FEDERAL COURT OF AUSTRALIA

Commonwealth Director of Public Prosecutions v Bingo Industries Pty Ltd;
Commonwealth Director of Public Prosecutions v Tartak
[2024] FCA 121

|  |  |
| --- | --- |
| File number(s): | NSD 647 of 2022NSD 648 of 2022 |
|  |  |
| Judgment of: | **WIGNEY J** |
|  |  |
| Date of judgment: | 23 February 2024 |
|  |  |
| Catchwords: | **CRIMINAL LAW** – sentencing – cartel conduct – making an arrangement containing a cartel provision – giving effect to a cartel provision – where corporate offender provided collections services and processing services for building and demolition waste in the Sydney metropolitan region – where the offender and its chief executive officer pleaded guilty – consideration of objective seriousness of the cartel offences – consideration of appropriate discounts for mitigating factors including plea of guilty and cooperation with law enforcement agencies – consideration of specific and general deterrence in sentencing cartel conduct – consideration of totality principle and parity with sentence imposed on co-offenders – consideration whether disqualification order should be made under s 86E of the *Competition and Consumer Act 2010* (Cth) – appropriate sentence  |
|  |  |
| Legislation: | *Competition and Consumer Act 2010* (Cth) ss 45AB, 45AF, 45AG, 79(1), 86E, 154X, 155*Corporations Act 2001* (Cth) ss 206B(1), 206G*Crimes Act 1914* (Cth) Pt IB, ss 16A, 16AC, 16BA, 16C, 17A, 19AC, 20(1)(b), 20AB*Crimes (Sentencing Procedure) Act 1999* (NSW) Pt 2 Div 3, Pt 5, ss 7, 17C, 17D, 66, 67, 69, 73, 73A |
|  |  |
| Cases cited: | *Australian Competition and Consumer Commission v ABB Transmission and Distribution Limited (No 2)* (2002) 190 ALR 169; [2002] FCA 559*Australian Competition and Consumer Commission v Apple Pty Limited* [2012] FCA 646*Australian Competition and Consumer Commission v Coles Supermarkets Australia Pty Ltd* (2015) 327 ALR 540; [2015] FCA 330*Australian Competition and Consumer Commission v Leahy Petroleum Pty Ltd (No 3)* (2005) 215 ALR 301; [2005] FCA 265*Australian Competition and Consumer Commission v Renegade Gas Pty Ltd (trading as Supagas NSW)* [2014] FCA 1135*Australian Competition and Consumer Commission v Visy Industries Holdings Pty Limited (No 3)* (2007) 244 ALR 673; [2007] FCA 1617*Australian Securities and Investments Commission v Wooldridge* [2019] FCAFC 172*Azari v The Queen* [2021] NSWCCA 199*Bui v Director of Public Prosecutions (Cth)* (2012) 244 CLR 638; [2012] HCA 1*Cameron v The Queen* (2002) 209 CLR 339; [2002] HCA 6*Camilleri’s Stock Feeds Pty Limited v Environment Protection Authority* (1993) 32 NSWLR 683*Commissioner for Corporate Affairs (WA) v Ekamper* (1987) 12 ACLR 519*Commonwealth Director of Public Prosecutions v Alkaloids of Australia Pty Ltd* [2022] FCA 1424*Commonwealth Director of Public Prosecutions v Joyce* [2022] FCA 1423*Commonwealth Director of Public Prosecutions v Kawasaki Kisen Kaisha Ltd* (2019) 137 ACSR 575; [2019] FCA 1170*Commonwealth Director of Public Prosecutions v Nippon Yusen Kabushiki Kaisha* (2017) 254 FCR 235; [2017] FCA 876*Commonwealth Director of Public Prosecutions v Vina Money Transfer Pty Ltd* (2022) 294 FCR 449; [2022] FCA 665*Commonwealth Director of Public Prosecutions v Wallenius Wilhelmsen Ocean AS* (2021) 386 ALR 98; [2021] FCA 52*Darter v Diden* (2006) 94 SASR 505; [2006] SASC 152*Director of Public Prosecutions (Cth) v El Karhani* (1990) 97 ALR 373; 21 NSWLR 370*Director of Public Prosecutions (Cth) v Page* [2006] VSCA 224*Dunn v The Queen* [2018] NSWCCA 108*Einfeld v The Queen* (2010) 200 A Crim R 1; [2010] NSWCCA 87*Elias v The Queen* (2013) 248 CLR 483; [2013] HCA 31*Environment Protection Authority v Barnes* [2006] NSWCCA 246*Gaggioli v The Queen* [2014] NSWCCA 246*Green v The Queen* (2011) 244 CLR 462; [2011] HCA 49*Hanley v The Queen* [2018] NSWCCA 262*Hili v The Queen* (2010) 242 CLR 520; [2010] HCA 45*Jahandideh v The Queen* [2014] NSWCCA 178*Jimmy v The Queen* (2010) 77 NSWLR 540; [2010] NSWCCA 60*Johnson v The Queen* (2004) 218 CLR 451; [2004] HCA 15*Kovacevic v Mills* (2000) 76 SASR 404; [2000] SASC 106*Markarian v The Queen* (2005) 228 CLR 357; [2005] HCA 25*Mill v The Queen* (1988) 166 CLR 59; [1988] HCA 70*Mourtada v The Queen* [2021] NSWCCA 211*Muldrock v The Queen* (2011) 244 CLR 120; [2011] HCA 39*R v Curtis (No 3)* (2016) 114 ACSR 184; [2016] NSWSC 866*R v Geddes* (1936) 36 SR (NSW) 554*R v Hannes* (2000) 36 ACSR 72; [2000] NSWCCA 503*R v Pullen* (2018) 87 MVR 47; [2018] NSWCCA 264*R v Rivkin* (2004) 59 NSWLR 284; [2004] NSWCCA 7*R v Zamagias* [2002] NSWCCA 17*Stanley v Director of Public Prosecutions (NSW)* (2023) 97 ALJR 107; [2023] HCA 3*Tapper v The Queen* (1992) 39 FCR 243*Totaan v The Queen* (2022) 108 NSWLR 17; [2022] NSWCCA 75*Tyler v The Queen* (2007) 173 A Crim R 458; [2007] NSWCCA 247*Wany v Director of Public Prosecutions (NSW)* (2020) 103 NSWLR 620; [2020] NSWCA 318*Wong v The Queen* (2001) 207 CLR 584; [2001] HCA 64*Xiao v The Queen* (2018) 329 FLR 1; [2018] NSWCCA 4 |
|  |  |
| Division: | General Division |
|  |  |
| Registry: | New South Wales |
|  |  |
| National Practice Area: | Federal Crime and Related Proceedings |
|  |  |
| Number of paragraphs: | 306 |
|  |  |
| Date of last submissions: | 2 August 2023 |
|  |  |
| Date of hearing: | 9 March 2023  |
|  |  |
| Counsel for the Prosecutor: | Mr P McGuire SC with Ms S Andrews |
|  |  |
| Solicitor for the Prosecutor: | Commonwealth Director of Public Prosecutions |
|  |  |
| Counsel for the Accused in NSD 647 of 2022: | Ms K C Morgan SC with Ms G Huxley |
|  |  |
| Solicitor for the Accused in NSD 647 of 2022: | Herbert Smith Freehills  |
|  |  |
| Counsel for the Accused in NSD 648 of 2022: | Mr T Game SC with Ms R C A Higgins SC and Ms J Roy |
|  |  |
| Solicitor for the Accused in NSD 648 of 2022: | Law Corporation |

ORDERS

|  |  |
| --- | --- |
|  | NSD 647 of 2022 |
|   |
| BETWEEN: | COMMONWEALTH DIRECTOR OF PUBLIC PROSECUTIONSProsecutor |
| AND: | BINGO INDUSTRIES PTY LIMITEDAccused |

|  |  |
| --- | --- |
| order made by: | WIGNEY J |
| DATE OF ORDER: | 23 February 2024 |

THE COURT ORDERS THAT:

1. Convictions be entered against Bingo Industries Pty Limited in respect of the following offences:

a. the offence of making a cartel provision contrary to s 45AF(1) of the *Competition and Consumer Act 2010* (Cth) as particularised in charge 1 in the indictment dated 1 March 2023 (**count 1**); and

b. the offence of giving effect to a cartel provision contrary to s 45AG(1) of the *Competition and Consumer Act 2010* (Cth) as particularised in charge 2 in the indictment dated 1 March 2023 (**count 2**).

2. The following sentences be imposed on Bingo Industries Pty Limited:

a. in respect of count 1, a fine of $15,000,000; and

b. in respect of count 2, a fine of $15,000,000.

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

ORDERS

|  |  |
| --- | --- |
|  | NSD 648 of 2022 |
|   |
| BETWEEN: | COMMONWEALTH DIRECTOR OF PUBLIC PROSECUTIONSProsecutor |
| AND: | DANIEL CHARBEL TARTAKAccused |

|  |  |
| --- | --- |
| order made by: | WIGNEY J |
| DATE OF ORDER: | 23 February 2024 |

THE COURT ORDERS THAT:

1. Convictions be entered against Daniel Charbel Tartak in respect of the following offences:

a. the offence of aiding, abetting, counselling or procuring Bingo Industries Limited to contravene a cartel offence provision, namely s 45AF(1) of the *Competition and Consumer Act 2010* (Cth) as particularised in charge 1 in the indictment dated 16 August 2022 (**count 1**); and

b. the offence of aiding, abetting, counselling or procuring Bingo Industries Limited to contravene a cartel offence provision, namely s 45AG(1) of the *Competition and Consumer Act 2010* (Cth) as particularised in charge 2 in the indictment dated 16 August 2022 (**count 2**).

2. The following sentences be imposed on Daniel Charbel Tartak:

a. in respect of count 1:

i. imprisonment for 18 months to commence on 23 February 2024 and end on 23 August 2025, with such imprisonment to be served by way of intensive correction in the community pursuant to s 7(1) of the *Crimes (Sentencing Procedure) Act* *1999* (NSW); and

ii. a fine of $50,000;

b. in respect of count 2:

i. imprisonment for 18 months to commence on 23 August 2024 and end on 23 February 2026, with such imprisonment to be served by way of intensive correction in the community pursuant to s 7(1) of the *Crimes (Sentencing Procedure) Act 1999* (NSW); and

ii. a fine of $50,000;

c. the following conditions are to apply to the intensive corrections orders referred to in orders 2(a)(i) and 2(b)(i):

i. the standard conditions prescribed by s 73 of the *Crimes (Sentencing Procedure) Act 1999* (NSW), namely that Daniel Charbel Tartak must not commit an offence and must submit to supervision by a community corrections officer; and

ii. an additional condition pursuant to s 73A(2)(d) of the *Crimes (Sentencing Procedure) Act 1999* (NSW), namely that Daniel Charbel Tartak perform community service work for 400 hours.

3. Pursuant to s 86E of the *Competition and Consumer Act 2010* (Cth), Daniel Charbel Tartak be disqualified from managing corporations for a period of five years commencing on 23 February 2024.

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

**TABLE OF CONTENTS**

|  |  |
| --- | --- |
| FACTS RELATING TO THE OFFENCES | [10] |
| The waste management industry | [11] |
| Collections services and processing services in the Sydney region | [17] |
| The context and circumstances in which the arrangements were made | [25] |
| The making of the arrangements | [28] |
| Giving effect to the arrangements | [35] |
| Abandonment of the arrangements | [41] |
| The impact of the arrangements | [42] |
| THE OFFENCES | [44] |
| MAXIMUM PENALTIES | [49] |
| ADDITIONAL EVIDENCE ADDUCED BY THE PROSECUTOR | [52] |
| EVIDENCE ADDUCED BY THE ACCUSED | [55] |
| Evidence adduced by Bingo | [56] |
| Evidence adduced by Mr Tartak | [62] |
| COOPERATION AND GUILTY PLEAS | [71] |
| RELEVANT SENTENCING PROVISIONS AND PRINCIPLES | [83] |
| Matters which the Court must take into account | [85] |
| MAXIMUM PENALTIES | [89] |
| THE SENTENCE TO BE IMPOSED ON BINGO | [94] |
| Issues raised by the competing submissions | [95] |
| The objective seriousness of the offences in question | [96] |
| The nature and circumstances of the offence – s 16A(2)(a) of the Crimes Act | [97] |
| The duration and scale of the offending conduct | [102] |
| The extent to which the conduct was deliberate, systematic and covert | [105] |
| Seniority of the offending officer(s) and corporate culture | [108] |
| Benefits obtained as a result of the conduct | [110] |
| Injury, loss or damage resulting from the offence – s 16A(2)(e) of the Crimes Act | [116] |
| Course of conduct – s 16A(2)(c) of the Crimes Act | [122] |
| Overall assessment of the seriousness of the offences | [128] |
| Bingo’s subjective circumstances | [133] |
| Contrition and remorse – s 16A(2)(f) of the Crimes Act | [135] |
| Guilty plea – s 16A(2)(g) of the Crimes Act | [140] |
| Cooperation - s 16A(2)(h) of the Crimes Act | [144] |
| Character, antecedents, and prospects of rehabilitation – s 16A(2)(m) and (n) of the Crimes Act | [155] |
| Financial circumstances – s 16C of the Crimes Act | [158] |
| Deterrence – s 16A(2)(j) and (ja) of the Crimes Act | [160] |
| Need for adequate punishment – s 16A(2)(k) of the Crimes Act | [166] |
| Sentences imposed on corporations in other cartel offence cases | [167] |
| Totality | [172] |
| Parity | [173] |
| The appropriate sentence for Bingo | [187] |
| THE SENTENCE TO BE IMPOSED ON MR TARTAK | [191] |
| Issues raised by the competing submissions | [192] |
| Differences between Bingo’s offences and Mr Tartak’s offences | [201] |
| The objective seriousness of the offences | [206] |
| Other offences – ss 16A(2)(b) and 16BA of the Crimes Act | [212] |
| Mr Tartak’s subjective circumstances | [220] |
| Character and antecedents – s 16A(2)(m) of the Crimes Act | [221] |
| Contrition – s 16A(2)(f) of the Crimes Act | [224] |
| Prospect of rehabilitation – s 16A(2)(n) of the Crimes Act | [225] |
| Plea of guilty and cooperation – s 16A(2)(g) and (h) of the Crimes Act | [226] |
| Financial circumstances – s 16C of the Crimes Act | [232] |
| Deterrence – s 16A(2)(j) and (ja) of the Crimes Act | [233] |
| Other subjective considerations | [235] |
| Other sentencing considerations – totality and parity | [239] |
| Sentences imposed on individuals in other cartel cases | [245] |
| The appropriate sentence to impose on Mr Tartak | [257] |
| Is imprisonment the only appropriate sentence? | [260] |
| The appropriate term of the sentence of imprisonment | [268] |
| Should the Court make a recognizance release order? | [274] |
| Is it appropriate for imprisonment to be served by way of an intensive correction order? | [277] |
| Imposition of a fine | [290] |
| DISQUALIFICATION | [295] |
| CONCLUSION AND DISPOSITION | [303] |

REASONS FOR JUDGMENT

WIGNEY J:

1 **Bingo** Industries Pty Limited and its former chief executive officer, Mr Daniel Charbel **Tartak** have each pleaded guilty to two cartel offences under the ***Competition and Consumer Act*** *2010* (Cth). The Court must now impose sentences in respect of those offences.

2 Bingo is a large waste management company based in New South Wales. At the time the cartel offences were committed, Bingo was a public company and was the largest provider of collections services and processing services for building and demolition waste in the **Sydney** metropolitan region. Collections services involved the collection and transportation of waste in skip bins to facilities for processing. Processing services involved sorting, processing, and recycling of the waste. Mr Tartak was Bingo’s chief executive officer at the time the offences were committed.

3 Many other small companies provided processing and collections services in Sydney. The second largest provider of collections services in Sydney at the time was Aussie Skips Bin Services Pty Ltd (**Aussie Skips**), though it had a significantly smaller market share than Bingo. A related company, Aussie Skips Recycling Pty Ltd (**Aussie Recycling**) was also a small provider of processing services in Sydney. Those two companies will collectively be referred to in these reasons as the **Aussie Companies**, other than where it is necessary to distinguish between them. Mr Emmanuel **Roussakis** was the chief executive officer of the Aussie Companies.

4 Over a five-day period commencing on 20 May 2019, Mr Tartak and Mr Roussakis engaged in a series of communications during which they made arrangements concerning the prices at which their respective companies would provide collections services and processing services. The essence of the arrangement in respect of collections services was that Bingo would maintain a price increase of 25% (or 23% in respect of its “top tier” customers) which it had advised its customers it would implement from 1 July 2019 and that Aussie Skips would increase its prices by at least 20%. The essence of the arrangement concerning processing services was that Bingo would maintain a price increase of at least $60/tonne and $35/m3 at its processing facilities which were near Aussie Recycling’s facility at Strathfield South and that Aussie Recycling would increase its prices at its Strathfield South facility by at least $50/tonne and $27.50/m3.

5 Over the following three months, Bingo, aided by Mr Tartak, gave effect to the arrangements that it had made with Aussie Skips and Aussie Recycling. As a result of the arrangements, there was a real chance that some customers would pay more than they otherwise would have paid for collections services and processing services.

6 Bingo was charged and pleaded guilty to an indictment containing one charge of intentionally making arrangements containing cartel provisions contrary to s 45AF(1) of the Competition and Consumer Act and one charge of giving effect to cartel provisions in arrangements contrary to s 45AG(1) of the Competition and Consumer Act. The particulars of those charges referred to both the arrangement containing the cartel provision concerning the prices for collections services and the arrangement containing the cartel provision concerning the prices for processing services.

7 Mr Tartak was similarly charged and pleaded guilty to an indictment containing two charges: a charge that he aided and abetted Bingo to contravene s 45AF(1) of the Competition and Consumer Act by making an arrangement containing a cartel provision; and a charge that he aided and abetted Bingo to contravene s 45AG(1) of the Competition and Consumer Act by giving effect to an arrangement containing a cartel provision. Those charges both concerned the arrangement with Aussie Skips which contained the cartel provision concerning the prices for collections services. Mr Tartak also asked the Court to take into account, in sentencing him for those offences, the fact that he admitted his guilt in respect of similar or corresponding offences relating to the arrangement with Aussie Recycling which contained the provision concerning the prices for processing services.

