FEDERAL COURT OF AUSTRALIA

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

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| File number: |  |
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| Judge: | **WIGNEY J** |
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| Date of judgment: | 3 August 2017 |
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| Catchwords: | **CRIMINAL LAW –** sentencing **–** cartel conduct – giving effect to a cartel provision – where offender is a corporation – where offender pleaded guilty – rolled up offence – appropriate pecuniary penalty – where offender provided bulk shipping services of “roll on, roll off” cargo to Australia  |
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| Legislation: | *Competition and Consumer Act 2010* (Cth) ss 4F, 5, 76, 44ZZRB, 44ZZRD, 44ZZRG, 44ZZRK, Part X (ss 10.17, 10.17A)*Crimes Act 1914* (Cth) ss 16A, 16AC*Criminal Code Act 1995* (Cth) s 5.6*Evidence Act 1995* (Cth) s 191*Federal Court of Australia Act 1976* (Cth) s 23AB(1)(b)  |
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| Cases cited: | *Application by the Attorney-General under s 37 of the Crimes (Sentencing Procedure) Act* (2004) 61 NSWLR 305 *Australian Competition and Consumer Commission v ABB Transmission and Distribution Ltd (No 2)* (2002) 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 J McPhee & Son (Australia) Pty Ltd (No 5)* [1998] FCA 310 *Australian Competition and Consumer Commission v TPG Internet Pty Ltd* (2013) 250 CLR 640 *Australian Competition and Consumer Commission v Visa Inc* (2015) 339 ALR 413 *Australian Competition and Consumer Commission v Visy Industries Holdings Pty Ltd (No 3)* (2007) 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) 209 CLR 339 *CMB v Attorney General for New South Wales* (2015) 256 CLR 346*Commonwealth v Director, Fair Work Building Industry Inspectorate* (2015) 326 ALR 476 *Commonwealth v Director, Fair Work Building Industry Inspectorate* (2015) 326 ALR 476*Direction of Public Prosecutions (Cth) v El Karhani* (1990) 21 NSWLR 370 a *Director of Public Prosecutions (Cth) v Thomas* [2016] VSCA 237 *Elias v The Queen* (2013) 248 CLR 483 *Environment Protection Authority v Truegrain Pty Ltd* (2013) 85 NSWLR 125 *Hartman v R* [2011] NSWCCA 261*Hili v The Queen* (2010) 242 CLR 520 *J McPhee & Son (Australia) Pty Ltd v Australian Competition and Consumer Commission* (2000) 172 ALR 532 *Lin v R; Ng v R* [2016] NSWCCA 200 *Ma v R* [2010] NSWCCA 320 *Markarian v The Queen* (2005) 228 CLR 357 *Matthews v The Queen* (2014) 44 VR 280; *McMahon v The Queen* [2011] NSWCCA 147 *NW Frozen Foods Pty Ltd v Australian Competition and Consumer Commission* (1996) 71 FCR 285*R v Adler* [2005] NSWSC 274*R v Barrientos* [1999] NSWCCA 1 *R v Cartwright* (1989) 17 NSWLR 243 *R v Curtis* (No 3) [2016] NSWSC 866 *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 *R v Hannigan* [2009] QCA 40 *R v Knight* [2004] NSWCCA 145 *R v M* [2005] NSWCCA 224 *R v Pang* [1999] NSWCCA 4 *R v Pham* (2015) 256 CLR 550 *R v Pogson* (2012) 82 NSWLR 60 *R v Richard* [2011] NSWSC 866 *R v Rivkin* [2004] NSWCCA 7*R v Ronen* [2006] NSWCCA 123 *R v Stanbouli* [2003] NSWCCA 355*R v Sukkar* [2006] NSWCCA 92*R v Thomson* (2000) 49 NSWLR 383 *R v Whitnall* (1993) 42 FCR 512 *R v Williams* [2005] NSWSC 315 *R v Williscroft* [1975] VR 292*Ryan v The Queen* (2001) 206 CLR 267 *Singtel Optus Pty Ltd v Australian Competition and Consumer Commission* (2012) 287 ALR 249 *SZ v R* [2007] NSWCCA 19*Trade Practices Commission v CSR Ltd* [1990] FCA 521 *Tyler v R* [2007] NSWCCA 247*Wang v R* [2010] NSWCCA 319 *Wong v The Queen* (2001) 207 CLR 584*Wong v The Queen* (2001) 207 CLR 584 *Zhang v R* [2011] NSWCCA 233 |
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| Date of hearing: | 11 April 2017 |
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ORDERS

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|  | NSD 1143 of 2016 |
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| BETWEEN: | COMMONWEALTH DIRECTOR OF PUBLIC PROSECUTIONSProsecutor |
| AND: | NIPPON YUSEN KABUSHIKI KAISHAAccused |

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| JUDGE: | WIGNEY J |
| DATE OF ORDER: | 3 AUGUST 2017 |

THE COURT ORDERS THAT:

1. Nippon Yusen Kabushiki Kaisha is convicted of intentionally giving effect to cartel provisions between about 24 July 2009 and about 6 September 2012, in Japan and elsewhere, in connection with the transport of vehicles to Australia, in an arrangement or understanding with others in relation to the supply of ocean shipping services, knowing or believing that the arrangement or understanding contained cartel provisions contrary to s 44ZZRG(1) of the *Competition and Consumer Act 2010* (Cth).
2. Nippon Yusen Kabushiki Kaisha is fined the sum of $25,000,000.

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

REASONS FOR JUDGMENT

WIGNEY J:

1. In July 2009, the *Trade Practices Act 1974* (Cth), now the *Competition and Consumer Act 2010* (Cth) (**C&C Act**), was amended to provide criminal sanctions for cartel conduct. Jurisdiction was conferred on this Court in respect of prosecutions on indictment for cartel offences. Prior to that, unlike the position in Australia’s major trading partners and most other developed nations, cartel conduct in Australia could only attract pecuniary penalties and other civil relief. In his Second Reading Speech concerning the Bill that was to introduce these changes, the then Minister for Competition Policy and Consumer Affairs explained the rationale for criminalising cartel conduct:

Competition is the primary means of ensuring that consumers get the best product or service for the lowest price possible. Competition enhances Australia’s welfare generally, because the efficiencies it creates lead to improved productivity and ultimately increased standards of living.

Cartels are widely condemned as the most egregious forms of anticompetitive behaviour. At its heart, a cartel is an agreement between competitors not to compete. Cartel conduct harms consumers, businesses and the economy by increasing prices, reducing choice and distorting innovation processes.

1. This is the first criminal prosecution for cartel conduct under this new regime. It arises out of a longstanding global cartel in a market of considerable importance to Australia: the market for the supply of ocean shipping services for “roll-on, roll-off” cargo, mainly cars and trucks. The particular cartel conduct the subject of the prosecution involved giving effect to the cartel arrangements in respect of shipping routes to Australia.
2. Nippon Yusen Kabushiki Kaisha (**NYK**) is a large Japanese company which has for many years shipped motor vehicles to Australia from various countries where the vehicles were manufactured. A number of other large foreign corporations also supplied ocean shipping services in respect of motor vehicles on routes to Australia. Those companies ostensibly competed with each other in relation to the supply of those services. From as early as February 1997, however, NYK and a number of the other shipping companies had arrangements or understandings which had the effect of limiting or distorting that competition.
3. NYK pleaded guilty to a single charge of giving effect to a cartel provision, contrary to s 44ZZRG(1) of the C&C Act. The indictment, which was filed ex officio by the Commonwealth **Director** of Public Prosecutions pursuant to s 23AB(1)(b) of the *Federal Court of Australia Act 1976* (Cth), 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, Nippon Yusen Kabushiki Kaisha intentionally gave effect to cartel provisions in an arrangement or understanding with others in relation to the supply of ocean shipping services, knowing or believing that the arrangement or understanding contained cartel provisions contrary to s 44ZZRG(1) *Competition and Consumer Act 2010* (Cth).

1. In broad terms, there were five other parties to the cartel provisions the subject of the indictment, each of them major shipping lines that also shipped motor vehicles to Australia: **Mitsui** OSK Lines Ltd, Kawasaki Kisen Kaisha Ltd (**K-Line**), **Toyofuji** Shipping Co, Nissan Motor Car Carrier Co (**Nissan MCC**) and **Wallenius Wilhelmsen** Logistics AS. The cartel provisions related to the fixing of freight rates, bid rigging and customer allocation in respect of shipping services supplied to ten major vehicle manufacturers: **Maruti** Suzuki India Limited, **Asian Honda** Motor Co Ltd, **Nissan** Motor Co Ltd, **Suzuki** Motor Corporation, **Mazda** Motor Corporation, **Hino** Motors, **Toyota** Motor Corporation, **UD Trucks**, **Isuzu** Linex Co Limited and **Fiat** Chrysler. Six shipping routes for vehicles to Australia were covered by the cartel provisions, being routes from India, Thailand, Japan, Indonesia, North America and Europe. The cartel provisions covered the contract years 2010, 2011 and 2012.
2. NYK’s offending conduct over the three year period covered by the charge involved the shipping of 69,348 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, NYK derived revenue of AU$54.9 million and profit of AU$15.4 million from the commerce affected by the conduct. Perhaps more significantly, it is likely that the anti-competitive effect of the offending conduct resulted in higher freight rates on the subject shipping routes to Australia and that, one way or another, those higher freight rates were passed through to Australian consumers in the form of higher prices for the imported cars and trucks.
3. On just about any view, this was an extremely serious offence against Australia’s laws prohibiting cartel conduct.
4. The task for the Court is to impose a sentence that is of a severity appropriate in all the circumstances of the offence. Since the offender is a corporation, not a natural person, that sentence must comprise a fine. In NYK’s case, given the terms of the relevant legislation, the fine must not exceed $100 million. The central question, then, is what size fine, up to that maximum, is the appropriate penalty for this serious offence.

# summary of the facts relevant to the offence

1. The facts upon which NYK is to be sentenced were not in dispute. The Director 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 lengthy, detailed and comprehensive document. It is unnecessary to rehearse the facts in their entirety in these reasons. Following is a relatively brief summary. Unless otherwise noted, the facts relate to the period covered by the indictment.
2. Needless to say, consideration has been given to all of the facts contained in the Statement of Agreed Facts. 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. Inferences drawn from the facts in the Statement of Agreed Facts will be noted where relevant.

## The Services and the relevant market

1. The cartel provisions the subject of the charge concerned the provision of ocean transport services for “roll-on, roll-off” cargo, including motor vehicles, trucks, buses, commercial vehicles, agricultural equipment and construction equipment, on international routes including to and from Australia, using specialised vessels known as “Pure Car Carriers” (**PCCs**) and “Pure Car and Truck Carriers” (**PCTCs**). Those services will generally be referred to in these reasons as the **Services**.
2. At the relevant time, approximately 80% of new passenger vehicles, 50% of large trucks and 100% of medium and light trucks sold in Australia were manufactured overseas. Self-evidently, all of those vehicles had to be shipped to Australia.
3. NYK was one of eight carriers who supplied the Services on routes to and from Australia. The other carriers were: Mitsui, K-Line, Nissan MCC (which was majority owned by Mitsui and had Nissan as a minority shareholder), Wallenius Wilhelmsen, **Eukor** Car Carriers Inc (a subsidiary of Wallenius Wilhelmsen), Toyofuji (which was majority owned and controlled by Toyota) and **Hoegh** Autolines Holdings AS. These carriers will be collectively referred to as the **Carriers**. NYK, Mitsui and K-Line were commonly referred to in the industry as “**the Three J’s**”, no doubt a reference to the fact that they were the three largest Japanese carriers.
4. Each of the Carriers was a large global shipping company. That was perhaps to be expected given the nature of the market in which they operated. The business of operating PCCs and PCTCs was characterised by high capital costs and long investment lead times. Capacity could not generally be smoothly adjusted in response to demand. PCCs and PCTCs were generally not available for short term lease or charter, though space on PCCs and PCTCs was sometimes made available pursuant to space chartering arrangements.
5. During the relevant period NYK’s global share of capacity for the Services, based on the number of PCCs and PCTCs, was between 15.5% and 17.5%. Mitsui and K-Line had a share of capacity of between 11.2% and 14.1% and between 11.6% and 12.6% respectively. Together, the Three J’s therefore accounted for between 38.3% and 44.2% of the global capacity for the Services. By comparison, Willenius Wilhelmsen’s capacity was between 8.2% and 10.5%; Eukor’s capacity was between 10.9% and 13.8%; Hoegh’s capacity was between 6.3% and 8.8%; and Toyofuji’s capacity was between 0.9% and 1.3%.
6. The customers who entered into contracts with the carriers in relation to the Services were generally large motor vehicle manufacturers. Relevantly, they included Maruti, Asian Honda, Nissan, Suzuki, Mazda, Hino, Toyota, UD Trucks, Isuzu and Fiat. As large global companies themselves, each of the motor vehicle manufacturers was able to exercise a degree of bargaining power in relation to the terms of the contracts for the Services. In addition, as already noted, Toyota and Nissan each had shareholdings in carriers. The majority of the Carriers’ contracts with the Japanese vehicle manufacturers were renewed annually in March or April each year, in line with the Japanese financial year.
7. The vehicle manufacturers required reliable, high-frequency PCC and PCTC 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.
8. The Japanese vehicle manufacturers traditionally built close and deeply integrated relationships with their carriers. NYK, for example, formed joint working committees with Japanese vehicle manufacturers and worked closely with them to develop systems and processes.

## Services on routes to Australia

1. Each of the Three J’s supplied the Services on routes to Australia from Japan, Thailand, India Indonesia and Europe. Mitsui also supplied Services to Australia from North America. Wallenius Wilhelmsen and Hoegh both supplied Services to Australia from Europe. Wallenius Wilhelmsen also provided Services to Australia from North America. Toyofuji only supplied Services to Australia from Japan.
2. The Three J’s accounted for approximately 85% of PCC and PCTC capacity operating direct routes from Japan to Australia, and 100% of PCC and PCTC capacity on direct routes from Thailand to Australia. The dominance of the Three J’s in the Japanese market was in large part due to the traditionally close and integrated relationships forged between the Japanese car manufacturers and the Japanese carriers.
3. There was some degree of cooperation and coordination between the Three J’s in relation to scheduling and operational matters in respect of the various shipping routes to Australia. That cooperation and coordination was reflected in a number of agreements: the Japan-East Australia Agreement; the Japan-West Australia Agreement; and the Thailand-Australia Agreement.
4. Each of the Three J’s was a party to the Japan-East Australia Agreement. It related to the supply of the Services in respect of the Japan and south and east Australia route. Pursuant to that agreement, the Three J’s 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. Four sailings were provided each fortnight. NYK contributed approximately one third of the operating capacity on this route; K-Line contributed slightly more than one third and Mitsui contributed slightly less than one third. Toyofuji had space charter arrangements with each of the Three J’s that allowed it to acquire capacity on the PCC and PCTCs operated by the Three J’s on this route.
5. The Three J’s were also parties to the Japan-West Australia Agreement, which related to the Japan and north and west Australian routes. Under that agreement, the Three J’s 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.
6. NYK and K-Line also operated their services from Thailand to Australia pursuant to the Thailand-Australia Agreement. Under that agreement, NYK and K-Line coordinated their sailings to offer a weekly combined schedule to which they contributed equally, met to discuss operational issues, customer preferences and requirements and upcoming capacity requirements, and sold capacity to each other pursuant to space charter arrangements.
7. In addition to those three agreements, the Three J’s entered into space chartering agreements with each other and other Carriers in relation to the routes in question. NYK and K-Line both space chartered on Mitsui’s sailings between Thailand and Australia; Mitsui chartered with both NYK and K-Line on their sailings between Thailand and Australia; Toyofuji had space charter arrangements with each of the Three J’s that enabled it to acquire capacity on those carriers’ sailings from Japan and Thailand to Australia; and Nissan MCC had space charter arrangements with each of the Three J’s that enabled it to acquire capacity on those carriers’ services from Japan, Thailand or Indonesia to Australia.
8. These various agreements also affected Services on routes from Europe, India and Indonesia to Australia insofar as cargo on those routes was shipped to Australia via Japan or Thailand. That procedure, known as transhipping, involved transporting the cargo to one port, where it was then transferred to a second PCC or PCTC, sometimes operated by a different carrier, bound for Australia.
9. Approximately 20% to 30% of vehicles carried by the Three J’s on routes from Japan to south and east Australia, from Thailand to Australia and on routes from Europe, India and Indonesia that were relevantly transhipped, were effected pursuant to the Japan-East Australia Agreement, the Thailand-Australia Agreement, or the space charter arrangements with Mitsui on the Thailand Australia route.
10. It should be noted that, because these particular agreements only concerned scheduling and operational matters, it is not suggested that any of them were unlawful in any relevant sense.
11. The Three J’s were also parties to a “conference agreement” which was registered under Part X of the C&C Act. The operation of Part X of the C&C Act will be briefly addressed later in the context of the relevant statutory scheme. Suffice it to say at this stage that, when applicable, Part X provides certain exemptions from the cartel provisions in the C&C Act.
12. The conference agreement to which the Three J’s were party was called the Australian and New Zealand/Eastern Shipping Conference, or **ANZESC**. The other parties to ANZESC were ANL Shipping Line Pty Limited, ANL Singapore Pte Ltd and Orient Overseas Container Line, though those other companies did not provide the Services. Nissan MCC, Wallenius Wilhelmsen, Hoegh, Eukor and Toyofuji were not parties to ANZESC.
13. Relevantly, the parties to ANZESC were able to agree on freight rates, referred to as tariffs, for the supply of shipping services on routes from Japan, Korea, China, Taiwan, Hong Kong, Borneo and the Philippines to Australia. The parties were required to levy those tariffs and not offer any others unless the parties agreed.
14. The Three J’s calculated some of the freight rates that they charged for the Services on the routes from Japan to Australia by reference to the tariff under ANZESC.
15. Importantly, however, none of the instances of conduct that are detailed later, and are the subject of the charge against NYK, fell within the exemptions in Part X of the C&C Act.

