosecuting any other offenders. As already noted, no undertaking of the sort referred to in s 16AC of the Crimes Act was given by K-Line.
25. Sixth, K-Line did not provide the ACCC with all of the information or documentation which it requested. Importantly, it also did not provide any waiver which would have enabled or facilitated the Japan Fair Trade Commission to provide the ACCC with information and documentation that K-Line had provided to the Japan Fair Trade Commission.
26. Seventh, while K-Line ultimately arranged and paid for its employees or former employees to be provided with independent legal advice and assistance, it cannot be concluded that this aspect of K-Line’s conduct materially or relevantly facilitated or assisted the ACCC in interviewing and taking statements from those individuals. Such limited assistance as was provided in relation to the interviewing of the employees was certainly not provided in a timely fashion. It also appeared to be provided with considerable reluctance and mostly occurred after the ACCC had independently approached the individuals.
27. As has already been noted, it is not particularly useful to attempt to sum up the degree of assistance provided by K-Line in one word or sentence. Even if it was, it could not be said that the degree of assistance and cooperation was “substantial” or “high level” as K-Line submitted.
28. As for the appropriate discount, in all the circumstances it would be appropriate to specify or quantify a single discount in respect of K-Line’s cooperation and its early plea of guilty and the contrition and remorse that is reflected in both the cooperation and early plea. That is because there is a clear and manifest public interest in encouraging corporations who have engaged in cartel conduct to come forward and cooperate with the ACCC and, where applicable, the Director, at the earliest opportunity. Cartel conduct often involves secrecy and collusion and is notoriously difficult to detect, investigate and prosecute. While a mathematical approach to sentencing is generally eschewed, remarks or reasons for imposing a sentence which, in an appropriate case, clearly and transparently articulate the extent to which the cooperation and plea of guilty have resulted in a lower sentence are likely to encourage such cooperation in other cases.
29. In all the circumstances of this case, an appropriate discount for K-Line’s cooperation, assistance, plea of guilty and the contrition and remorse reflected in the cooperation and plea is 28%.