8 The task for the Court, in sentencing both Bingo and Mr Tartak in respect of the offences to which they have pleaded guilty, is to impose penalties that are of a severity appropriate in all the circumstances. The maximum penalty for each of the offences committed by Bingo is $40,200,000, being 10% of its annual turnover in the preceding 12-month period. The maximum penalty for the offences committed by Mr Tartak is a term of imprisonment not exceeding 10 years, or a fine not exceeding $420,000, or both.

9 The Prosecutor, the Commonwealth Director of Public Prosecutions, also applied for an order, pursuant to s 86E of the Competition and Consumer Act, the effect of which was to disqualify Mr Tartak from managing corporations for a period of five years.

# FACTS RELATING TO THE OFFENCES

10 The primary facts relating to the offences upon which both Bingo and Mr Tartak are to be sentenced were for the most part not in dispute. The Prosecutor tendered separate statements of agreed facts in respect of Bingo and Mr Tartak. While there were some slight differences between those documents, those differences were largely immaterial for the purposes of sentencing. The facts relevant to the offences committed by each offender were essentially the same. Following is a short summary or distillation of the material facts. Unless stated otherwise, the facts relate to the period during which the offences were committed.

## The waste management industry

11 The waste management industry in New South Wales generally dealt with three streams of waste: building and demolition waste, commercial and industrial waste, and municipal waste.

12 Companies in the waste management industry generally provided one or more of three types of services in respect of building and demolition waste: collections services, processing services, and disposal services.

13 Collections services, or skip bin services, involved the physical collection and transporting of building and demolition waste in skip bins to facilities for processing. Waste processors charged collectors a fee to accept and process the waste. Those fees were generally calculated by the tonnage of waste or the cubic metre size of the skip bin containing the waste.

14 Processing services, or “tipping”, involved the sorting, processing, and recycling of the waste. Material would be sorted into its component parts and any reusable material would be recycled or further processed and resold.

15 Disposal services involved disposing of residual waste that could not be recycled, primarily by way of landfill.

16 The pricing of the services in the industry were affected by landfill disposal costs. Those costs were to some extent passed through to recycling and collections pricing.

## Collections services and processing services in the Sydney region

17 Bingo was the largest provider of collections services, including for mixed building and demolition waste in Sydney. It operated about 165 collections trucks and had an estimated market share of 22% in respect of collections services. In the 12 months preceding August 2018, its estimated revenue from collections services alone was $134 million.

18 Bingo was also the largest provider of processing services for mixed building and demolition waste. It operated nine processing facilities in the Sydney region. Those facilities were located at Greenacre, Revesby, Auburn, Alexandria, Artarmon, Smithfield, Eastern Creek, Minto, and St Marys. As at 22 November 2018, Bingo had approximately 21% of the market capacity to process mixed building and development waste in Sydney, based on the capacity of processing facilities.

19 Aussie Skips and Aussie Recycling were also waste management companies based and operating in New South Wales.

20 Aussie Skips provided collections services for building and demolition waste in Sydney. It operated about 25 collections trucks and had an estimated market share of 3% in respect of collections services. In the 12 months preceding August 2018, its estimated revenue from collections services was $26 million.

21 Aussie Recycling provided processing services for building and demolition waste. It operated one processing facility at Strathfield South, a suburb of Sydney. That facility was approximately one kilometre from Bingo’s Greenacre facility and about eight kilometres from Bingo’s Revesby and Auburn facilities.

22 Bingo competed with Aussie Skips in the market for collections services, and with Aussie Recycling in the market for processing services, in Sydney.

23 Many other companies provided collections services in Sydney. The next largest provider, a business known as Grasshopper, operated 18 trucks, had a market share of 2% and generated revenue of $12 million in the 12 months preceding August 2018. None of the other companies that provided collections services had a market share of more than 2%. Most had a market share of 1% or less.

24 Aside from Bingo and Aussie Recycling, about 13 other companies had building and demolition waste processing facilities in the Sydney region. Most of them had only one facility, though a few had two.

## The context and circumstances in which the arrangements were made

25 Prior to 1 July 2019, many building and demolition waste processors in New South Wales, including Bingo and Aussie Recycling, transported and disposed of residual waste in Queensland landfills. That was generally a cheaper alternative to disposing of the waste in New South Wales landfills. That was because Queensland landfills did not have a waste levy, whereas New South Wales landfills did. In November 2018, however, the Queensland Government announced that it would re-introduce a waste levy, and in February 2019, the relevant legislation in Queensland was amended to re-introduce a waste levy of $75.00/tonne, commencing 1 July 2019.

26 The reintroduction of the waste levy in Queensland increased the costs for those waste management companies in New South Wales who had previously utilised landfills in Queensland. They no longer had access to levy-free landfills in Queensland. As a result, it was widely anticipated that waste management companies would have to increase their fees from July 2019.

27 On the afternoon of 20 May 2019, Bingo sent a letter to its customers which advised that it would increase its prices for both collections services and processing services from 1 July 2019. The precise timing of the sending of that letter is of some importance and is discussed later. The letter advised that there was to be a 25% price increase for collections services and that the price for processing services was to be increased by $35/m3 and $60/tonne for processing mixed building and demolition waste at Bingo’s Sydney processing facilities, other than Eastern Creek, where the fees would be increased by $28/m3 and $50/tonne. Those price increases were greater than the amount that was required to directly offset the anticipated additional costs arising from the reintroduction of the waste levy in Queensland.

## The making of the arrangements

28 At 2.30pm on 20 May 2019, Mr Tartak and Mr Roussakis met at a café in Belfield, a suburb of Sydney. The meeting was held at Mr Tartak’s request. The events that followed that meeting support the inference that Mr Tartak and Mr Roussakis discussed the increased prices that Bingo and the Aussie Companies were proposing to charge for their services.

29 Bingo’s letter to its customers advising of its price increases was emailed to its customers shortly *after* that meeting.

30 Over the following days, Mr Tartak and Mr Roussakis engaged in a lengthy series of “WhatsApp” communications. WhatsApp is an encrypted text message service. Mr Roussakis also engaged in a series of WhatsApp communications with a senior employee of Bingo. That senior employee is referred to as **AB** in the agreed facts.

31 It is unnecessary to set out the full content of the various WhatsApp messages. It suffices to note that the overall effect of the communications was that Mr Tartak, on behalf of Bingo, agreed that Bingo would maintain its price increase of at least 25% for collections services that it had announced to its customers, save that the price increase could be as low as 22% for “top tier” customers, and Mr Roussakis agreed that Aussie Skips would increase its prices for collections services by at least 20%. It was also agreed that Bingo would maintain its price increase of at least $60/tonne and $35/m3 for processing services at its facilities near Aussie Recycling facility at Strathfield South and that Aussie Recycling would increase its prices by at least $50/tonne and $27.5/m3 for processing services at its Strathfield South facility.

32 Throughout his communications with Mr Roussakis, Mr Tartak encouraged Mr Roussakis, on behalf of the Aussie Companies, to adhere to the arrangements and “stick to [his] guns”. He also sought to reassure Mr Roussakis that Bingo would abide by the arrangements and confirmed that he would not “back paddle” [sic] when pressed by Mr Roussakis. Presumably Mr Roussakis meant back-pedal.

33 Mr Tartak was aware that the arrangements he made, on behalf of Bingo, with Mr Roussakis, on behalf of the Aussie Companies, had the purpose and likely effect of fixing the price of collections services and processing services that the companies provided to their customers. Mr Tartak was also aware that Bingo competed with the Aussie Companies in respect of the provision of those services.

34 On 24 May 2019, the Aussie Companies sent letters to its customers advising them of price increases consistent with those that were the subject of the arrangements between Mr Tartak and Mr Roussakis.

## Giving effect to the arrangements

35 The WhatsApp communications between Mr Roussakis, on the one hand, and Mr Tartak and AB, on the other, continued after 24 May 2019. Commencing on around 30 May 2019, Mr Roussakis sent a number of WhatsApp messages to Mr Tartak, AB and others in an effort to arrange a meeting. That meeting eventually occurred at Mr Roussakis’s home on 4 June 2019. On the following day, Mr Tartak and Mr Roussakis exchanged WhatsApp messages in which they discussed their competitors’ pricing.

36 Mr Roussakis also exchanged WhatsApp messages with Mr Tartak on 24 June and 4 July 2019, sent WhatsApp messages to Mr Tartak on 24 July and 8 August 2019 and engaged in several WhatsApp exchanges with AB in June, July, and August 2019. Those WhatsApp messages and exchanges referenced the arrangements that had been made between Bingo and the Aussie Companies, discussed pricing, and included complaints, mainly by Mr Roussakis, that the Aussie Companies were losing customers. Some of the messages included suggestions or accusations, mostly by Mr Roussakis, but also in later messages by AB, that the arrangements were not being adhered to. Mr Roussakis also met with AB at a café on 12 June 2019.

37 Despite some of the claims made in the WhatsApp exchanges between Mr Roussakis, AB, and Mr Tartak, Bingo and the Aussie Companies generally adhered to, and gave effect to, the provisions in the arrangements concerning their pricing for collections services and processing services in the period from 24 May to 31 August 2019.

38 In Bingo’s case, it implemented and generally maintained the price increases in respect of its collections services that it had announced to its customers effective from 1 July 2019. The average price Bingo charged customers for building and demolition waste for the most common type of skip bin increased from approximately $790 in June 2019 to approximately $940 in July 2019, and $915 in August 2019. Throughout July and August 2019, Bingo charged approximately 42% of its customers, including some top tier customers, a price increase of at least 25% for at least one type of skip bin, though price increases varied in the case of other skip bins.

39 Bingo also implemented and generally maintained the price increases in respect of its processing services effective from 1 July 2019. The average price it charged account customers for processing building and demolition waste increased from $192.46/tonne in June 2019 to $246.70/tonne in July 2019, and $241.68/tonne in August 2019. Throughout July and August 2019, in most cases Bingo charged its account customers at its Greenacre, Revesby and Auburn facilities a price increase of at least $60/tonne or $35/m3 for processing services.

40 Mr Tartak assisted, and was knowingly involved, in Bingo’s adherence to the arrangements. He was, as chief executive officer, undoubtedly involved in pricing decisions and, as noted earlier, continued his communications with Mr Roussakis concerning the price increases during June, July, and August 2019.

## Abandonment of the arrangements

41 The arrangements between Bingo and the Aussie Companies were effectively abandoned by about 1 September 2019. That was a product of both commercial considerations and the fact that, as had been adverted to in some of the WhatsApp exchanges referred to earlier, there were some instances of non-compliance with the arrangements, or at least allegations by each of the parties to the arrangements that the other party was not complying with the arrangements.

## The impact of the arrangements

42 As a result of the arrangement between Bingo and Aussie Skips concerning their pricing in respect of collections services, there was a real chance that some customers of Bingo and Aussie Skips would pay more than they otherwise would have for collections services in Sydney. Mr Tartak and Bingo were aware that there was a real chance that the prices charged by Bingo and Aussie Skips for collections services pursuant to the arrangement would have an impact on the prices that their competitors charged their customers in Sydney.

43 Similarly, as a result of the arrangement between Bingo and Aussie Recycling concerning their pricing in respect of processing services, there was a real chance that customers of Aussie Recycling at its Strathfield South facility, and Bingo’s customers at its Greenacre, Revesby, and Auburn processing facilities (those being the facilities closest to Aussie Recycling’s Strathfield South facility) would pay more than they otherwise would have for processing services. There was also a possibility that those customers who tipped building and demolition waste at other processing facilities in Sydney could have paid prices different to those they would have paid had the arrangement not been made and implemented. Mr Tartak and Bingo were aware that there was a real chance that the prices charged by Bingo and Aussie Recycling for processing services pursuant to the arrangement would most likely have an impact on the prices that their competitors charged their customers in Sydney.

# THE OFFENCES

44 The indictment presented against Bingo contained the following two charges:

1. Between about 20 May 2019 and about 24 May 2019 at Auburn in the State of New South Wales and elsewhere, Bingo Industries Pty Limited intentionally made an arrangement with each of Aussie Skips Bin Services Pty Ltd and Aussie Skips Recycling Pty Ltd which contained a cartel provision, knowing or believing that the arrangements each contained a cartel provision.

Contrary to section 45AF(1) of the *Competition and Consumer Act 2010* (Cth).

**Particulars of the Arrangements**

a. Bingo Industries Pty Limited and Aussie Skips Bin Services Pty Ltd made an arrangement about the price of skip bin services in respect of mixed building and demolition waste in the Sydney Metropolitan region that:

i. Bingo Industries Pty Limited would maintain a price increase of at least 25% (save that the price increase may be as low as 22% for top tier customers); and

ii. Aussie Skips Bin Services Pty Ltd would increase its prices by at least 20%,

from at least 1 July 2019 (the **Collections Arrangement**).

b. Bingo Industries Pty Limited and Aussie Skips Recycling Pty Ltd made an arrangement about the price of processing services for the mixed building and demolition waste stream that:

i. Bingo Industries Pty Limited would maintain a price increase of at least $60/tonne and $35/m3 at its facilities proximate to Aussie Skips Recycling Pty Ltd's Strathfield South facility; and

ii. Aussie Skips Recycling Pty Ltd would increase its prices by at least $50/tonne and $27.50/m3 at its Strathfield South facility,

from at least 1 July 2019 (the **Processing Arrangement**).

2. From about 24 May 2019 until at least 31 August 2019 at Auburn in the State of New South Wales and elsewhere, Bingo Industries Pty Limited intentionally gave effect to cartel provisions contained in arrangements made with each of Aussie Skips Bin Services Pty Ltd and Aussie Skips Recycling Pty Ltd, knowing or believing that the arrangements each contained a cartel provision.

Contrary to section 45AG(1) of the *Competition and Consumer Act 2010* (Cth).

**Particulars**

a. Bingo Industries Pty Limited gave effect to the cartel provision contained in the Collections Arrangement.

b. Bingo Industries Pty Limited gave effect to the cartel provision contained in the Processing Arrangement.

45 Bingo entered pleas of guilty to both charges.

46 The indictment presented against Mr Tartak included the following two charges:

1. Between about 20 May 2019 and about 24 May 2019 at Auburn in the State of New South Wales and elsewhere, Daniel Charbel Tartak did aid, abet, counsel or procure Bingo Industries Ltd to contravene a cartel offence provision, namely, section 45AF(1) of the *Competition and Consumer Act 2010* (Cth), in that Bingo Industries Ltd intentionally made an arrangement with Aussie Skips Bin Services Pty Ltd containing a cartel provision, which to the knowledge or belief of Bingo Industries Limited and Daniel Charbel Tartak contained a cartel provision.

Contrary to section 45AF(1) with section 79(1)(a) of the *Competition and Consumer Act 2010* (Cth).

**Particulars of Arrangement**

Between about 20 May 2019 and about 24 May 2019, Bingo Industries Ltd and Aussie Skips Bin Services Pty Ltd made an arrangement about the price of skip bin services in respect of mixed building and demolition waste in the Sydney Metropolitan region that:

a. Bingo Industries Ltd would maintain a price increase of at least 25% (save that the price increase may be as low as 22% for top tier customers); and

b. Aussie Skips Bin Services Pty Ltd would increase its prices by at least 20%,

from at least 1 July 2019 (the **Collections Arrangement**).

2. From about 24 May 2019 until at least 31 August 2019 at Auburn in the State of New South Wales and elsewhere, Daniel Charbel Tartak did aid, abet, counsel or procure Bingo Industries Ltd to contravene a cartel offence provision, namely, section 45AG(1) of the *Competition and Consumer Act 2010* (Cth), in that Bingo Industries Ltd intentionally gave effect to the cartel provision contained in the Collections Arrangement, which to the knowledge or belief of Bingo Industries Ltd and Daniel Charbel Tartak contained a cartel provision.

Contrary to section 45AG(1) with section 79(1)(a) of the *Competition and Consumer Act 2010* (Cth).

47 Mr Tartak entered pleas of guilty to each of those charges.

48 Mr Tartak also asked the Court to take into account, pursuant to s 16BA of the ***Crimes Act*** *1914* (Cth), two additional offences. Those two offences related to the arrangement entered into between Bingo and Aussie Recycling which contained the cartel provision concerning prices in respect of processing services. Those two offences were particularised in the following terms in the notice filed pursuant to s 16BA:

[Between about 20 May 2019 and about 24 May 2019, at Auburn, New South Wales and elsewhere,] Daniel Charbel Tartak was knowingly concerned in the contravention by Bingo Industries Ltd of a cartel offence provision, namely, section 45AF(1) of the *Competition and Consumer Act 2010* (Cth), in that Bingo Industries Ltd intentionally made an arrangement with Aussie Skips Recycling Pty Ltd which contained a cartel provision, which to the knowledge or belief of Bingo Industries Limited and Daniel Charbel Tartak contained a cartel provision, contrary to section 45AF(1) with section 79(1)(a) of that Act.

**Particulars**

Daniel Charbel Tartak was knowingly concerned in Bingo Industries Ltd making an arrangement with Aussie Skips Recycling Pty Ltd about the price of processing services for the mixed building and demolition of waste stream that:

a. Bingo Industries Ltd would maintain a price increase of at least $60/tonne and $35/m3 at its facilities proximate to Aussie Skips Recycling Pty Ltd’s Strathfield South facility; and

b. Aussie Skips Bin Services Pty Ltd would increase its prices by at least $50/tonne and $27.50m3 at its Strathfield South facility,

from 1 July 2019 (the **Processing Arrangement**).

[From about 24 May 2019 until at least 31 August 2019, at Auburn, New South Wales and elsewhere] Daniel Charbel Tartak was knowingly concerned in the contravention by Bingo Industries Ltd of a cartel offence provision, namely, section 45AG(1) of the *Competition and Consumer Act 2010* (Cth), in that Bingo Industries Ltd intentionally gave effect to the cartel provision contained in the Processing Arrangement, which to the knowledge or belief of Bingo Industries Ltd and Daniel Charbel Tartak contained a cartel provision, contrary to section 45AG(1) with section 79(1)(c) of that Act.

# MAXIMUM PENALTIES

49 At the time Bingo committed the offences, the maximum penalty for an offence committed against each of ss 45AF(1) and 45AG(1) was a fine not exceeding the greater of: $10,000,000; or, if the court can determine the total value of the benefits that were obtained by one or more persons and that are reasonably attributable to the commission of the offence, three times that total value; or, 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: ss 45AF(3) and 45AG(3) of the Competition and Consumer Act.

