THE FIRST CARTEL OFFENCE PROSECUTION IN AUSTRALIA: IMPLICATIONS AND NON-IMPLICATIONS

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I *Commonwealth Director of Public Prosecutions v Nippon Yusen Kabushiki Kaisha*

Sentence was handed down on 3 August 2017 in *Commonwealth Director of Public Prosecutions v Nippon Yusen Kabushiki Kaisha* (***CDPP v NYK***),[1] the first cartel prosecution for a cartel offence since cartel offences became law on 24 July 2009. The decision usefully maps the application of section 16A of the *Crimes Act 1914* (Cth) (***Crimes Act***) and section 44ZZRG(3) of the *Competition and Consumer Act 2010* (Cth) (***CCA***) to cartel conduct by a corporate accused (see Section II). However, as amplified in Section III, the decision raises deeper questions about: (a) the role of individual criminal liability; and (b) the role of corporate criminal liability given that, as the law stands, corporate civil liability for a penalty is a more expeditious way of achieving general deterrence than criminal liability for a fine.

CDPP v NYK arose from a longstanding global cartel in the market for the supply of ocean shipping services for "roll-on, roll-off" cargo, mainly cars and trucks. The cartel conduct prosecuted was giving effect to certain cartel provisions in cartel arrangements about shipping routes to Australia. NYK and five other major shipping lines were parties to the cartel arrangements alleged.

The cartel conduct appears to have come to the attention of the ACCC as a result of investigations by the Japanese Fair Trade Commission and the US Department of Justice, media reports, and an immunity application to the ACCC.[2]

NYK pleaded guilty to a single charge of giving effect to a cartel provision, contrary to s 44ZZRG(1) of the *CCA*. The charge was that between about 24 July 2009 and 6 September 2012, in Japan and elsewhere, NYK intentionally gave effect to cartel provisions in an arrangement or understanding with others in relation to the supply of ocean shipping services. This was a "rolled up" charge.[3] The particulars and agreed facts disclosed that NYK

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1 [2017] FCA 876.

2 Id at [160], [264].

3 Id at [205]-[207].

engaged in conduct which gave effect to a cartel provision, or cartel provisions, on at least 20 separate occasions in the period from 24 July 2009 to 6 September 2012.

No individual persons were charged. A number of senior managers employed by NYK in Japan and elsewhere overseas were implicated in the conduct. They escaped the territorial reach of section 5 of the *CCA* because none were Australian citizens or residents.[4]

The cartel provisions to which NYK was a party related to the supply of shipping services supplied to ten major vehicle manufacturers over six shipping routes. The cartel provisions related to the fixing of freight rates in respect of the shipping routes to Australia, the rigging of bids in response to requests for bids by the motor vehicle manufacturers, and the allocation of the customers, the motor vehicle manufacturers, between the members of the cartel.

The shipping contracts affected by NYK's offending conduct over the three years from 2010 to 2012 involved the shipping of 69,348 new vehicles to Australia. NYK derived revenue of AU$54.9 million and profit of AU$15.4 million from the commerce affected by the conduct.

The anti-competitive effect of the offending conduct probably resulted in higher freight rates on the subject shipping routes to Australia. Those higher freight rates were most likely to have been passed through to Australian consumers in the form of higher prices for the imported cars and trucks.

The Federal Court (Wigney J) found NYK's conduct to be an extremely serious offence and imposed a fine of $25 million.

The maximum fine possible under the relevant statutory provisions was $100 million. The maximum penalty for an offence against s 44ZZRG(1) is the greater of $10 million, three times the benefits attributable to the commission of the offence or, if the benefits cannot be determined, 10% of the corporation's annual turnover in respect of supplies connected with Australia in the 12 months preceding the offence. In NYK's case, the benefits could not be determined. NYK's annual turnover from supplies connected with Australia in the relevant 12 month period was $1 billion. Accordingly, the maximum penalty was $100 million.