## Deterrence: ss 16A(2)(j) and (ja) of the Crimes Act

1. There could be little doubt that general deterrence is a significant consideration in sentencing for cartel related offences. That is the case for a number of reasons.
2. First, as has already been noted, cartel conduct is notoriously difficult to detect, investigate and prosecute. It often involves large and sophisticated corporate offenders who can deploy their considerable resources and position to minimise the risk of detection. It is well accepted that general deterrence is a weighty consideration in sentencing for offences which are difficult to detect and investigate: see for example *R v Curtis (No 3)* [2016] NSWSC 866 at [51]-[53]; *R v Hannes* [2000] NSWCCA 503; 158 FLR 359 at [394]; *R v Rivkin* [2004] NSWCCA 7; 59 NSWLR 284 at [423]. The importance of general deterrence has also been accepted in imposing penalties for anti-competitive conduct in the civil penalty context: *ABB Transmission* at [16]; *Australian Competition and Consumer Commission v J McPhee & Son (Australia) Pty Ltd (No 5)* [1998] FCA 310; *J McPhee & Son (Australia) Pty Ltd v Australian Competition and Consumer Commission* [2000] FCA 365; 172 ALR 532 at [157].
3. Second, cartel conduct is an essentially economic or commercial crime that generally involves the offender weighing up whether the benefit or profit from the conduct is likely to outweigh the risks of detection and punishment. Sentences imposed for such offences should be set so that others who may engage in such a weighing exercise will come to appreciate that the risks are likely to outweigh the benefits: that the likely penalty will be such that it could not be regarded as an acceptable cost of doing business. This consideration has also been accepted in the civil penalty context: *Singtel Optus Pty Ltd v Australian Competition and Consumer Commission* [2012] FCAFC 20; 287 ALR 249 at [62]-[63]; *Australian Competition and Consumer Commission v TPG Internet Pty Ltd* (2013) 250 CLR 640 at [65]-[66]; *Australian Competition and Consumer Commission v* ***Visa*** *Inc* [2015] FCA 1020; 339 ALR 413 at [114].
4. As events have transpired, specific deterrence is not a particularly significant consideration in imposing the appropriate sentence in this matter. That is because the evidence shows that K-Line has already taken extensive steps to not only change its corporate culture, but also establish structures, systems and processes to ensure that there is minimal risk of a similar cartel offence being committed in the future. The prospects of rehabilitation are good. Specific deterrence nevertheless remains an important consideration and must be reflected in the sentence imposed.
5. One issue that needs to be considered in the context of specific deterrence is the offender’s size. As discussed earlier, it has generally been accepted, particularly in the civil penalty context, that the size of the offending corporation is a relevant consideration in imposing a penalty for contraventions and offences involving anti-competitive behaviour. That is primarily because deterrence is a major consideration in determining the appropriate penalty in respect of such contraventions or offences. Size is particularly relevant to specific deterrence because the penalty must generally be sufficiently large that the corporation will not view the risk of imposition of such a penalty as a price worth paying for anti-competitive behaviour. The larger corporation, the higher that price may be.
6. There was relatively limited evidence or other information in relation to K-Line’s size at relevant times. Perhaps most significantly, it was agreed that K-Line’s annual turnover during the 12 month period prior to date that it began committing the offence (23 July 2008 to 24 July 2009), relevantly excluding supplies not connected with Australia, was approximately AU$1 billion. That fact would suggest that, on just about any view, K-Line was or must have been a very large corporation at the time the offence was committed. Small corporations do not tend to have such a large turnover.
7. Other facts relevant to size include that during the period when the offence was committed, the K-Line Group collectively employed over 8,000 employees. As at the time of sentence, however, it employed about 2,000 employees. During the period when the offences were committed, K-Line’s share of the market for the supply of roll-on, roll-off shipping services was between about 11.6% and 11.9%. It shipped just over 600,000 vehicles to Australia during that period, earning revenue of just over $630,000.
8. As for its size at the date of the sentence hearing, in the Japanese fiscal year ending 31 March 2018, being the relevant fiscal year immediately prior to the sentence hearing, K-Line’s consolidated operating revenue was almost US$11 billion, its operating income was almost US$68 million and its profit attributable to the owners of the parent company was US$98 million.
9. K-Line was clearly a very large corporation.
10. K-Line submitted that it was a materially smaller corporation than NYK. That submission will be considered later in the context of parity.