50 The Prosecutor and Bingo agreed that it was not possible to determine the total value of the benefits obtained by Bingo that were reasonably attributable to the commission of the offences. The Prosecutor and Bingo also agreed that Bingo’s annual turnover during the 12-month period ending on the date the offences were committed was $402 million. It follows that the maximum penalty for each of the offences committed by Bingo is $40,200,000.

51 A person who is not a body corporate and who, by virtue of having aided, abetted, counselled, or procured a person to commit a cartel offence provision, is taken to have contravened that provision, is punishable by a term of imprisonment not exceeding 10 years or a fine not exceeding 2,000 penalty units, or both: s 79(1) of the Competition and Consumer Act. A penalty unit at the time Mr Tartak aided and abetted Bingo’s commission of the two cartel offences was $210. It follows that the maximum penalty in respect of each of the offences committed by Mr Tartak is 10 years imprisonment, or a fine of $420,000, or both.

# ADDITIONAL EVIDENCE ADDUCED BY THE PROSECUTOR

52 The Prosecutor relied on affidavit evidence from an Australian Competition and Consumer Commission (**ACCC**) investigator, Mr Blake **Donald**. That evidence was primarily adduced in respect of the case against Bingo and mainly concerned the extent to which Bingo had cooperated with the ACCC’s investigation into their offending conduct.

53 Mr Donald’s evidence, in summary, was that on 4 December 2019 he executed a search warrant at Bingo’s business premises in Auburn. That search warrant had been issued to Mr Donald pursuant to s 154X of the Competition and Consumer Act. The ACCC subsequently issued and served on Bingo a series of notices under s 155 of the Competition and Consumer Act. Those notices, which were dated 6 November 2020, 26 February 2021, 30 March 2021, and 28 April 2021, required Bingo to furnish specified information and produce specified documents relevant to the ACCC’s investigation. Bingo complied with those notices. On 11 December 2020, the ACCC sent letters to the legal advisers who were acting for Bingo and Mr Tartak. Those letters outlined the ACCC’s allegations concerning cartel conduct by Bingo and Mr Tartak. Mr Tartak was invited to cooperate by attending an interview.

54 The Prosecutor also separately tendered, in its case against Mr Tartak, a letter signed by Mr Donald which concerned the assistance that Mr Tartak had provided to the ACCC in its investigation. The letter was tendered in a manner which suggested that its contents were confidential, though the nature and quality of Mr Tartak’s assistance was referred to openly in the parties’ submissions. Mr Tartak’s assistance and cooperation is a topic which is addressed separately, and in more detail, later in these reasons.

# EVIDENCE ADDUCED BY THE ACCUSED

55 Both Bingo and Mr Tartak adduced evidence in support of their plea in mitigation.

## Evidence adduced by Bingo

56 Bingo adduced affidavit evidence from Mr Christopher **Jeffrey**, who was appointed chief executive officer of Bingo in September 2021. Mr Jeffrey apologised unreservedly on behalf of Bingo for the conduct which resulted in its conviction and its failure to comply with competition law. His evidence was that that conduct does not reflect Bingo’s values. Mr Jeffrey stated that, in his position as chief executive officer, he reinforced what he referred to as Bingo’s “Zero Harm” focus, a key pillar of which was compliance with the law. According to Mr Jeffrey, Bingo recognises that the conduct which resulted in its conviction was unacceptable and should not have occurred.

57 Perhaps more significantly, Mr Jeffrey’s evidence was that Bingo, with the full support of its board of directors, had taken active steps to ensure that the offending conduct does not occur again. Those steps included: allocating additional resources to support compliance with competition law; retaining external legal advisers to identify and implement necessary improvements to Bingo’s competition compliance processes; establishing and implementing processes and procedures which govern the way in which Bingo and its personnel engage with Bingo’s competitors; implementing processes to monitor dealings with competitors; directing that Bingo’s employees not use WhatsApp or other messaging formats for business communications; the rolling-out of a comprehensive competition compliance training to all Bingo sales and executive team members in New South Wales and Victoria; the appointment of a new risk and compliance manager who reports to the general counsel; and the implementation of annual quality assurance reviews during which each sales team member is required to confirm their compliance with internal processes and policies, including those concerning competition law.

58 Mr Jeffrey also stated that the composition of Bingo’s board of directors had changed in August 2021. A new independent chair was appointed along with three new directors. Mr Tartak stepped down from his role as chief executive officer of Bingo in September 2021 and he stepped down from the boards of all “Bingo entities” in May 2022. The Bingo board initially resolved to ‘freeze’ certain financial incentives that were otherwise payable to Mr Tartak pending the ACCC investigation. Those financial incentives, which exceeded $4 million, were ultimately not paid to Mr Tartak. Finally, Mr Jeffrey noted that, apart from the matters the subject of this proceeding, Bingo has not been the subject of any proceedings alleging a contravention of the Competition and Consumer Act.

59 Bingo also adduced affidavit evidence from Mr Stephen **Schmidhofer**, who has held the position of general counsel and company secretary of Bingo since January 2019. In early 2020, shortly after the search warrant was executed at Bingo’s premises, Mr Schmidhofer was responsible for engaging external advisers and considering what improvements could be made to Bingo’s compliance program. Mr Schmidhofer candidly conceded that competition compliance had not been a focus at Bingo until after the commencement of the ACCC investigation. The primary focus of the compliance program up until then had been occupational health and safety and environmental compliance.

60 In June 2020, Mr Schmidhofer was involved, with the assistance of external advisers, in the presentation of competition compliance training for Bingo employees. The training focused on the management of interactions between Bingo’s sales staff and Bingo’s competitors, particularly in circumstances where the competitors were also customers. Mr Schmidhofer’s evidence was that Bingo has since “rolled-out” comprehensive competition compliance training to Bingo staff and executive team members in New South Wales, Victoria and Queensland. Mr Schmidhofer also noted that an internal risk and audit manager had been appointed in January 2020. The “key focus” of that role was said to be “to embed a risk and compliance focus across the business and further develop effective controls to manage key risks”.

61 Mr Jeffrey and Mr Schmidhofer were not cross-examined, and their evidence was not otherwise the subject of any substantive challenge or criticism.

## Evidence adduced by Mr Tartak

62 Mr Tartak tendered eleven letters or references from various people that attested to his good character. Those letters included letters from his spouse, former and current leaders of his former school and the school currently attended by three of his sons, leaders from his church community, business colleagues and associates, and officers of charitable organisations which he has assisted and supported. All the authors of the letters and reports were aware of the offences committed by Mr Tartak.

63 It is possible to shortly summarise those letters and references because they essentially speak with one voice. That is not to downplay their impressive nature and significance.

64 There could be no doubt that, putting to one side the offences currently under consideration, Mr Tartak is a man of good character with many laudable qualities. He is well-respected by those who know him well. He has been married for over a decade and has five children: four sons and a daughter. He is a devoted, supportive, and loving husband and father. One of his children has a medical condition which has undoubtedly given rise to additional parental responsibilities and pressures.

65 He is a distinguished alumnus of the well-regarded school he attended. He maintains a close contact with that school. He excelled at school and was vice-captain in his senior year. The current headmaster of the school spoke of Mr Tartak’s ongoing support for the school and its philanthropic endeavours.

66 He is a valued member of his church community. His parish priest always found him to be a “dedicated, responsible, honest, and reliable person with good morals and spiritual character”. He has served on parish committees, has volunteered his time, and has donated to charities associated with the church.

67 Mr Tartak’s business colleagues and associates respected and admired his work-ethic, motivation, commitment, and diligence. They spoke of the pressure and anxiety he suffered upon his appointment as a relatively young and inexperienced chief executive officer of a public company. They also spoke of Mr Tartak’s philanthropic and charitable endeavours.

68 Leaders of a wide range of charities that Mr Tartak has assisted and supported over the years referred to his outstanding contribution to those charities.

69 A consistent theme of the letters and references is that Mr Tartak’s offending conduct was out of character and came as a considerable surprise to those who knew him. Each of the authors also referred to Mr Tartak’s feelings of shame, regret and remorse in having committed the offences. As his wife put it:

It is hard to overstate [Mr Tartak’s] feeling of great shame at having fallen from the position for which he was so admired and respected by our family and friends. He reproaches himself constantly and feels great regret for his actions and the effect it has had on both the family he loves so much and everyone else affected by them.

70 The evidence concerning Mr Tartak’s sense of shame and remorse was supported by the opinion evidence of a psychologist who Mr Tartak consulted following his conviction. In his report, which was tendered without objection, the psychologist also expressed the opinion, based on his forensic interview and clinical assessment of Mr Tartak, that in the period leading up to and during the commission of the offences, Mr Tartak was suffering from an “Adjustment Disorder with Anxiety … secondary to high-level work and major family stressors”. Mr Tartak’s stressors at the time included: a higher-than-normal level of work demands; escalating concern for the well-being of his wife and children; the special needs of his son who was born with a medical condition; the deteriorating health and ultimate passing of his sister-in-law; and fatigue and sleep deprivation. According to the psychologist, the “accumulation and enmeshing of the major stressors over a protracted period led to the development” of the adjustment disorder. The psychologist was not cross-examined, and his evidence was not otherwise disputed.

# COOPERATION AND GUILTY PLEAS

71 Bingo and Mr Tartak first became aware of the ACCC’s investigation into their cartel conduct when the search warrant was executed at Bingo’s business premises on 4 December 2019. On 11 December 2020, the ACCC wrote to Mr Tartak, through his legal representatives, and invited him to participate in an interview. That invitation was declined in March 2021, however Mr Tartak’s legal representatives invited further dialogue with the ACCC concerning the ACCC’s investigation.

72 Between June 2021 and August 2021, the ACCC, legal representatives for Bingo, and legal representatives for Mr Tartak, had several discussions about the ACCC’s investigation, including the charges to which Bingo and Mr Tartak may be willing to plead guilty, and the form of any cooperation that Bingo and Mr Tartak may be able to provide the ACCC. Mr Tartak was still chief executive officer of Bingo at that time. Mr Tartak indicated that he could potentially encourage the Aussie Companies and Mr Roussakis to approach the ACCC and enter negotiations. He also indicated that he could potentially provide an induced statement to the ACCC.

73 In July 2021, the ACCC was told that Mr Tartak’s legal advisers had contacted the legal advisers acting for Mr Roussakis and the Aussie Companies. ACCC investigators subsequently contacted and engaged in discussions with those legal advisers. Mr Roussakis, Aussie Skips and Aussie Recycling were eventually charged with cartel provision offences in late 2022. They entered pleas of guilty to the charges in an amended indictment in early 2023.

74 On 1 September 2021, legal officers in the Prosecutor’s office engaged in separate plea negotiations with the legal representatives of Bingo and Mr Tartak.

75 On 15 September 2021, Mr Tartak stepped down as chief executive officer of Bingo. He resigned as a director of Bingo and related companies effective from 9 June 2022.

76 The plea negotiations between the Prosecutor’s office and the separate legal representatives of Bingo and Mr Tartak continued until 16 August 2022, when the parties each signed an agreed statement of facts and the Prosecutor filed indictments in this Court. There were no committal proceedings.

77 Bingo entered pleas of guilty to the charges in the indictment referrable to him on 16 August 2022.

78 Mr Tartak entered pleas of guilty to the charges in the indictment referrable to him on 20 October 2022.

79 Mr Tartak also participated in interviews with the ACCC on 7 and 9 November 2022. He signed an induced statement on 11 November 2022. On 6 February 2023, he signed an undertaking pursuant to s 16AC of the Crimes Act.

80 As noted earlier, the Prosecutor tendered a letter signed by an ACCC investigator, Mr Donald, which referred to and assessed the substance and quality of the cooperation and assistance provided to the ACCC by Mr Tartak. According to Mr Donald, the main elements of the assistance provided by Mr Tartak were his participation in an interview with the ACCC, his provision of an induced statement, and the steps he took to encourage the Aussie Companies and Mr Roussakis to engage in discussions or negotiations with the ACCC.

81 In relation to the interview and induced statement, Mr Donald noted that the ACCC investigators had no reason to doubt that Mr Tartak had been “full and frank in his disclosures”, and that Mr Tartak had provided some “material information regarding the offending conduct which was not previously known to the ACCC”. The information provided by Mr Tartak otherwise corroborated evidence already known to and held by the ACCC. Mr Donald stated, however, that Mr Tartak’s evidence had not been used in any current ACCC investigation and was unlikely to be used in any future investigation.

82 Ultimately, Mr Donald assessed the value of the assistance provided by Mr Tartak as being of “medium value”.

# RELEVANT SENTENCING PROVISIONS AND PRINCIPLES

83 The statutory provisions pursuant to which Bingo and Mr Tartak are to be sentenced are primarily found in Pt IB of the Crimes Act.

84 The overarching principle in Pt IB 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.

## Matters which the Court must take into account

85 Section 16A(2) of the Crimes Act details the matters that the Court must take into account so far as they are relevant and known to the Court. Those matters relevantly include: the nature and the circumstances of the offence; other offences (if any) that are required or permitted to be taken into account; if the offence forms part of a course of conduct, that course of conduct; the personal circumstances of any victim of the offence; any injury, loss or damage resulting 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 or other offences; the deterrent effect of any sentence on the offender or any other person; the need to ensure that the offender is adequately punished for the offence; the character and antecedents of the offender; and the prospect of rehabilitation of the offender.

86 The Court must identify and ascribe weight to the relevant factors and make a value judgment as to what is the appropriate sentence given those factors; a process sometimes referred to as “instinctive synthesis”: ***Markarian*** *v The Queen* (2005) 228 CLR 357; [2005] HCA 25 at [51].

87 The factors that are of relevance in sentencing Bingo and Mr Tartak are specifically identified and considered later in these reasons.

88 The “checklist” of matters detailed in s 16A(2) does not exclude other relevant considerations, including common law sentencing principles: *Director of Public Prosecutions (Cth) v El Karhani* (1990) 97 ALR 373; 21 NSWLR 370 at 377-378; *Bui v Director of Public Prosecutions (Cth)* (2012) 244 CLR 638; [2012] HCA 1 at [18]; *Johnson v The Queen* (2004) 218 CLR 451; [2004] HCA 15 at [15]. Sentencing principles such as totality and proportionality are important considerations in fixing a sentence of a severity appropriate in all the circumstances: ***Hili v The Queen*** (2010) 242 CLR 520; [2010] HCA 45 at [25]; *Wong v The Queen* (2001) 207 CLR 584; [2001] HCA 64 at [78].

## Maximum penalties

89 The maximum penalty for an offence is often viewed as a “yardstick” that bears on the ultimate discretionary determination of the sentence for the offence: ***Elias*** *v The Queen* (2013) 248 CLR 483; [2013] HCA 31 at [27]. It can also be taken to represent the legislature’s assessment of the seriousness of the offence: *Muldrock v The Queen* (2011) 244 CLR 120; [2011] HCA 39 at [31]. The maximum penalty, however, is only one of many factors that should be taken into account when determining the appropriate sentence. In some cases, and in some circumstances, it may provide little to no assistance: *Markarian* at [65]; *R v Geddes* (1936) 36 SR (NSW) 554 at 555-556. As the High Court has observed, “[i]t is 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].

90 The maximum penalty for an offence against ss 45AF and 45AG of the Competition and Consumer Act is not a single specified sum or formula. The provision instead provides for alternative maximum penalties.

91 As discussed earlier, the maximum penalty in Bingo’s case is based on its annual turnover, as defined in s 45AB of the Competition and Consumer Act. That is because, as was agreed by the parties, it was not possible to determine the total value of the benefits obtained by one or more persons that were reasonably attributable to the commission of the offence, and 10% of Bingo’s agreed annual turnover was greater than the sum of $10,000,000: see ss 45AF(3) and 45AG(3) of the Competition and Consumer Act.

92 The relevance of this basis of assessment of the maximum penalty was explained in *Commonwealth Director of Public Prosecutions v Kawasaki Kisen Kaisha Ltd* (2019) 137 ACSR 575; [2019] FCA 1170 (***CDPP v K-Line***) at [274] as follows (see also *Commonwealth Director of Public Prosecutions v Nippon Yusen Kabushiki Kaisha* (2017) 254 FCR 235; [2017] FCA 876 (***CDPP v NYK***) at [211]):

One can readily comprehend why the legislature chose to include a maximum penalty for cartel offences which may be based on the offending corporation’s annual turnover. Specific deterrence is a major consideration in determining the appropriate size of the fine to impose in relation to a cartel offence. The fine should be such as to ensure that the penalty is not to be regarded by the offender or others as an acceptable cost of doing business. The sum required to achieve that objective will generally be larger where the offending corporation is a very large corporation, as may be reflected in its annual turnover. That said, in some cases a maximum penalty based on the offending corporation’s annual turnover may not provide a realistic guide to the objective seriousness of the offending conduct or criminality involved in the offence. It is, for example, possible to imagine a case where a large corporation with a very high annual turnover committed a single relatively minor offence against s 44ZZRG [now s 45AG] of the [Competition and Consumer Act].

93 As indicated earlier, in Mr Tartak’s case, the maximum penalty is imprisonment not exceeding 10 years, or a fine not exceeding $420,000, or both.

# THE SENTENCE TO BE IMPOSED ON BINGO

94 As discussed earlier, the appropriate course to adopt in determining the appropriate sentence to impose on Bingo is to identify and ascribe weight to the relevant factors, including, but not necessarily limited to, those referred to in s 16A(2) of the Crimes Act. Those factors may conveniently be categorised as those that are relevant to the objective seriousness of the offences and the offending conduct and those that concern the subjective or personal circumstances of the offender in question.

## Issues raised by the competing submissions

95 The main issues that divided the parties in respect of the appropriate sentence for Bingo concerned the seriousness of the offences and the nature and extent of Bingo’s cooperation with the authorities. Bingo submitted that, while the offences it committed were serious, they were nevertheless towards the “lower to mid-range” end of the scale having regard to the limited nature, duration and scope of the arrangements. Bingo also emphasised that it was not possible to identify any real benefit derived from the offences, or any harm to consumers caused by the offences. Bingo also took issue with the Prosecutor’s characterisation of the conduct in question as systematic.

## The objective seriousness of the offences in question

96 The factors that are generally relevant to assessing the seriousness of the offences include: the nature and circumstances of the offence; the duration and scale of the offences; the extent to which the offences were deliberate, systematic and covert; the nature and extent of any benefits obtained as a result of the offence; any loss or damage caused by the offence; and whether the offences formed part of a course of conduct.