Having regard to all relevant circumstances and the factors to be considered under section 16A of the *Crimes Act*, Wigney J held that the appropriate sentence was a fine of $25 million. That amount incorporated a global discount of 50% for NYK's early plea of guilty and past and future assistance and cooperation, together with the contrition inherent in or demonstrated by NYK's early plea and cooperation. Of that 50% discount, 10% related specifically to future cooperation. For the purposes of s 16AC of the *Crimes Act*, the severity

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4 Id at [188].

of the sentence imposed on NYK was reduced because NYK had undertaken to cooperate with law enforcement agencies in proceedings relating to alleged offences committed by others, and the sentence that would have been imposed but for that reduction was $30 million.

A second corporation allegedly involved in the cartel is the subject of prosecution.[5]

II Sentencing a corporate accused for cartel conduct

A The statutory framework

The statutory framework that had to be applied in *CDPP v NYK* is not first-grade legislative steel.

Section 16A(2) of the *Crimes Act* sets out a non-exhaustive list of factors that a court must take into account in sentencing an offender, to the extent they are relevant and known to the court. It provides as follows:

> In addition to any other matters, the court must take into account such of the following matters as are relevant and known to the court:
> (a) the nature and circumstances of the offence;
> (b) other offences (if any) that are required or permitted to be taken into account;
> (c) if the offence forms part of a course of conduct consisting of a series of criminal acts of the same or a similar character – that course of conduct;
> (d) the personal circumstances of any victim of the offence;
> (e) any injury, loss or damage resulting from the offence;
> (f) the degree to which the person has shown contrition for the offence:
> (i) by taking action to make reparation for any injury, loss or damage resulting from the offence; or
> (ii) in any other manner;
> (fa) the extent to which the person has failed to comply with:
> (i) any order under subsection 23CD(1) of the *Federal Court of Australia Act 1976* or
> (ii) any obligation under a law of the Commonwealth; or
> (iii) any obligation under a law of the State or Territory applying under subsection 68(1) of the *Judiciary Act 1903*; about pre–trial disclosure, or ongoing disclosure, in proceedings relating to the offence;
> (g) if the person has pleaded guilty to the charge in respect of the offence – that fact;
> (h) the degree to which the person has cooperated with law enforcement agencies in the investigation of the offence or of other offences;
> (i) the deterrent effect that any sentence or order under consideration may have on the person;
> (k) the need to ensure that the person is adequately punished for the offence;
> (m) the character, antecedents, cultural background, age, means and physical or mental condition of the person;
> (n) the prospect of rehabilitation of the person;
> (p) the probable effect that any sentence or order under consideration would have on any of the person's family or dependants.

Part IB of the *Crimes Act* has been criticised for complexity, poor drafting, inflexibility, limited scope and impracticality.[6] This led to an extensive review by the ALRC and a

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5 'Criminal cartel charges laid against K-Line', 15 November 2016, at: http://www.accc.gov.au/media-release/criminal-cartel-charges-laid-against-k-line.

substantial report (*Same Crime, Same Time: Sentencing of Federal Offenders*) in 2006.[7] The Commission reiterated its call for a separate new federal sentencing Act, distinct from the *Crimes Act* provisions dealing with substantive criminal law and criminal procedure. The ALRC recommended that the sentencing factors corresponding with sentencing purposes (see paras (j), (k) and (n)) be relocated to a codified list of such purposes in a separate provision of a federal sentencing Act. It recommended also that the sentencing factors be substantially restructured and revised.

Section 16A(2) is tailored more to the sentencing of individuals than to the sentencing of corporations. The ALRC recommended that there be a statutory list of factors specific to sentencing of corporations.[8] The factors are:

> (a) the type, size, financial circumstances and internal culture of the corporation
> (b) the existence or absence of an effective compliance program designed to prevent and detect criminal conduct
> (c) whether the corporation ceased the unlawful conduct voluntarily and promptly upon discovery of the offence
> (d) the extent to which the offence or its consequences could be foreseen and
> (e) the effect of the sentence on third parties.

The provisions on maximum sentence in s 44ZZRG(3) of the *CCA* were a further part of the relevant statutory framework in *CDPP v NYK*. For the purposes of the cartel offences, under ss 44ZZRF(3) and 44ZZRG(3),

> a corporation is subject upon conviction to a fine not exceeding the greater of the following:
> (a) AU$10 000 000;
> (b) if the court can determine the total value of the benefits that:
> (i) have been obtained by one or more 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.