## Need for adequate punishment: s 16A(2)(k) of the Crimes Act

1. The need to impose an adequate punishment in all the circumstances is largely self-evident and requires little elaboration. One issue that requires consideration in this context, however, is the relevance or weight that is to be attached to the fact that K-Line has been penalised in other jurisdictions in respect of conduct relating to or arising from the cartel the subject of this matter. Those penalties were detailed earlier.
2. There is no doubt that in sentencing an offender, the Court can take into account “extra-curial” punishment. Extra-curial punishment is “loss or detriment imposed on an offender by persons other than the sentencing court, for the purpose of punishing the offender for his [or her] offence or at least by reason of the offender having committed the offence”: *Silvano v R* [2008] NSWCCA 118; 184 A Crim R 593 at [29]; see also *R v Wilhelm* [2010] NSWSC 378 at [21]. The weight to be given to any extra-curial punishment will depend on the particular facts and circumstances of the case. Relevant considerations include the nature and size of the extra-curial punishment, the extent to which the penalty related to the conduct the subject of the offence, the capacity of the offender to pay, the effect that the other penalty had in real terms on the offender and other questions of hardship. In some circumstances, extra-curial or extra-judicial punishment may attract very little or no weight: *R v Daetz* [2003] NSWCCA 216; 139 A Crim R 398 at [62].
3. Administrative penalties imposed on an offender may be considered to be a form of extra-curial punishment: *R v Whitnall* (1993) 42 FCR 512 at 517-518; *R v Gay* [2002] NSWCCA 6 at [23]-[24]; *R v Ronen* [2006] NSWCCA 123; 161 A Crim R 300 at [50]-[52]; *R v Hannigan* [2009] QCA 40; 193 A Crim R 399 at [25].
4. In *CDPP v NYK* (at [278]-[283]) it was accepted that the substantial penalties that had been imposed on NYK in overseas jurisdictions should be afforded weight, but not significant weight. That was so for four reasons. First, with the exception of the surcharge payment order imposed by the Japan Fair Trade Commission, the overseas penalties were not imposed in respect of the conduct the subject of the charge or offence for which NYK was being punished. Second, the penalty that was to be imposed was required to be sufficient to act as a deterrence and “[l]arge multinational corporations who engage in global cartels or other anti-competitive conduct must be sent a clear and strong message that they will be punished in Australia in respect of Australian-related conduct irrespective of what penalties may have been imposed in other jurisdictions” (at [281]). Third, insofar as extra-curial punishment was relevant to specific deterrence, that was not a particularly significant consideration given that it was accepted that NYK had been deterred and rehabilitated. Fourth, while the overseas penalties were large, so too was NYK.
5. The same considerations apply in relation to the overseas penalties imposed on K-Line and the weight that should be afforded to them in the exercise of the sentencing discretion.
6. K-Line advanced two submissions in relation to the approach taken to the overseas penalties in *CDPP v NYK*.
7. The first submission was that the relevance of the overseas penalties was not limited to extra-curial punishment and specific deterrence. In K-Line’s submission, the other penalties bore “substantively on the application of the totality principle”. K-Line relied, in support of that submission, on what was said about the totality principle in *Mill v The Queen* (1988) 166 CLR 59. In *Mill*, the offender had committed a series of armed robberies over a six week period. Two were committed in Victoria and one in Queensland. The offender was convicted and sentenced in Victoria in respect of the Victorian offences. On release after serving a sentence of eight years imprisonment in Victoria, the offender was arrested, tried and convicted in Queensland in respect of the Queensland offence. He was sentenced to another lengthy term in prison. The High Court held, amongst other things, that the sentencing judge in Queensland erred and that “the proper approach which his Honour should have taken was to ask what would be likely to have been the effective head sentence imposed if the [offender] had committed all three offences of armed robbery in one jurisdiction and had been sentenced at one time” (at 66).
8. It is unclear exactly how the totality principle was supposed to operate in the circumstances of this case. K-Line accepted that it would not be “feasible to commence the sentencing exercise in this case by reference to the hypothetical penalty that would be imposed for all of the conduct in respect of which K-Line has received criminal and civil penalties around the world”. So much so may readily be accepted. It was nevertheless submitted by K-Line that the decision in *Mill* “demonstrates the need for the court to craft a sentence which gives effect to the principle of totality even in respect of different, but related, offending that has been previously punished in different jurisdictions”. The effect, so it was said, was to “decrease the penalty that would otherwise be necessary to adequately reflect the seriousness of the crime in respect of which it is imposed”. Indeed, the totality principle was said to require a “substantial downward adjustment on penalty”.
9. That submission is rejected. There is no doubt that the penalties imposed on K-Line overseas must be afforded some weight as a mitigating factor and that the penalty that would otherwise be imposed on K-Line must be reduced accordingly. It is, however, at best doubtful that the overseas penalties and the appropriate reduction in the sentence to reflect them should be approached through the prism of the totality principle in the way contended by K-Line. More significantly, even if it was somehow necessary to approach the issue having regard to the totality principle, the application of the totality principle in the circumstances of this case would not warrant a “substantial downward adjustment” as contended by K-Line. That is so for a number of reasons.
10. First, it is not settled law that the totality principle as formulated in *Mill* applies in respect of offences committed in overseas jurisdictions, as opposed to State and federal offences committed in different States or Territories.
11. The totality principle is reflected in s 16B of the Crimes Act, which provides as follows:

**16B Court to have regard to other periods of imprisonment required to be served**

In sentencing a person convicted of a federal offence, a court must have regard to:

* 1. any sentence already imposed on the person by the court or another court for any other federal offence or for any State or Territory offence, being a sentence that the person has not served; and
  2. any sentence that the person is liable to serve because of the revocation of a parole order made, or licence granted, under this Part or under a law of a State or Territory.