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

97 Section 16A(2)(a) provides that the Court must take into account “the nature and circumstances of the offence”.

98 Cartel conduct generally involves anti-competitive conduct of a very serious nature that should be emphatically condemned and deterred by the imposition of appropriately stern penalties. Such conduct is “extremely destructive of the competition on which the prosperity of a free market economy depends”: *Australian Competition and Consumer Commission v* ***Visy*** *Industries Holdings Pty Limited (No 3)* (2007) 244 ALR 673; [2007] FCA 1617 at [306]. It can “never really be considered as anything other than serious”: *Australian Competition and Consumer Commission v* ***ABB*** *Transmission and Distribution Limited (No 2)* (2002) 190 ALR 169; [2002] FCA 559 at [13]. While *Visy* and *ABB* were both civil penalty cases, the observations concerning the seriousness of cartel conduct apply equally to cartel offences.

99 Prior to 2009, cartel conduct attracted only civil penalties. The fact that cartel conduct was criminalised in 2009 no doubt reflects the fact that Parliament regarded it as sufficiently serious to attract “opprobrium and societal condemnation in a way that the imposition of a civil penalty cannot”: *CDPP v NYK* at [215]-[216]; see also [1], where the Minister’s Second Reading Speech in respect of the Bill that criminalised cartel conduct is reproduced; see also *CDPP v K-Line* at [275], [278].

100 The objective seriousness of cartel offences is reflected in the substantial maximum penalties. It is, however, undoubtedly necessary to have regard to the specific facts and circumstances of the offences committed by the offender in question.

101 As has already been noted, the factors or considerations which are generally considered to be relevant in assessing the objective seriousness of cartel offences include: the duration and scale of the offending conduct; the extent to which the conduct was deliberate, systematic and covert; the seniority of the officers or employees involved in the offences; the existence or otherwise of any corporate culture of compliance; the profit or benefit attributable to the conduct; and any loss or damage arising from the conduct: see *CDPP v NYK* at [219]-[220]; *CDPP v K-Line* at [279]-[281]; *Commonwealth Director of Public Prosecutions v Wallenius Wilhelmsen Ocean AS* (2021) 386 ALR 98; [2021] FCA 52 (***CDPP v WWO***) at [174]-[175].

### The duration and scale of the offending conduct

102 The duration of the offending conduct was a little over three months. Bingo made the arrangements with the Aussie Companies between 20 and 24 May 2019 and gave effect to the cartel provisions from about 24 May to about 31 August 2019. The arrangements were effectively abandoned by 1 September 2019. The cartel arrangements did not cease because the participants recognised that what they had been doing was wrong or for any altruistic reasons. Rather, the arrangements were abandoned for reasons of commercial self-interest and because one or other of participants began to independently depart from the arrangements, or at least perceived that the other participant was cheating on the arrangements.

103 It may be accepted that the duration of the cartel arrangements in question was not as long as the cartel arrangements in most of the other reported cartel offence cases, including the cases concerning the shipping cartel: *CDPP v NYK*; *CDPP v K-Line*, and *CDPP v WWO*. The duration of the arrangements nevertheless could not really be said to be insubstantial or “very short” as Bingo submitted. I also do not consider that there is much to be gained from comparing the circumstances of this case with other cartel cases.

104 Bingo also placed some reliance on the fact that the scope of the cartel arrangements was limited to Sydney, or in the case of the arrangement concerning processing services, that part of Sydney near Strathfield South, and involved only two participants in the relevant waste management services markets in that region. It may be accepted that the nature and scope of the cartel arrangements were limited in that respect, however the market for waste management services in Sydney was nevertheless substantial and lucrative, a fact revealed by the revenue earned by Bingo ($134 million) and Aussie Skips ($26 million) in respect of collections services in Sydney in the 12-month period preceding August 2018. While the arrangements in question were only between two participants, those two participants were effectively the largest two participants in the market for collections services and one of those participants, Bingo, had by far the largest market share or capacity in both the market for collections services (about 22-24% market share) and the market for processing services (about 21% of the market capacity).

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

105 Cartels, by their very nature, generally involve deliberate conduct and require a significant degree of planning and deliberation. They are also likely to be covert and involve conduct which is engaged in such a way as to avoid detection by regulatory authorities: *CDPP v NYK* at [239]; *CDPP v K-Line* at [298].

106 There could be little doubt that Bingo’s conduct, through Mr Tartak, was deliberate. It may be inferred from the nature and content of Mr Tartak’s communications with Mr Roussakis that Mr Tartak knew what he was doing and well-knew that it was wrong. There likewise could be little doubt that the conduct which gave rise to the cartel arrangements, and the way in which those arrangements were implemented, was covert. The meetings that Mr Tartak had with Mr Roussakis did not occur on either of their business premises and most of their communications took place over WhatsApp, which, as noted earlier, is an encrypted messaging application the records of which cannot be readily accessed by persons other than those who participate in the communications. The arrangements were not otherwise recorded or documented. Knowledge of the arrangements was also confined to a very small number of people, no doubt deliberately so.

107 It is, however, difficult to see how the arrangements could fairly or accurately be characterised as systematic, as contended by the Prosecutor. The arrangements were made, and the cartel provisions were given effect to, essentially through a few meetings between Mr Tartak and Mr Roussakis and a series of WhatsApp messages. The meetings and communications were somewhat ad-hoc and somewhat unsophisticated. No sophisticated, organised or methodical systems were put in place to monitor the arrangements. That perhaps also goes some way towards explaining how and why the arrangements ultimately broke down.

### Seniority of the offending officer(s) and corporate culture

108 This was not a case where the cartel arrangements were made and given effect to by lower-level management. The arrangements were made between the chief executive officers of Bingo and the Aussie Companies respectively. That is particularly significant in Bingo’s case as it was a public company at the time the offences were committed. There is, however, no suggestion that any members of Bingo’s board of directors were aware of the arrangements, let alone authorised or sanctioned them.

109 It is also readily apparent that at the time the offences were committed, Bingo did not have any compliance programs which specifically addressed competition issues and concerns. Nor is there any evidence to suggest that there was any corporate culture at Bingo concerning compliance with competition law. Indeed, the fact that Bingo’s chief executive officer engaged in the offending conduct would tend to confirm that that there was no culture of compliance at Bingo, at least in respect of competition issues and concerns.

### Benefits obtained as a result of the conduct

110 In assessing the seriousness of a cartel offence, it is relevant to have regard to any benefits that the offender obtained as a result of the offence. That is no doubt why one of the methods by which the maximum penalty may be calculated involves the determination of the financial benefits that were obtained as a result of the offence. Experience shows, however, that it is frequently very difficult to calculate or quantify, in monetary terms, the benefits obtained that may be said to be reasonably attributable to the commission of the offence.

111 This is such a case. The parties agree that it is not possible to determine the monetary value of any benefits obtained by Bingo that are reasonably attributable to the offence. It does not follow, however, that Bingo did not derive any benefits from the offences it committed. Nor does it follow that the offences committed by either Bingo or Mr Tartak cannot be said to be serious: *CDPP v WWO* at [223]; *Commonwealth Director of Public Prosecutions v Alkaloids of Australia Pty Ltd* [2022] FCA 1424 at [89] (***CDPP v Alkaloids***). The benefits that a corporation may derive from a cartel are not limited to quantifiable financial benefits, but include more intangible, but nonetheless extremely valuable, benefits: *CDPP v NYK* at [247]; *CDPP v K-Line* at [307]; *CDPP v Alkaloids* at [89]-[91].

112 It can be inferred from the facts of this case that Bingo benefitted from the cartel arrangements, albeit in a way that cannot be precisely quantified. First, Bingo increased its prices. It is true, as Bingo submitted, that Bingo had already effectively determined that it was going to increase its prices in the face of the reintroduction of the waste levy by the Queensland government. It would appear, however, that Bingo’s price increases were higher than the amount that was required to directly offset its additional costs arising from the levy and other regulatory changes that occurred at the time. It is also clear that Bingo only communicated its price increases to its customers after Mr Tartak had met with Mr Roussakis at 2.30pm on 20 May 2019. While other cost and commercial considerations may well have fed into Bingo’s pricing decisions at the time, it is difficult to accept that the price increases that Bingo ultimately conveyed to its customers were not materially influenced by the cartel arrangements.

113 More significantly, it can readily be inferred that the main point of the cartel arrangements that Bingo made with the Aussie Companies was to avoid the loss of customers which might otherwise have occurred if Bingo unilaterally increased its prices. It may readily be inferred that Mr Tartak and Mr Roussakis believed that if Bingo and the Aussie Companies coordinated their price increases, it was less likely that they would lose customers, not only to each other, but to other suppliers. As Mr Roussakis put it in one of his communications with Mr Tartak: “[w]e need to be on the same page if this is going to work”. Mr Tartak agreed.

114 While of course there were other service providers, the available inference is that Mr Tartak believed that if both Bingo and the Aussie Companies increased their prices, or maintained their increased prices, as they had agreed, the other smaller service providers would soon follow. There was a sound basis for that belief. There was at the very least a real chance that the prices charged by the two largest providers of collections services in the region would have an impact on how other competitors decided to set their prices.

115 It may accordingly be inferred that, while it is not possible to quantify the benefit derived by Bingo from its offending conduct, Bingo nevertheless derived benefits because it was able to increase its prices without losing the customers it might otherwise have lost if it had unilaterally increased its prices. That was the very point of the arrangements. It may readily be inferred that Bingo would not have continued to give effect to the arrangements for over three months if it was not deriving, or did not believe it were deriving, any benefit from them.

### Injury, loss or damage resulting from the offence – s 16A(2)(e) of the Crimes Act

116 Section 16A(2)(e) provides that the Court must take into account “any injury, loss or damage resulting from the offence”.

117 It is common ground that it is not possible to calculate or quantify any loss that may have been suffered by anyone as a direct result of the offences committed by Bingo and Mr Tartak. It does not follow, however, that Bingo and Mr Tartak should be sentenced on the basis that their offending caused no injury, loss or damage.

118 As has already been noted, Bingo notified its customers that it was increasing its prices at about the time it made the cartel arrangements. The Aussie Companies also increased their prices following the making of the cartel arrangements. There was also a real risk that the increased prices charged by Bingo and the Aussie Companies would have an impact on the prices that other suppliers charged their customers.

119 There was also no dispute that one of the impacts of the cartel arrangements was that there was a real chance that some consumers of collections services in Sydney paid more for those services than they otherwise would have, and that some consumers of processing services at Bingo’s processing facilities at Greenacre, Revesby and Auburn, and Aussie Recycling’s processing facility at South Strathfield, paid more than they otherwise would have for processing services. It is, however, not possible to identify any specific customers who in fact paid more for the relevant services, and not possible to quantify the price increases that can be reasonably attributed to the cartel arrangements.

120 The fact that it is not possible to identify or quantify any direct detrimental price effect on Bingo’s customers arising from the cartel arrangements does not significantly detract from the seriousness of the offending conduct. Nor does it follow that the cartel arrangements in question had a “limited impact” as Bingo submitted. The fact remains that the impact of the cartel arrangements was that price competition in the not insubstantial market for collections services in Sydney was reduced and distorted for a not insubstantial period, as was price competition in the market for processing services in part of that region. It may readily be inferred that the reduction of price competition would have had an adverse impact on at least some consumers of those services in those regions.

121 In relation to loss or damage to the relevant markets and the economic system generally, as was said in *CDPP v WWO* (at [242]): “[c]artel conduct, like other anti-competitive behaviour, is inimical to, destructive of and may lead to a loss of public confidence in, Australia’s markets and economic system”. The cartel arrangements in question in this matter undoubtedly suppressed and distorted price competition in the important markets for waste collections and processing services in Sydney.

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

122 Section 16A(2)(c) provides that “if the offence forms part of a course of conduct, consisting of a series of criminal acts of the same or similar character – that course of conduct” must be taken into account.

123 The offences committed by Bingo could be said to form part of a course of conduct consisting of a series of criminal acts of a similar nature.

124 Both offences committed by Bingo could fairly be characterised as being “rolled-up” offences. A rolled-up charge or offence is generally one where, while only one offence is charged, the particulars involve multiple acts each of which is capable of constituting a separate and discrete offence: see *CDPP v K-Line* at [269]. The offences committed by Bingo are rolled-up offences because the particulars to each of the offences refer to two separate arrangements each of which contained a cartel provision. One of those arrangements was the arrangement between Bingo and Aussie Skips which contained a cartel provision concerning their prices for collections services. The other arrangement was the arrangement between Bingo and Aussie Recycling which contained a cartel provision concerning their prices in respect of processing services. Each of those arrangements could have been the subject of a separate charge.

125 The correct approach to take when imposing a sentence for a rolled-up offence was outlined as follows in *CDPP v K-Line* at [270]:

In sentencing a rolled-up charge, the Court is required to assess the criminality of an offender’s conduct as particularised. The issue for the Court on sentence is the criminality disclosed by the offence, not the number of charges: *R v Knight* [2004] NSWCCA 145 at [25]-[26]. The more contraventions or episodes of criminality that form part of the rolled-up charge, the more objectively serious the offence is likely to be: ***R v Richard*** [2011] NSWSC 866 at [65(f)]; *R v Glynatsis* [2013] NSWCCA 131; 230 A Crim R 99 at [66]; *R v De Leeuw* [2015] NSWCCA 183 at [116]. That said, the maximum penalty for the rolled-up charge is the maximum penalty for one offence, not the aggregate of the penalties for what could have been charged as separate offences: *R v Richard* at [105]; *R v Donald* [2013] NSWCCA 238 at [85].

126 In Bingo’s case, while each of the offences in fact involves two “criminal acts” of a similar character, because they involved two separate arrangements, those criminal acts formed part of a single course of conduct. In relation to the offence under s 45AF(1) of the Competition and Consumer Act, both arrangements were made in the course of the meetings and WhatsApp messages between Mr Tartak and Mr Roussakis between 20 and 24 May 2019. Those meetings and communications effectively constituted a single course of conduct. Mr Tartak and Mr Roussakis did not have separate meetings and communications in respect of the two arrangements. Likewise, both arrangements were given effect to in the course of meetings and WhatsApp communications between Mr Tartak (and in some instances AB) and Mr Roussakis between 24 May and 8 August 2019. While there were multiple meetings and communications, the conduct involved in giving effect to the two arrangements was effectively part of a single course of conduct.

127 It follows that, while it is appropriate to approach both offences on the basis that they are more objectively serious because they involve two contraventions and could have been charged as separate offences, that is not a particularly significant or weighty consideration. That is because the two contraventions involved in each offence in any event arose out of a single course of conduct.

### Overall assessment of the seriousness of the offences

128 There could be little doubt that the offences committed by Bingo were very serious offences which warrant a condign sentence.

129 The offences involved conduct which resulted in the stifling and distortion of price competition in the substantial and relatively lucrative markets for waste collections services and processing services in Sydney or a significant part thereof. The anti-competitive behaviour persisted for a period of just over three months and only ceased because commercial pressures ultimately caused the participants to cheat on the arrangements. The offending conduct was deliberate, covert and was carried out by Bingo’s most senior executive officer in circumstances where there was little or no corporate culture of compliance in respect of competition law. Bingo was the instigator of the cartel arrangements and the largest provider of collections services and processing services in the relevant markets.

130 While it is not possible to calculate or quantify any benefits obtained by Bingo as a result of its anti-competitive conduct, it may nevertheless be inferred that Bingo materially benefited from the arrangements. It was able to avoid some competitive price pressures that it would otherwise have faced because of its price increases. Likewise, while it is not possible to precisely identify the damage and loss wrought by the offending conduct, it may nevertheless be inferred that a not insignificant proportion of the consumers of the relevant services in the markets in question were likely to, and did, pay more for collections services and processing services while the arrangements persisted.

131 Bingo submitted that, having regard to all the circumstances, Bingo’s offending conduct was “within the low to mid-range of serious”. I do not consider it to be particularly fruitful to endeavour to position the offending conduct of any cartel offender on some hypothetical spectrum or scale of seriousness. The complex and multi-faceted nature of cartel conduct means that it is difficult to conceptualise where a spectrum or scale of seriousness may begin or end, or where any given case might be positioned on it. Were it necessary or fruitful to do so, however, I would probably position the seriousness of Bingo’s offending conduct somewhere within the mid-range of seriousness.

132 Similarly, I do not consider it to be particularly useful to compare and contrast Bingo’s offending conduct with the offending conduct in other cartel offence cases which have found their way to this Court. Bingo’s offending conduct was in some respects less serious than the offending conduct in the shipping cartel cases (*CDPP v NYK*; *CDPP v K-Line* and *CDPP v WWO*). In some respects, however, it could perhaps be said that the offences were more serious, for instance because they involved conduct of the chief executive officer, not lower-level management. Each case must be considered having regard to its own unique facts and circumstances.

## Bingo’s subjective circumstances

133 At the time it committed the offences, Bingo was a large and successful public company. In its 2019 Annual Report, Bingo described itself (and its controlled entities) as being a “leading recycling and waste management company” operating across New South Wales and Victoria in both the building and demolition and commercial and industrial “waste streams” with “capabilities across waste collection, processing and recovery, disposal and bin manufacturing”. As at 30 June 2019, it had net assets of $826,450,000. Its total revenue and income for the year ending 30 June 2019 was $402,158,000 and its profit was $22,265,000.

134 Bingo converted from a public company to a proprietary limited company on 28 July 2022.

### Contrition and remorse – s 16A(2)(f) of the Crimes Act

135 Section 16A(2)(f) of the Crimes Act provides that a relevant matter that must be taken into account by the Court is “the degree to which the [offender] has shown contrition for the offence” by either “taking any action to make reparation for any injury, loss or damage resulting from the offence” or “in any other manner”.

136 There is no suggestion that Bingo has taken any action to make reparation for any injury, loss or damage resulting from its offences. It may, however, be accepted that it would have been difficult, if not impossible, for Bingo to have taken any such action given that it is not possible to calculate or quantify any loss or damage resulting from the offences. Nor is it possible to identify any specific person who suffered any such loss or damage.

137 Bingo has, however, through its chief executive officer, Mr Jeffrey, unreservedly apologised for its offending conduct and acknowledged that its conduct was unacceptable and should not have occurred. Mr Jeffrey was not cross-examined and there is no reason to doubt the genuineness and sincerity of the apology he proffered.