This formula is ill-designed.[9] The main difficulty is that assessment of the total value of the benefits obtained by one or more persons is complex and rarely possible given the typical lack of sufficient data. That approach is avoided in most jurisdictions around the world.

B Determining the maximum fine

The main points made in *CDPP v NYK* about the maximum fine applicable to NYK under section 44ZZRG(3) of the *CCA* were:

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6 See e.g., *R v Paull* (1990) 20 NSWLR 427, 437; Attorney-General's Department, Review of Commonwealth Criminal Law: Fifth Interim Report, Australian Government Publishing Service, Canberra, 1991, chs. 10–18.

7 Report 103, 2006.

8 Id, Recommendation 30-2.

9 See C Beaton-Wells and B Fisse, *Australian Cartel Regulation* (Cambridge University Press, 2011) 11.3.4.

- The task under the maximum sentence provisions in s 44ZZRG(3) (or s 44ZZRDF(3)) of determining the benefits "reasonably attributable" to the commission of all but the simplest of offences is likely be extraordinarily difficult.[10] The definition of "benefit" may be wide enough to include all manner of intangible benefits, and the relevant benefits may include benefits obtained by "one or more persons", including persons other than the offender or joint offender.[11] [185]

- The calculation under the maximum sentence provisions in s 44ZZRG(3) (or s 44ZZRDF(3)) of an offending corporation's annual turnover for the 12 month period before the offence may be very difficult given the complex definition of "annual turnover". [12] However, in *CDPP v NYK* it was an agreed fact that NYK's annual turnover 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 was $100 million.[13]

C Relevance or otherwise of civil penalties as a guide to criminal sentences

Wigney J accepted that the factors relevant when determining civil penalties under s 76 of the *CCA* apply in the criminal sentencing context:

- 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.[14] There is nothing particularly novel or unique in the factors referred to in the civil penalty cases. Most of the factors are simply matters of common-sense. Most of them are replicated, in one way or another, in the list of relevant considerations in s 16A(2) of the *Crimes Act*.

- The list of factors that has been developed in the civil penalty context should 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.[15]

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10 [2017] FCA 876 at [185].
11 Ibid.
12 Id at [186].
13 Ibid.
14 Id at [220].
15 Ibid.

However, the actual penalties imposed in civil penalty cases were of little if any assistance to the determination of sentence against NYK in *CDPP v NYK*:

- 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. [16]
- 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.[17]
- The facts and circumstances of each of the cases referred to by both NYK and the CDPP were different in important respects from this case.[18]
- Perhaps most significantly, the civil penalty cases did not disclose any discernible pattern or range of penalties that could be transposed to the criminal sentencing context. [19] Nor was 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. [20]

D Factors going to the seriousness of the cartel offence

The decision in *CDPP v NYK* establishes that cartel conduct before the commencement of the cartel offences can be taken into account when considering the seriousness of the later cartel conduct charged.[21] In *CDPP v NYK* the offence occurred in the context of an extremely longstanding global cartel. The offence did not occur in isolation and was not a spur of the moment or one-off offence. [22]

The profit derived from an offence is relevant to the seriousness of the offence. *CDPP v NYK* affirms that "profit" in this context is a broad concept. Account must be taken of not only

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16 Id at [289], citing eg *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 at [55] (per French CJ, Kiefel, Bell, Nettle and Gordon JJ); *NW Frozen Foods Pty Ltd v Australian Competition and Consumer Commission* (1996) 71 FCR 285, Burchett and Kiefel JJ at 296-7.