1. In ***Postiglione*** *v The Queen* (1997) 189 CLR 295, McHugh J held (at 314 footnote 47) that the sentencing judge was entitled to take into account a sentence imposed on the offender by an Italian court as a mitigating factor, but was not entitled to take it into account “under the totality principle recognised by s 16B of the [Crimes] Act” because s 16B was confined to sentences imposed for federal, State or Territory offences”. His Honour also held that the sentencing judge was not entitled to take the Italian sentence into account under the totality principle as formulated in *Mill*. While McHugh J dissented in *Postiglione*, none of the judges in the majority suggested that the Italian sentences were required to be taken into account either pursuant to s 16B of the Crimes Act or pursuant to the totality principle as formulated in *Mill*. Justices Dawson and Gaudron held (at 303) that the convictions for offences under Italian law “properly justify a difference in sentencing outcomes”, though their Honours did not refer to the totality principle in that context. Similarly Kirby J (at 343) had regard to the fact that the appellant would have to serve a sentence of imprisonment in Italy, but not in the context of the totality principle.
2. K-Line did not identify any authority for the proposition that the totality principle as articulated in *Mill* applied where the relevant offences were committed in several different overseas jurisdictions. There is, however, at least one case where it appeared to be accepted that the totality principle might apply to foreign sentences. In *Tsang v Director of Public Prosecutions (Cth)* [2011] VSCA 336; 35 VR 240, the Court of Appeal of Victoria considered whether a sentencing judge had erred in not taking into account a period of imprisonment that the appellant had served in Canada. The Court held that *Mill* was distinguishable because the offences for which the appellant was sentenced in Canada were of a different nature to the offences for which he was being sentenced in Victoria. They had also been committed at a different time. The Court did not, however, distinguish *Mill* on the basis that the totality principle considered in *Mill* related to offences that occurred across state borders, not international borders.
3. Second, other than the sentence that was imposed on K-Line in the United States, all of the other foreign penalties or orders appeared to be entirely administrative or civil in nature. They were not penalties or sentences imposed in respect of criminal convictions. K-Line did not cite any authority for the proposition that the totality principle as articulated in *Mill* applies to civil or administrative penalties imposed in foreign jurisdictions.
4. Third, the Court was provided with incomplete, inadequate and insufficient information in relation to the overseas penalties and orders to enable it to realistically assess the overall or total criminality involved in K-Line’s international conduct. As already noted, all but the United States convictions appeared to involve some form of administrative or civil penalty. The precise nature of the orders or penalties was also, for the most part, unclear, as was the precise nature and details of the law which was transgressed in each foreign jurisdiction and the precise nature and details of the conduct which gave rise to the order or penalty, including the maximum penalties that may have been applicable to the transgressions.
5. Fourth, the facts and circumstances of this case were far removed and distinguishable from the facts in *Mill* and similar cases such as *R v Todd* [1982] 2 NSWLR 517. Those cases involved the situation where an individual offender had committed multiple offences which, but for the intrusion of State or territory borders, would most likely have been sentenced for all the offences at the same time. Provision could then have been made for sentences of imprisonment for the separate offences to be served concurrently or partly concurrently.
6. What is involved here, however, is a global cartel which was given effect to, or implemented, in multiple foreign jurisdictions in ways that gave rise to different transgressions of different laws, mostly civil or administrative, which were applicable in those jurisdictions. The orders or penalties imposed in the different foreign jurisdictions were likely to have been imposed having regard to the particular anti-competitive effects in each of the separate jurisdictions. One can readily understand why it would be unfair to an offender to sentence him or her as if the offences committed in the separate states were entirely discreet. It is difficult to see why, in imposing a sentence on K-Line in respect of its offence against Australian law, the Court should give substantial weight to the fact that different types of mostly civil or administrative penalties have been imposed on K-Line by different authorities, courts and tribunals in different countries, for having engaged in different anti-competitive conduct in those countries, albeit that the anti-competitive conduct in Australia and those other countries all occurred under the general umbrella of the Respect Agreement. It is, as K-Line effectively conceded, entirely unrealistic and impractical to envisage that the Court could somehow stand back and attempt to comprehend some overall penalty that would reflect the overall criminality of K-Line’s conduct and “craft” a sentence accordingly.
7. That is not to say that the imposition of the foreign penalties should be ignored or given little or no weight. As was accepted in *CDPP v NYK*, and has already been accepted, those penalties should be given some weight and should be reflected in the fine that it ultimately imposed. Whether they are considered and afforded weight as instances of extra-curial punishment, or pursuant to the totality principle in *Mill* is ultimately immaterial. The main point is that K-Line has failed to identify or articulate any basis for its contention or submissions that the affect would be a “substantial downward adjustment”.