## NYK

1. At the relevant time, NYK was a Japanese company, headquartered in Tokyo, which provided global shipping services, including the Services. It had over 1500 employees. It had a controlling interest in a global group of companies, with offices throughout the world, which employed over 33,000 people. The NYK group had three distinct business divisions: global logistics, bulk shipping, and other businesses. NYK’s **Car Carrier Group** was part of its bulk shipping division. The Car Carrier Group was responsible for providing the Services.
2. The Car Carrier Group was organised into six sales teams; four geographic teams, plus a global marketing team and a team dedicated to high and heavy cargo such as construction equipment. Each team was also the ‘sales window’ for key customers, operating as the primary contact for requests for information and quotes, contract renewals and responses to global tenders. The sales window would forward each relevant request or communication to the relevant geographic sales team, which would calculate the freight on the routes for which they had responsibility. The sales window would collate the information and provide a response to the customer. The Asia-Oceania Team was the geographic team responsible for trade routes from Japan, Thailand, India and Indonesia to Australia.
3. In terms of reporting structure, the General Manager of the Car Carrier Group had overall responsibility for the group, and reported to NYK’s executive officers. Two Deputy General Managers each had responsibility for several sales teams and reported to the General Manager. Each sales team itself had a Manager, who was responsible for sales and contracts in relation to the sales team’s routes, as well as a small number of Deputy Managers who reported to the Manager.

## NYK’s operations in relation to Australia

1. NYK was and is a foreign corporation which carried on business in Australia within the meaning of s 5 of the C&C Act.
2. As already indicated, NYK supplied Services on routes to and from Australia. It negotiated and entered into contracts in relation to those Services with the head offices of the motor vehicle manufacturers. Those negotiations invariably took place outside Australia. Likewise, the relevant contracts were invariably entered into overseas. Pursuant to those contracts, NYK charged the manufacturers a freight rate to ship their vehicles to Australia. With some small exceptions, the cost of freight was prepaid by the manufacturers. Costs and fees related to entry into a destination port, including in Australia, were factored into the freight rate that NYK charged its customers. Once the vehicles arrived in Australia, they were collected by the consignees, usually the Australian subsidiaries of the international manufacturers. The consignees then distributed the vehicles to dealerships and commercial buyers in Australia.
3. NYK had an Australian subsidiary, NYK (Australia) Pty Ltd (**NYK Australia**). NYK Australia acted as NYK’s local agent, arranging ancillary services such as berthing, stevedoring and other port and landside services for NYK vessels in Australia. NYK Australia also liaised with local consignees. NYK Australia carried out that work on instructions from NYK’s head office in Tokyo.
4. As has also already been noted, NYK operated direct routes to Australia from Japan and Thailand. It also operated indirect routes from India, Indonesia, Europe and North America to Australia by transhipping through major ports in Japan or Singapore. Its operations in relation to Australia were facilitated by the various agreements and space charter arrangements with the Three J’s referred to in detail earlier.
5. Throughout the relevant period, NYK was or was likely to be, or but for the impugned cartel conduct which is about to be described, was or was likely to be, in competition with some or all of Mitsui, K-Line, Nissan MCC, Wallenius Wilhelmson, Hoegh and Toyofuji in relation to the supply of the Services on some or all of the routes to Australia from Japan, Thailand, India, Indonesia, North America and Europe.
6. In 2009, NYK shipped 138,857 vehicles to Australia, representing 18.26% of the vehicles imported into Australia that year. It is estimated that it earned revenue of $124,618,025 in relation to those shipments.
7. In 2010, NYK shipped 180,416 vehicles to Australia, representing 17.75% of the vehicles imported into Australia that year. It is estimated that it earned revenue of $150,336,127 in relation to those shipments.
8. In 2011, NYK shipped 156,456 vehicles to Australia, representing 17.36% of the vehicles imported into Australia that year. It is estimated that it earned revenue of $128,775,743 in relation to those shipments.
9. In 2012, NYK shipped 218,697 vehicles to Australia, representing 20.26% of the vehicles imported into Australia that year. It is estimated that it earned revenue of $183,116,521 in relation to those shipments.

## The “Respect Agreement”

1. From at least February 1997, NYK and a number of other shipping companies, including the Carriers, had arrived at an arrangement or reached an understanding to the effect that, as a general proposition, they would not seek to alter their existing market shares or otherwise win existing business from each other. That overarching arrangement or understanding was generally referred to as “maintaining the status quo” or giving and receiving “respect”. It may conveniently be called the “**Respect Agreement**”.
2. The Respect Agreement relevantly applied to the Carriers’ supply of the Services on various international shipping routes, including to and from Australia. There could be no doubt that the parties to the Respect Agreement, including NYK, competed with each other in respect of the supply of the Services, or at the very least would have competed with each other but for the operation of the Respect Agreement.
3. The Respect Agreement relevantly contained three provisions: the “**Freight Rate Provision**”, the “**Bid Rigging Provision**” and the “**Customer Allocation Provision**”.

### The Freight Rate Provision

1. The Freight Rate Provision was to the effect that, from time to time, some or all of the Carriers would agree to do some or all of the following four things: *first*, 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; *second*, reach agreement about the freight rates, approximate rates, proposed changes or approximate changes to freight rates to be bid or otherwise communicated to customers and potential customers for the supply of Services on the routes; *third*, submit bids, or decline to submit bids, on the basis of the agreement reached; and *fourth*, enter into contracts with customers for the supply of Services on the routes reflecting the bids submitted to those customers in accordance with the agreement.
2. In the particular circumstances elaborated on later, the purpose, effect or likely effect of the Freight Rate Provision was to directly or indirectly fix, control or maintain the price for Services supplied by the parties to the Respect Agreement.

### The Bid Rigging Provision

1. The Bid Rigging Provision was to the effect that, from time to time, in the event of requests for bids being made by customers or potential customers for the supply of Services, some or all of the Carriers would do one or more of the following four things: *first* share information with one another about the requests for bids and freight rates or proposed changes to freight rates; *second*, reach agreement about how they would respond to requests for bids (which sometimes included an agreement not to bid); *third*, submit bids, or decline to submit bids, on the basis of the agreement reached; and *fourth*, enter into contracts with customers for the supply of Services on the routes reflecting the bids submitted to those customers.
2. In the particular circumstances referred to later, a purpose of the Bid Rigging Provision was to ensure that, in the event of a request for bids in relation to the supply of Services in respect of which two or more of the parties were or were likely to be in competition with each other, one of three things would occur: one or more of the Carriers would bid but one or more of the other Carriers would not; or two or more of the Carriers would bid but at least two of them would do so on the basis that one of those bids was more likely to be successful than the others; or two or more of the Carriers would bid, but a material component of at least one of those bids would be worked out in accordance with the Respect Agreement.

### The Customer Allocation Provision

1. The Customer Allocation Provision was to the effect that, from time to time, some or all of the Carriers would agree to allocate customers or potential customers who acquired, or were likely to acquire, Services from any or all of the Carriers on a particular route or routes. In the particular circumstances considered later, a purpose of the Customer Allocation Provision was to directly or indirectly allocate between the Carriers the customers who would acquire, or were likely to acquire, Services from those Carriers on a particular route or routes. But for this provision of the Respect Agreement, the parties would have competed for the allocation of the customers.

## Giving effect to the provisions of the Respect Agreement

1. In order to give effect to the provisions of the Respect Agreement, NYK from time-to-time did the following things.
2. First, it made arrangements or arrived at understandings with other Carriers in relation to some or all of the following things: *first*, the freight rates to be bid or otherwise communicated to customers or potential customers for the supply of Services; *second*, the responses to requests for bids from customers or potential customers for the supply of Services; and *third*, the allocation of customers or potential customers who had acquired, or were likely to acquire, Services from the Carriers.
3. Second, it submitted bids, or declined to submit bids, to customers or potential customers on the basis of the arrangements made or understandings arrived at.
4. Third, it entered into contracts with customers for the supply of Services on the Routes reflecting the bids submitted to those customers.
5. Senior executives or senior employees of NYK engaged in discussions, either at meetings or over the telephone, with their counterparts at the other Carriers concerning the matters the subject of the Freight Rate Provision, the Bid Rigging Provision and the Customer Allocation Provision. That was a longstanding practice within NYK’s Car Carrier Group.
6. Customer sales and contracts were the responsibility of managers in the Car Carrier Group, though some of that responsibility could also be delegated to the deputy managers. It was a common practice for employees in the Car Carrier Group to have discussions with employees of other Carriers about freight rates and responses to requests for tender.
7. Employees in NYK’s Car Carrier Group also came to learn or understand, from their observations of the conduct of their colleagues, that communications with their counterparts at other Carriers were a common practice within the group. Some of those employees were directly instructed to have those discussions by senior management (including at times at the executive officer level) of NYK’s Car Carrier Group. Employees in NYK’s Car Carrier Group were also expected to, and routinely did, report those discussions up to senior management. Some, but not all, of the NYK employees who engaged in communications with their counterparts at other Carriers were aware that such communications breached, or were likely to breach, anti-trust laws.
8. Where NYK did not carry a customer’s cargo on a particular route, but NYK had received a request for a bid from that customer, NYK employees would, from time to time, discuss that request with their counterparts from the other Carriers who carried the customer’s cargo on that route. Those discussions on occasion included a discussion about how NYK intended to respond. In some cases, the NYK employee would agree with their counterpart that NYK would not offer a freight rate. In other cases, at the request of NYK’s competitor, the NYK employee would reach an agreement with their counterpart about the approximate or minimum freight rate that NYK would offer, which was higher than the freight rate the other Carrier intended to offer, with the intention that NYK would not win the business.
9. Similar discussions would often occur in circumstances where NYK did carry cargo for a particular customer on a particular route, and considered it likely that another Carrier which did not carry such cargo had also received a request for tender from the customer. In those cases, the NYK employees would endeavour to extract from their counterpart an agreement that the other Carrier would offer a rate higher than the rate that NYK intended to offer so NYK would retain or win the business.
10. Employees in NYK’s Car Carrier Group would also sometimes have conversations with their counterparts in circumstances where NYK and other Carriers each carried a share of cargo for a particular customer on a particular route. In such a case, the freight rates or approximate freight rates that each Carrier would offer would be agreed, or it would be agreed to leave freight rates for particular routes, or for particular customers, generally unchanged, or to increase or decrease the freight rate by an amount or an approximate amount.

## Specific instances where NYK gave effect to the Respect Agreement

1. Following is a summary of some specific instances of executives and employees of NYK giving effect to the provisions of the Respect Agreement in respect of the supply of the Services to NYK’s major customers on routes to Australia in the contract years 2010, 2011 and 2012.
2. The employees or executives who occupied the positions of Manager or Deputy Manager of the Asia-Oceania Team within the Car Carrier Group of NYK were the persons who were primarily involved in the conduct that involved giving effect to the Respect Agreement. On some occasions, more senior executives in the Car Carrier Group were involved. The Agreed Statement of Facts does not name any of the relevant employees or executives. For the sake of brevity and simplicity, the relevant officer who occupied one of those managerial or executive positions will simply be referred to as the relevant **NYK Manager**. The relevant NYK Manager’s counterpart at one of the other Carriers will likewise simply be referred to as the Manager, for example, the Mitsui Manager or the K-Line Manager.

### Maruti Suzuki – India to Australia 2010, 2011 and 2012

1. Maruti Suzuki was a company based in India. It relevantly began exporting Suzuki vehicles to Australia in 2009. The Three J’s provided Services to Maruti Suzuki on the route from India to Australia.
2. In late 2008, Maruti Suzuki requested bids for the provision of Services for its cargo on the route from India to Australia commencing on 1 April 2009 and expiring on 30 April 2010. The Three J’s submitted bids in response to that request.
3. In about early February 2009, Maruti Suzuki informed each of the Three J’s that they had been awarded the cargo on the route from India to Australia on an exclusive basis. It then sought to obtain lower freight rates from each of the Three J’s. In particular, it requested NYK to lower its bid. NYK agreed to do that.
4. The NYK Manager subsequently discussed Maruti Suzuki’s request for bids with his counterparts at Mitsui and K-Line. Through these discussions, each of the Three J’s became aware that Maruti Suzuki had informed each of the Three J’s that they had been awarded 100% of the cargo, and that NYK had already signed a contract with Maruti Suzuki at a particular freight rate. On that basis, Mitsui decided that it would also agree to Maruti Suzuki's request to reduce its freight rate.
5. On or around 30 March 2009, the NYK Manager met with his counterpart at Mitsui. At that meeting, NYK and Mistui agreed, through their respective managers, that the business should be shared by the Three J’s and that NYK should seek K-Line's agreement to this.
6. In late 2009, Maruti Suzuki issued a request for bids for the provision of Services for the period 1 May 2010 to 30 April 2011. It then engaged in negotiations with each of the Three J’s in relation to that request. In that context, the relevant managers at each of the Three J’s had discussions about the freight rates to be offered to Maruti Suzuki and agreed to leave freight rates unchanged. NYK submitted a bid and entered into a contract with Maruti Suzuki for the provision of Services at a freight rate that was consistent with the agreement reached between the Three J’s.
7. NYK carried 1,262 Maruti Suzuki vehicles on the route from India to Australia for the 2010 contract period. Its estimated revenue and profit from that commerce was disclosed to the Court but is confidential. Suffice it to say that its revenue and profit was not insubstantial.
8. Similar conduct occurred in relation to the 2011 contract year. In late 2010, Maruti Suzuki issued a request for bids for the provision of Services for the period 1 May 2011 to 30 April 2012. Following that request, the Three J’s agreed to each seek a freight rate increase from Maruti Suzuki. Both Mitsui and NYK submitted bids in accordance with that agreement. Maruti Suzuki, however, rejected those offers and indicated that it would accept a specific nominated rate. That prompted further discussions between the relevant managers at Mitsui and NYK, during which the Mitsui Manager disclosed that Mitsui had offered a rate consistent with Maruti’s indication and the NYK Manager disclosed that NYK’s offer was about the same as Mitsui’s offer.
9. As it turned out, NYK ultimately offered the same rate as Mitsui and entered into a contract with Maruti Suzuki for the provision of Services at that rate, which represented a small percentage freight rate increase. NYK carried 1,346 Maruti Suzuki vehicles on the route from India to Australia pursuant to that contract in the period from 1 May 2011 to 30 April 2012. Its estimated revenue and profit from that commerce was not insubstantial.
10. The Three J’s once again engaged in similar conduct when, in late 2011, Maruti Suzuki issued a request for bids in respect of the provision of Services in respect of the 2012 contract year. In response, the relevant managers at each of the Three J’s engaged in discussions and reached agreement that they should seek a freight rate increase sufficient to compensate for the amount by which fuel prices had increased since the rate review. Consistent with the agreement, both Mitsui and NYK subsequently sought freight rate increases from Maruti Suzuki, though NYK’s increase was less than Mitsui’s.
11. Maruti Suzuki subsequently indicated to each of the Three J’s that it would accept a freight rate increase of US$15 per unit. In its negotiations with Mitsui, Maruti Suzuki informed Mitsui that NYK and K-Line were willing to accept Maruti Suzuki's offer of an increase of US$15 per unit. A manager at Mitsui then had discussions with his counterparts at NYK and K-Line. During that conversation, the NYK Manager confirmed that it was going to accept Maruti Suzuki’s offer, which it in due course did.
12. NYK carried 1,743 Maruti Suzuki vehicles on the route from India to Australia pursuant to the contract entered into after these discussions. Its estimated revenue and profit from that commerce was not insubstantial.