17 Id at [290].

18 Id at [291].

19 Id at [292].

20 Ibid.

21 Id at [224].

22 Ibid.

direct monetary benefit but also indirect monetary benefits and benefits of a more intangible nature.[23]

Did it matter that the loss suffered by particular victims had not been identified? "No" was the answer emphatically given in *CDPP v NYK*. It is wrong to consider the seriousness of a cartel offence as if it was a victimless offence, simply because no specific individual or quantified loss can be identified: [24]

> The cartel offence in s 44ZZRG(1) is part of a suite of provisions .. 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 judgment in *CDPP v NYK* does not discuss the extent to which the fine imposed on NYK was likely to be passed on to customers and consumers. This issue is not flagged by the archaic wording of section 16A(2) of the *Crimes Act*, but plainly is relevant and encompassed by the corporate sentencing factor "the effect of the sentence on third parties" proposed by the ALRC in 2006.[25] It seems perverse to express concern about the impact that price fixing is likely to have on customers and consumers by increasing prices[26] without also addressing the impact that a fine, especially a large fine, is likely to have by being passed on.[27]

The question of passing on is likely to be acute in the context of price fixing by the members of an oligopoly. The larger and more equal the fines imposed on the corporate members of the oligopoly, the greater the incentive to pass the fines on to consumers. This is a fundamental weakness of fines against corporations as a sanction for deterring cartel conduct. In theory, a fine might be imposed on condition that it not be passed on to consumers. However, query whether or not such a condition is possible under the CCA.[28] If possible in law, it could be difficult or impossible to enforce in practice.

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23 Id at [247].

24 Id at [252].

25 Australian Law Reform Commission, *Same Crime, Same Time: Sentencing of Federal Offenders*, Report 103, 2006, Recommendation 30-2.

26 The likely increase of the price fixing on prices is discussed in [2017] FCA 876 at [251].

27 See further C Beaton-Wells and A Ezrachi (eds), *Criminalising Cartels: Critical Studies of an International Regulatory Movement* (2011) 316.

28 Compare *Construction, Forestry, Mining and Energy Union v Australian Building and Construction Commissioner* [2016] FCAFC 184.

E Mitigating factors

The prime significance of *CDPP v NYK* on mitigating factors is that it shows that a very substantial discount may be given for past cooperation with the ACCC and the CDPP and for entering a plea of guilty.

In *CDPP v NYK* the discount given was 40% for NYK's past cooperation, assistance, plea of guilty and the contrition and remorse reflected in the cooperation and plea. The extent of NYK's cooperation was considerable: [29]

> 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 y 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. 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.

The discount in *CDPP v NYK* for past cooperation and the plea of guilty was quantified because of the need to give corporations a clear incentive to cooperate with the ACCC and the CDPPP in cartel cases:[30]

> 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.

A further discount of 10% was given in *CDPP v NYK* for future cooperation. NYK gave an undertaking to provide cooperation in future proceedings. [31] The detail of that future cooperation was included in confidential exhibits and could not be reproduced in the

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29 [2017] FCA 876 at [264].
30 Id at [266].
31 Id at [268].

judgment. The cooperation was, or was likely, to be "significant and valuable". [32] The sentence that would have been imposed otherwise was $30 million.

CDPP v NYK makes numerous further instructive points about mitigating factors:

- Instances of non-adherence to, or departure from, specific agreements entered into to give effect to the provisions of a cartel arrangement must be taken into account.[33] However, they will have little or no significance as a mitigating factor where the competitive process has been restricted or distorted by the cartel conduct alleged. In *CDPP v NYK* the instances of non-adherence or departure were almost without exception fairly minor and isolated.[34] Even in those cases where one of the parties cheated on the agreement or arrangement, the competitive process was nonetheless restricted or distorted by the actions of the other parties. Cheating between cartelists is a common feature of many cartels. It is in cartelists' own self- interest to cheat on a cartel; they do not cheat for the benefit of the customer or consumer.
- Attempts to mitigate sentence by arguing that the victims were large corporations with countervailing market power are likely to be washed in skeptical acid. In *CDPP v NYK*, the concessions or discounts negotiated by the victims in some instances were based on a reference point that arose from collusion and was most likely higher than it would have been but for the collusion. [35]
- Attempts to mitigate sentence by arguing that, but for the cartel conduct, the market would not have been competitive are unlikely to succeed unless such counterfactual analysis is supported by strong economic analysis. [36] No such analysis was provided in *CDPP v NYK*; NYK's submission that competition in the market would have been muted in any event was "largely speculative". [37]
- Mitigation of sentence might be attempted by arguing that the cartel conduct alleged, while not covered by an exemption under the CCA, is similar to conduct that is subject to an exemption. This line of mitigation may be credible in some circumstances[38] but will be fanciful in others. In *CDPP v NYK* it was argued that Part

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32 Ibid.
33 Id at [231].
34 Ibid.
35 Id at [234].
36 Id at [235].
37 Ibid.
38 As in the situation where the conduct is likely to have been authorised if authorisation has been sought and where D mistakenly believed on reasonable grounds that authorisation has been sought and granted.