## The character and antecedents of the offender: s 16A(2)(m) of the Crimes Act

1. K-Line does not have a prior record of corporate criminal misconduct in Australia. There is also no evidence that it has any such record anywhere overseas. That is no doubt an important consideration. It does not necessarily follow that K-Line should be sentenced on the basis that it was of good character – that it was a good corporate citizen – at the time of the conduct the subject of the charge: cf. *R v Adler* [2005] NSWSC 274; 53 ACSR 471 at [51]. The fact that it had been a party to the Respect Agreement since at least 1997 rather suggests otherwise. K-Line had not been a good corporate citizen prior to the commission of this offence: it just had not been caught. Prior good character is also not generally given significant weight in sentencing for offences where general deterrence is a significant consideration: *R v Williams* [2005] NSWSC 315; 152 A Crim R 548 at [60]; *McMahon v The Queen* [2011] NSWCCA 147 at [76]; *ABB Transmission* at [28].

## The prospect of rehabilitation of the offender: s 16A(2)(n) of the Crimes Act

1. Rehabilitation is undoubtedly an important purpose of criminal sentencing. The fact that an offender has good prospects of rehabilitation, or has already demonstrated rehabilitation at the time of sentence and is unlikely to reoffend, is an important mitigating consideration.
2. As has already been noted, it may be accepted that K-Line has largely rehabilitated itself, or has at the very least demonstrated good prospects of rehabilitation. There is unchallenged evidence that in the six years since its offending behaviour was detected, K-Line has taken significant steps to change its corporate culture of compliance, has renounced its wrongdoing and has established structures, systems and programs to prevent any reoffending. It has remodelled its corporate thinking and behaviour so that it may re-establish itself as a good corporate citizen: cf. *R v Pogson* (2012) 82 NSWLR 60 at [122]-[123].

## Parity

1. K-Line and its co-offender NYK each pleaded guilty to a single rolled-up count involving 20 instances of giving effect to a cartel provision in the same overarching arrangement or understanding. The maximum penalty for both K-Line and NYK was $100 million as they both had the same relevant annual turnover in the 12 months preceding the offending conduct.
2. The sentence imposed on NYK was a fine of $25 million. That fine incorporated a global discount of 50% for NYK’s early plea of guilty and past and future assistance and cooperation, together with the contrition inherent in the early plea and cooperation. But for the early plea and past and future assistance and cooperation, the fine would have been $50 million. Of the 50% discount, 10% related to future cooperation. But for the discount for future assistance, NYK’s fine would have been $30 million.
3. In imposing a sentence on K-Line, the Court must have regard to the principle of parity. That principle requires that like offenders should be treated in a like manner, though allows for different sentences to be imposed upon like offenders to reflect different degrees of culpability and/or different circumstances: ***Green*** *v The Queen* [2011] HCA 49; 244 CLR 462 at [28]. The notion of equal justice “requires that, as between co-offenders, there should not be a marked disparity which gives rise to ‘a justifiable sense of grievance’”: *Postiglione* at 301. Disparity between the sentences imposed on co-offenders will be justified by differences such as “age, background, criminal history, general character and the part each has played in the relevant criminal conduct”: *Green* at [30].