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

1. Asian Honda was based in Thailand. For shipments on the route from Thailand to Australia, NYK’s and K-Line’s vessels travelled in a clockwise direction around Australia and Mitsui’s vessels travelled in an anti-clockwise direction. Relevantly, Asian Honda entered into annual contract negotiations with each of the Three J’s in respect of the 2010 and 2011 contract years.
2. In February 2010 Asian Honda issued a request for bids in relation to 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. Shortly thereafter, the NYK Manager had discussions with his counterparts at Mitsui and K-Line. During those discussions, information about the current levels of freight rates charged for the provision of Services to Asian Honda on the route from Thailand to Australia was exchanged. It was then agreed that each of the Three J’s would submit a specified freight rate to Asian Honda in the first round of negotiations, and another rate in the second round of negotiations. The objective was to maintain existing market shares. NYK submitted a bid in accordance with that agreement and subsequently entered into a contract with Asian Honda.
3. NYK carried 10,102 Asian Honda vehicles on the route from Thailand to Australia pursuant to its contract with Asian Honda in the period from 1 April 2010 to 31 March 2011. While its revenue from that commerce was substantial, it nevertheless made an overall loss from the carriage of those vehicles.
4. In February 2011, Asian Honda issued a request for bids for the provision of Services in the period from 1 April 2011 to 31 March 2012. Shortly after the issue of that request, the NYK Manager had discussions with his counterpart at Mitsui about Asian Honda’s request for bids. During those discussions, the Mitsui Manager requested that NYK submit a particular freight rate to Asian Honda in order to maintain market shares and rates. NYK agreed to do so. Mitsui did not disclose the price which it intended to bid. The NYK Manager told his Mitsui counterpart that he had had similar discussions with their counterpart at K-Line.
5. NYK submitted a bid that was consistent with its agreement with Mitsui and K-Line. That bid was accepted and NYK entered into a contract with Asian Honda for the 2011 contract period. NYK carried 2,433 Asian Honda vehicles on the route from Thailand to Australia pursuant to that contract in the period from 1 April 2011 to 31 March 2012. While its revenue from that commerce was substantial, it nevertheless made an overall loss from the carriage of those vehicles.
6. It should be noted, however, that K-Line offered a lower freight rate to Asian Honda than it had agreed to do in its discussions with NYK. When the business was awarded, K-Line’s share of the business increased and NYK’s share decreased.

### Nissan – Japan and Thailand to Australia 2010; Indonesia to Australia 2011

1. Nissan acquired Services on the routes from Japan, Thailand, Indonesia and India to Australia.
2. Sometime before 8 February 2010, Nissan issued a request for bids for the provision of Services for Nissan cargo on the routes from Japan to Australia for the period 1 April 2010 to 31 March 2011. It requested a freight rate reduction from the Carriers in respect of the route from Japan to north and west Australia.
3. Following Nissan’s request, the NYK Manager had a discussion with his counterpart at Mitsui. During that discussion, the Mitsui Manager told the NYK Manager that Mitsui was intending to accept a decrease in the freight rate. He requested that NYK not offer a larger discount so the respective market shares of Mitsui and NYK would be maintained. The NYK Manager agreed.
4. NYK submitted a bid and entered into a contract with Nissan for the provision of Services for Nissan cargo on the route from Japan to north and west Australia for the 2010 contract period at a discounted freight rate which was consistent with the agreement it had reached with Mitsui. NYK carried 489 Nissan vehicles on the route from Japan to Australia pursuant to that contract in the period from 1 June 2010 to 31 March 2011. NYK’s revenue and profit from that commerce was not insubstantial.
5. Similar conduct occurred in relation to the Thailand route for the 2010 contract period. At that time, Nissan MCC had been awarded 100% of the Nissan cargo on the route from Thailand to Australia. Nissan MCC did not, however, operate its own PCC or PCTC vessels on that route. It entered into space chartering arrangements with the Three J’s.
6. On 26 February 2010, Nissan issued a request to the Three J’s and Hoegh for bids 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 NYK and Mitsui reduce their freight rates.
7. Sometime later, the NYK Manager had discussions with his counterparts at Mitsui and K-Line about the freight rates each of the Three J’s would submit to Nissan. It was agreed that none of the Three J’s would offer Nissan any reduction in freight rates. The Three J’s would thereby maintain their existing space charter allocations.
8. NYK submitted a freight rate to Nissan which was consistent with the agreement reached with Mitsui and K-Line. Mitsui, however, did cut its rates. There is no indication that it disclosed its intentions in that regard to NYK.
9. Nissan maintained that the price offered by NYK was too high. It agreed to contract at the rate submitted by NYK for a period of two months while negotiations for the balance of the year continued. NYK subsequently agreed to offer a reduced freight rate and agreed to pay Nissan MCC a rebate.
10. NYK carried 507 Nissan vehicles on the route from Thailand to Australia in the period from 1 April 2010 to 31 May 2010. While its revenue from that commerce was not insubstantial, it nevertheless made an overall loss from the carriage of those vehicles.
11. In relation to the route from Indonesia to Australia, in late 2010 Nissan proposed to move the production of one of its models from Thailand to Indonesia. Towards the end of December 2010, Nissan issued a request for bids from the Three J’s, Wallenius Wilhelmsen, Hoegh and Nissan MCC for the provision of Services on the route from Indonesia to Australia for the period from October 2011 to March 2012. Following that request, a manager at Nissan MCC contacted the NYK Manager and asserted that, as the current carrier of Nissan vehicles from Thailand to Australia, Nissan MCC should be entitled to ship those vehicles from Indonesia to Australia. NYK was asked to respect those rights. As noted earlier, Nissan MCC entered into space chartering arrangements with the Three J’s in relation to the Thailand to Australia route. It was suggested that as part of the agreement, Nissan MCC would effectively subcontract with the Three J’s on the Indonesia to Australia route in the same shares as it did on the route from Thailand to Australia.
12. NYK agreed to accept Nissan MCC’s proposal. It agreed on the freight rates that it would offer to Nissan.
13. In early July 2011, NYK submitted a freight rate to Nissan that was consistent with the rate agreed with Nissan MCC. As events transpired, Nissan MCC was awarded the contract for carriage of all Nissan cargo on the route from Indonesia to Australia for the period from 1 October 2011 to 31 March 2012 to Nissan MCC. Nissan MCC then effectively subcontracted with the Three J’s in respect of the carriage of vehicles on that route as it had agreed to do.
14. NYK carried 85 Nissan vehicles on the route from Indonesia to Brisbane and Townsville in the period from 1 October 2011 to 31 March 2012. It derived only a fairly modest revenue and profit from that commerce.

### Suzuki – Japan to Australia 2011; Thailand to Australia 2013

1. In early 2011, Suzuki issued a request for bids from the Three J’s 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. Shortly after Suzuki issued that request, a manager at Mitsui communicated with managers at each of NYK and K-Line in relation to Suzuki’s request. As a result of those communications, NYK agreed with Mitsui that the freight rates to be submitted to Suzuki by each Carrier would be the same as each Carrier’s existing freight rates. The purpose of that agreement was so as to maintain the existing market shares for that business.
2. In accordance with the agreement reached with Mitsui and K-Line, on 22 March 2011 NYK submitted a freight rate quotation to Suzuki at effectively its existing rate, which involved a percentage discount off the relevant conference rate. Suzuki subsequently approached NYK and offered to allocate it a higher share of its business on the route from Japan to south and east Australia if it agreed to offer Suzuki a higher discount. Suzuki stated that this discount was not the cheapest of the three carriers, but would nevertheless be acceptable to Suzuki because Suzuki wanted to decrease the share of its business that was allocated to K-Line. NYK did not disclose those further negotiations with Suzuki to the other Carriers.
3. NYK subsequently offered Suzuki a further discount. When the allocations were awarded by Suzuki, NYK's share of Suzuki business on the route from Japan to south and east Australia increased.
4. NYK carried 9,100 Suzuki vehicles on the route from Japan to Australia for the 2011 contract period. NYK derived significant revenue and profits from that commerce.
5. In 2012, Suzuki decided to shift production of its “Swift” model from Japan to Thailand. Sometime before August 2012, Suzuki issued a request for bids for the provision of Services in relation to the Swift model on the route from Thailand to Australia. This was a new route for Suzuki.
6. On 28 August 2012, the NYK Manager had a telephone conversation with his counterpart at K-Line about Suzuki’s quotation request. During that conversation, the NYK and K-Line Managers agreed that, in order to maintain the existing market shares held by the Three J’s for Suzuki cargo on the Japan to Australia route, NYK and K-Line would each offer a freight rate within a specified range in response to Suzuki’s request for quotation.
7. Following that conversation, the NYK Manager telephoned his counterpart at Mitsui. During the ensuing telephone conversation, the NYK Manager sought Mitsui’s agreement to what had previously been agreed with K-Line. Mitsui, however, refused to agree.
8. Nevertheless, on 31 August 2012, NYK submitted freight rates in accordance with the agreement it had reached with K-Line. It did so in the expectation that, based on past experience, Suzuki would not accept the first rate offered to it, but would instead contact each of the Carriers to further negotiate the rates offered by each Carrier. That is what occurred. During the further negotiations with Suzuki, NYK agreed to offer freight rates that were slightly lower than those previously offered, but were still within the range it had agreed with K-Line. NYK did not discuss these further negotiations, or this further offer, with the other two carriers.
9. In September 2012, Suzuki announced that NYK and K-Line were both successful in obtaining business on the route from Thailand to south and east Australia.
10. NYK carried 2,927 Suzuki vehicles on the route from Thailand to Australia pursuant to this contract in the period from 1 January 2013 to 31 December 2013. NYK derived substantial revenue, and not insubstantial profits, from that commerce.

### Mazda – Japan to Australia 2010

1. From at least 1 January 2009 to at least mid-2011, the Three J’s each had annual contracts with Mazda on the route from Japan to south and east Australia. The contract periods that K-Line and Mitsui had with Mazda, however, were not aligned with the contract period that NYK had with Mazda. This meant that there was limited scope for NYK to coordinate its submissions to Mazda with the other Carriers. The Three J’s nevertheless exchanged freight rate information during the periods when negotiations with Mazda took place.
2. In early 2010, Mazda requested freight rates from NYK for the provision of Services for Mazda cargo on the routes from Japan to Australia for the period 1 April 2010 to 31 March 2011. In early March 2010, the NYK Manager and his counterpart at Mitsui had a discussion about negotiations between NYK and Mazda. The NYK Manager and his counterpart discussed the Three J’s current freight rates for Mazda on the route from Japan to south and east Australia. The NYK and Mitsui Managers agreed that NYK would not submit a freight rate below a certain specified rate.
3. NYK subsequently submitted a bid and entered into a contract with Mazda which was consistent with the agreement that it had reached with Mitsui. NYK carried 18,676 Mazda vehicles on the route from Japan to south and east Australia pursuant to this contract in the period from 1 April 2010 to 31 March 2011. The revenue and profits derived by NYK from that commerce were substantial.

### Hino – Japan to Australia 2010 and 2011

1. Hino manufactured trucks and buses, and acquired Services on the routes from Japan to Australia and Thailand to Australia pursuant to annual contracts. Hino manufactured three sizes of trucks – small, mid-sized and large. Historically, on the route from Japan to south and east Australia, large and mid-sized Hino trucks had been carried by NYK, and small trucks had been carried by Mitsui. Each year, Hino requested freight rate estimates from the Three J’s, and on some occasions, Toyofuji, in respect of each of the categories of trucks.
2. In early 2010, Toyota, on behalf of Hino, issued a request for bids from the Three J’s for the provision of Services in relation to small trucks on the route from Japan to south and east Australia for the period 1 April 2010 to 31 March 2011. Hino also issued a request for the same period in respect of the provision of Services in relation to mid-sized and large trucks on the routes from Japan to south and east Australia and Japan to north and west Australia. Following those requests, the NYK Manager had a discussion or discussions with his counterpart at Mitsui.
3. In relation to the request relating to small trucks, the NYK Manager agreed with his counterpart at Mitsui that NYK would submit a freight rate at around or above a specified level. The stated objective of the agreement was to maintain Mitsui’s status as the sole carrier of Hino small trucks on that route. NYK subsequently submitted a bid to Hino in accordance with its agreement with Mitsui and, after contracts were awarded, Mitsui retained its status as sole carrier.
4. In relation to the provision of Services for mid-sized and large trucks on the route from Japan to south and east Australia, the NYK Manager and his counterpart at Mitsui agreed that Mitsui would submit the same freight rate it had submitted in the previous year. The objective was to maintain NYK’s status as sole carrier of mid-size and large trucks on that route. After those discussions between NYK and Mitsui, NYK and Hino engaged in some further negotiations concerning this route. NYK did not disclose those further negotiations to Mitsui or K-Line. In any event, after NYK and Mitsui submitted their bids to Hino, and Hino awarded its contracts, NYK retained its status as sole carrier.
5. NYK carried 1,882 Hino vehicles on the route from Japan to south and east Australia in the period from 1 April 2010 to 31 March 2011 pursuant to its contract with Hino. NYK derived substantial revenue and not insubstantial profits from that commerce.
6. In early 2011, Toyota, on behalf of Hino, issued a request for bids from the Three J’s and Toyofuji for the provision of Services for Hino truck cargo consisting of small trucks on the route from Japan to south and east Australia for the period 1 April 2011 to 31 March 2012. Hino also issued a request for bids from the Three J’s for the provision of Services for mid-sized and large trucks on the same route and for the same period.
7. After Hino and Toyota issued those requests, and before Mitsui or NYK submitted their bids, the NYK Manager had a discussion with his counterpart at Mitsui. During that discussion, the respective managers agreed that Mitsui would propose an increase in its freight rate for small trucks and that NYK would submit freight rates at an agreed level. NYK would propose a similar level of increase for its freight rate for mid-sized and large trucks and Mitsui would submit freight rates at an agreed level. The stated objective of the arrangements was to maintain Mitsui’s status as sole carrier for Hino’s small trucks, and NYK’s status as sole carrier of Hino’s mid-sized and large trucks.
8. As events transpired, however, NYK did not propose increased freight rates in respect of mid-sized and large trucks. It did, however, submit freight rates in respect of small trucks that were consistent with its agreement with Mitsui.
9. The outcome of the tenders was that Mitsui retained its status as the sole carrier of Hino small trucks and NYK retained its status as the sole carrier of Hino mid-sized and large trucks.
10. NYK carried 1,840 Hino vehicles on the route from Japan to south and east Australia for the 2011 contract period. The revenue and profits derived by NYK from this commerce were substantial.