138 Bingo’s early guilty pleas are also evidence of its contrition. The Prosecutor accepted that Bingo’s pleas of guilty could not be said to be a “recognition of the inevitable”: cf ***Tyler*** *v The Queen* (2007) 173 A Crim R 458; [2007] NSWCCA 247 at [114]. The Prosecutor nevertheless submitted that “the extent to which the guilty plea itself should be understood to reflect genuine contrition is somewhat diminished” by what was said to be a “strong” prosecution case. There is, however, little merit in that submission. It is difficult to assess the strength of the prosecution case on the basis of an agreed statement of facts that was itself the product of the plea negotiations. In any event, even if it could be said that there was a strong prosecution case, there is nothing to suggest that Bingo’s guilty plea was not, at least in part, a reflection of Bingo’s genuine contrition.

139 Bingo should, in all the circumstances, be sentenced on the basis that it is genuinely contrite in respect of its offending conduct.

### Guilty plea – s 16A(2)(g) of the Crimes Act

140 Section 16A(2)(g) provides that where an offender has pleaded guilty, the Court must have regard to that fact.

141 Factors relevant to the weight that should be given to a guilty plea and the discount that should be given for the guilty plea include: the timing of the guilty plea and whether it was entered at the earliest reasonable opportunity (see *Cameron v The Queen* (2002) 209 CLR 339; [2002] HCA 6 at [22]); whether the plea was motivated by contrition or a genuine willingness to facilitate the course of justice, as opposed to being a recognition of the inevitable in the face of a strong prosecution case (see *Tyler* at [114]); and the extent of any “utilitarian value” in the plea of guilty: ***Xiao*** *v The Queen* (2018) 329 FLR 1; [2018] NSWCCA 4; see also *CDPP v WWO* at [250]. It is generally considered desirable to quantify the sentence discount for a plea of guilty (*Markarian* at [24]), though there is no obligation to do so: *Tyler* at [112]; *Xiao* at [280]; *Commonwealth Director of Public Prosecutions v Vina Money Transfer Pty Ltd* (2022) 294 FCR 449; [2022] FCA 665 at [97] (***CDPP v Vina Money Transfer***).

142 Bingo entered a plea of guilty to both offences at the earliest possible stage of the proceeding. The Prosecutor filed an indictment directly in this Court on 16 August 2022 and Bingo entered a plea of guilty on the same day. It may be inferred that there were no committal proceedings because Bingo had already advised the Prosecutor of its intention to plead guilty. For the reasons already given, Bingo’s early pleas of guilty may be taken to be a reflection of its genuine contrition and willingness to facilitate the course of justice. There was also a significant utilitarian value in Bingo’s early pleas of guilty as they avoided the need for any committal proceedings and trial.

143 The appropriate discount for the pleas of guilty is addressed later in these reasons.

### Cooperation - s 16A(2)(h) of the Crimes Act

144 Section 16A(2)(h) provides that “the degree to which the [offender] has cooperated with law enforcement agencies in the investigation of the offence or of other offences” is a matter that the Court must take into account.

145 In assessing the degree to which an offender has provided cooperation to law enforcement agencies, it is relevant to have regard to, inter alia: the effectiveness of the cooperation and its practical value to law enforcement agencies; the extent to which the offender has disclosed everything of relevance and not tailored the disclosure to material already known; the extent to which the cooperation relates to offences which are otherwise difficult to detect and investigate; the extent to which the cooperation disclosed the offender’s guilt in respect of other offences; the motive for the cooperation, including whether it was motivated by genuine contrition rather than self-interest; and whether the offender’s cooperation caused others to cooperate: *CDPP v NYK* at [262]; *CDPP v K-Line* at [330] (and the cases cited therein).

146 Cooperation which is ineffective or is of little practical value must still be taken into account because it is generally evidence of contrition and should be recognised and encouraged in the public interest: *CDPP v K-Line* at [331] (and the cases cited therein).

147 The authorities generally refer to the application of a “discount” to reflect the offender’s cooperation, however there is no obligation to separately identify a discount for cooperation, particularly where the cooperation forms part of a complex set of interrelated considerations including a plea of guilty and contrition: *CDPP v K-Line* at [332]. Often the Court identifies a combined discount for a guilty plea and assistance. There is also no fixed tariff or range, though it is frequently said that the “customary” range is between 20% and 50%: *CDPP v K-Line* at [333].

148 Bingo provided some assistance to the ACCC in its investigation. As discussed earlier, the ACCC’s investigation commenced in 2019. A search warrant was executed at Bingo’s business premises in December 2019 and the ACCC issued notices to produce information and documents in November 2020 and February, March, and April 2021.

149 Bingo’s cooperation commenced in about June 2021 when joint discussions took place between the ACCC’s legal representatives and the legal representatives who were at that point acting for Bingo and Mr Tartak. Those discussions included discussions about the ACCC’s investigation, the charges to which Bingo and Mr Tartak might plead guilty, and any cooperation that Bingo and Mr Tartak might be able to provide. The ACCC was advised that Mr Tartak, who at that time was still chief executive officer of Bingo, could assist by encouraging Mr Roussakis to enter negotiations with the ACCC. Mr Tartak also advised that he may be able to provide an induced statement.

150 In July 2021, the ACCC was told that Mr Tartak’s legal representatives had contacted the legal representatives who acted for Mr Roussakis and the Aussie Companies. The ACCC subsequently contacted those legal representatives. In September 2021, legal officers from the Prosecutor’s office commenced separate plea negotiations with the legal representatives who were acting for Bingo and Mr Tartak. Those plea negotiations apparently continued over the following 11 months, at which point, in August 2022, an agreed statement of facts was signed, the Prosecutor filed indictments and Bingo entered pleas of guilty.

151 Mr Tartak entered pleas of guilty to the indictment that had been filed against him on 20 October 2022. By that point, Mr Tartak was no longer chief executive officer of Bingo, having stepped down from that position in September 2021. In November 2022, Mr Tartak participated in interviews with the ACCC and signed an induced statement.

152 Bingo characterised its cooperation with the ACCC as being “extensive”. The Prosecutor took issue with that submission. The Prosecutor accepted that the actions of Mr Tartak in encouraging Mr Roussakis and the Aussie Companies to enter into negotiations with the ACCC was assistance that could properly be attributed to Bingo because at that time Mr Tartak was still chief executive officer of Bingo. In contrast, Mr Tartak’s actions in participating in an interview with the ACCC and providing an induced statement could not be attributed to Bingo because by that point Mr Tartak was no long chief executive officer of Bingo. The Prosecutor accepted that Bingo, through its legal advisers, had actively engaged in plea negotiations, but submitted that that cooperation was best considered as an element of Bingo’s guilty pleas.

153 It would not, in all the circumstances, be fair or accurate to describe or characterise Bingo’s engagement with the ACCC and the Prosecutor’s office as comprising or constituting “extensive” cooperation with the ACCC’s investigation. It would be more accurate to describe it as constituting a component of the negotiations which ultimately resulted in Bingo pleading guilty. It is also difficult to accept that Mr Tartak’s participation in interviews with the ACCC and his provision of an induced statement could fairly be attributed to Bingo given that, by that point, Mr Tartak was no longer a senior executive officer of Bingo and was separately represented.

154 There is, in those circumstances, considerable merit in the Prosecutor’s submission that Bingo should receive a single discount referable to its cooperation and plea of guilty. There is also considerable merit in the submission that much of what Bingo characterised as constituting cooperation was in reality part and parcel of the process by which it ultimately entered its pleas of guilty.

### Character, antecedents, and prospects of rehabilitation – s 16A(2)(m) and (n) of the Crimes Act

155 Section 16A(2)(m) of the Crimes Act relevantly provides that an offender’s character and “antecedents” are relevant matters that must be taken into account. Antecedents, in that context, refers to the offender’s criminal record, if any. Section 16A(2)(n) also specifies “the prospect of rehabilitation” as being a relevant matter.

156 Bingo has not previously been the subject of any proceedings involving an alleged contravention of the Competition and Consumer Act. It does not follow from that fact alone that Bingo should be sentenced on the basis that it was a good corporate citizen. Prior good character is not usually seen to be a particularly weighty consideration when sentencing for offences, like cartel offences, where general deterrence is a significant consideration: *CDPP v NYK* at [284]; *CDPP v K-Line* at [385]; *CDPP v WWO* at [292]; *CDPP* *v Vina Money Transfer* at [112]; *CDPP v* *Alkaloids* at [189]. Despite that, Bingo must be given some credit for not having any relevant criminal record or any history of having engaged in anti-competitive conduct.

157 It may also be accepted that Bingo’s prospects of rehabilitation are good. As discussed in detail earlier, Bingo is contrite and the evidence of both Mr Jeffrey and Mr Schmidhofer is that in recent times Bingo has taken several positive steps to improve its policies, procedures and training. Among other things: in January 2020 it appointed an internal risk and audit manager; it began providing competition compliance training in June 2020; it appointed a new risk and compliance manager (apparently to replace and enhance the prior position of internal risk and audit manager); and, it terminated AB’s employment in August 2022.

### Financial circumstances – s 16C of the Crimes Act

158 Section 16C(1) of the Crimes Act requires the Court to take into account the financial circumstances of an offender before imposing a fine for a federal offence. Section 16C(2) provides, however, that the inability to determine an offender’s financial circumstances does not prevent the Court from imposing a fine. Nor does the offender’s financial circumstances dictate the fine to be imposed. Capacity to pay is only one of many factors to be considered: *Jahandideh v The Queen* [2014] NSWCCA 178 at [15]-[17]; *CDPP v WWO* at [297]; see also *Darter v Diden* (2006) 94 SASR 505; [2006] SASC 152 at [30].

159 There does not appear to be any issue concerning Bingo’s capacity to pay a fine. Bingo did not adduce any evidence concerning its financial position as at the date of the sentence hearing and did not submit that its financial circumstances were such that it would not have the capacity to pay a substantial fine.

## Deterrence – s 16A(2)(j) and (ja) of the Crimes Act

160 Section 16A(2)(j) of the Crimes Act provides that the Court must have regard to “the deterrent effect that any sentence or order under consideration may have on the [offender]”, and s 16A(2)(ja) provides that the Court must have regard to “the deterrent effect that any sentence or order under consideration may have on other persons”. Those two forms of deterrence are referred to as specific and general deterrence.

161 It is well-accepted that general deterrence is a particularly significant consideration in sentencing for cartel offences. That is so for at least two reasons. The first reason is that cartel conduct is notoriously difficult to detect, investigate, and prosecute. It is well-accepted that general deterrence is a weighty consideration in sentencing for offences which are difficult to detect and investigate: see *R v Curtis (No 3)* (2016) 114 ACSR 184; [2016] NSWSC 866 at [51]-[53]; *R v Hannes* (2000) 36 ACSR 72; [2000] NSWCCA 503 at [394]; *R v Rivkin* (2004) 59 NSWLR 284; [2004] NSWCCA 7 at [423]; see also, in the specific context of cartel contraventions and offences: *CDPP v NYK* at [271]-[273]; *CDPP v K-Line* at [274], [357]-[361]; *CDPP v WWO* at [270]; CDPP v *Vina Money Transfer* at [110]. The second reason is that cartel conduct is an essentially economic or commercial crime that generally involves the offender weighing up whether the benefit or profit from the conduct is likely to outweigh the risks of detection and punishment. Sentences imposed for such offences should be set so that others who may engage in such a weighing exercise will come to appreciate that the risks are likely to outweigh the benefits and that the likely penalty will be such that it could not be regarded as an acceptable cost of doing business: *CDPP v NYK* at [211]; *CDPP v K-Line* at [274], [359]; *CDPP v WWO* at [271].

162 In relation to specific deterrence, when considering the size of the appropriate fine to impose on a corporation for a cartel offence, it is generally relevant to have regard to the size of the corporation and the financial resources available to it. That is because a fine of, say $1 million, is likely to operate as a significant deterrent in the case of a relatively small company, but is unlikely to have much deterrent effect in the case of a large company with financial resources measuring in the tens or hundreds of millions of dollars: see *CDPP v WWO* at [273]; see also in the civil penalty context, *Australian Competition and Consumer Commission v Leahy Petroleum Pty Ltd (No 3)* (2005) 215 ALR 301; [2005] FCA 265 at [39]; *Australian Competition and Consumer Commission v Apple Pty Limited* [2012] FCA 646 at [38].

163 Some caution, however, should be exercised when having regard to the size of the corporation in this context. That is particularly the case where, as here, the maximum penalty applicable in respect of the offence is calculated by reference to the corporation’s annual turnover; that is, where it is not possible to determine the total value of the benefits derived from the offence and the amount representing 10% of the corporation’s annual turnover in the preceding 12-month period exceeds $10 million: see ss 45AF(3) and 45AG(3) of the Competition and Consumer Act. In such a case, the size of the corporation has already been taken into account in determining the maximum penalty, at least insofar as turnover may be regarded as a measure of the size of the company. The Court must be astute to avoid any form of double-counting in those circumstances. Moreover, the size of the corporate offender could not of itself justify a higher penalty than could otherwise properly be imposed: see, in the civil penalty context, *Australian Competition and Consumer Commission v Coles Supermarkets Australia Pty Ltd* (2015) 327 ALR 540; [2015] FCA 330 at [89]-[92].

164 Perhaps more significantly, the size of the corporate offender should not deflect attention from other facts and circumstances which are relevant to assessing the size of the fine which would achieve specific deterrence in the case at hand. As has already been noted, in Bingo’s case, the evidence indicates that its new management have established training programs and implemented other measures which are likely to reduce the risk of a similar cartel offence being committed in the future. That goes some way towards addressing the need for specific deterrence in Bingo’s case.

165 Finally, on the topic of deterrence, while the relative importance of deterrence has been repeatedly referred to in the authorities dealing with sentencing for cartel offences, it should be emphasised that s 16A does not create any hierarchy of matters to be considered by the Court and the need for deterrence in such cases should not be seen to operate as a fetter on the Court’s sentencing discretion: ***Totaan*** *v The Queen* (2022) 108 NSWLR 17; [2022] NSWCCA 75 at [98]-[99] (Bell CJ, with whom Gleeson JA and Harrison, Adamson and Dhanji JJ agreed). While deterrence is no doubt an important consideration, all the relevant facts, matters, and circumstances must be considered and weighed when determining the appropriate sentence. That includes, where appropriate, personal mitigating circumstances such as prior good character and prospects for rehabilitation: *Totaan* at [99]-[100]; ***Kovacevic v Mills*** (2000) 76 SASR 404; [2000] SASC 106 at [43].

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

166 The need to impose an adequate punishment in all the circumstances is largely self-evident and requires no elaboration. All the matters that have been considered earlier in these reasons concerning the objective seriousness of the offences and offending conduct and Bingo’s subjective circumstances must be taken into account in determining the punishment that is adequate in the circumstances.

## Sentences imposed on corporations in other cartel offence cases

167 The sentences that have been imposed in other cases involving cartel offences provide limited assistance, other than to the extent that they establish the relevant sentencing principles. It is doubtful that they could be said to disclose any applicable sentencing pattern or establish any applicable range of sentences. The previous cases involved offending conduct that was different in many respects from the offending conduct in this matter, and offenders who had materially different subjective circumstances to Bingo’s subjective circumstances. There were also differences between the maximum penalties that applied in the previous cases. It is nevertheless worth briefly noting the sentences that have been imposed on corporations in the earlier cartel offence cases. The sentences that have previously been imposed on individuals will be considered later in the context of Mr Tartak’s sentence.

168 The offending conduct in the three shipping cartel cases, *CDPP v NYK*, *CDPP v K-Line*, and *CDPP v WWO*, involved an international cartel between large multi-national shipping companies. The cartel involved the fixing of freight rates in respect of the shipment of motor vehicles, including on routes to and from Australia. Each of the shipping companies pleaded guilty to rolled-up charges of intentionally giving effect to the cartel provisions over relatively lengthy periods of time.

169 In *CDPP v NYK*, the maximum penalty was $100 million. The sentence imposed was a fine of $25 million, which incorporated a discount of 50% for an early guilty plea and past and future assistance to the authorities. In *CDPP v K-Line*, the maximum penalty was again $100 million. The fine imposed was $34.5 million, which incorporated a discount just over 28% for an early guilty plea and past assistance. In *CDPP v WWO*, the maximum penalty was approximately $48.5 million. The fine imposed was $24 million, which incorporated a discount of 20% for an early guilty plea.

170 In *CDPP v Alkaloids*, the corporate offender, a moderately sized family-owned company, produced a product which was used in pharmaceuticals. Almost all that product was exported. The offender pleaded guilty to two charges of giving effect to a cartel arrangement which had the purpose or effect of fixing the price of its product, limiting production, and allocating or rigging bids. It also pleaded guilty to one charge of attempting to make a cartel arrangement which had the purpose or effect of fixing the price or rigging bids. The maximum penalty for the offences was $10 million. The fines imposed on the offender totalled $1,987,500, incorporating a discount of 25% for its plea of guilty.

171 In *CDPP v Vina Money Transfer*, the corporate offender operated a money exchange and remittance business. It pleaded guilty to two offences of giving effect to a cartel arrangement which involved charging customers a common exchange rate and price for the remittance services. The maximum penalty for the offences was $10 million. The fines imposed on the offender totalled $1 million. It was accepted that the offender would not be able to pay any fine.

## Totality

172 Because Bingo is to be sentenced for two offences, it is necessary to have regard to the totality principle, which requires the sentencing judge to ensure that, when the individual sentences for each offence are aggregated, the total sentence is just and appropriate and reflects the overall criminality: *Mill v The Queen* (1988) 166 CLR 59 at 62-63; [1988] HCA 70. The totality principle applies to the imposition of fines: *Camilleri’s Stock Feeds Pty Limited v Environment Protection Authority* (1993) 32 NSWLR 683 at 704; *Environment Protection Authority v Barnes* [2006] NSWCCA 246 at [43]-[50]. Accordingly, if upon aggregation, multiple fines would result in an excessive penalty, the fines in relation to each offence should be moderated.

## Parity

173 The “parity principle” was summarised in the following terms in *CDPP v WWO* at [299]:

… That principle requires that like offenders should be treated in a like manner, though allows for different sentences to be imposed upon like offenders to reflect different degrees of culpability and/or different circumstances: *Green v The Queen* (2011) 244 CLR 462 at [28]. The notion of consistency does not equate to numerical equivalence: see *Hili* at [46]-[54]. Rather, equal justice “requires that, as between co-offenders, there should not be a marked disparity which gives rise to ‘a justifiable sense of grievance’”: *Postiglione* at 301. Disparity between the sentences imposed on co-offenders will be justified by differences such as “age, background, criminal history, general character and the part each has played in the relevant criminal conduct”: *Green* at [31]; see also *R v Li* [2010] NSWCCA 125; 202 A Crim R 195 at [5].