### The parties’ submissions concerning parity

1. There was a substantial divide between the parties’ submissions concerning parity.
2. The Director submitted that the objective criminality of the offences committed by K-Line and NYK was relevantly the same and that there were no significant differences between the levels of criminality or the seriousness of the offending conduct engaged in by each of them. As for the respective subjective circumstances, the Director submitted that NYK pleaded guilty at a much earlier stage than K-Line and gave substantially greater cooperation and assistance to the authorities than K-Line, including future assistance in relation to other matters. The Director accepted that K-Line’s retraction in size in recent times was a relevant subjective factor to take into account, though in the Director’s submission that consideration was not such as to substantially mitigate the penalty.
3. K-Line submitted that the objective criminality or objective seriousness of its offending conduct was “substantively less” than that of NYK. It also submitted that there were relevant differences between K-Line’s and NYK’s subjective circumstances. In support of those submissions K-Line relied on what it contended were four material differences.
4. First, it submitted that its participation in the cartel was “less enthusiastic, less extensive and less rigorous” than NYK’s participation. Its submissions in that regard focussed on the instances where individual K-Line employees bid less than the freight rate which had been discussed and agreed with their counterparts at the other carriers. It also relied on facts which suggested that some K-Line employees were, at times, not fully trusted by their counterparts to implement the agreements. The facts and findings concerning the instances of “cheating” and the distrust of certain NYK employees were discussed in detail earlier.
5. Second, K-Line noted that, in its sentence hearing, NYK had agreed that a proportion of the higher freight rates caused by the cartel would have been passed through to corporations or consumers in Australia in the form of increased wholesale or retail prices for motor vehicles. In contrast, K-Line did not agree to any such fact and submitted that it could not or should not be inferred that there was any relevant pass-through of higher freight rates to Australian consumers.
6. Third, K-Line pointed out that the cartel provisions in the Respect Agreement, that NYK gave effect to, included not only a price fixing provision, but also anti-competitive provisions involving bid rigging and customer allocation. K-Line only gave effect to the price fixing provision.
7. Fourth, K-Line submitted that it was a smaller company than K-Line, both at the time of the commission of the offence and at the time of sentencing. It relied, in that regard, on the following facts: NYK held a slightly higher market share in respect of the relevant services during the charge period; K-Line shipped less cars to Australia in the freight contracts affected by the cartel behaviour; K-Line’s consolidated operating revenue and profits since the merger of its containership business with the containership business of NYK and Mitsui have been considerably smaller than NYK’s; and the number of its employees has shrunk from 8,000 prior to the merger to 2,000 at the time of sentence. The NYK Group employed about 33,000 people at the time of the offending.
8. While K-Line submitted that its cooperation and assistance shouldn’t be approached by reference to the parity principle, or by simply comparing or contrasting it with the cooperation and assistance provided by NYK, it nevertheless submitted that the discount that it should be given should not be significantly less than the 40% discount given to NYK in respect of its past cooperation and assistance.