### Toyota – Japan to Australia 2010; United States to Australia 2012

1. Toyota acquired Services on the routes from Japan to Australia and from Thailand to Australia. Toyota Logistics Services (**Toyota LS**) was a subsidiary of Toyota based in North America.
2. Each March and September, Toyota released its expected volumes for the next half-year. Carriers would then be provided with a requested reduction in freight rates by Toyota. The stated objective of that request was to reduce Toyota’s overall global expenditure on ocean freight. This process was known as the “price challenge”. NYK invariably complied with Toyota’s requests for rate reductions, but commonly did so by co-ordinating its response with the other relevant Carriers to ensure that the Carriers were able to maintain existing market shares.
3. In September 2010, Toyota issued a request for bids for global routes for the period October 2010 to March 2011. As part of that request, Toyota requested a particular percentage reduction on freight rates globally. Toyota did not dictate the routes on which the reduction was to be achieved.
4. After receiving Toyota’s request, and prior to responding to it, the NYK Manager and his counterpart at K-Line had a number of conversations in which they discussed proposed adjustments to freight rates on the routes from Japan to Australia. The NYK Manager and his counterpart agreed on the level of reduction that each would offer to Toyota in order to maintain existing market shares. NYK submitted freight rates to Toyota in accordance with the levels of reductions that had been agreed between the NYK Manager and his counterpart at K-Line.
5. The outcome of this “price challenge” process was that NYK delivered to Toyota its requested total freight decrease and NYK’s share of Toyota cargo on routes from Japan to Australia did not change.
6. NYK carried 14,977 Toyota vehicles on the route from Japan to Australia between October 2010 and March 2011. NYK derived very substantial revenue and profits from that commerce.
7. In February 2012, Toyota LS issued a feasibility study request seeking pricing proposals for, relevantly, the provision of Services for a specific vehicle (known in United States as the Highlander, but in Australia as the Kluger) on the route from the United States to Australia. At that time, NYK did not have a direct service from the United States to Australia, though Wallenius Wilhelmsen did.
8. NYK considered proposing a freight rate to Toyota LS based on NYK transhipping the cargo through Japan. The freight rate which NYK considered proposing was based on an aggregation of the freight rate for the provision of Services on the route from the US to Japan, the freight rate for the provision of Services on the route from Japan to south and east Australia, and a small transhipment cost.
9. On about 29 February 2012, the NYK Manager received a phone call from his counterpart at Wallenius Wilhelmsen. In the ensuing conversation, the NYK Manager was informed that Wallenius Wilhelmsen was intending to submit a bid for the Highlander cargo, but that it did not want to interfere with NYK in respect of that cargo. The NYK Manager informed his counterpart of NYK’s proposed freight rate, the response to which was that NYK’s proposed rate was significantly higher than the freight rate that Wallenius Wilhelmsen charged for its direct service on the route from the US to Australia. The NYK Manager then requested that Wallenius Wilhelmsen bid “a three digit figure” in order to ensure that Wallenius Wilhelmsen would not win the Toyota Highlander business. Ultimately it was agreed that Wallenius Wilhelmsen would submit a specific bid which was considered to be sufficiently high to ensure that Wallenius Wilhelmsen would not win the Toyota Highlander business.
10. At about the same time, the NYK Manager had a telephone conversation with the Mitsui Manager during which the Mitsui Manager confirmed that Mitsui did not want to take the Toyota business on the route US to Australia route away from NYK. The NYK Manager and the Mitsui Manager agreed that Mitsui would offer a specified freight rate that was sufficiently high to ensure that Mitsui did not win the Toyota Highlander business.
11. In March 2012, NYK responded to Toyota LS’s feasibility study offering a freight rate which was below that which Wallenius Wilhelmsen and Mitsui had agreed to submit.
12. As events transpired, however, NYK’s conduct was to no avail.
13. After the submission of bids in response to the feasibility study, Toyota LS issued a formal tender in relation to the provision of Services for the Toyota Highlander on the route from the United States to Australia. Following the issue of the tender, senior managers of NYK engaged in a number of discussions with their counterparts at Wallenius Wilhelmsen. It is unnecessary to detail the content of those discussions. Suffice it to say that they included discussions about the freight rates that Wallenius Wilhelmsen proposed to submit in response to the tender. Those rates were lower than the rates that it had offered in response to the feasibility study. Ultimately Wallenius Wilhelmsen was the successful party in the tender and was awarded 100% of the business.

### UD Trucks – 2010, 2011 and 2012

1. UD Trucks was a subsidiary of Volvo. UD Trucks acquired Services on the routes from Japan to Australia. Tenders for UD Trucks’ business were conducted by Volvo Logistics each year in around September or October.
2. On 28 June 2010, Volvo Logistics issued a request for bids for the provision of Services for UD Trucks’ cargo on the routes from Japan to Australia for the contract period October 2010 to September 2011. This tender included the route from Japan to north and west Australia, which was a new route for the carriage of UD Trucks’ cargo, in addition to the route from Japan to south and east Australia. At that time, NYK was the sole carrier of UD Trucks' cargo on the route from Japan to south and east Australia.
3. Following the issue of this request, managers from Mitsui and K-Line separately contacted the NYK Manager and enquired as to what freight rates they should submit for the provision of Services to UD Trucks on the route from Japan to north and west Australia. As a result of those discussions, the Three J’s ultimately agreed, in relation to the route to south and east Australia, that Mitsui and K-Line would each structure their bids within a certain range requested by NYK so that NYK would win the business and maintain its status as sole carrier for that route. In relation to the route to north and west Australia, it was agreed that they would each effectively bid the same rates.
4. The outcome of this tender process was that NYK remained as the sole carrier of UD Trucks on the route from Japan to south and east Australia and the Three J’s were each awarded a contract to supply Services on the route from Japan to north and west Australia.
5. Ultimately NYK did not transport any of UD Trucks’ cargo on the route to north and west Australia. It carried 425 UD Trucks on the route from Japan to south and east Australia for the contract period October 2010 to September 2011. Its revenue and profits from that commerce were not insubstantial.
6. Similar conduct occurred in relation to the 2011 contract period. Sometime before 7 July 2011, Volvo Logistics issued a request for bids for the provision of Services in relation to UD Trucks’ cargo on the route from Japan to south and east Australia for the contract period October 2011 to September 2012. NYK was still the sole carrier of UD Trucks’ cargo on that route.
7. The NYK Manager subsequently discussed the tender individually with his counterparts at both Mitsui and K-Line. As a result of those discussions, the Three J’s agreed that they would structure their bids so as to ensure that NYK would continue as the sole carrier of UD Trucks’ cargo on that route. The Three J’s submitted bids in accordance with that agreement. The outcome of the tender was that NYK remained as the sole carrier of UD Trucks on the route from Japan to south and east Australia.
8. NYK carried 854 UD Trucks on the route from Japan to south and east Australia for the contract period October 2011 to September 2012. NYK derived revenue and profits from that commerce that were substantial.
9. In relation to the 2012 contract year, Volvo Logistics issued a request for bids for the provision of Services on the routes to Australia in about July 2012. As had been done in previous years, the NYK Manager subsequently had a telephone conversation with his counterpart at Mitsui, during which it was indicated that Mitsui had no intention to make any major changes in relation to the market shares in respect of UD Trucks’ business on the relevant route. In a subsequent discussion, the NYK Manager and his Mitsui counterpart agreed that market conditions were such that it was unlikely that freight rates on the route from Japan to south and east Australia could be increased. The NYK Manager reported that conversation to the General Manager of NYK’s Car Carrier Group and the Corporate Officer of NYK.
10. NYK submitted a bid which was unchanged from its existing rate. UD Trucks rejected that offer. Further negotiations then took place which resulted in NYK offering a lower rate. That offer was accepted and NYK remained the sole carrier of UD Trucks’ cargo on the route.
11. NYK carried 525 UD Trucks on the route from Japan to south and east Australia for the contract period of October 2012 to September 2013. NYK derived substantial revenue and profits from that commerce.

### Isuzu – Japan to Australia 2010

1. Isuzu acquired Services on the route from Japan to north and west Australia. K-Line was the lead carrier for Isuzu cargo on that route. In around February or March each year Isuzu requested quotes for the provision of Services on that route for the contract period 1 April of that year to 31 March of the following year.
2. In early 2010, Isuzu issued a request for bids for the provision of Services on the route from Japan to north and west Australia for the contract period 1 April 2010 to 31 March 2011. Following the issue of that request, the NYK Manager had a discussion with his counterpart at K-Line. The managers discussed, amongst other things, whether or not they thought rates should be increased. While they did not disclose to each another the actual freight rates that NYK and K-Line currently charged or intended to charge Isuzu, they nevertheless agreed to maintain the current rates for the provision of Services on the relevant route.
3. NYK did not have any discussions with Mitsui, the other supplier of Services to Isuzu on this route. That was because K-Line was the lead carrier for Isuzu on that route. In accordance with past practice, NYK understood or expected that K-Line would engage in discussions with Mitsui of the same type that it had engaged in with NYK.
4. NYK submitted a bid to Isuzu which, consistent with the agreement reached with K-Line, was at the same rate as the previous year. It was awarded a contract by Isuzu and carried 175 Isuzu vehicles on the route from Japan to Australia in the period from 1 April 2010 to 31 March 2011. It derived not insubstantial revenue and profits from that commerce.

### Fiat – Europe to Australia 2012

1. In 2012, NYK commenced a three-year fixed term exclusive freight rate contract with Fiat for the provision of Services on a variety of routes, including the route from Europe to Australia. In about March 2012, Chrysler Australia Pty Ltd took over the distribution of Fiat and Alfa Romeo vehicles in Australia.
2. On 30 July 2012, the NYK Manager received a telephone call from his counterpart at Wallenius Wilhelmsen. In the ensuing conversation, the NYK Manager was informed that Chrysler Australia had asked Wallenius Wilhelmsen for a freight rate quote for the provision of Services in relation to Fiat cargo on the route from Europe to Australia. He was told that Wallenius Wilhelmsen did not want to interfere with NYK’s Fiat business, but that it nevertheless would have to provide a quote because of its relationship with Fiat on other routes. The NYK manager told his counterpart that he would call him back shortly.
3. After this telephone conversation, the NYK Manager calculated the freight rates that he would request Wallenius Wilhelmsen to quote to Chrysler Australia. He then telephoned his counterpart at Wallenius Wilhelmsen back and provided him with freight rates that he said NYK was charging Fiat. In fact, those rates were slightly higher than NYK’s actual freight rates. The NYK manager then asked the Wallenius Wilhelmsen Manager to quote a freight rate higher than the freight rate he had provided. He agreed to do so.
4. A day or two later, the NYK Manager received a telephone call from the Wallenius Wilhelmsen Manager he had previously spoken with. He was informed that Wallenius Wilhelmsen’s Australian office had already quoted a freight rate to Chrysler Australia. That rate, which was set independently of any communication or understanding with NYK, was higher than NYK's contract rate agreed with Fiat. The NYK manager nevertheless asked his counterpart to increase Wallenius Wilhelmsen’s current quote because the gap between NYK’s offer and Wallenius Wilhelmsen’s offer was very small. In response, the NYK Manager was told that it would be difficult for Wallenius Wilhelmsen to raise the freight rate immediately, but that in order to ensure that it did not win the business from NYK, Wallenius Wilhelmsen would tell Chrysler that it did not have space to carry Fiat cargo on the route from Europe to Australia.
5. NYK relevantly carried 459 Fiat vehicles on the route from Europe to Australia in August and September 2012. It derived not insubstantial revenue and profits from that commerce.

## NYK’s knowledge of antitrust law

1. In around 2009, some employees in NYK’s Car Carrier Group attended training provided by NYK’s Fair Trade Promotion Group or NYK’s Anti-Monopoly Act Task Force Team. Throughout the Relevant Period, the Fair Trade Promotion Group was responsible for monitoring NYK’s compliance with anti-trust laws, and providing training to NYK employees in respect of anti-trust laws. The training included contact details of a ‘Help Desk’ for employees in the Car Carrier Group to report issues regarding anti-trust legislation in Japan and examples of recent anti-trust findings against companies in different jurisdictions, including Japan, Europe and the United States.
2. Some of the employees who engaged in the communications with their counterparts at other Carriers also undertook online training courses concerning anti-trust law during 2010. That training did not cause the employees to stop having discussions with their counterparts at the other Carriers about freight rates and coordinated responses to tenders. Despite the training, the employees continued to observe that such discussions were expected and remained the general practice within NYK’s Car Carrier Group.
3. In early June 2011, Deputy Managers from NYK’s Car Carrier Group attended a meeting with the General Manager of the Fair Trade Promotion Group concerning upcoming antitrust law training to be conducted by the Fair Trade Promotion Group. Following that meeting, the General Manager of the Fair Trade Promotion Group met with the senior management of NYK’s Car Carrier Group. He told senior management that there was a possibility that employees of the Car Carrier Group were communicating with their counterparts at other Carriers in ways that could contravene Japanese anti-trust laws. He told senior management that such communications should stop.
4. Senior management of the Car Carrier Group did not heed that advice or follow that directive. They decided that communications with NYK’s competitors should continue, but that only employees at the Manager level or above should engage in them. They also decided that the communications should not be documented in any way. They called a meeting of all Car Carrier Group staff at the Manager level and above who were involved in sales and advised them of those decisions.
5. Not surprisingly, following this intervention by senior management, NYK employees in the Car Carrier Group continued to engage in communications with their counterparts at the other Carriers. Those communications were generally conducted orally over the telephone or in face-to-face meetings. They were rarely documented. Where the discussions were conducted by telephone, the employees generally conducted the conversations away from their desks, in hallways, lift lobbies, outside the office or in a room referred to as the “phone booth”. The phone booth was a small, glass enclosed room about the size of a phone booth. Some employees were specifically instructed to conduct such telephone calls away from their desks to minimise the risk of junior staff overhearing the conversation and reporting the conduct to the Fair Trade Promotion Group.
6. In some instances, NYK employees did make notes of their discussions with their counterparts at other Carriers, but did so in a way that concealed or disguised the true nature of the discussions. For example, in one instance, an NYK Deputy Manager disguised his notes by including phrases such as “based on rumour” and including question marks next to notes of the competitor’s freight rates, so that it appeared that the notes were based on the employee’s own conjecture, rather than on the employee’s conversations with his counterpart.

## Investigations and cooperation

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 NYK and a number of other shipping companies.
2. On 10 September 2012, the Australian Competition and Consumer Commission (**ACCC**) sent a fax to NYK Australia referring to the media reports regarding alleged cartel arrangements between international shipping lines. It would appear that the ACCC’s fax did not come to the immediate attention of management at NYK Australia or NYK because it was received by a fax machine located in the container shipping sales department of NYK Australia.
3. In any event, in October of 2012, NYK contacted the ACCC and offered to fully cooperate with any investigation the ACCC may conduct into the alleged cartel conduct. From that time, NYK has cooperated fully with the ACCC in its investigations.NYK’s cooperation included facilitating interviews with NYK executives who could not have been compelled to travel to Australia to attend interviews. The nature and extent of NYK’s cooperation was the subject of evidence at the sentence hearing. That evidence will be addressed later.

## Penalties imposed in other jurisdictions

1. Other competition regulators around the world have imposed penalties, or brought court actions to impose penalties, on NYK in respect of certain aspects of its conduct related to the Respect Agreement.