X reflected a policy that coordination between competitors in the market for international liner cargo shipping services, including in relation to freight rates, might be beneficial to Australian businesses. That argument was rejected, partly on these grounds: [39]

> 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.

- Penalties imposed overseas in a global cartel are to be taken into account. However, they are not to be given significant weight where the penalties imposed relate to, or otherwise affect, those overseas jurisdictions. In *CDPP v NYK* the overseas penalties, although considerable, had not been imposed in respect of the conduct the subject of the charge by the CDPP.[40] There was no suggestion, let alone evidence, that NYK did not have the capacity to pay the fine imposed by the Federal Court in addition to the overseas administrative penalties. [41]
- Account is to be taken of compliance precautions undertaken by a corporate accused when considering the relevance or otherwise of the factors of specific deterrence and rehabilitation. [42] Compliance precautions were a significant consideration in *CDPP v NYK*:[43]

> The evidence of [two senior NYK managers] 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.

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39 [2017] FCA 876 at [238].
40 Id at [279].
41 Id at [279]-[280].
42 Compare the limited recognition of compliance precautions as a mitigating factor in the US and Europe; see eg OECD, *Promoting Compliance with Competition Law* (2011) at: http://www.oecd.org/daf/competition/Promotingcompliancewithcompetitionlaw2011.pdf
43 Id at [253].

> 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.

- The fact that a corporate accused has no prior criminal record does not necessarily mean that the corporation was of good character.[44] However, prior good character is not generally given significant weight in sentencing for offences where general deterrence is a significant consideration. [45]
- The prospect of rehabilitation is an important mitigating factor under s 16A(2)(n) of the *Crimes Act* and is a relevant when sentencing a corporate accused. This factor was significant in *CDPP v NYK*:[46]

> 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 comp liance, 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].

F Submissions on penalty range

In a criminal prosecution the CDPP cannot, but an accused can, advance submissions concerning the appropriate penalty range.[47] The CDPP can and should respond to any range proposed by an accused indicating whether in the CDPP'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.[48] In *CDPP v NYK*, 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.[49] The CDPP's response was that "no submission is

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44 [2017] FCA 876 at [284].

45 Citing *R v Williams* [2005] NSWSC 315; 152 ACrim R 548 at [60]; *McMahon v The Queen* [2011] NSWCCA 147 at [76]; *Australian Competition and Consumer Commission v ABB Transmission and Distribution Ltd (No 2)* [2002] FCA 559; 190 ALR 169 at [28].

46 [2017] FCA 876 at [286].

47 *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).

48 [2017] FCA 876 at [294].

49 Id at [295].

made that the court would fall into appellable error in relation to the range of penalty suggested by NYK …".[50]

III Deeper questions

Notable as *CDPP v NYK* is for what it says about the application of section 16A(2) of the *Crimes Act* and section 44ZZRG(3) of the *CCA* to cartel conduct by a corporate accused, the prosecution of a corporate accused alone raises deeper questions.

A. Individual liability?

The targetting of a corporate accused alone in *CDPP v NYK* induces wonder about the non-prosecution of individual accused during the 8 years since Australia introduced cartel offences.[51] *CDPP v NYK* is also an ominous reminder that major obstacles stand in the way of successfully prosecuting individual persons for cartel conduct.