174 There will almost always be differences between the objective and subjective elements in any case involving multiple offenders. The question, at the sentencing stage (as opposed to the appellate stage) is whether any material differences between the sentences to be imposed on co-offenders are warranted or justifiable having regard to those different objective and subjective elements.

175 In separate proceedings I have convicted both Aussie Skips and Aussie Recycling of an offence against both s 45AF(1) of the Competition and Consumer Act. I imposed a fine on each company of $1,750,000. Bingo, on the one hand, and Aussie Skips and Aussie Recycling, on the other, are undoubtedly co-offenders or like offenders. The parity principle undoubtedly applies in those circumstances.

176 The application of the principle is difficult and complex in the circumstances of this case for several reasons.

177 First, as already adverted to, while the Aussie Companies and Bingo were co-offenders, the Prosecutor chose to conduct separate prosecution proceedings against them. Often co-offenders are tried and sentenced together. That was not the case here. Bingo filed written submissions dealing with parity issues well after the sentence hearing in this matter; prompted, no doubt, by submissions made on behalf of the Aussie Companies in their separate sentence proceedings.

178 Second, the agreed facts upon which Aussie Skips and Aussie Recycling were sentenced, while similar to the agreed facts in this matter, differed in some, albeit fairly minor, respects. It may perhaps be inferred that the differences between the agreed facts was a product of the plea negotiations. In considering the parties’ submissions concerning parity, the Court must be astute to ensure that Bingo is sentenced on the basis of the agreed facts and evidence that was before the Court in its case. It is well recognised that sentences imposed on co-offenders may be based upon different factual findings if the evidence before either the same or a different sentencing judge differs: ***Gaggioli*** *v The Queen* [2014] NSWCCA 246 at [27].

179 Third, for reasons that are unclear, but again appear to have something to do with the respective plea agreements that the Prosecutor entered with the offenders, the Prosecutor proceeded with different charges against Aussie Skips and Aussie Recycling. Both Aussie Skips and Aussie Recycling were charged with only one offence of making a cartel arrangement with Bingo, though offences involving the giving effect to of that arrangement were to be taken into account pursuant to s 16BA of the Crimes Act. Bingo, on the other hand, is to be sentenced in respect of two offences; one offence of making the cartel arrangements with Aussie Skips and Aussie Recycling and one offence of giving effect to those cartel arrangements.

180 The parity principle nevertheless applies where co-offenders are not charged with the same offences, despite the practical difficulties in comparing the sentences imposed on co-offenders who have been charged with different crimes: *Green v The Queen* (2011) 244 CLR 462; [2011] HCA 49 at [30]; *Jimmy v The Queen* (2010) 77 NSWLR 540; [2010] NSWCCA 60 at [201]-[203]. There are particular difficulties where one co-offender has been charged with a particular offence whereas the other co-offender was sentenced on the basis that the corresponding offence was to be taken into account pursuant to s 16BA of the Crimes Act or a similar procedure in cognate legislation: see *Azari v The Queen* [2021] NSWCCA 199 at [76]. Indeed, in *Dunn v The Queen* [2018] NSWCCA 108 at [16], it was held that the parity principle does not apply in those circumstances because “[t]here is no relevant comparison between a sentence that has been imposed for an offence … and an unspecified increase in a sentence imposed for another offence by reason of the corresponding charge being taken into account” by virtue of a procedure similar to s 16BA of the Crimes Act.

181 Fourth, and significantly, the maximum penalty which applied in respect of both offences to which Bingo pleaded guilty was significantly higher than the maximum penalty faced by Aussie Skips and Aussie Recycling. As has already been noted, the maximum penalty for each of the offences to which Bingo pleaded guilty was calculated by reference to Bingo’s turnover in accordance with ss 45AF(3)(c) and 45AG(3)(c) of the Competition and Consumer Act. The total penalty in respect of each offence was $40,200,000 – making a total overall maximum penalty of $80,400,000. The maximum penalty for the offences to which both Aussie Skips and Aussie Recycling pleaded guilty was only $10,000,000 because s 45AF(3)(b) and (c) did not apply in the circumstances of their case. Differences between the maximum penalties that apply to the offences committed by co-offenders can and should be taken into account in applying the parity principle. The differences between the applicable maximum penalties may explain the differences between the sentences imposed on the co-offenders: see for example *Gaggioli* at [36]. Where there are different maximum penalties, the result is that “the relevant comparison is more broad and impressionistic than might otherwise be the case”: *Hanley v The Queen* [2018] NSWCCA 262 at [56].

182 Even putting those complications to one side, there are some material differences between objective seriousness of the offences committed by the co-offenders and some material differences between their subjective circumstances. Those differences must be considered when it comes to ensuring that there is no marked disparity between the sentences imposed such as might give rise to a justifiable sense of grievance.

183 In relation to the objective seriousness of the offending, the offences committed by Bingo were objectively more serious than those committed by Aussie Skips and Aussie Recycling because it was not only the instigator of the cartel arrangements, through Mr Tartak, but also a significantly larger corporation with a much larger market share and therefore more market power. While Aussie Skips and Aussie Recycling were by no means reluctant or unenthusiastic participants, it does not follow that their criminality was as serious as that of the instigator. As for Bingo’s size and market power, while that is also an important subjective circumstance, it is also relevant in assessing the criminality involved in the offending. It is generally more serious for a larger public company with significant market power to instigate cartel conduct than it is for a smaller private company to agree to participate in that cartel conduct.

184 There are, however, some aspects of Bingo’s subjective circumstances which are more favourable than Aussie’s subjective circumstances. Bingo’s evidence concerning its contrition and the steps it had taken to rehabilitate and prevent any future offending was more impressive than the evidence which was adduced on behalf of the Aussie Companies. Bingo also cooperated with the ACCC to a certain extent. Finally, unlike Aussie Recycling, Bingo has not been convicted of any offence, though that it is a relatively minor difference given the nature of the offence committed by Aussie Recycling, which was of a materially different nature to a cartel offence.

185 As complicated as the exercise may be, I have endeavoured to ensure that there is no marked or unjustifiable disparity between the sentences imposed on Bingo, on the one hand, and Aussie Skips and Aussie Recycling, on the other, and that the respective sentences do not gives rise to any justifiable sense of grievance. I have also endeavoured to ensure that the different sentences are explicable on the basis of the different charges, the different maximum penalties, the differences in the objective seriousness of their offending and the differences between their subjective circumstances.

186 The differences between the objective and subjective elements of the respective offences committed by Mr Tartak, on the one hand, and Mr Roussakis, on the other, will be considered separately in the context of the reasoning concerning the sentence to be imposed on Mr Tartak. Needless to say, the question of parity will also have to be considered in the context of the sentencing of the Aussie Companies and Mr Roussakis.

## The appropriate sentence for Bingo

187 The Prosecutor submitted that, having regard to the “applicable principles, in particular the need for general deterrence, the relevant objective and subjective factors and the maximum penalty … the monetary penalty to be imposed on Bingo should be significant”. Bingo also acknowledged that the offending conduct was serious and that an appropriate penalty “will be significant”. It submitted that the offences were in the “low to mid-range” and that the seriousness of the offending was diminished by Bingo’s early plea and cooperation, its contrition and good prospects of rehabilitation and the fact that it has taken steps to prevent any re-offending, including by introducing better compliance systems. In Bingo’s submission, the appropriate sentence to impose was an aggregate fine in the range of $32 million to $36 million. The Prosecutor did not submit that a fine within that range would be inappropriate or inadequate.

188 The facts and matters which are relevant and must be considered in fixing the appropriate sentence have been discussed at length earlier in this judgment. They include: the seriousness of the offences and offending conduct having regard to the nature, duration and scale of the cartel arrangements; the deliberate and covert nature of the conduct involved; the seniority of the officers involved in making and giving effect to the arrangements; the benefits, albeit mostly intangible benefits, that it may be inferred were likely to have been derived from the offences; the loss and damage, albeit unquantifiable loss or damage, that it may be inferred were likely to have been caused by the offences; Bingo’s contrition; the early plea of guilty and cooperation with the authorities; Bingo’s good prospects of rehabilitation; and, the need for the sentence to be imposed to have a deterrent effect on Bingo and others. All those matters must be weighed in the balance in determining the appropriate penalty.

189 I have determined that in Bingo’s case the sentence which is appropriate in all the circumstances involves fines that, when aggregated, total $30,000,000. I have arrived at that figure in the following way. The starting point is that fines of $25,000,000 would be appropriate for each of the offences. I then apply a discount of 30% having regard to Bingo’s early plea of guilty and cooperation with the authorities. That results in fines of $17,500,000 for each offence, and therefore an aggregate or overall fine of $35,000,000. It is appropriate in all the circumstances to moderate the fines having regard to the totality principle and the fact that the criminality involved in the separate offences overlaps to some extent. The appropriate reduction is $2,500,000 in respect of each offence. The appropriate sentence for each offence is accordingly $15,000,000. The aggregate or overall fine is therefore $30,000,000.

190 I recognise that the fines imposed on Aussie Skips and Aussie Recycling (and the combined fine) are significantly less than the fine I have decided to impose on Bingo. As explained earlier in the context of the discussion concerning parity, the difference may be explained on the basis of the differences between the offences (including s 16BA offences) in the two cases, the different applicable maximum penalties, the differences, albeit not substantial, between the objective seriousness of the offending conduct, and the different subjective circumstances, including the size of the respective corporations and their capacity to pay the fines imposed.

# THE SENTENCE TO BE IMPOSED ON MR TARTAK

191 It is possible to address the sentence to be imposed on Mr Tartak in somewhat briefer terms because many of the relevant matters, particularly those relating to the nature and seriousness of the offences and offending conduct, have already been addressed at length in the context of arriving at the sentences for Bingo. It is, however, necessary to separately address Mr Tartak’s subjective circumstances which, as adverted to earlier, compel a degree of leniency.

## Issues raised by the competing submissions

192 As was the case with Bingo, the main areas of dispute between the parties concerned the seriousness of the offending conduct and the size of the discount that Mr Tartak should receive having regard to his early guilty plea and assistance and cooperation with the authorities. The most significant area of disagreement was whether the Court could or would be satisfied that no sentence other than imprisonment would be appropriate in all the circumstances.

193 Like Bingo, Mr Tartak submitted the seriousness of the offending conduct was lessened by what was said to be the limited scope, scale, and duration of the cartel arrangements. In his submission, the arrangements occurred in only discrete or subsidiary “streams” of services in the building and development “subset” of the market for waste services in New South Wales. The cartel arrangements also only impacted the services in those subsidiary streams in Sydney.

194 Mr Tartak emphasised that Aussie Skips had only a 3% market share in respect of collections services and the market was otherwise “diffuse”. He also relied on the fact that Bingo’s price increases had been “settled” prior to the making of the arrangement with Mr Roussakis and Aussie Skips. While he accepted that there was a real chance that certain customers of Bingo and Aussie Skips would have paid more for their collections services than they otherwise would have, he submitted that it was not possible to determine the extent to which the price rises that in fact occurred could be attributed to the cartel arrangements. Mr Tartak also pointed out that the arrangement was given effect to for only a few months and “voluntarily ceased”. Like Bingo, Mr Tartak also took issue with the Prosecutor’s characterisation of the arrangement as “systematic”.

195 As for his subjective case, Mr Tartak relied on the impressive array of positive character references. He maintained that he had been humbled by what he had done and that his remorse was genuine. In relation to the evidence of the psychologist, Mr Tartak indicated that he did not wish to excuse his conduct on the basis of the mental disorder diagnosed by the psychologist, but relied on that evidence as providing “important context” in respect of the circumstances in which the offending conduct occurred.

196 In relation to cooperation and assistance, Mr Tartak submitted that his assistance had been fulsome and that he was entitled to a combined discount of 50% for his early plea of guilty and assistance. He also submitted that his cooperation and assistance was equally relevant in determining the type of sentence to be imposed.

197 In Mr Tartak’s submission, the Court could or would not pass a sentence of imprisonment because the Court, after considering all other available sentences, could not or would not be satisfied that no other sentence was appropriate in all the circumstances of the case: see s 17A(2) of the Crimes Act.

198 The Prosecutor maintained that the seriousness of Mr Tartak’s offending conduct was not diminished by the fact that the arrangement affected only a subset of services within a broader waste management market, or by virtue of the fact that the arrangement was only given effect to over a three-month period. In the Prosecutor’s submission, the markets involved in the contravention were substantial and important, even if they could accurately be seen as being subsets of a broader market. Three months was also a significant period for a cartel to operate.

199 The Prosecutor submitted that Mr Tartak’s reliance on the fact that Bingo had already determined to increase its prices was misplaced in circumstances where the purpose and effect of the arrangement was to enable Bingo to continue to charge those increased prices without being vulnerable to the ordinary pressures of a competitive market. In relation to assistance and cooperation, the Prosecutor supported the ACCC’s characterisation of Mr Tartak’s assistance as “medium value” and submitted that a discount of 50% was not warranted.

200 The Prosecutor’s ultimate submission was that a sentence of imprisonment was the only appropriate sentence.

## Differences between Bingo’s offences and Mr Tartak’s offences

201 Before addressing the objective seriousness of the offences committed by Mr Tartak and his subjective circumstances, it is important to highlight the differences between the offences for which Bingo is to be sentenced and the offences for which Mr Tartak is to be sentenced.

202 As outlined earlier, Bingo entered pleas of guilty to two offences. The first offence was an offence of making arrangements which contained cartel provisions and the second offence was an offence of giving effect to arrangements which contained cartel provisions. Each of the two offences encompassed two arrangements which contained cartel provisions. The first was the arrangement between Bingo and Aussie Skips which contained a cartel provision concerning prices for collections services. The second was the arrangement between Bingo and Aussie Recycling which contained a cartel provision concerning prices for processing services.

203 Mr Tartak also pleaded guilty to two offences. The first offence was an offence of aiding and abetting Bingo in making an arrangement containing a cartel provision and the second offence was an offence of aiding and abetting Bingo in giving effect to an arrangement containing a cartel provision. The arrangement in each case was the one between Bingo and Aussie Skips which contained a cartel provision in relation to prices for collections services. Mr Tartak also requested the Court to take into account two other offences pursuant to s 16BA of the Crimes Act. Those two offences were offences of being knowingly concerned in Bingo’s contraventions in respect of making, and giving effect to, of the arrangement between Bingo and Aussie Recycling which contained the cartel provision concerning prices for processing services. The effect and operation of s 16BA of the Crimes Act will be addressed later.

204 It is somewhat curious that the Prosecutor pursued different charges against Bingo and Mr Tartak. It is curious because the conduct that caused or resulted in Bingo committing its offences was almost entirely Mr Tartak’s conduct. Nevertheless, Bingo and Mr Tartak must be sentenced in respect of different offences. That said, as a practical matter the differences between the respective charges are not particularly significant and Mr Tartak is to be sentenced in respect of his offending conduct generally.

205 It is necessary to first consider the objective seriousness of the offences to which Mr Tartak has pleaded guilty. Consideration will then be given to the two offences which Mr Tartak requested the Court to take into account pursuant to s 16BA of the Crimes Act.

## The objective seriousness of the offences

206 It is unnecessary to repeat what was said earlier in these reasons concerning the objective seriousness of the two offences committed by Mr Tartak and the matters specified in s 16A(2)(a), (c) and (e) of the Crimes Act. The offending conduct which gave rise to the offences committed by Bingo was essentially the offending conduct engaged in by Mr Tartak, though in Bingo’s case the offences concerned both the cartel arrangement between Bingo and Aussie Skips and the cartel arrangement with Aussie Recycling. Putting that difference to one side for the moment, it is readily apparent that it was Mr Tartak who caused Bingo to make the cartel arrangement with Aussie Skips which contained the cartel provision concerning prices for collections services. It was also Mr Tartak who was primarily responsible for giving effect to that cartel provision, though AB also had some involvement in that conduct. There is, in all the circumstances, no sound basis upon which it could be concluded that Mr Tartak’s culpability, as aider and abettor, is somehow less than Bingo’s culpability as principal offender.

207 Bingo was a substantial public company and Mr Tartak was its most senior executive officer. Mr Tartak’s offending conduct was covert and deliberate. He undoubtedly knew that what he was causing Bingo to do was wrong. That is no doubt why he did what he did in a covert fashion and essentially kept it to himself.

208 The cartel arrangement in question was undoubtedly significant and it may readily be inferred that Mr Tartak knew that to be the case. The cartel arrangement effectively stifled and distorted the price competition in respect of collections services provided by Bingo and Aussie Skips in Sydney or parts thereof. Even if it were fair to characterise the arrangement as only concerning a “discrete area within a subset” of the market for waste management services, which is doubtful, that discrete area was nonetheless substantial and lucrative, particularly for Bingo. Likewise, while the arrangement may have been limited to the Sydney metropolitan region, that could scarcely be said to be a small or insubstantial geographical area. The revenue that Bingo derived from the provision of collections services in Sydney was substantial.

209 As for the fact that Bingo, through Mr Tartak, only gave effect to the cartel arrangements over a three-month period, it may be accepted that the cartel arrangements in other cartel offence cases that have been prosecuted in this Court persisted over lengthier periods. It does not follow that giving effect to cartel arrangements over a three-month period is not a serious offence. It should also be reiterated that the arrangement only ceased after three-months because of commercial self-interest and the fact that the parties each began to cheat on the arrangement, or at least each perceived that the other was cheating on the arrangement. It is not as if Mr Tartak always intended to terminate the arrangement after three months, or that he decided to end the arrangement because of a sudden realisation that what he had caused Bingo to do was wrong.

210 The fact that the benefits that Bingo derived from the cartel arrangement cannot be calculated or quantified does not significantly lessen the seriousness of the offending. For the reasons given earlier in the context of Bingo’s offences, it may readily be inferred that Bingo benefited from the arrangement, including in intangible ways, and that Mr Tartak knew that to be the case. Bingo benefited from the arrangement because it was able to maintain its increased prices without exposing itself to the full risk of losing customers to Aussie Skips and perhaps other competitors. It is by no means unusual that the benefits flowing from a cartel arrangement cannot be precisely quantified.

211 The same can be said concerning the inability to precisely identify or quantify the loss or damage caused by the cartel arrangement. The fact is that Bingo maintained its increased prices, Aussie Skips increased its prices and there was at the very least a real risk that those increased prices under the arrangement would have an impact on the prices charged by other service providers in the market. There was also a real chance that some of Bingo’s customers would have paid more for collections services because of the cartel arrangement. It may readily be inferred that Mr Tartak knew that to be the case.