### Japan

1. On 18 March 2014, the Japan Free Trade Commission found that NYK and certain other Carriers had illegally coordinated their responses to requests for prices from customers in breach of anti-trust laws in Japan. The Commission issued an administrative "Surcharge Payment Order" to NYK in the amount of ¥13,101,070,000 (approximately AU$157 million) in respect of that conduct. NYK has paid that amount.
2. The administrative surcharge order issued to NYK by the Japan Free Trade Commission included an amount of ¥1,652,960,000 (approximately AU$20 million) for coordination in respect of the carriage of vehicles from Japan on the 'Oceania route', of which 87% related to the carriage of vehicles on the route from Japan to south and east Australia. The conduct the subject of that part of the order included some of the conduct relating to NYK’s supply of Services to Suzuki, Mazda, Hino, Toyota and Volvo Logistics on the route from Japan to south and east Australia. The formula adopted by the Japan Free Trade Commission in determining this part of the order was based on a proportion of the value of freight services supplied by NYK in respect of vehicles on that route.
3. The Japan Free Trade Commission also issued a “Cease and Desist Order” to both NYK and K-Line in relation to the Oceania route. In very general terms, the Order included provisions requiring NYK and K-Line to terminate certain anti-competitive agreements or arrangements that had been entered into in the past; to refrain from engaging in acts which involved coordination in the setting of freight rates; to refrain from exchanging information concerning freight rates; to provide training to their employees concerning Japanese anti-trust laws; and to conduct regular audits in respect of compliance with anti-trust laws.

### United States of America

1. On 29 December 2014, NYK agreed to plead guilty and pay a criminal fine of US$59.4 million 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 to and from the United States and elsewhere. There is no clear indication that any of the conduct the subject of the charge in the United States involved any of the relevant routes to Australia. A senior officer of NYK’s Car Carrier Group also pleaded guilty in relation to his participation in the relevant conspiracy. He paid a fine of US$20,000 and was sentenced to 15 months imprisonment.

### South Africa

1. On 30 June 2015, the Competition Commission of South Africa and NYK filed a settlement agreement with the Competition Tribunal of South Africa in respect of a matter involving collusion on 14 tenders with its competitors for the transportation of motor vehicles to and from South Africa by sea. Pursuant to the settlement NYK agreed to pay a penalty of R104 million (approximately AU$10,202,582). The Competition Tribunal approved the settlement.

### Chile

1. On 27 January 2015, the Fiscalia Nacional Economica (**FNE**) filed a claim in the Competition Court against NYK, Mitsui, K-Line, Eukor and two Chilean companies for colluding in multiple bidding processes in respect of the shipment of motor vehicles to Chile since 2000. NYK has been granted leniency by the FNE under its “leniency program”. The FNE have sought a fine of approximately US$25 million against NYK.

### China

1. On 28 December 2015, China’s National Development and Reform Commission fined eight car carrier operators for anti-competitive behaviour in the car carrying industry. Wallenius Wilhelmsen, Eukor, K-Line, Mitsui and three other shipping companies were fined a total of US$65 million. NYK was not fined as it was the immunity applicant.

# cartel conduct - the LEGISLATIVE SCHEME

1. The legislative scheme in Division 1 of Part IV of the C&C Act for criminal cartel conduct was introduced into the *Trade Practices Act* on 24 July 2009. Cartel offences for collusive tendering and bid-rigging had existed under the former *Trade Practices Act 1965* (Cth), however all contraventions of competition provisions became civil penalty provisions with the introduction of the *Trade Practices Act 1974* (Cth).
2. The offence to which NYK has entered a plea of guilty is the offence of giving effect to a cartel provision contrary to s 44ZZRG(1) of the C&C Act. Section 44ZZRG(1) provides as follows:

**44ZZRG Giving effect to a cartel provision**

*Offence*

(1) A corporation commits an offence if:

(a) a contract, arrangement or understanding contains a cartel provision; and

(b) the corporation gives effect to the cartel provision.

1. Subsection 44ZZRG(2) provides that the fault element for paragraph (1)(a) is knowledge or belief. That simply means that, in accordance with the general principles of criminal responsibility set out in Chapter 2 of the ***Criminal Code*** *Act 1995* (Cth), it is necessary to prove that the corporation knew or believed that the relevant contract, arrangement or understanding contained a cartel provision. No fault element is specified in relation to paragraph (1)(b). It follows that the fault element for the conduct in that paragraph is intention: s 5.6 of the Criminal Code. It must accordingly be proved that the corporation intended to give effect to the cartel provision. It should perhaps be noted in this context that these fault elements are the only difference between the criminal offence created by s 44ZZRG and the civil penalty provision concerning giving effect to a cartel provision in s 44ZZRK. Section 44ZZRG(5) provides that an offence against subsection (1) is an indictable offence.
2. The relative simplicity of the offence provision in s 44ZZRG(1) belies the complexity introduced by the provisions of the C&C Act that give content to the term “cartel provision”. The main provision in that regard is s 44ZZRD. It is useful to set that section out in full, if only because it makes good the proposition that the elements of the offence against s 44ZZRG(1) are very complex.

**44ZZRD Cartel provisions**

1. For the purposes of this Act, a provision of a contract, arrangement or understanding is a *cartel provision* if:
	1. either of the following conditions is satisfied in relation to the provision:
		1. the purpose/effect condition set out in subsection (2);
		2. the purpose condition set out in subsection (3); and
	2. the competition condition set out in subsection (4) is satisfied in relation to the provision.

*Purpose/effect condition*

1. The purpose/effect condition is satisfied if the provision has the purpose, or has or is likely to have the effect, of directly or indirectly:
	1. fixing, controlling or maintaining; or
	2. providing for the fixing, controlling or maintaining of;

the price for, or a discount, allowance, rebate or credit in relation to:

* 1. goods or services supplied, or likely to be supplied, by any or all of the parties to the contract, arrangement or understanding; or
	2. goods or services acquired, or likely to be acquired, by any or all of the parties to the contract, arrangement or understanding; or
	3. goods or services re-supplied, or likely to be re-supplied, by persons or classes of persons to whom those goods or services were supplied by any or all of the parties to the contract, arrangement or understanding; or
	4. goods or services likely to be re-supplied by persons or classes of persons to whom those goods or services are likely to be supplied by any or all of the parties to the contract, arrangement or understanding.

Note 1: The purpose/effect condition can be satisfied when a provision is considered with related provisions – see subsection (8).

Note 2: ***Party*** has an extended meaning – see section 44ZZRC.

*Purpose condition*

1. The purpose condition is satisfied if the provision has the purpose of directly or indirectly:
	1. preventing, restricting or limiting:
		1. the production, or likely production, of goods by any or all of the parties to the contract, arrangement or understanding; or
		2. the capacity, or likely capacity, of any or all of the parties to the contract, arrangement or understanding to supply services; or
		3. the supply, or likely supply, of goods or services to persons or classes of persons by any or all of the parties to the contract, arrangement or understanding; or
	2. allocating between any or all of the parties to the contract, arrangement or understanding:
		1. the persons or classes of persons who have acquired, or who are likely to acquire, goods or services from any or all of the parties to the contract, arrangement or understanding; or
		2. the persons or classes of persons who have supplied, or who are likely to supply, goods or services to any or all of the parties to the contract, arrangement or understanding; or
		3. the geographical areas in which goods or services are supplied, or likely to be supplied, by any or all of the parties to the contract, arrangement or understanding; or
		4. the geographical areas in which goods or services are acquired, or likely to be acquired, by any or all of the parties to the contract, arrangement or understanding; or
	3. ensuring that in the event of a request for bids in relation to the supply or acquisition of goods or services:
		1. one or more parties to the contract, arrangement or understanding bid, but one or more other parties do not; or
		2. 2 or more parties to the contract, arrangement or understanding bid, but at least 2 of them do so on the basis that one of those bids is more likely to be successful than the others; or
		3. 2 or more parties to the contract, arrangement or understanding bid, but not all of those parties proceed with their bids until the suspension or finalisation of the request for bids process; or
		4. 2 or more parties to the contract, arrangement or understanding bid and proceed with their bids, but at least 2 of them proceed with their bids on the basis that one of those bids is more likely to be successful than the others; or
		5. 2 or more parties to the contract, arrangement or understanding bid, but a material component of at least one of those bids is worked out in accordance with the contract, arrangement or understanding.

Note 1: For example, subparagraph (3)(a)(iii) will not apply in relation to a roster for the supply of after-hours medical services if the roster does not prevent, restrict or limit the supply of services.

Note 2: The purpose condition can be satisfied when a provision is considered with related provisions – see subsection (9).

Note 3: ***Party*** has an extended meaning – see section 44ZZRC.

*Competition condition*

1. The competition condition is satisfied if at least 2 of the parties to the contract, arrangement or understanding:
	1. are or are likely to be; or
	2. but for any contract, arrangement or understanding, would be or would be likely to be;

in competition with each other in relation to:

* 1. if paragraph (2)(c) or (3)(b) applies in relation to a supply, or likely supply, of goods or services—the supply of those goods or services; or
	2. if paragraph (2)(d) or (3)(b) applies in relation to an acquisition, or likely acquisition, of goods or services—the acquisition of those goods or services; or
	3. if paragraph (2)(e) or (f) applies in relation to a re-supply, or likely re-supply, of goods or services—the supply of those goods or services to that re-supplier; or
	4. if subparagraph (3)(a)(i) applies in relation to preventing, restricting or limiting the production, or likely production, of goods—the production of those goods; or
	5. if subparagraph (3)(a)(ii) applies in relation to preventing, restricting or limiting the capacity, or likely capacity, to supply services—the supply of those services; or
	6. if subparagraph (3)(a)(iii) applies in relation to preventing, restricting or limiting the supply, or likely supply, of goods or services—the supply of those goods or services; or
	7. if paragraph (3)(c) applies in relation to a supply of goods or services—the supply of those goods or services; or
	8. if paragraph (3)(c) applies in relation to an acquisition of goods or services—the acquisition of those goods or services.

Note: ***Party*** has an extended meaning—see section 44ZZRC.

*Immaterial whether identities of persons can be ascertained*

1. It is immaterial whether the identities of the persons referred to in paragraph (2)(e) or (f) or subparagraph (3)(a)(iii), (b)(i) or (ii) can be ascertained.

*Recommending prices etc.*

1. For the purposes of this Division, a provision of a contract, arrangement or understanding is not taken:
	1. to have the purpose mentioned in subsection (2); or
	2. to have, or be likely to have, the effect mentioned in subsection (2);

by reason only that it recommends, or provides for the recommending of, a price, discount, allowance, rebate or credit.

*Immaterial whether particular circumstances or particular conditions*

1. It is immaterial whether:
	1. for the purposes of subsection (2), subparagraph (3)(a)(iii) and paragraphs (3)(b) and (c)—a supply or acquisition happens, or a likely supply or likely acquisition is to happen, in particular circumstances or on particular conditions; and
	2. for the purposes of subparagraph (3)(a)(i)—the production happens, or the likely production is to happen, in particular circumstances or on particular conditions; and
	3. for the purposes of subparagraph (3)(a)(ii)—the capacity exists, or the likely capacity is to exist, in particular circumstances or on particular conditions.

*Considering related provisions – purpose/effect condition*

1. For the purposes of this Division, a provision of a contract, arrangement or understanding is taken to have the purpose, or to have or be likely to have the effect, mentioned in subsection (2) if the provision, when considered together with any or all of the following provisions:
	1. the other provisions of the contract, arrangement or understanding;
	2. the provisions of another contract, arrangement or understanding, if the parties to that other contract, arrangement or understanding consist of or include at least one of the parties to the first-mentioned contract, arrangement or understanding;

has that purpose, or has or is likely to have that effect.

*Considering related provisions – purpose condition*

1. For the purposes of this Division, a provision of a contract, arrangement or understanding is taken to have the purpose mentioned in a paragraph of subsection (3) if the provision, when considered together with any or all of the following provisions:
	1. the other provisions of the contract, arrangement or understanding;
	2. the provisions of another contract, arrangement or understanding, if the parties to that other contract, arrangement or understanding consist of or include at least one of the parties to the first-mentioned contract, arrangement or understanding;

has that purpose.

*Purpose/effect of a provision*

1. For the purposes of this Division, a provision of a contract, arrangement or understanding is not to be taken not to have the purpose, or not to have or to be likely to have the effect, mentioned in subsection (2) by reason only of:
	1. the form of the provision; or
	2. the form of the contract, arrangement or understanding; or
	3. any description given to the provision, or to the contract, arrangement or understanding, by the parties.

*Purpose of a provision*

1. For the purposes of this Division, a provision of a contract, arrangement or understanding is not to be taken not to have the purpose mentioned in a paragraph of subsection (3) by reason only of:
	1. the form of the provision; or
	2. the form of the contract, arrangement or understanding; or
	3. any description given to the provision, or to the contract, arrangement or understanding, by the parties.
2. The central provisions are in subss (1) to (4). In simple terms, a provision of a contract, agreement or understanding will be a cartel provision if it satisfies either the purpose/effect condition in subs (2), or the purpose condition in subs (3), and it also satisfies the competition condition in subs (4).
3. Relevantly for present purposes: the purpose/effect condition will be satisfied by a provision which has the purpose, or has or is likely to have the effect, of fixing, controlling or maintaining the price for goods or services supplied by any or all of the parties to the contract, arrangement or understanding; the purpose condition will be satisfied by a provision that, in the event of a request for bids in relation to the supply of services, one or more of the parties to the contract, arrangement or understanding bid, but one or more of the other parties do not, or 2 or more parties bid, but at least 2 of them do so on the basis that one of those bids is more likely to be successful than the others; and the purpose condition also includes a provision which directly or indirectly has the purpose of allocating between any or all of the parties to the contract, arrangement or understanding the persons who are likely to acquire services from any or all of the parties. The competition condition is relevantly satisfied if at least 2 of the parties to the contract, arrangement or understanding are, or but for the contract, arrangement or understanding would be, in competition with each other in relation to the supply or likely supply of services.
4. It is unnecessary for present purposes to delve into the complexities of s 44ZZRD(5) to (11). Suffice it to say that subss (6), (10) and (11) set out some circumstances where a provision is not taken to satisfy the purpose/effect condition; subss (5) and (7) set out facts or circumstances which are immaterial in considering whether a provision satisfies either the purpose/effect condition or the purpose condition; and subss (8) and (9) set out circumstances where a provision is taken to satisfy either the purpose/effect condition or the purpose condition. None of those provisions is directly relevant to NYK’s admitted contravention of s 44ZZRG.
5. In relation to the purpose condition, s 4F of the C&C Act provides as follows:

**4F References to purpose or reason**

1. For the purposes of this Act:
	1. a provision of a contract, arrangement or understanding or of a proposed contract, arrangement or understanding, or a covenant or a proposed covenant, shall be deemed to have had, or to have, a particular purpose if:
		1. the provision was included in the contract, arrangement or understanding or is to be included in the proposed contract, arrangement or understanding, or the covenant was required to be given or the proposed covenant is to be required to be given, as the case may be, for that purpose or for purposes that included or include that purpose; and
		2. that purpose was or is a substantial purpose; and
	2. a person shall be deemed to have engaged or to engage in conduct for a particular purpose or a particular reason if:
		1. the person engaged or engages in the conduct for purposes that included or include that purpose or for reasons that included or include that reason, as the case may be; and
		2. that purpose or reason was or is a substantial purpose or reason.
2. In simple terms, it is sufficient if the substantial purpose of the provision was one of the purposes listed in s 44ZZRD(2) or (3). A provision is deemed to have a particular purpose if that was its substantial purpose.
3. Section 44ZZRB contains some definitions of some words that are used in s 44ZZRD. A “bid”, for example, is defined as including a tender and “the taking, by a potential bidder or tenderer, of a preliminary step in a bidding or tendering process”. Curiously, the word “likely” is defined as including a “possibility that is not remote”, but only when used in relation to a supply of goods or services, an acquisition of goods or services, the production of goods or the capacity to supply goods. That definition would appear to extend the ordinary meaning of the word “likely”. That expanded definition would clearly apply to the word “likely” where it is used in some of the paragraphs of s 44ZZRD(2) and (3) in relation to the purpose/effect condition and purpose condition: for example, it would apply to the use of the word in s 44ZZRD(2)(c), which refers to “goods or services supplied, or likely to be supplied”. Issues may arise in relation to whether the definition of “likely” applies to other uses of the word in s 44ZZRD, including where it is used in the description of the competition condition in s 44ZZRD(4). The competition condition may be satisfied if 2 or more parties to the relevant contract, arrangement or understanding “are or are likely to be … in competition with each other in relation to … the supply of those goods or services”: s 44ZZRD(4)(a) and (c). On one view, at least, the use of the word “likely” in that particular phrase is not “in relation to” a supply of goods or services or any of the other elements of the definition in s 44ZZRB. Equally, however, it would be just a little bit bizarre if the word “likely” could have a different meaning in s 44ZZRD depending on the exact context in which it is used. Fortunately, it is unnecessary for present purposes to resolve any such arcane issues that may arise from the definition of “likely”.
4. There is no dispute that the relevant provisions of the Respect Agreement satisfied the purpose/effect condition and the purpose condition. The Freight Rate Provision satisfied the purpose effect/condition, as it had the purpose, or was likely to have the effect of, fixing, controlling or maintaining the price for Services supplied by any or all of the Carriers party to the Respect Agreement. The purpose condition was satisfied by the Bid Rigging Provision and the Customer Allocation Provision. The Bid Rigging provision, amongst other things, had the purpose of directly or indirectly ensuring that in the event of a request for bids in relation to the supply of Services, one or more Carriers bid while others did not, or 2 or more of the Carriers bid, but at least 2 of them did so on the basis that one of those bids was more likely to be successful than the others. The Customer Allocation Provision had the purpose of directly or indirectly allocating between the Carriers customers who had acquired, or were likely to acquire, Services.
5. As for the competition condition, it was not controversial, and in any event was fairly self-evident, that NYK was in competition with the other Carriers in relation to the supply of the Services, or at the very least was likely to be in competition with them, or would have been, in competition with the other Carriers in respect of the supply of the Services but for the provisions of the Respect Agreement. The roll-on, roll-off shipping services supplied by NYK were relevantly substitutable for the similar services supplied by the other Carriers. There clearly was, or at least would have been, but for the provisions of the Respect Agreement, rivalry between the Carriers in respect of the supply of the Services to the major car and truck manufacturers, particularly surrounding or in response to the manufacturers’ periodic calls for bids for the supply of Services for the routes in question.
6. The penalty for an offence against s 44ZZRG(1) is set out in the following terms in s 44ZZRG(3):

(3) An offence against subsection (1) is punishable on conviction by a fine not exceeding the greater of the following:

(a) $10,000,000

(b) if the court can determine the total value of the benefits that:

(i) have been obtained by one or more of the persons; and

(ii) are reasonably attributable to the commission of the offence;

3 times that total value;

(c) if the court cannot determine the total value of those benefits – 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.