The expectation that fuelled the introduction of cartel offences in Australia was that the threat of individual criminal liability and imprisonment was necessary in order to deter cartel conduct effectively.[52] That expectation has often been voiced subsequently, including by the Chairman of the ACCC in 2017.[53]

The main obstacle to individual liability highlighted by *CDPP v NYK* is the inadequacy of the *CCA* provisions relating to conduct outside Australia. NYK's conduct occurred outside Australia but was caught by section 5(1) because it was an agreed fact that NYK carried on business in Australia.[54] However, the managers of NYK implicated in the cartel conduct could not be liable because none were Australian citizens or residents as required by section 5(1).[55] The failure of section 5(1) to reach the conduct of non-citizens or non-residents who orchestrate or are knowingly concerned in breaches of the *CCA* is an obvious and significant loophole.[56]

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50 Id at [296].

51 On the importance of individual responsibility for cartel conduct see C Beaton-Wells & B Fisse, *Australian Cartel Regulation* (2011) 6.6; C Beaton-Wells & B Fisse, 'US Policy and Practice in Pursuing Individual Accountability for Cartel Conduct: A Preliminary Critique' (2011) 56 Antitrust Bulletin 277.

52 See Trade Practices Amendment (Cartel Conduct and Other Measures) Bill 2008, Second Reading Speech, Hansard, House of Representatives, 3 December 2008, 12309. See also G Samuel, 'Delivering for Australian consumers: making a good Act better', 25 June 2008, National Press Club, Canberra, 5-6.

53 R Sims, 'CCA compliance in interesting times', 24 February 2017, at: http://www.accc.gov.au/speech/cca-compliance-in-interesting-times ("I fear that only jail sentences for individuals in prominent companies will send the appropriate deterrence messages").

54 [2017] FCA 876 at [188].

55 *Poynter v Commerce Commission* [2010] NZSC 38.

56 C Beaton-Wells and B Fisse, *Australian Cartel Regulation*, 16.

Contrast the wider scope of territorial jurisdiction under section 14.1 of the *Criminal Code* (Standard geographical jurisdiction). Under s 14.1 of the *Criminal Code*, unless a contrary intention appears, geographical jurisdiction extends to an 'ancillary offence' that occurs wholly outside Australia if the primary offence occurs or is intended to occur in Australia (see section 14.1(1)(b) and (2)(c)).[57] However, the section 14.1 territorial test does not apply to ancillary liability under section 79 of the *CCA* for a cartel offence. The term 'ancillary offence' is defined by the *Criminal Code* Dictionary to mean: (a) an offence against section 11.1, 11.4 or 11.5; or (b) an offence against a law of the Commonwealth, to the extent to which the offence arises out of the operation of section 11.2, 11.2A or 11.3. Liability for aiding, abetting, counselling or procuring a cartel offence does not arise by operation of section 11.2, 11.2A or 11.3 of the Criminal Code but by operation of section 79(5) of the *CCA* and hence section 14.1(2)(c) does not apply to that type of ancillary liability.

Ancillary liability for cartel offences and breaches of the civil cartel prohibitions under the *CCA* should be subject to the same extraterritorial test as that under s 14.1 of the *Criminal Code*.

Extradition is another question. Even if section 5(1) were amended to embody a test parallel to that under s 14.1 of the *Criminal Code*, individuals implicated in cartel offences by conduct overseas could be brought to justice only if extradition arrangements are in place. Australia does not have extradition arrangements with many countries. For instance, there is no extradition treaty with Japan or China.

Where an individual accused can be prosecuted in Australia, the workability of joint trials of individual and corporate accused for a cartel offence has yet to be demonstrated. Joint trials are likely to be efficient and can help to reduce the risk of scapegoating individual employees where corporate factors have contributed materially to the commission of a cartel offence.[58] However, joint trials are not always possible.[59] Evidence admissible against the corporate

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57 See further S Odgers, *Principles of Federal Criminal Law* (Lawbook Co, 3rd ed 2017), 291-296.

58 On corporate contributing factors see B Fisse and J Braithwaite, *Corporations, Crime and Accountability* (Cambridge University Press, 1993), ch 2.