### Parity – Consideration

1. K-Line’s submission that the objective criminality or seriousness of its offending conduct was substantially less than that of is co-offender NYK has no merit and is not supported by a close consideration and analysis of the facts and circumstances of the respective cases. The Director’s submission that the objective criminality of the offences committed by K-Line and NYK is essentially the same should be accepted.
2. It may be accepted that K-Line employees were involved in more individual instances of cheating or departing from price fixing agreements entered into under the Respect Agreement. It may also be accepted that some K-Line employees were not always trusted by the counterparts to give effect to, or not depart from, the price fixing agreements. For the reasons given in detail earlier, however, it cannot be accepted that this feature of K-Line’s participation in the cartel significantly or materially mitigated the seriousness of the offending behaviour. Nor can it be accepted that K-Line was an outlying participant or a disruptive influence in the cartel. The instances of cheating were fairly isolated, minor and, at times, ineffective. In any event, cheating on a cartel should not generally be considered to be a significant mitigating circumstance.
3. K-Line’s submission concerning whether the higher freight rates which were the product of the cartel were passed through to Australian consumers also does not support a finding that the seriousness of K-Line’s offending was less than NYK’s. It is true, as K-Line pointed out, that NYK agreed or admitted that the higher freight rates were likely to have been passed onto Australian consumers and that K-Line did not make any such admission or concession. It may also be accepted that it cannot necessarily be inferred from the agreed facts that the higher freight rates were directly passed on to Australian consumers. As discussed earlier, however, it may nevertheless be inferred that there was at least a risk that Australian consumers would have been impacted in some way by the fact that the motor vehicle manufacturers’ costs of shipping their vehicles were increased by the collusive behaviour pursuant to the Respect Agreement. The slight differences in the factual findings concerning the impact on Australian consumers does not mean that K-Line’s offending conduct should be viewed any less seriously than NYK’s. That is all the more so given that the nature of the offending behaviour by NYK and K-Line was relevantly the same.
4. Finally, in terms of objective considerations, it is of little or no significance that the particulars of NYK’s offending involved not only the price fixing provision of the Respect Agreement, but also provisions involving bid rigging and customer allocations, whereas K-Line’s offending only involved the price fixing provision. The underlying nature of the conduct engaged in by K-Line was relevantly the same as the conduct engaged in by NYK. The slightly different characterisation of it as involving only price fixing, and not also bid rigging or customer allocation, is largely immaterial in terms of assessing the objective seriousness of the conduct.
5. While the objective seriousness of K-Line’s offending conduct was relevantly the same as the seriousness of NYK’s offending, there is a difference, albeit a relatively minor one, between the relevant subjective circumstances of K-Line and NYK. That difference is that, while K-Line may not have been relevantly or materially smaller than NYK at the time of the offending, it may be accepted that K-Line is now a smaller company than NYK.
6. While K-Line had a smaller share of the global capacity for ocean transport services than NYK at the time of the offences, K-Line and NYK had the same annual turnover in the 12 months prior to the offending. There is, in those circumstances, no sound basis for finding that K-Line was a materially smaller corporation at that time. Since the merger of the containership businesses of K-Line, NYK and Mitsui in 2016, however, it would appear that K-Line has shrunk in size. It has less employees and its consolidated operating revenue, operating income and profits have generally been significantly less than NYK’s in recent years.
7. As has already been noted, it is generally accepted that the size of the offending corporation is a relevant consideration in fixing the penalty for offences or contraventions of cartel provisions and other restrictive trade practices. In the particular circumstances of this case, however, the comparative differences in the size of K-Line and its co-offender NYK is not a particularly significant consideration. There is no question that K-Line is still a very large corporation with substantial resources. While it may readily be accepted that a sentence which involves a large fine will cause it some hardship or financial pain, that is essentially what is necessary to ensure that the punishment achieves not only specific deterrence, but importantly also general deterrence. K-Line did not submit that it did not have the capacity to pay a large fine. Nor was there any evidence to suggest as much.
8. Finally, it is necessary to have regard to the different subjective considerations arising from the respective cooperation and assistance provided by K-Line and NYK. There could be no doubt that K-Line pleaded guilty at a much later stage than NYK. K-Line’s cooperation and assistance to the authorities was also of materially less significance than NYK’s cooperation.
9. The agreed findings concerning K-Line’s plea of guilty and the cooperation and assistance it provided to the ACCC were discussed in detail earlier. It suffices to reiterate that K-Line’s plea of guilty was only entered after a lengthy committal process and after its trial was set down for hearing in this Court. Perhaps more significantly, contrary to K-Line’s contention, the cooperation and assistance it provided to the ACCC could not accurately be characterised as “substantial” or “high level”. Rather, its cooperation was for the most part essentially responsive, rather than active, was at times provided somewhat reluctantly and in an untimely manner and was not entirely fulsome. It did not include the provision of a waiver in respect of the information which it had provided to the Japan Fair Trade Commission, did not include all information or documentation requested by the ACCC, the admissions that were provided appeared not to be particularly comprehensive or decisive and the assistance that was provided in terms of interviewing employees or former employees was quite limited.
10. The assistance and cooperation provided by NYK was of an entirely different character and nature. NYK pleaded guilty at the earliest possible opportunity; before the ACCC had compiled a brief of evidence and in circumstances which obviated the need for a committal hearing in the Local Court. The cooperation it provided to the ACCC was also found to be timely, full, frank, truthful and, in most instances, expeditious. Its cooperation concerned both its own offending and the offending of other persons and entities and included assistance in relation to another matter. NYK also gave an undertaking to assist in future prosecutions. NYK’s cooperation and assistance could fairly be described as high-level and substantial, if not, exceptional.