1. The word “benefit’ is defined in s 44ZZRB as including “any advantage and is not limited to property”. The ‘annual turnover’ of a corporation is defined in s 44ZZRB in the following terms:

"***annual turnover***", of a body corporate during a 12-month period, means the sum of the values of all the supplies that the body corporate, and any body corporate related to the body corporate, have made, or are likely to make, during the 12-month period, other than:

* 1. supplies made from any of those bodies corporate to any other of those bodies corporate; or
	2. supplies that are input taxed; or
	3. supplies that are not for consideration (and are not taxable supplies under section 72-5 of the *A New Tax System (Goods and Services Tax) Act 1999*); or
	4. supplies that are not made in connection with an enterprise that the body corporate carries on; or
	5. supplies that are not connected with Australia.
1. It was common ground that the total value of the benefits obtained by NYK reasonably attributable to the commission of the offence could not be determined. That is perhaps not surprising. The task of determining the benefits “reasonably attributable” to the commission of all but the simplest of offences against s 44ZZRG(1) would most likely be extraordinarily difficult. That is particularly because the definition of “benefit” may be wide enough to include all manner of intangible benefits, and because the relevant benefits may include benefits obtained by “one or more persons”, who may be persons other than the offender.
2. The calculation of an offending corporation’s annual turnover for the 12 month period before the offence may also be very difficult given the complex definition of “annual turnover” in this context. Fortunately, it was an agreed fact for the purpose of this proceeding that NYK’s annual turnover, as defined, from 1 August 2008 to 31 July 2009 was approximately AUD $1 billion. Having regard to that agreed fact, the maximum fine in NYK’s case is $100 million.
3. A further aspect of the statutory scheme in the C&C Act that requires brief mention is the operation of Part X of the C&C Act. Part X sets up a system for regulating international line cargo shipping services. The system relevantly provides for the registration of conference agreements relating to those services. If the conference agreement is registered under Part X, the parties are given partial and conditional exemptions from, relevantly, s 44ZZRG of the C&A Act: s 10.17 and 10.17A of Part X. It is unnecessary to consider the provisions of Part X in any great detail. While NYK was a party to a conference agreement that was registered under Part X, none of the conduct the subject of the charge fell within the exemptions in Part X.
4. The final matter to note concerning the statutory scheme concerns the extraterritorial operation of s 44ZZRG and other provisions in Part IV of the C&C Act. As is readily apparent from the agreed facts, all of the offending conduct occurred outside Australia. All of the collusive arrangements and discussions, and all of the contracts that resulted from them, were engaged in overseas. It would appear that none of the NYK managers who were involved in conduct were Australian citizens or residents. Section 5 of the C&C Act provides that the provisions of, inter alia, Part IV of the C&C Act extend to, relevantly, the engaging in conduct outside Australia by bodies corporate incorporated or carrying on business in Australia. NYK was not incorporated in Australia, however it is an agreed fact that NYK carried on business in Australia. It is on that basis that s 44ZZRG extends to NYK’s offending conduct, occurring as it did outside Australia.

# evidence in relation to sentence

1. Both the Director and NYK adduced evidence in addition to the Statement of Agreed Facts. That evidence was directed primarily to NYK’s cooperation with the ACCC and the Director and changes in NYK’s management and compliance programs and systems since the events in question.

## Cooperation

1. The Director adduced affidavit evidence of an officer of the ACCC concerning NYK’s cooperation throughout the ACCC’s investigation into the alleged cartel conduct. That officer’s evidence was that NYK had provided “full, frank and truthful disclosure and cooperated fully and, in most instances, expeditiously, on a continuing basis throughout the ACCC’s investigation”. The officer expressed the view that the cooperation NYK provided, both in relation to its own offending and the alleged offending of others, had been “significant and valuable”.
2. The assistance and cooperation provided by NYK included: providing the ACCC with a detailed background briefing paper together with copies of relevant documents; complying with the ACCC’s voluntary requests for information and documents; and facilitating interviews of a number of NYK executives in circumstances where they could not have been compelled to travel to Australia to be interviewed. The ACCC officer’s evidence was that NYK’s cooperation had “enabled the ACCC to obtain a range of information in relation to the conduct of NYK and other parties that may not otherwise have been discovered by the ACCC”.
3. NYK agreed to plead guilty to the single “rolled-up” charge at a very early stage, after extensive negotiations between its lawyers and the ACCC and Director, but before a full brief of evidence had been served by the Director. The negotiations also resulted in agreement concerning the Statement of Agreed Facts.
4. NYK has also given an undertaking pursuant to s 16AC of the ***Crimes Act*** *1914* (Cth). That undertaking provides for employees and executives of NYK to give evidence, including in person, in accordance with any witness statements made by them, in any proceedings commenced by the Director or the ACCC. It also provides for NYK employees to provide additional witness statements and to attend such conferences as might reasonably be requested by the ACCC or the Director.
5. Finally, NYK has cooperated with the ACCC in another respect. That cooperation was detailed in confidential evidence and therefore cannot be referred to in these reasons. Suffice it to say, that cooperation was potentially significant.

## Contrition and compliance

1. NYK relied on affidavit evidence from two senior executives: Mr Tsuneaki Yamamichi, the Deputy General Manager of the Legal and Fair Trade Promotion Group and Mr Yoshiyuki Yoshida, a director and Chief Compliance Officer of NYK.
2. Mr Yoshida was appointed a director of NYK in 2015, after the conduct the subject of the charge. He was appointed Deputy Chief Compliance Officer in April 2013 and Chief Compliance Officer in 2016. Mr Yoshida expressed contrition on behalf of NYK and stated that NYK is committed to complying fully with competition law and policy, including Australian law, and committed to ensure that the sort of conduct that resulted in the charge never happens again.
3. Mr Yoshida’s evidence included evidence of management changes since the raids by the Japan Fair Trade Commission in September 2012. In March 2013, after an internal investigation, the three top officers in the Car Carrier Group resigned and were replaced by new senior managers from outside that group. A number of other senior officers in the Car Carrier Group had their salaries reduced for a period of time.
4. In May 2013, NYK established a Compliance Executive Committee to ensure compliance with competition laws. That committee provides a mechanism for regular monitoring at the highest levels of NYK’s leadership and with NYK’s independent directors and external lawyers. It includes a mechanism by which there are reports made from different sections of the company to the leadership to ensure compliance with competition laws. In November 2013, the Chief Compliance Officer of NYK was given power to conduct internal audits and investigations concerning compliance with competition laws. Since then, more than 80 risk assessments have been conducted and the operations of the Car Carrier Group have been reviewed twice. No evidence of further contraventions of competition law have been identified.
5. Mr Yoshida’s evidence also included other examples of positive changes in respect of NYK’s corporate social responsibility. None of his evidence was challenged or subject to any criticism by the Director.
6. Mr Yamamichi was appointed as a manager in NYK’s Legal and Fair Trade Promotion Group in September 2012, shortly after the raids by the Japan Fair Trade Commission. His evidence included a very detailed description of the measures that NYK has taken and continues to take to ensure that NYK complies with anti-trust or competition law. It is unnecessary to rehearse the details of Mr Yamamichi’s evidence in that regard. That is not to say that it has not been considered and given considerable weight.
7. There could be no doubt that since September 2012, NYK has taken a large range of measures to strengthen the culture of compliance with competition laws and prevent any recurrence of the contraventions that occurred in the Car Carrier Group in the years prior to 2012. The measures include, in very brief terms: management changes; consultation with external specialist competition law advisers; the establishment of an entirely new compliance regime called the “FTPG New Deal”; the establishment of the Compliance Executive Committee, which includes NYK’s most senior executives; a compliance pledge that all NYK employees are required to sign; a leniency policy and whistle-blower protection to encourage staff who have engaged in or witnessed violations of competition laws to report the violations to the Legal and Fair Trade Promotion Group; the conduct of formalised and systematic competition law risk assessments of each group within NYK; and global face to face competition law compliance training, which includes education of staff concerning competition laws in the jurisdictions relevant to them. NYK has also withdrawn from all conference agreements to which it has been a party.

# THE APPROPRIATE sentence

1. As a corporation convicted of a federal offence, NYK is to be sentenced in accordance with Part IB of the Crimes Act. The overarching principle 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.
2. The Court must take into account the matters set out in s 16A(2) so far as they are relevant and known to the Court. The “checklist” in s 16A(2) 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) 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.

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

1. The offence committed by NYK was on any view a very serious offence which requires condign punishment. A number of features of the offence and the offending conduct compel that conclusion.

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

1. NYK has been charged with one offence against s 44ZZRG(1). Strictly speaking, however, the particulars and agreed facts reveal that NYK committed multiple offences against s 44ZZRG(1) over a lengthy period of time. A separate offence against s 44ZZRG(1) is committed each time a corporation engages in conduct which gives effect to a cartel provision. The particulars and agreed facts disclose that NYK engaged in conduct which gave effect to a cartel provision, or cartel provisions, on at least 20 separate occasions: each time it colluded with other Carriers prior to or during the annual contract negotiations with the various vehicle manufacturers in the charge period from 24 July 2009 to 6 September 2012.
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 for 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 NYK 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: *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, in any event, 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) is somewhat unusual. Most offence provisions specify a single maximum penalty. As has been seen, s 44ZZRG(3) provides alternative maximum penalties. The maximum penalty in NYK’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. As discussed in detail later, specific and general deterrence must be considered to be 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 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. As the following discussion reveals, however, this case is not such a case.
5. NYK submitted that the maximum penalty of $100 million in its case should be treated with some particular circumspection because there was a level of disconnection between the likely financial effects of the offence and the size of the maximum penalty. It emphasised, in that regard, the fact that the profits it earned on the shipments pursuant to the contracts affected by the conduct the subject of the charge was estimated to be $15,412,911. It was submitted that the benefit it obtained from the offence therefore could not exceed that amount. NYK relied on the fact that the maximum possible benefit of $15,412,911, even multiplied by three, was significantly less than $100 million.
6. NYK’s reliance on the profit it derived from the impugned shipments, in the context of the maximum penalty, was somewhat misplaced. There was no dispute that the total benefit obtained by one or more persons that was reasonably attributable to the offence could not be determined and therefore s 44ZZRG(3)(b) did not apply. And, given the broad definition of “benefit”, together with the fact that benefits, for the purpose of s 44ZZRG(3)(b), may have been derived not only by NYK, but by other persons, it is not correct to say, in this context at least, that the maximum benefit attributable to the offence was $15,412,911. NYK’s profit from the relevant shipments accordingly does not provide a basis for treating the maximum penalty of $100 million with circumspection.
7. Nevertheless, as already indicated, the maximum penalty is but one of the many relevant considerations in fixing the appropriate penalty. There could be little doubt that the size of the profits derived by NYK from the shipments that were affected by the offending conduct is a material fact in considering the nature and seriousness of the offence. Equally, however, it is only one of the many material facts that must be considered in assessing the seriousness of the offence.

### Cartel offences generally

1. As has already been noted, the conduct engaged in by NYK only became liable to criminal sanction on and from 24 July 2009. That accounts for the start date of the period in the charge. Prior to that date, such conduct 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, is in essentially the same terms as s 44ZZRG, other than that s 44ZZRG includes relevant “fault elements” for the purposes of the *Criminal Code*. Curiously, the maximum pecuniary penalty payable by a corporation for contravening s 44ZZRK is effectively the same as the maximum fine payable by a corporation which has been convicted of an offence against s 44ZZRG: see s 76(1) and (1A) of the C&C Act. It would seem that the only 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 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. She relied, in that regard, on extrinsic material, including an extract from the Minister’s Second Reading, part of which is reproduced at the very commencement of these reasons. 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. NYK submitted that caution should be applied in applying such general statements in the criminal sentencing context. It submitted that the Court is required to assess the objective seriousness of the particular offence; that there is risk of “double counting” if factors are taken into account as evidence of the intrinsic seriousness of a species of offence, and then considered again in determining the objective seriousness of the particular offence; and that the statements made in the civil penalty context may not be apposite given the different nature and objectives of criminal sentencing.
4. It is unnecessary to resolve that rather arid debate. There is no doubt that offences against s 44ZZRG(1) may be 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 some cases, as it is in this case. General observations that have been made in other contexts, including in the civil penalty context, may be of some assistance, though as is the case with sentencing for any offence, ultimately it is a matter for the Court to consider the nature and objective seriousness of the particular case at hand. If careful attention is given to the particular facts and circumstances of the case, there is no risk of double counting.
5. The Director also relied on 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; 326 ALR 476 at [51]-[61]), the task of appraising the nature and seriousness of particular contravening conduct in a civil penalty proceeding is relevantly the same as appraising the seriousness of an offence for the purpose of imposing a criminal sentence. 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 common-sense. 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 point to emphasise is that the list of factors that has been developed in the civil penalty context should 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.
2. Somewhat more controversially, both the Director and NYK took the Court to pecuniary penalties that have been imposed in civil penalty cases concerning cartel or other anti-competitive conduct. Those cases, and the assistance sought to be derived from them, will be addressed later in these reasons. Suffice it to say at this stage that the penalties imposed in the civil penalty cases, most of which were in cases that had settled on the basis of an agreed penalty and joint submissions, are of little if any assistance to the determination of the appropriate sentence in this matter.