59 Separate trials will not be ordered unless the prejudice flowing to an accused by reason of the case for or against another accused cannot be avoided by the trial judge's directions: *R v Gibb* [1983] 2 VR 155. It is also possible in complicated cases to take verdicts in relation to each accused separately: *Smith v R* (1970) 121 CLR 572; *R v McPhail* (1988) 36 A Crim R 390. However, where the evidence that is admissible against D1 is significantly different from the evidence admissible against D2 they should be tried separately: *R v Darby* (1982) 148 CLR 668; *R v Guldur* (1986) 8 NSWLR 12. This is so even where both accused are charged with agreeing with each other to engage in cartel conduct: see *R v Darby* (1982) 148 CLR 668. D is not permitted to give evidence against DCo as a witness where D and DCo are tried jointly: *Kirk v Industrial commission of NSW* (2010) 239 CLR 531, [76] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ). The prejudicial effect of out of court statements by one

accused may be inadmissible against the individual accused and unusable against the corporation in the same trial without unfairly prejudicing the individual accused. For instance, evidence obtained by reliance on section 155 of the *CCA* may be important and admissible against a corporation but not against individual employees of that corporation.[60]

B. Justification for pursuing corporate criminal liability in *CDPP v NYK* instead of corporate civil liability for a penalty?

What is the justification for pursuing corporate criminal liability instead of corporate civil liability for a penalty in *CDPP v NYK*? The justification appears to be that the cartel conduct was extremely serious and called for not merely a civil penalty but the opprobrium and social condemnation of a corporate criminal conviction. However, given that the only forms of sentence possible against a corporation for a cartel offence are a fine and non-punitive orders, some will see this justification as being more theoretical than real.

Consider the following observations in *CDPP v NYK*:[61]

> 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. [62]

It is an empirical question whether or not the criminal conviction of corporations is likely to enhance general deterrence by adding a significant element of opprobrium and societal condemnation beyond the financial impact of a monetary penalty. However, as the law stands, the additional element of opprobrium and social condemnation seems ephemeral. A corporate conviction for a cartel offence is not reinforced by any form of punishment that is explicitly or inherently a condemnatory criminal sanction. Under s 86C of the *CCA*, a corporation may be sentenced to a community service order, a probation order or a publicity order but these sanctions are characterised in section 86C as being "non-punitive orders".[63]

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accused and their effect on the minds of the jury as against a co-accused may warrant an order for separation: *R v Smith* (1994) 63 SASR 123 at 135–6.

60 See *CCA* s 155(7), s 76B(5). The privilege against a self-incrimination does not apply to a corporation: *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477; *Trade Practices Commission v Abbco Ice Works Pty Ltd* (1994) 52 FCR 96.

61 [2017] FCA 876 at [215].

62 Citing Commonwealth of Australia, *The Review of Competition Law Provisions of the Trade Practices Act* (2003), ch 10.

63 See further C Beaton-Wells and B Fisse, *Australian Cartel Regulation*, 11.3.5.

The position would be different if, as recommended by the ALRC, corporate offenders were subject to punitive injunctions and other distinctively punitive sanctions.[64] Alternatively or additionally, the maximum fine for cartel offences could be increased.

The ephemeral additional general deterrent impact of a corporate conviction must be weighed up against the costs, delay and difficulty of resorting to criminal proceedings in a case where corporate civil liability for a penalty is likely to be a far more expeditious way of achieving general deterrence.

It is conceivable that the amount of a civil penalty for serious cartel conduct could be higher than the amount of fine in criminal proceedings. The amount of a fine for an offence is subject to the constraint of proportionality[65] whereas civil penalties under s 76 of the *CCA* are not. A civil penalty that is higher than the amount of a proportionate fine may be imposed on utilitarian grounds. For instance, where proceedings are brought against a corporation but not against the individual managers implicated the contravention, the deterrence deficit resulting from the absence of enforcement against the responsible individuals could be reduced by imposing a higher penalty on the corporation.