## Other offences – ss 16A(2)(b) and 16BA of the Crimes Act

212 As has already been noted, while Mr Tartak is only to be sentenced in respect of two aid and abet offences relating to the arrangement between Bingo and Aussie Skips containing the cartel provision concerning prices for collections services, he also asked the Court to take into account two offences of being knowingly concerned in Bingo making, and giving effect to, the arrangement between Bingo and Aussie Recycling which contained the cartel provision concerning prices for processing services.

213 Section 16BA(1) of the Crimes Act provides that where a person is convicted of a federal offence and the Court is satisfied of certain conditions, the Court may, with the consent of the Prosecutor, ask the convicted person whether he or she admits his or her guilt in respect of all or any other specified offences and wishes them to be taken into account by the Court in passing sentence. Section 16BA(2) provides that if that person admits his or her guilt in respect of all or any of the other specified offences and wishes to have them taken into account, the Court may, if it thinks fit, take into account all or any of the those other offences in passing sentence on that person. The general effect and operation of s 16BA was summarised as follows in *CDPP v WWO* at [226]-[229]:

The general effect and operation of similar provisions which operate in New South Wales was helpfully explained by Spigelman CJ in *Attorney General’s Application Under s 37 of the Crimes (Sentencing Procedure) Act 1999 (No 1 of 2002)* (2002) 56 NSWLR 146 (***AG’s Application***). The reasoning in *AG’s Application* applies equally to s 16BA of the Crimes Act: see *R v Lamella* [2014] NSWCCA 122 at [48].

The objective of taking other offences into account pursuant to provisions such as s 16BA of the Crimes Act is to ensure that the sentence imposed “is one which best meets the situation”: *AG’s Application* at [30]. The Court takes into account the other offences “with a view to increasing the penalty that would otherwise be appropriate for the particular offence” for which the offender is to be sentenced: *AG’s Application* at [42]. The increased penalty is effectively the product of the Court giving greater weight to two elements in the sentencing process: the first being the need for personal deterrence, as the commission of other offences will frequently indicate that the accused has engaged in a course of conduct; the second being “the community’s entitlement to extract retribution for serious offences when there are offences for which no punishment has in fact been imposed”: *AG’s Application* at [42]. The additional penalty as a result of taking the s 16BA offences into account will not necessarily be small; sometimes it will be substantial: *AG’s Application* at [18].

The manner and degree to which other offences, which are taken into account pursuant to provisions such as s 16BA of the Crimes Act, can impinge upon elements relevant to the sentencing process will depend on a range of other factors pertinent to those elements and the weight to be given to them in the overall sentencing task. For that reason it will rarely be appropriate for a sentencing judge to attempt to quantify the effect on the sentence of taking those other offences into account: *AG’s Application* at [44].

Section 16BA must be applied having regard to the basic common law principle that no one should be punished for an offence of which he or she has not been convicted. Section 16BA offences constitute an admission of guilt only: there is, relevantly, no conviction: *AG’s Application* at [23]. It follows that in taking the s 16BA offences into account, the sentencing judge is not imposing any punishment for those offences: *AG’s Application* at [29]. Rather, when taking the other (s 16BA) offences into account, the Court is concerned and concerned only with imposing a sentence for “the principal offence”; it is no part of the task of the sentencing court to determine appropriate sentences for s 16BA offences or to determine the overall sentence that would be appropriate for all the offences and then apply a “discount” for the use of the procedure under s 16BA: *AG’s Application* at [39]. The use of the s 16BA procedure, however, will generally result in a lower effective sentence than would have been imposed if the offender had been separately sentenced for the s 16BA offences: *AG’s Application* at [34].

214 The practical effect of the application of those principles to the exercise of the sentencing discretion in Mr Tartak’s case is essentially twofold.

215 First, although the Court is sentencing Mr Tartak for the two offences to which he pleaded guilty, which relate to the cartel arrangement between Bingo and Aussie Skips, the Court may, in the exercise of its sentencing discretion, take into account the two s 16BA offences which Mr Tartak has admitted by increasing the penalties that would otherwise be appropriate for the offences to which he has pleaded guilty. Neither the Prosecutor nor Mr Tartak submitted that the Court should not, in the exercise of its discretion, take the two s 16BA offences into account. Nor were there any considerations which would compel the Court to refuse to take those two offences into account as envisaged by s 16BA of the Crimes Act.

216 Second, the Court is not convicting Mr Tartak, or imposing a discrete punishment, in respect of the two s 16BA offences which he has admitted. Nor is the Court required to quantify the effect of taking the two s 16BA offences into account in sentencing for the two offences for which Mr Tartak is to be sentenced. It may be expected that the use of the s 16BA procedure will result in a lower effective sentence than would have been imposed if Mr Tartak had been sentenced not only for the offences to which he pleaded guilty but also for the two s 16BA schedule offences. It does not necessarily follow, however, that the effect or impact of taking the two s 16BA offences into account will necessarily be small.

217 The two s 16BA offences involve some additional criminality that should be reflected in the sentences imposed in respect of the two offences to which Mr Tartak pleaded guilty. The two s 16BA offences concern a separate cartel arrangement between Bingo and Aussie Recycling. Aussie Recycling was, of course, closely related to Aussie Skips. It nevertheless was a different company, which provided different services. More significantly, the cartel arrangement between Bingo and Aussie Recycling concerned a separate and distinct market – the market for processing services.

218 The seriousness of the two s 16BA offences has been addressed earlier in these reasons in the context of the offences committed by Bingo which involved both cartel arrangements. It is unnecessary to repeat what was said earlier in that regard. It suffices to note that the arrangement effectively stifled price competition in a segment of the market for processing services in Sydney. As a result of the arrangement, there was a real chance that customers of a number of processing facilities operated by Bingo and Aussie Recycling paid more for those services than would otherwise have been the case.

219 It would, however, be fair to say that Mr Tartak’s conduct by which he became knowingly concerned in Bingo’s making of the cartel arrangement with Aussie Recycling broadly formed part of the same course of conduct by which Mr Tartak aided and abetted Bingo to enter into the cartel arrangement with Aussie Skips. Similarly, the conduct by which Mr Tartak aided and abetted Bingo to give effect to the cartel arrangement with Aussie Recycling formed part of the same course of conduct by which Mr Tartak aided and abetted Bingo to give effect to the cartel arrangement with Aussie Skips. Those courses of conduct primarily involved Mr Tartak communicating with Mr Roussakis, mostly via a series of WhatsApp messages. The fact that the offences to which Mr Tartak pleaded guilty essentially arose from the same course of conduct that gave rise to the two s 16BA offences means that the additional criminality that is to be taken into account in sentencing Mr Tartak is not substantial.

## Mr Tartak’s subjective circumstances

220 Mr Tartak’s subjective circumstances undoubtedly compel a significant degree of leniency. They can be addressed in fairly brief terms, though that is not to understate their importance in arriving at the appropriate sentence. The applicable principles in respect of the subjective circumstances have for the most part been addressed earlier in the context of Bingo’s sentence.

### Character and antecedents – s 16A(2)(m) of the Crimes Act

221 Mr Tartak has no prior convictions. Perhaps more significantly, as discussed in detail earlier, the character references tendered by Mr Tartak reveal that he was and is widely considered to be a man of exceptional character. He is undoubtedly a devoted and supportive family man who was and still is highly respected and admired by business colleagues and church, school, and community leaders. He has contributed to many community and charitable ventures and associations in the past and there could be little doubt that he will continue to positively contribute to the community in the future. His fall from grace has been significant.

222 It may also be accepted that the offending conduct was out of character. It can perhaps be explained, at least to some degree, by the medical condition described by Dr Woods and, more broadly, by the pressure and anxiety that Mr Tartak was suffering at the time as a relatively young and inexperienced chief executive officer of a public company.

223 There is authority to the effect that prior good character is generally not afforded as much weight as it would otherwise when sentencing for offences in respect of which general deterrence is an important consideration: *CDPP v NYK* at [284]; *CDPP v* *Vina Money Transfer* at [112] (and the cases there cited). Some care should be exercised when applying that principle. As adverted to earlier, s 16A of the Crimes Act does not create any hierarchy of matters to be considered by the Court. While deterrence is no doubt an important consideration in sentencing for cartel offences, all the relevant facts, matters, and circumstances must nevertheless be considered and weighed when determining the appropriate sentence for such offences. That includes, where appropriate, personal mitigating circumstances such as prior good character: *Totaan* at [99]-[100]; *Kovacevic* *v Mills* at [43].

### Contrition – s 16A(2)(f) of the Crimes Act

224 There could also be no doubt that Mr Tartak is genuinely remorseful and contrite. That is a universal theme of the character references. It is also readily apparent from Dr Woods’s report. Mr Tartak’s contrition and remorse is also reflected in his early plea of guilty.

### Prospect of rehabilitation – s 16A(2)(n) of the Crimes Act

225 I am, in all the circumstances, satisfied that the risk of Mr Tartak reoffending is low and that his prospects of rehabilitation are good. The Prosecutor did not submit otherwise.

### Plea of guilty and cooperation – s 16A(2)(g) and (h) of the Crimes Act

226 It is convenient to address Mr Tartak’s early plea of guilty and cooperation with the authorities together.

227 The facts relevant to Mr Tartak’s plea of guilty and assistance to, and cooperation with, the ACCC and the Prosecutor’s office were considered at length earlier in these reasons. So too were the applicable principles in respect of cooperation in the context of sentencing.

228 In short summary, Mr Tartak agreed to enter a plea of guilty before the ACCC had compiled a brief of evidence. He also effectively agreed to the presentation of an ex officio indictment in this Court and thereby avoided any need for committal proceedings. He assisted the ACCC by effectively encouraging his co-offender, through his and the co-offender’s legal advisers, to engage with the ACCC in respect of the ACCC’s investigation. He subsequently agreed to be interviewed by the ACCC and signed an induced statement.

229 Mr Tartak submitted that the Court should apply a combined discount of 50% in respect of his early guilty plea and his cooperation and assistance. He also submitted that his early plea and cooperation and assistance should “sound in the range of non-custodial sentencing options considered appropriate by this Court”.

230 The Prosecutor accepted that Mr Tartak’s plea of guilty was entered at the earliest stage and had resulted in a benefit to both the community and witnesses given that there was no need for a potentially lengthy and complicated trial. The Prosecutor contended that the plea of guilty was in the face of a strong prosecution case. It is, however, somewhat difficult to gauge the strength of the prosecution case and most contested trials in respect of cartel offences are likely to involve a degree of difficulty and complexity in any event. As for cooperation, the Prosecutor supported the ACCC’s assessment of Mr Tartak’s cooperation as being of “medium value” and submitted that the discount should be “broadly commensurate” with that assessment.

231 I will specify the appropriate discount later in these reasons. It suffices at this point that I would tend to agree with the ACCC’s assessment of Mr Tartak’s cooperation. I do not consider that a combined discount as high as 50%, as contended by Mr Tartak, would be appropriate in all the circumstances, though I accept that a substantial discount is appropriate in the circumstances. It is also important to emphasise that neither party submitted that the Court was required by s 16AC of the Crimes Act to specify a separate discount for future cooperation. That was no doubt because Mr Roussakis and the Aussie Companies have pleaded guilty and there is no suggestion that Mr Tartak’s cooperation will be sought or required in any other proceedings.

### Financial circumstances – s 16C of the Crimes Act

232 There was no direct evidence concerning Mr Tartak’s financial circumstances. As noted earlier, however, inability to determine an offender’s financial circumstances does not prevent the Court from imposing a fine (s 16C(2) of the Crimes Act) and the offender’s capacity to pay is in any event only one of the factors to be taken into account. It is not determinative.

### Deterrence – s 16A(2)(j) and (ja) of the Crimes Act

233 The importance of general deterrence as a consideration in sentencing for cartel offences and applicable principles in respect of deterrence generally have been addressed earlier. It is unnecessary to repeat what was said in that regard in the context of Bingo’s sentence, save as to note that general deterrence is of as much importance in sentencing an individual offender as it is in sentencing a corporation.

234 As for specific deterrence, for the reasons already given, I consider that the likelihood of Mr Tartak reoffending is low and his prospect of rehabilitation is good. I take those findings into account in determining the weight that should be given to the need for specific deterrence in the particular circumstances of this case.

### Other subjective considerations

235 Two other considerations relevant to Mr Tartak’s subjective circumstances were revealed by the material that was tendered on his behalf.

236 First, Mr Tartak could be said to have suffered what is customarily called “extra-curial punishment” arising from his convictions. Most significantly, as discussed later in these reasons, Mr Tartak will be disqualified from managing a corporation for a period of five years because of his convictions. It is appropriate to take Mr Tartak’s disqualification into account when determining the appropriate sentence: see, albeit in somewhat different contexts, *Australian Securities and Investments Commission v Wooldridge* [2019] FCAFC 172 at [56]-[57]; *Tapper v The Queen* (1992) 39 FCR 243 at 249. Mr Tartak’s disqualification, coupled with the fact that Mr Tartak lost his job as chief executive officer of Bingo, along with some associated financial incentives and benefits, and has almost inevitably lost his professional reputation and career prospects, are factors which must be given some weight in determining the appropriate sentence to impose: see *CDPP v NYK* at [276]-[277]; *Commonwealth Director of Public Prosecutions v Joyce* [2022] FCA 1423 (***CDPP v Joyce***) at [161]. The fact that Mr Tartak has suffered a substantial fall from grace and has suffered a loss of pride and standing in the community, however, are considerations that are deserving of less weight because they are in effect the inevitable consequences of the offending conduct: *Einfeld v The Queen* (2010) 200 A Crim R 1; [2010] NSWCCA 87 at [89].

237 Second, the probable effect that the sentence imposed on Mr Tartak will have on his family is a relevant consideration: s 16A(2)(p) of the Crimes Act. That is so even if there are no exceptional circumstances: *Totaan* at [93]. It may be accepted that a sentence of imprisonment would have a significant adverse effect on Mr Tartak’s family. That is particularly the case given the special needs of one of Mr Tartak’s sons.

238 I have also had regard to the evidence of the psychologist which was adduced by Mr Tartak. That evidence was summarised earlier.

## Other sentencing considerations – totality and parity

239 As discussed earlier in the context of Bingo’s sentence, because Mr Tartak is to be sentenced for two offences, it is necessary to have regard to the totality principle. The totality principle was discussed earlier in the context of the sentence to be imposed on Bingo.

240 Perhaps more significantly, it is also necessary to have regard to the principles relating to parity, particularly because the Court will also be imposing a sentence on Mr Tartak’s co-offender, Mr Roussakis. The parity principle was discussed earlier. In summary, the Court must avoid any unjustified disparity between the sentences imposed on Mr Tartak and Mr Roussakis. It is necessary to consider, in that regard, whether there are any significant or material differences between the objective circumstances of the offending conduct by Mr Tartak and Mr Roussakis, or any material differences between their respective subjective circumstances, which would warrant or justify the imposition of materially different sentences.

241 Some of the difficulties and complexities in applying the parity principle that were discussed earlier in the context of Bingo’s sentence also apply in the context of the application of the parity principle to the sentences imposed on Mr Tartak and Mr Roussakis.

242 In particular, Mr Tartak is to be sentenced in respect of two offences, one of aiding and abetting Bingo to make the cartel arrangement with the Aussie Companies and one of aiding and abetting Bingo to give effect to the cartel arrangement with the Aussie Companies, whereas Mr Roussakis pleaded guilty to only one offence of aiding and abetting the Aussie Skips and Aussie Recycling to make cartel arrangements with Bingo. Mr Tartak also asked the Court to take into account two other offences pursuant to s 16BA of the Crimes Act, those offences being offences of being knowingly concerned in Bingo’s contraventions in respect of making the cartel arrangement with Aussie Recycling and giving effect to the cartel arrangement with Aussie Recycling. Mr Roussakis, on the other hand, asked the Court to take into account only one other offence pursuant to s 16BA of the Crimes Act, that offence being one of aiding and abetting Aussie Skips and Aussie Recycling to give effect to the cartel arrangements.

243 There are also some material differences between the objective serious of the offending by Mr Roussakis and Mr Tartak and some differences in their subjective circumstances. In relation to the objective seriousness of the offending, as discussed earlier, Mr Tartak was the instigator of the cartel conduct. He was also the chief executive officer of a large public company which had more market power and a significantly higher market share than both Aussie Skips and Aussie Recycling. As for subjective circumstances, Mr Tartak cooperated and provided some assistance to the authorities. He also had no prior convictions. Mr Roussakis, on the other hand, provided no additional cooperation and had prior convictions.

244 I have endeavoured to ensure that the different sentences to be imposed on Mr Tartak and Mr Roussakis do not give rise to any justifiable sense of grievance and that the different sentences are explicable on the basis of the different offences, the differences in the objective seriousness of their offending and the differences between their subjective circumstances.

## Sentences imposed on individuals in other cartel cases

245 There have been two other cases where individuals have been sentenced for aiding and abetting, or being knowingly concerned in, the commission of cartel offences by corporations. Both cases resulted in the imposition of sentences of imprisonment. It is useful to briefly consider the offending conduct and the sentences imposed in those cases, though as will be seen, there are material differences between the objective and subjective elements of those cases and this case.

246 As discussed earlier, in *CDPP v Vina Money Transfer*, the corporate offender was convicted and fined $1 million in respect of two offences of giving effect to cartel arrangements which, broadly speaking, involved charging customers a common exchange rate and price for the remittance services. Four individuals also pleaded guilty to offences involving them being knowingly concerned in giving effect to the cartel arrangements. None of the individual offenders were convicted of any offence of being knowingly concerned in the making of the cartel arrangements.

247 The first of the individual offenders, Van Ngoc Le was convicted of two offences, one of which involved him being knowing concerned in the corporate offender’s offence of giving effect to cartel arrangements over a four-and-a-half-year period. He was a director of the corporate offender. He was sentenced to an effective term of imprisonment of two years and six months, though he was released immediately pursuant to a recognizance release order. The term of imprisonment incorporated a 25% discount for the plea of guilty. There were some subjective circumstances which were considered favourable to the offender and compelled a degree of leniency.

248 The second of the individual offenders, Tony Le, was Van Ngoc Le’s son and an employee of the corporate offender. He was convicted of a single offence of being knowingly concerned in the corporate offender giving effect to a cartel arrangement over a 14-month period, a sentence which incorporated a 25% discount for the guilty plea. He was sentenced to imprisonment for nine months, though again he was released immediately pursuant to a recognizance release order.