### The duration and scale of the offending conduct

1. The following points may be made concerning the duration and scope of NYK’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 entirely artificial and simply represents the commencement of the criminalisation of cartel conduct in Australia. While NYK cannot be punished for its conduct prior to 24 July 2009, and that conduct cannot serve to aggravate NYK’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. NYK had one of the largest global capacities of all carriers, amounting to between 15.5% and 17.5%. All of the carriers on the shipping routes to Australia that are the subject of the charge were parties to the cartel. Collectively, the Three J’s, NYK 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. NYK alone shipped almost 70,000 vehicles to Australia pursuant to contracts affected by the conduct the subject of the charge. NYK’s estimated revenue from those shipments was almost AU$55 million.
6. NYK submitted that four aspects of the offending conduct and the market in question should be taken into account in assessing the scale and seriousness of the offence: first, the fact that the members of the cartel did not always adhere to the agreements they entered into in giving effect to the provisions of the Respect Agreement; second, that the capacity of the members of the cartel to fix, control or maintain the freight rates was constrained by the bargaining power of the motor vehicle manufacturers; third, the characteristics of the relevant market meant that there was limited scope for intense competition even in the absence of the cartel; and fourth, the fact that Part X of the C&C Act shows that in some circumstances cooperation between competitors in the market for international liner cargo shipping services is likely to be beneficial.
7. As to the first of those matters, the agreed facts reveal that there were some occasions when one of the Carriers did not fully adhere to the agreement or arrangement that had been entered into to give effect to the provisions of the Respect Agreement. NYK identified nine occasions that this occurred in respect of the specific instances of giving effect that are included in the particulars to the charge. It is unnecessary to consider each of those nine occasions. It suffices to briefly refer to four occasions that were emphasised in NYK’s submissions.
8. The first example related to Asian Honda and the 2010 contract in respect of shipments from Thailand to Australia. The Three J’s agreed to submit a particular freight rate to Asian Honda, but K-Line offered a lower rate than the agreed rate. K-Line’s market share nevertheless decreased due to service issues. The second example again concerned Asian Honda and the Thailand to Australia route, but related to the 2011 contract year. In respect of that year, NYK agreed with Mitsui to submit a particular price. That it did. NYK was aware that Mitsui had reached a similar agreement with K-Line. K-Line, however, again submitted a price less than the price it had agreed with Mitsui. The third example concerned Nissan and related to the 2010 contract in respect of the route from Thailand to Australia. The Three J’s agreed not to offer Nissan any reduction in freight rates, but Mitsui in fact cut its rates without notifying the other two carriers. NYK also subsequently agreed to reduce its rate without disclosing that to the other two carriers. The fourth example related to Hino and concerned the 2011 contract period in respect of the route from Japan to Australia. NYK agreed with Mitsui that it would submit higher rates in respect of mid-sized and large trucks. As events transpired, NYK did not increase its rates as agreed with Mitsui.
9. Some of the other instances of non-adherence relied on by NYK were less clear. In some cases they concerned further negotiations between the carriers and the manufacturers that occurred after bids had been submitted by the carriers in accordance with an agreement entered into between them. It may be noted, however, that the reference point for the further negotiations was a freight rate that had been the subject of collusion. In one case, NYK and K-Line entered into an agreement to offer particular rates. Mitsui, however, was not a party to that agreement. Nevertheless, NYK and K-Line were the successful bidders.
10. NYK must undoubtedly be sentenced having regard to all of the facts. The fact that there were some instances of non-adherence to, or departure from, specific agreements entered into to give effect to the provisions of the Respect Agreement, must be taken into account. That does not mean that the agreements that had been entered into in those instances did not give effect to the provisions of the Respect Agreement. It is agreed that they did. It is also not a significant mitigating factor. The instances of non-adherence or departure were almost without exception fairly minor and isolated. And even in those cases where one of the parties cheated, as it were, on the agreement or arrangement, the competitive process was nonetheless restricted or distorted by the actions of the other parties. It cannot be concluded that the rates ultimately agreed to by the vehicle manufacturer were not affected by the collusion. It should also be noted that experience has shown that cheating between cartelists is a common feature of many cartels. Indeed, economic theory suggests that such conduct is economically rational. It is in the cartelist’s own self-interest to cheat on the cartel. They do not cheat for the benefit of the customer or consumer.
11. The second matter relied on by NYK was the fact that the motor vehicle manufacturers were large corporations and therefore had a degree of bargaining power in respect of the setting of freight rates. It was submitted that the manufacturers’ bargaining power constrained the ability of the Carriers to fix, control or maintain the freight rates. NYK pointed in particular to occasions when the relevant manufacturer rejected, or sought to further negotiate, bids that had been the product of the collusive conduct between the Carriers.
12. It is no doubt relevant that the customers in the market for the relevant supplies were themselves large foreign or multinational corporations. The facts also reveal that on some occasions the manufacturers did not simply accept and act on the collusive bids that had been submitted to them. On some occasions, the manufacturers were successful in procuring lower bids from some or all of the Carriers following the initial collusive bids. It does not follow, however, that the collusive behaviour of NYK and the other carriers was not effective to some extent in fixing, controlling or maintaining the freight rates. The facts do not go so far as to suggest that the freight rates were not ultimately affected by the collusive behaviour. The reference point for the manufacturers’ further negotiations was a bid that was not the subject of a competitive process. While there may have been some instances where the manufacturers, by dint of their bargaining power, were able to win further discounts or concessions, those were discounts or concessions from a reference point that was most likely higher than it would have been but for the collusion. Those instances were also fairly minor and isolated.
13. The third matter relied on by NYK was that the nature and characteristics of the relevant market suggested that it is unlikely that there would have been particularly aggressive or intense competition between the carriers in relation to the supply of the Services even if the cartel had not existed. NYK pointed, in that regard, to the fact that there was a degree of interdependence between the Three J’s in relation to schedules, operational issues, capacity requirements and space chartering arrangements. Likewise, there were integrated and well-established relationships between the manufacturers and the Carriers.
14. The agreed facts are, however, insufficient to enable the Court to determine the degree of competition which would or might have existed but for the cartel. That is particularly the case given the circumstance that the cartel had been on foot for so many years. It may be accepted that the nature of the market was such that there was a degree of cooperation and coordination between the Carriers, particularly in relation to scheduling and operational matters. That is not to say, however, that but for the cartel there would not have been any real competition between the Carriers in relation to freight rates. Likewise, the fact that some of the manufacturers had close relationships with some of the Carriers does not mean that the manufacturers would not have sought to obtain the best freights rates they could from the competitive tender process that each of them sought to put in place each contract year. In the absence of sound economic analysis, NYK’s submission that competition in the market would have been muted in any event is largely speculative.
15. The fourth and final matter relied on by NYK in assessing the seriousness of the offending conduct concerns Part X of the C&C Act. The general operation of that Part was briefly considered earlier in the context of the statutory scheme. NYK submitted that, in considering the question of harm that cartel conduct in the provision of international shipping services may have on the economy and the intention of Parliament in relation to the objective seriousness of the offence, it is relevant to have regard to the purposes served by Part X of the C&C Act.
16. It may be correct, as NYK submitted, that in a broad sense Parliament has recognised, in enacting Part X, that in some circumstances some level of coordination between competitors in the market for international liner cargo shipping services, including in relation to freight rates, might be beneficial to Australian businesses. Equally, however, it is clear that Parliament intended that the coordination, through conference operations, should only be permitted in defined and controlled circumstances which are open to public and regulatory scrutiny. The provisions in Part X were intended to enhance, not detract from, the competitive environment for international liner cargo shipping services: see generally s 10.01 of the C&C Act.
17. It is, in all the circumstances, difficult to see how the provisions in Part X could be relevant to an assessment of the seriousness of NYK’s offending conduct. While it was open to NYK to utilise the provisions of Part X, it did not relevantly do so in respect of the conduct the subject of the charge. None of the offending conduct fell within any of the exemptions in Part X. Nor did NYK relevantly apply for any exemption under Part X in respect of any of its offending conduct. That is not surprising because NYK’s offending conduct was inimical to the objects of Part X. Its collusive arrangements were not registered and open to public and regulatory scrutiny. They were covert and concealed. To the extent that NYK’s arrangements with its competitors could be characterised as mere coordination, it was not the sort of coordination that was intended to benefit, or capable of benefiting, Australian businesses and consumers. It was only capable of benefiting NYK and its fellow cartelists.

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

1. Cartels, by their very nature, are likely to be deliberate and covert and are likely to require some degree of planning and deliberation. The cartel in this matter was no exception.
2. The facts reveal that the cartel, evidenced by the conduct of NYK 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 the Manager and Deputy Managers in the Asia Oceania Team of the Car Carrier Group at NYK, would communicate with their counterparts in advance of and during each bidding and contract negotiation cycle. In some instances, senior management at NYK directed those discussions to occur, or were at the very least aware that they were occurring. The effect or outcomes of the discussions were also on occasion reported to senior management.
3. 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 NYK, 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. That was certainly the case from June 2011, when after having been advised by the General Manager of the Fair Trade Promotion Group that the collusive communications with their competitors should cease, senior management directed the managers who were involved in the communications should not document them. From that time onwards, the communications mostly occurred orally over the telephone or in face to face meetings. Notes were not taken. When notes were taken, they were disguised. As discussed in more detail later, there could be no doubt that the managers and senior management knew that the communications were contrary to competition laws. There could be no doubt that the relevant conduct was covert.
4. NYK submitted that the covert conduct was responsive to, and directed towards, NYK’s own Fair Trade Promotion Group. It is difficult to see why that should be considered to be a mitigating circumstance. The managers were told to stop the collusive communications by the Fair Trade Promotion Group. The available inference is that they must have been aware that they were being told to stop the communications because they were contrary to competition laws. They persisted with the communications in defiance of that directive. While their covert actions may have been prompted in the first instance by the directive, it may nevertheless be inferred that the managers also knew that their actions should be conducted in such a way as to minimise the risk that the Japan Fair Trade Commission or other regulatory authorities would become aware of the communications. And while the fact that one arm of the company may have been trying to stamp out the collusive communications is a relevant consideration, in the particular circumstances of this case it is not a significant mitigating factor.
5. NYK also submitted that the evidence does not establish that the relevant NYK managers knew that their conduct was illegal, or potentially illegal, under Australian law. It may be accepted that there is no direct evidence that the NYK managers knew that their conduct was illegal under Australian law. It may be inferred that their primary concern was most likely the competition laws in Japan. It is, however, difficult to accept that, when their collusive conduct involved routes to Australia, they were not aware that there was at least a significant risk that the conduct might breach Australian law. In any event, if they did not know that their conduct, when it concerned routes to Australia, breached, or might have breached Australian law, that would simply demonstrate the inadequacy of such training and education they might have received in relation to competition law. It would certainly not suggest that there was a culture of compliance at NYK. Ignorance of Australian law, in those circumstances, could hardly be considered to be a mitigating circumstance.

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

1. As has already been touched on, there is no dispute that senior managers within the Car Carrier Group at NYK were involved in the conduct the subject of the charge. There are also clear indications that senior executive officers outside the Car Carrier Group were involved in, or at least knew about, the Respect Agreement and the steps taken by managers within the Car Carrier Group to give effect to that agreement. To give but one example, in January 2008 the Managing Corporate Officer of NYK was involved in a meeting with Mistui and K-Line at which it was agreed to increase freight rates globally. The Managing Corporate Officer was a senior executive officer to whom the General Manager of the Car Carrier Group reported.

### The profit or benefit attributable to the conduct

1. As has already been made clear, it is not possible to determine the profit or benefit derived by NYK, or other persons, from the offending conduct.
2. It was agreed that NYK obtained revenue of $54.9 million and a profit of $15.4 million from the contracts that were subject to the collusive bidding practices the subject of the charge. The Director rightly accepted that those revenue and profit amounts were not wholly attributable to the cartel conduct. That said, it may be inferred that NYK engaged in the conduct for the very purpose of obtaining a benefit from higher freight rates and consistent market shares in respect of the routes to Australia. That was the whole purpose of the Respect Agreement and the conduct engaged in to give effect to it. It may be inferred that NYK obtained substantial monetary benefits from the cartel conduct in the form of higher revenues and profits. If it did not, it is unlikely that it would have continued to engage in that conduct.
3. NYK submitted that the profit figure of $15.4 million must be taken as the upper bound of the benefit derived from the conduct. That submission would have considerable merit if it was limited to the direct monetary benefit. It can, however, be inferred that the offending conduct may also have given rise to indirect monetary benefits and also benefits of a more intangible nature. Those indirect and intangible benefits were likely to derive from the increased certainty arising from stable market shares and customer allocations and the absence of any aggressive price competition.
4. NYK also submitted that the profit derived from the offending behaviour was likely to have been significantly less than $15.4 million. In its submission, it should be inferred that NYK would have made a profit if the cartel did not exist, otherwise it is unlikely that it would have continued to supply the Services. It is, however, difficult to draw that inference in circumstances where the Respect Agreement had been operative for so long. It was also suggested that the $15.4 million profit figure included profits from contracts in respect of which the conduct had only a marginal effect. It is, however, difficult to draw any concrete inferences from the agreed facts in relation to the precise monetary effect of the conduct, either generally or in relation to specific contracts. The agreed facts did not descend into any level of detail in relation to the financial benefits or effects of the conduct. It was, of course, open to NYK to lead detailed financial evidence if it wished to demonstrate that the financial benefits it derived were substantially less than $15.4 million. It did not lead any such evidence.

## Course of conduct: s 16A(2)(c) 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: s 16A(2)(d) and (e) Crimes Act

1. In a sense, the only direct victims of the offence were the foreign owned vehicle manufacturers who, it may be inferred, paid higher freight rates as a result of the collusive behaviour of the Carriers, including NYK. It is not possible to quantify the extent of any injury loss or damage suffered by the manufacturers.
2. It is, however, common ground that, to the extent that the collusive conduct increased freights rates, or limited any decrease in the freight rates that might have resulted from competition, it is likely that a proportion of that increase would have been passed through to corporations or consumers in Australia in the form of increased wholesale or retail prices for motor vehicles. It will be recalled that 69,348 cars and trucks were shipped to Australia pursuant to carriage contracts that were entered into following the impugned collusive conduct. It is, however, again not possible to calculate with any degree of precision the extent of any such pass through.
3. In any event, as with other market related offences, it would 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 C&C Act that are designed to protect the integrity of Australia’s markets and economic system. Our 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 harm the economy.

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

1. The evidence of Messrs Yamamichi and Yoshida demonstrates that NYK is contrite and has taken extensive measures to ensure that offences of this type are not repeated. It is unnecessary to rehearse their evidence. Since the offending conduct was uncovered, NYK has replaced senior management in the Car Carrier Group and has established substantial compliance, training and education structures, systems and procedures to combat any risk of anti-competitive behaviour. There also appears to have been a wholesale change in corporate culture in respect of anti-competitive practices. If NYK has not already rehabilitated itself, the prospects of it doing so are very high. The need for personal deterrence is relatively low.
2. NYK’s contrition is also reflected in its plea of guilty and its assistance to the authorities, both of which will be dealt with separately.

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

1. NYK entered a plea of guilty at the earliest opportunity. Full recognition should be given to the remorse, acceptance of responsibility and willingness to facilitate the course of justice demonstrated by the plea.
2. There is at present a divide, of sorts, between the Victorian Court of Appeal and the New South Wales Court of Criminal Appeal concerning the basis for taking a plea of guilty into account in federal sentencing.
3. In ***Tyler*** *v R* [2007] NSWCCA 247; 173 A Crim R 458 at [114], Simpson J (with whom Spigelman CJ and Harrison J agreed) held, referring to ***Cameron*** *v The Queen* (2002) 209 CLR 339 at 343, that a discount should not be given for the so-called “utilitarian value” of a plea: meaning that a discount should not be given on the basis that the plea has saved the community the expense of a contested hearing. The rationale for that approach is that it would constitute an unjust penalty for exercising the right to trial.
4. In *Director of Public Prosecutions (Cth) v Thomas* [2016] VSCA 237 at [149], however, the Victorian Court of Appeal disagreed with *Tyler* and held that the court should take into account the utilitarian benefit of a plea of guilty. It was noted, however, that in most cases, there will be little or no difference in outcome, whether the obligation in s 16A(2)(g) of the Crimes Act is expressed in objective terms (the utilitarian benefit) or subjective terms (acceptance of responsibility and a willingness to facilitate the course of justice).
5. This is such a case. Whether the rationale is expressed in subjective or objective terms, NYK’s plea of guilty in all the circumstances is a weighty mitigating consideration and should result in a significant discount to the fine that would otherwise have been imposed. The amount of that discount will be considered separately later. Suffice it to say at this stage that State court guideline judgments, such as *R v Thomson* (2000) 49 NSWLR 383 do not apply to sentencing for federal offences: *Wong v The Queen* (2001) 207 CLR 584. 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].
6. A significant factor in determining the extent of any discount is whether the plea was entered at the first reasonable opportunity: *Cameron* at [22]. Here, there is no question that NYK entered its plea at the earliest opportunity. The strength of the Crown case may be taken into account in assessing whether the plea was motivated by a willingness to facilitate the course of justice, or was simply the “recognition of the inevitable”: *Tyler* at [114]. Here, while the Crown case may well have been strong, there is no question that NYK was nevertheless motivated by a willingness to facilitate the course of justice.