IV Main conclusions

- Section 16A(2) of the *Crimes Act* is archaic and anthropomorphic. It should be modernised and the modernisation should include factors that relate to corporate offenders.
- The formula for determining maximum sentence under s 44ZZRF(3) and s 44ZZRG(3) include an impractical requirement that account be taken of the "benefits" made by the offender and others. The requirement should be deleted.
- *CDPP v NYK* usefully maps the application of section 16A of the *Crimes Act* and section 44ZZRG(3) of the *CCA* to cartel conduct by a corporate accused. The most important part of the map shows that a very substantial discount may be given for past cooperation with the ACCC and the CDPP and for entering a plea

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64 Australian Law Reform Commission, *Same Crime, Same Time: Sentencing of Federal Offenders*, 748; On punitive injunctions see B Fisse. "Cartel Offences and Non-Monetary Punishment: The Punitive Injunction as a Sanction against Corporations" in C Beaton-Wells and A Ezrachi (eds), *Criminalising Cartels: Critical Studies of an International Regulatory Movement* (Hart Publishing, Oxford, 2011) ch 14.

65 *Veen v The Queen [No. 1]* (1979) 143 CLR 458; *Veen v The Queen [No. 2]* (1988) 164 CLR 465; *Hoare v The Queen* (1989) 167 CLR 348; SJ Odgers, *Sentence* (Longeville, 2d ed 2013) 111-118; C Beaton-Wells and B Fisse, *Australian Cartel Regulation*, 11.4.4.1.

of guilty (in *CDPP v NYK* the discount was 40%). A significant discount may also be given for future cooperation (in *CDPP v NYK* the discount was 10%).

- The judgment in *CDPP v NYK* does not discuss the extent to which the fine imposed on NYK was likely to be passed on to customers and consumers. It seems perverse to express concern about the impact that price fixing is likely to have on customers and consumers by increasing prices without also addressing the impact that a fine, especially a large fine, is likely to have by being passed on.
- The question of passing on fines is likely to be acute in the context of price fixing by the members of an oligopoly. The larger and more equal the fines imposed on the corporate members of the oligopoly, the greater the incentive to pass the fines on to consumers. This is a remarkable weakness in the capacity of fines to deter cartel conduct.
- There have yet to be prosecutions against individuals in serious cartel cases, including cases where banks allegedly have rigged rates.[66] The jury thus remains out on the question: "Are the cartel offences worth all the effort that has gone into creating them and in gearing up for prosecutions?"[67]
- The targetting of a corporate accused alone in *CDPP v NYK* is an ominous sign that major obstacles stand in the way of successfully prosecuting individual persons for cartel conduct. One obstacle is the failure of section 5(1) of the *CCA* to reach the conduct of non-citizens or non-residents who, like the managers implicated in NYK's cartel offence, orchestrate or are knowingly concerned in breaches of the *CCA*. Such conduct would be caught by the broader jurisdictional test under section 14.1 of the *Criminal Code* but section 14.1 does not apply to the cartel offences. This is an obvious and significant loophole. Ancillary liability for cartel offence and breaches of the civil cartel prohibitions under the *CCA* should be subject to the same extraterritorial test as that under s 14.1 of the *Criminal Code*.
- The justification for resorting to criminal proceedings in *CDPP v NYK* appears to be that the cartel conduct was extremely serious and called for not merely a civil

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66 See eg 'ASIC widens rate-rigging net', SMH 5 April 2016, 19; 'ACCC rate rigging probe well advanced', The Australian, 7 March 2016; M Taibbi, 'Everything Is Rigged: The Biggest Price-Fixing Scandal Ever', RollingStone, 25 April 2013; Council on Foreign Relations, Understanding the Libor scandal', 12 October 2016, at: http://www.cfr.org/united-kingdom/understanding-libor-scandal/p28729.

67 See further C Beaton-Wells and A Ezrachi (eds), *Criminalising Cartels: Critical Studies of an International Regulatory Movement* (2011).

penalty but the opprobrium and social condemnation of a corporate criminal conviction. However, as the law stands, the additional element of opprobrium and social condemnation seems ephemeral. A corporate conviction for a cartel offence is not reinforced by any form of punishment that is explicitly or inherently a condemnatory criminal sanction. Under s 86C of the *CCA*, a corporation may be sentenced to a community service order, a probation order or a publicity order but these sanctions are characterised in section 86C as being "non-punitive orders".

- There would be a stronger justification for imposing corporate criminal liability for cartel conduct if corporate offenders were subject to punitive injunctions and other distinctively punitive sanctions. However, cartel offences in Australia have yet to be taken that seriously.