## The parties’ submissions in relation to the appropriate penalty

1. It was open to K-Line to make submissions concerning the appropriate penalty range in all the circumstances: *Barbaro v The Queen* (2014) 253 CLR 58; ***Matthews*** *v The Queen* [2014] VSCA 291; 44 VR 280; *CMB v Attorney General for the State of New South Wales* (2015) 256 CLR 346 at [38] (per French CJ and Gageler J) and at [64] (per Kiefel, Bell and Keane JJ). It did not do so in terms. Instead, it effectively put to the Court what it considered the relevant penalty should be having regard to the maximum penalty, the purposes of sentencing, the objective features of the offence, K-Line’s subjective circumstances and the penalties or orders it has been subject to in other jurisdictions. That sentence was a fine “in the order of” $30 million.
2. It was not open to the Director to provide a sentencing range for the Court’s consideration. It was, however, open to the Director to respond to the range proposed in K-Line’s submissions: *Matthews* at [25]. The Director’s response was, in effect, a statement of what was not submitted. The Director’s response was that “no submission is made on behalf of the Crown that the Court would fall into appellable error if a fine of $30 million or more is imposed”.

## The appropriate sentence in this case

1. In sentencing K-Line, the Court must consider and weigh up or balance all the factors that are relevant to the sentence and make a value judgment as to the appropriate sentence. The relevant factors or features in this matter have been discussed at considerable length throughout these reasons. Findings or observations have been made concerning the significance and weight that should be given to those factors in the particular circumstances of this case. In short summary, the factors which tend to weigh in favour of a more severe punishment include: the maximum penalty (fine of $100 million); the very serious nature of the offence, involving as it did deliberate, systematic and covert conduct by relatively senior management over a lengthy period of time and involving a large number of shipments; the damage, or potential damage, to the integrity of Australia’s markets and economic system caused by such conduct; and the need for specific and general deterrence. The mitigating factors include K-Line’s contrition and rehabilitation, including the steps taken by it to change its corporate culture to prevent any reoffending; K-Line’s plea of guilty; the cooperation and assistance it provided to the ACCC during the investigation; the penalties and other orders that have been imposed on K-Line by courts, tribunals and competition authorities in other jurisdictions in respect of its participation in or implementation of the relevant cartel in those jurisdictions; and the fact that K-Line has not previously been convicted of any offence in Australia or overseas.
2. Having regard to all of the relevant features and factors, and giving them appropriate weight, the appropriate sentence in all the circumstances is a fine of $34.5 million. That fine incorporates a global discount of just over 28% for K-Line’s early plea of guilty and assistance and cooperation, together with the contrition inherent in the early plea and cooperation: meaning that but for the early plea and past cooperation, the fine would have been $48 million. The slightly lower starting point, as compared to the starting point for the sentence imposed on NYK, primarily reflects the slightly different objective seriousness of the offending conduct and the slightly different subjective circumstances of K-Line, in particular the fact that it is now a smaller company than NYK was at the time it was sentenced.
3. It is important to reiterate that cartel conduct of the sort engaged in by K-Line warrants stern 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 K-Line 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.

# CONCLUSION AND DISPOSITION

1. K-Line has been convicted of an offence of giving effect to a cartel provision contrary to s 44ZZRG(1) of the Competition Act. The sentence imposed in respect of that conviction is a fine of $34.5 million.

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| I certify that the preceding four hundred and fourteen (414) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Wigney. |

Associate:

Dated: 2 August 2019