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

1. Section 16A(2)(h) is expressed in the past tense and may be taken to refer to co-operation with law enforcement agencies up to the point in time that the offender is sentenced. That interpretation is reinforced by the terms of s 16AC 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.

### Past cooperation

1. Dealing first with past cooperation, 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 v R* [2011] NSWCCA 233 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) 206 CLR 267 at [15]); and whether the offender’s cooperation caused others to cooperate (*Lin v R; Ng v R* [2016] NSWCCA 200 at [10]). Cooperation which is ineffective or provides little practical value must still be considered (*R v Stanbouli* [2003] NSWCCA 355 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]; *Cartright* at 252-255).
2. 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]. There is certainly 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].
3. NYK’s cooperation with both the ACCC and the Director is a highly significant consideration and deserving of considerable weight. As discussed earlier, the evidence demonstrates that NYK has provided timely, full, frank, truthful and, in most instances, expeditious cooperation throughout the ACCC’s investigation. That cooperation concerned both its own offending and the offending of others in respect of offences that are notoriously difficult to detect and investigate. It included the provision of information concerning the conduct of NYK and other persons and entities that otherwise may not have been discovered by the ACCC. The cooperation was provided despite the fact that NYK knew that immunity under the ACCC’s Immunity Policy for Cartel Conduct was unavailable because another member of the cartel had already obtained a “marker” under that policy. NYK has also provided information and assistance to the ACCC in another respect, though the detail of that cooperation is the subject of a confidentiality order.
4. NYK also cooperated in relation to the prosecution. It pleaded guilty in circumstances where no full brief of evidence had been compiled or served by the ACCC. Rather, NYK pleaded guilty on the basis of the Statement of Agreed Facts, which was the settled and agreed following extensive negotiations with the ACCC and the Director. Agreeing to plead guilty on that basis saved the ACCC considerable time and resources.
5. The circumstances of this case are such that it is appropriate to specify or quantify a single discount in respect of NYK’s past cooperation, assistance, early plea of guilty and the contrition and remorse that is reflected in the cooperation and early plea. There is a 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. That is because 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 early plea have resulted in a lower sentence are likely to encourage such cooperation in other cases.
6. In all the circumstances of this case, an appropriate discount for NYK’s past cooperation, assistance, plea of guilty and the contrition and remorse reflected in the cooperation and plea is 40%.

### Future cooperation

1. NYK has given an undertaking to provide cooperation in future proceedings. The detail of that future cooperation was included in confidential exhibits and cannot be reproduced in these reasons. Suffice it to say that the cooperation is, or is likely to be, significant and valuable.
2. Unlike the position with past cooperation, s 16AC specifically provides that, where a court imposing a sentence or making an order for a federal offence reduces the severity of the sentence or order, the court must state that the sentence or order is being reduced for that reason and specify the sentence that would have been imposed, or the order that would have been made, but for the reduction.
3. In this matter, the circumstances are such that NYK is entitled to a discount of 10% in respect of future cooperation. The sentence that would have been imposed but for that discount is specified later in these reasons.

## Deterrence: s 16A(2)(j) and (ja) 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 generally 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; 184 FLR 365 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 penalisation. 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. It is essentially common ground that specific deterrence is not a significant consideration in the particular facts and circumstances of this matter. That is because the evidence clearly shows that NYK 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.

## Need for adequate punishment: s 16A(2)(k) 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 that context, however, is the relevance or weight that is to be attached to the fact that NYK has been penalised in other jurisdictions in respect of conduct relating to or arising from the cartel the subject of this matter. NYK submitted that the penalties imposed overseas constituted a significant punishment in their own right, went some considerable way towards satisfying the requirements of deterrence in respect of the charged conduct, and were therefore a material consideration in determining an appropriate sentence. The Director submitted that the overseas penalties were only relevant in a “general way” and should not substantially reduce an otherwise appropriate sentence.
2. The issue between the Director and NYK concerning the overseas penalties really came down to a dispute concerning the weight that should be given to the overseas penalties. It may be accepted that the fact that an offender has already been the subject of extra-curial punishment – loss or damage suffered by the offender as a result of having committed the offence, outside or in addition to the court-imposed sanction – may in some circumstances be a relevant consideration in sentencing the offender: *Application by the Attorney-General under s 37 of the Crimes (Sentencing Procedure) Act* (2004) 61 NSWLR 305 at [114]. Administrative penalties imposed upon 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].
3. The weight to be given to any extra-curial punishment depends on the particular facts and circumstances of each case. Relevant considerations include the nature and size of the administrative or other extra-curial punishment, the extent to which the penalty relates to the conduct the subject of the offence, the capacity of the offender to pay, the effect that the administrative penalty had in real terms on the offender and other questions of hardship. Each case must be considered on its own merits.
4. It is clear that some weight must be given to the overseas penalties. They are undoubtedly very large penalties which were imposed as a result of NYK’s involvement in the global cartel pursuant to which the offending conduct the subject of the charge relates. Those penalties would undoubtedly themselves go some way towards deterring NYK from re-offending. There are, however, a number of reasons why the overseas penalties should not be given significant weight.
5. The first and most important reason is that, with the possible 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 in this matter. While the agreed facts in relation to the overseas penalties are fairly sparse, it would appear, or at least can be inferred, that they were imposed in respect of NYK’s collusion or anti-competitive conduct in relation to freight rates on routes other than routes to Australia. In short, the overseas jurisdictions imposed sanctions or penalties in respect of conduct that occurred in, or in relation to, or otherwise affected, those jurisdictions.
6. As indicated, the Japanese order is somewhat different. That is because approximately AU$20 million of the overall order related to the Oceania route, 87% of which related to the carriage of vehicles on the route from Japan to south and east Australia. It follows that there is some overlap between the conduct that led to the imposition of that part of the Japanese order, and the conduct the subject of the charge in this matter. That is a relevant consideration, because the Court should strive to avoid any element of double punishment. That said, it may be inferred that the administrative penalty imposed by the Japanese regulator was imposed having regard to Japan’s laws and public policy considerations. The Japanese regulator’s primary concerns were unlikely to relate to the impact that the conduct had on Australian related commerce or Australian consumers.
7. The second and related reason is that the sentence imposed on NYK must be sufficient to operate as a deterrence, both specific and general, in relation to cartel conduct that relates to Australia and Australia’s laws. Large 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. Whatever decisions may be made globally, Australia will not tolerate anti-competitive conduct in respect of the supply of goods and services to, or relating to, Australia or Australian consumers: cf. *Visa* at [114].
8. The third reason is that, insofar as extra-curial punishment is relevant to specific deterrence, that is not a significant consideration in this matter for the reasons already given. NYK has already demonstrated that it has been deterred and has rehabilitated.
9. The fourth and related reason is that, while the overseas penalties are very large, so too is NYK. There is no suggestion, let alone evidence, that NYK does not have the capacity to pay the fine imposed in relation to this matter in addition to the overseas administrative penalties. There is no evidence of any particular hardship arising from the overseas penalties.

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

1. NYK does not have a prior record of corporate criminal misconduct in Australia or elsewhere. That is no doubt an important consideration. It does not necessarily follow that NYK 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. NYK 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: s 16A(2)(n) 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. It may be accepted that NYK has rehabilitated itself, or has at the very least demonstrated excellent prospects of rehabilitation. In the five years since its offending behaviour was detected, NYK has demonstrated a change in its corporate culture of compliance, renounced its wrongdoing and 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].

## Comparable cases

1. Both the Director and NYK referred in their submissions to pecuniary penalties that have been imposed in a number of “comparison” civil cartel cases. Those cases, however, provide little, if any assistance, in relation to the imposition of an adequate sentence in this matter.
2. The consideration of sentences imposed in other comparable cases may be useful, but must be approached with some caution. Comparable cases may be useful in two ways: first, if it is possible to discern from them any unifying sentencing principles that should be applied; and second, if an analysis of the cases discloses discernible sentencing patterns or a range of sentences. However, the cases may not establish a relevant range, or the range may not necessarily be the correct range or otherwise determinative of the upper and lower limits of sentencing discretion: *Hili v The Queen* (2010) 242 CLR 520 at [53]-[55] (per French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ); *Wong v The Queen* (2001) 207 CLR 584 at [59] (per Gaudron, Gummow and Hayne JJ); *R v Pham* (2015) 256 CLR 550 at [26]-[27] (per French CJ, Keane and Nettle JJ). Much will depend on the number of cases referred to and whether they are truly comparable.
3. There are a number of difficulties in placing any reliance on the penalties imposed in the civil penalty cases. First, it appears to have been accepted that the purpose of imposing a civil penalty is different to the purpose of imposing a criminal penalty. Whereas criminal penalties import notions of retribution and rehabilitation, the purpose of a civil penalty is said to be primarily, if not wholly, protective in promoting the public interest in compliance: *Trade Practices Commission v CSR Ltd* [1990] FCA 521; (1991) ATPR 41-076 at 52,152; *Commonwealth v Director, Fair Work Building Industry Inspectorate* [2015] HCA 46; 326 ALR 476 (***Commonwealth v Director, FWBII***) at [55] (per French CJ, Kiefel, Bell, Nettle and Gordon JJ). Indeed, it has been suggested that punishment is not a purpose of imposing a civil penalty: *NW Frozen Foods Pty Ltd v Australian Competition and Consumer Commission* (1996) 71 FCR 285, Burchett and Kiefel JJ said (at 296-7); cf. *ACCC v ANZ* at [80]. Given the differences between criminal proceedings and civil penalty proceedings that were identified in *Commonwealth v Director, FWBII*, some caution must be exercised in applying to criminal sentencing the principles that have been developed in the civil penalty context.
4. Second, many of the penalties that have been imposed in the civil penalty cases were agreed penalties. While those agreed penalties were approved by the Court, it may nevertheless be inferred that the penalties involved some element of compromise and may not reflect the penalty that would have been imposed by the Court had there been no agreement: see *Commonwealth v Director, FWBII* at [109] (per Keane J).
5. Third, the civil cartel cases referred to by the parties are in any event not truly comparable. The facts and circumstances of each of the cases referred to by both NYK and the Director were different in important respects from this case.
6. Fourth, and perhaps most significantly, the civil penalty cases do not disclose any discernible pattern or range of penalties that could be transposed to the criminal sentencing context. Nor is it possible to discern from them any unifying principles that should be applied in the criminal sentencing context, other than perhaps the importance of general deterrence, as discussed earlier.

## Submissions

1. Had the ACCC (no doubt after consultation with the Director) elected to proceed against NYK by way of a civil penalty proceeding, rather than a criminal prosecution, the ACCC and NYK could have proposed an agreed penalty to the Court. Even if they did not agree on the penalty, both the ACCC and NYK could have submitted that a specific penalty, or penalty range, was the appropriate penalty or penalty range in the circumstances.
2. Because this is a criminal prosecution, however, the Director cannot, but NYK can, advance submissions concerning the appropriate penalty range: *Barbaro v The Queen* (2014) 253 CLR 58; ***Matthews*** *v The Queen* [2014] VSCA 291; 44 VR 280; *CMB v Attorney General for New South Wales* (2015) 256 CLR 346 at [38] (per French CJ and Gageler J) and [64] (per Kiefel, Bell and Keane JJ). The Director can and should respond to any range proposed by NYK by indicating whether in the Director’s submission it would be open to impose a sentence within that range, or whether imposing a sentence within that range might lead to appellable error: *Matthews* at [25]. It is neither necessary nor meaningful to say anything further on this issue, save as to say that this was the course adopted by NYK and the Director in this matter.
3. NYK submitted that, having regard to the maximum penalty, the purposes of sentencing, the objective features of the offence, NYK’s compelling subjective circumstances and the fines already paid by NYK, the appropriate penalty range (after the application of a discount for plea and cooperation) would be a fine in the order of $20 million to $25 million.
4. The Director’s response was that “no submission is made that the court would fall into appellable error in relation to the range of penalty suggested by NYK …”.

## The appropriate sentence in this case

1. In *Markarian*, McHugh J said (at [66]) that the reality of the sentencing process is that the judge must weigh all the circumstances and make a judgment as to what is the appropriate sentence. Since the decision of the Full Court of the Supreme Court of Victoria in *R v Williscroft* [1975] VR 292, this value judgment has frequently been described as an “instinctive synthesis of all the various aspects involved in the punitive process” (at 300). As was pointed out in the joint judgment in *Markarian*, the expression “instinctive synthesis” may need further explanation lest it be “understood to suggest an arcane process into the mysteries of which only judges can be initiated” (at [39]). It is difficult to improve on the explanation given by McHugh J in *Markarian*, where his Honour described it as “the method of sentencing by which the judge identifies all the factors that are relevant to the sentence, discusses their significance and then makes a value judgment as to what is the appropriate sentence given all the factors of the case” (at [51]). Or, as the plurality put it in *Wong* (at [75]) “the sentencer is called on to reach a single sentence which … balances many different and conflicting features.”
2. The relevant factors or features in this matter have been discussed at 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. 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 involving a large number of shipments); the damage, or potential damage, to the integrity of Australia’s markets and economic system caused by the conduct; and the need for general deterrence, particularly in respect of offences of this kind. The mitigating factors include NYK’s genuine contrition and rehabilitation, including the extensive steps taken by it to present any reoffending; NYK’s early plea of guilty; NYK’s significant and valuable cooperation and assistance to the ACCC and the Director in relation to the investigation of this offence and possible offences by others; NYK’s undertaking to provide assistance in relation to proceedings in the future; the extra-curial punishment, in the form of penalties imposed by courts and tribunals in other jurisdictions, already imposed on NYK in respect of conduct related to the relevant cartel; and the fact that NYK has not previously been convicted of any offence in Australia or overseas.
3. 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 $25 million. That fine incorporates 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: meaning that but for the early plea and past and future cooperation, the fine would have been $50 million. Of that 50% discount, 10% relates to future cooperation. For the purposes of s 16AC of the Crimes Act, it is stated that the severity of the sentence imposed on NYK has been reduced because NYK has undertaken to cooperate with law enforcement agencies in proceedings relating to alleged offences committed by others and that the sentence that would have been imposed but for that reduction was $30 million.
4. Cartel conduct of the sort engaged in by NYK warrants denunciation and condign punishment. It is inimical to and destructive of the competition that underpins Australia’s free market economy. It is ultimately detrimental to, or at least likely to be detrimental to, Australian businesses and consumers. The penalty imposed on NYK should send a powerful message to multinational corporations that conduct business in Australia that anti-competitive conduct will not be tolerated and will be dealt with harshly. That is so even where, as here, the decisions and conduct are engaged in overseas and as part of a global cartel. As has already been explained, but for NYK’s cooperation and willingness to facilitate the administration of justice, the penalty would have been substantially higher. That should serve as a clear and present warning to others who may have, or may be considering or planning to, engage in similar conduct.

# Conclusion and disposition

1. NYK has been convicted of an offence of giving effect to a cartel provision contrary to s 44ZZRG(1( of the C&C Act. The sentence imposed in respect of that conviction is a fine of $25 million.

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| I certify that the preceding three hundred and one (301) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Wigney. |

Associate:

Dated: 3 August 2017