249 The third offender, Khai Tran, was a director, employee or agent of one of the other corporate parties to the cartel arrangement. He was convicted of being knowingly concerned in that other party giving effect to a cartel arrangement over an almost three-year period. He was sentenced to imprisonment for a period of one year and seven months, a sentence which incorporated a 25% discount. He was again immediately released pursuant to a recognizance release order.

250 The fourth offender, Thi Huong Nguyen, was an employee or agent of one of the other corporate parties to the cartel arrangement. She was convicted of two offences of being knowingly concerned in that party giving effect to cartel arrangements, one of which was given effect to over an almost three-year period. It was accepted that she had limited awareness that her conduct was unlawful at the time. She had a prior conviction. She was sentenced to imprisonment for an effective term of two years and four months, incorporating a 20% discount for the guilty plea. She was also immediately released on a recognizance release order.

251 It may be accepted that the offences committed by the individual offenders in *CDPP v Vina Money Transfer* were in some respects more serious than the offending by Mr Tartak in this matter. In particular, the cartel arrangements in *CDPP v Vina Money Transfer* were given effect to over a much lengthier period and the corporate offenders operated businesses in suburbs of both Sydney and Melbourne. It does not follow, however, that the offences in that case were significantly more serious, as contended by Mr Tartak. For one thing, the corporate offender in question in this case was a public company and Mr Tartak was its chief executive officer. The companies in question in *CDPP v Vina Money Transfer* were much smaller private companies and only some of the individual offenders were directors. The market affected by the offending in this matter was also more substantial and lucrative than the market in question in *CDPP v Vina Money Transfer*. The offences committed by the individual offenders were all offences of being knowingly concerned in giving effect to cartel arrangements, as opposed to being knowingly concerned in the making of cartel arrangements. It is also clear that the subjective circumstances of the individual offenders in *CDPP v Vina Money Transfer* were substantially different to Mr Tartak’s subjective circumstances.

252 As discussed earlier, the corporate offender in *CDPP v Alkaloids* wasa moderately sized family-owned company based in Queensland. It was convicted of three cartel offences. Two of the offences were offences of giving effect to a cartel arrangement which had the purpose or effect of fixing the price of its product, limiting production, and allocating or rigging bids. The other offence was an offence of attempting to make a cartel arrangement which had the purpose or effect of fixing the price or rigging bids. The market which was affected by the cartel arrangements was the market for a product which was used in pharmaceuticals. Almost all that product was exported.

253 Mr Christopher **Joyce** was the export manager of the corporate offender. He pleaded guilty to three cartel offences: two offences of aiding and abetting the corporate offender to give effect to cartel arrangements, and one offence of aiding and abetting the corporate offender’s attempt to make a cartel arrangement. Mr Joyce also asked the Court to take into account seven offences identified in a schedule under s 16BA of the Crimes Act. Five of those offences were offences of aiding and abetting the corporate offender to make, or in two cases attempt to make, cartel arrangements. Two offences were offences of aiding and abetting the corporate offender to give effect to cartel arrangements.

254 The offences committed by Mr Joyce, in summary, involved multiple cartel arrangements with up to six competitors. Those cartel arrangements were given effect to over a nine-year period. Mr Joyce’s offending conduct was undoubtedly very serious. He had a senior role with the corporate offender and the conduct he engaged in was covert, deliberate and systematic. He was motivated by, among other things, financial benefit. While it was accepted that he felt humiliation and regret, he attempted to minimise his culpability and his evidence was found to be less than candid. Mr Joyce was sentenced to imprisonment for 32 months, a sentence which incorporated a 25% discount for the plea of guilty and assistance. That imprisonment was to be served by way of intensive correction order, the conditions of which included that Mr Joyce perform 400 hours of community service and pay a fine of $50,000.

255 It may again be accepted that the offences committed by Mr Joyce were in some respects more serious than the offending by Mr Tartak in this matter. Mr Joyce was sentenced for three offences, as opposed to two offences in Mr Tartak’s case, and seven further offences were taken into account pursuant to s 16BA of the Crimes Act, as opposed to two offences in Mr Tartak’s case. The cartel arrangements involved more parties and were given effect to over a much lengthier period than those involved in Mr Tartak’s case.

256 There are nevertheless elements of Mr Tartak’s offending that are more serious than Mr Joyce’s offending. Bingo was a publicly owned and ASX listed company at the time of the offences, as opposed to the corporate offender in Mr Joyce’s case, which was a relatively small privately owned company. Mr Tartak was the chief executive officer, whereas Mr Joyce was simply an officer retained by the company, albeit a fairly senior one. The markets affected by Mr Tartak’s offending conduct were substantial domestic markets, whereas the markets affected by Mr Joyce’s conduct were mainly overseas given that most of the relevant product was exported.

## The appropriate sentence to impose on Mr Tartak

257 The Prosecutor submitted that in all the circumstances, and particularly having regard to the inherent and objective seriousness of Mr Tartak’s offending conduct, a sentence of imprisonment was the only appropriate sentence. The Prosecutor added, however, that she would “not be heard against a submission advanced on behalf of Mr Tartak that an intensive correction order with an appropriate additional condition (community service work or home detention) is within the range of available sentences”. Intensive correction orders are a sentencing option provided by the *Crimes (****Sentencing Procedure****)* ***Act*** *1999* (NSW) which may, in an appropriate case, be picked up and applied to federal offenders by virtue of s 20AB of the Crimes Act.

258 Mr Tartak’s primary submission was that the Court could not or would not be satisfied that no other sentence but imprisonment is warranted. He relied, in support of that submission, on his early plea, his “fulsome” assistance, his genuine remorse and rehabilitation, the extra-curial punishment he had suffered and “familial impacts”. He also submitted that his offending was less serious than the offending in *CDPP v Vina Money Transfer* and *CDPP v Joyce*. Mr Tartak’s secondary submission was that, if the Court was satisfied that a sentence of imprisonment was the only appropriate sentence, the Court should immediately suspend any sentence of imprisonment by way of a recognizance release order under s 20(1)(b) of the Crimes Act, or order that the sentence of imprisonment be served by way of an intensive correction order.

259 In light of those competing submissions, the first question to consider is whether the Court is satisfied that no sentence other than one involving imprisonment is appropriate in all of the circumstances of the case. The parties rightly identify this as a critical consideration given the terms of s 17A of the Crimes Act, which provides that a court “shall not pass a sentence of imprisonment on any person … unless the court, after having considered all other available sentences, is satisfied that no other sentence is appropriate in all the circumstances of the case”.

### Is imprisonment the only appropriate sentence?

260 The facts, matters, and circumstances that are relevant and must be considered in determining the appropriate sentence to impose on Mr Tartak have been identified and discussed in detail throughout these reasons. Those facts, matters, and circumstances, broadly speaking, relate to the objective seriousness of the offences committed by Mr Tartak and to Mr Tartak’s subjective circumstances, particularly those that mitigate and compel a degree of leniency. In determining whether imprisonment is the only appropriate circumstances, it is necessary to consider and weigh all those facts, matters, and circumstances in the balance. It is also necessary to have regard to the sentencing principles to which reference has already been made.

261 I am satisfied that, when all of the relevant facts, matters, and circumstances are weighed in the balance, it can safely be concluded that no sentence other than one involving imprisonment is appropriate in Mr Tartak’s case. While some of Mr Tartak’s subjective circumstances are undoubtedly mitigatory and compel a degree of leniency, the objective seriousness of his offences are such as to require a sentence of imprisonment.

262 The legislature has seen fit to provide a maximum penalty for cartel offences committed by an individual which includes imprisonment for up to ten years. That reflects how seriously the legislature views cartel offences. There could also be little doubt that the legislature chose to provide penalties which include imprisonment because the prospect of a sentence of imprisonment provides a real and powerful deterrent, not only for the offender in question, but also for would-be cartel offenders. The possibility, if not prospect, of imprisonment would no doubt make officers and employees of other corporations think twice before committing their corporations to cartel arrangements given the possibility, if not prospect, that they may be imprisoned if they do.

263 The cartel offences committed by Mr Tartak are also objectively very serious offences. Without wishing to unnecessarily repeat what also already been said, Mr Tartak, as the chief executive officer of a publicly owned and ASX listed corporation, caused that corporation to enter and give effect to an arrangement which included a cartel provision. That cartel provision concerned the prices that the two main competitors in the relevant market would charge for their services. In Bingo’s case, it would maintain certain specified price increases. There could be little doubt that the cartel provision had an impact on price competition in the relevant market with the result that there was a real chance that certain customers would pay more than they otherwise would have for the relevant services. The market in question – the market for collections services for building and demolition waste in Sydney – was a substantial and lucrative market.

264 It is true, as Mr Tartak pointed out, that the cartel arrangement only affected a geographically limited segment of the overall market for waste management services. It is equally true that the arrangement only persisted for a three-month period and that its impact – both in terms of the benefits derived and the harm caused – cannot be precisely identified or quantified. Those features of the cartel arrangement and the conduct generally must obviously be considered in assessing the overall seriousness of the offending conduct. The offences are undoubtedly less serious than they would have been if the cartel arrangements had a larger scope or persisted for longer. It does however not follow that the offences as committed were not very serious.

265 It is also necessary to have regard to the criminality involved in the two offences that Mr Tartak has requested the Court to have regard to pursuant to s 16BA of the Crimes Act. It is again unnecessary to rehearse what has already been said concerning those offences and the manner and means by which they may be taken into account in sentencing Mr Tartak. It suffices to note that the criminality involved in those offences was also serious, though to an extent they arose out of the same course of conduct that gave rise to the offences for which Mr Tartak is to be sentenced.

266 Of course, the seriousness of Mr Tartak’s offending must be weighed against his subjective circumstances. Those subjective circumstances were in many respects compelling. Again, without wishing to be repetitive, Mr Tartak was a man of prior good character, and a valued and well-respected member of the community. His fall from grace has been substantial and he has, and will continue to, suffer some extra-curial punishment. The offence was out of character. He is genuinely contrite and remorseful. That is reflected in his early plea of guilty and assistance to the relevant authorities. His early plea and assistance also had a utilitarian benefit. He has good prospects of rehabilitation and there is a low risk of him reoffending. Any sentence involving imprisonment will have a deleterious effect on his family.

267 As compelling as Mr Tartak’s subjective circumstances may be, I am not persuaded that they outweigh the objective seriousness of his offending such as to warrant or compel the conclusion that some penalty other than imprisonment would or may be appropriate. Rather, I am satisfied that the objective seriousness of Mr Tartak’s offending and the important deterrent effect of a sentence of imprisonment in the case of cartel offences compel the conclusion that no sentence other than imprisonment would be appropriate in Mr Tartak’s case. I am not satisfied that the imposition of a fine, even a large fine, would be a sentence of a severity appropriate in all the circumstances. Nor am I satisfied that any non-custodial sentence in Pt 2 Div 3 of the Sentencing Procedure Act that the Court could impose on Mr Tartak by virtue of s 20AB of the Crimes Act would be of a severity appropriate in all the circumstances.

### The appropriate term of the sentence of imprisonment

268 The process of determining the length of the term of imprisonment that should be imposed on Mr Tartak in respect of the two offences again involves considering and weighing the relevant facts, matters, and circumstances and making a value judgment as to the sentence which would be of a severity appropriate in all the circumstances having regard to the established sentencing principles. It is again unnecessary to repeat what has already been said concerning the facts, matters, and circumstances relevant to the objective seriousness of the offences committed by Mr Tartak and Mr Tartak’s subjective circumstances. Having considered and weighed all those facts, matters, and circumstances, in my judgment the appropriate sentence of imprisonment to impose is as follows.

269 In respect of the offence under s 45AF(1) and s 79(1)(a) of the Competition and Consumer Act, the sentence that is of appropriate severity is a sentence of imprisonment for eighteen months. In arriving at that sentence, I have applied a discount of 40% for Mr Tartak’s early plea of guilty and assistance and cooperation with the authorities. But for that early plea and assistance, the appropriate sentence would have been two and a half years imprisonment.

270 In respect of the offence under s 45AG(1) and s 79(1)(a) of the Competition and Consumer Act, the sentence that is of appropriate severity is a sentence of imprisonment for eighteen months. In arriving at that sentence, I have again applied a discount of 40% for Mr Tartak’s early plea of guilty and assistance and cooperation with the authorities. But for that early plea and assistance, the appropriate sentence would have been two and a half years imprisonment.

271 Having regard to the principle of totality and the fact that there is there is a degree of overlap in the criminality involved in the two offences, it is appropriate to order that the sentences be served partly concurrently. It would in all the circumstances be appropriate for the sentence for the s 45AG(1) offence to commence six months after the commencement of the sentence for the s 45AF(1) offence, meaning that 12 months of the sentence will be served concurrently and there will only be an effective accumulation of six months. The effective sentence is accordingly a sentence of two years’ imprisonment.

272 In light of Mr Tartak’s submissions, it is next necessary to consider whether the Court should order his immediate release pursuant to a recognizance release order under s 20(1)(b) of the Crimes Act, or in the alternative whether it is appropriate to order that the sentence of imprisonment be served by way of an intensive corrections order.

273 As discussed later, I also propose to impose a fine on Mr Tartak.

### Should the Court make a recognizance release order?

274 Section 19AC of the Crimes Act provides, in effect, that where a sentencing court imposes a sentence of imprisonment on a federal offender the term of which is between six months and three years, the court is required to make a recognizance release order in respect of that sentence unless “the court is satisfied that such an order is not appropriate having regard to … the nature and circumstances of the offence or offences concerned; and … the antecedents of the person”.

275 Section 20(1)(b)(i) of the Crimes Act relevantly provides that “[w]here a person is convicted of a federal offence or federal offences, the court before which he or she is convicted may, if it thinks fit … sentence the person to imprisonment in respect of the offence or each offence but direct, by order, that the person be released, upon giving security of the kind referred to in [s 20(1)(a)] … either immediately or after the person has served a specified period of imprisonment …”. In determining what recognizance release order should be made, the Court is required to take into account all of the relevant circumstances, including the matters in s 16A(2) of the Crimes Act, as well as the requirement in s 16A(1) that the sentence imposed must be of a severity appropriate in all the circumstances of the offence: see *Hili v The Queen* at [40]. In determining what period of imprisonment should be served, the sentencing court must have regard to the objective gravity of the offending and general deterrence: *Director of Public Prosecutions (Cth) v Page* [2006] VSCA 224 at [53]-[54]; *CDPP v Vina Money Transfer* at [198]; *CDPP v Joyce* at [187].

276 I do not consider that it would be appropriate to make an order under s 20(1)(b) of the Crimes Act directing that Mr Tartak be released immediately. That would not be a sentence of a severity appropriate in all the circumstances. Indeed, it would be far too lenient in all the circumstances. In arriving at that conclusion, I have had regard to all the facts, matters, and circumstances of the offences, including those that relate to the objective seriousness of the offences and those that relate to Mr Tartak’s subjective circumstances. In my view, the objective seriousness of the offences and the importance of general deterrence when sentencing for cartel offences makes immediate release under s 20(1)(b) of the Crimes Act inappropriate.

### Is it appropriate for imprisonment to be served by way of an intensive correction order?

277 I am, however, satisfied that it would be appropriate to make an intensive correction order directing that the sentences of imprisonment be served by way of intensive correction in the community pursuant to s 7 of the Sentencing Procedure Act and s 20AB of the Crimes Act. Section 20AB(1AA)(a)(ix) specifically identifies an order that is known as an “intensive correction order” as being an additional sentencing alternative which is available under s 20AB(1).

278 A court cannot make, or consider making, an intensive correction order unless and until it has determined that no sentence other than imprisonment is appropriate and has determined the appropriate term of the sentence without regard to the manner in which the sentence will or should be served: ***Stanley*** *v Director of Public Prosecutions (NSW)* (2023) 97 ALJR 107; [2023] HCA 3 at [62]; *Wany v Director of Public Prosecutions (NSW)* (2020) 103 NSWLR 620; [2020] NSWCA 318 at [18]; *R v Zamagias* [2002] NSWCCA 17 at [26]. I have, for the reasons already given, determined that no sentence other than imprisonment is appropriate in Mr Tartak’s case and have determined the appropriate length or terms of that imprisonment. I have made those determinations without regard to the potential availability of an intensive correction order.

279 The sentencing procedure for intensive correction orders is set out in Pt 5 of the Sentencing Procedure Act. Those procedures are also relevantly picked up by s 20AB of the Crimes Act: ***Mourtada*** *v The Queen* [2021] NSWCCA 211 at [20]; *CDPP v Joyce* at [168].

280 Section 66(1) of the Sentencing Procedure Act provides that “community safety” is the paramount consideration when determining whether to make an intensive correction order and s 66(2) provides that when considering community safety, the court “is to assess whether making the order or serving the sentence by way of full-time detention is more likely to address the risk of reoffending”. That requirement “recognises that: community safety is not achieved by simply incarcerating an offender, but that incarceration may have the opposite effect; and the concept of community safety is linked with considerations of rehabilitation, which is more likely to occur with supervision and access to programs in the community”: *CDPP v Joyce* at [168] citing *R v Pullen* (2018) 87 MVR 47; [2018] NSWCCA 264 at [84]; see also *Stanley* at [83]-[88].

281 Section 67 of the Sentencing Procedure Act contains a list of offences and types of offences in respect of which an intensive correction order is not available as a sentencing option. The offences committed by Mr Tartak do not fall within that list. Section 68 provides that intensive correction orders are not available where the term of imprisonment exceeds certain specified durations. Those durations relevantly include, where two or more offences are committed, the duration of the term of imprisonment imposed for all the offences exceeds three years. The sentences of imprisonment that I have determined to be appropriate in Mr Tartak’s case do not exceed three years given the way they have been structured.

282 In considering whether it is appropriate to make an intensive correction order I have considered the contents of an assessment report in respect of Mr Tartak prepared by a community corrections officer of Corrective Services NSW: see s 17C and s 69 of the Sentencing Procedure Act. That report, among other things, assessed that there was a low risk of Mr Tartak reoffending and that Mr Tartak was suitable to undertake community service work. While the report does not specifically refer to the availability or suitability of an intensive correction order, it may nevertheless be inferred that it is a “relevant assessment report” for the purposes of s 17D(1) of the Sentencing Procedure Act. Even if that was not the case, I am nevertheless satisfied that there is sufficient information before the Court to justify the making of an intensive correction order without obtaining a relevant assessment report: see s 17D(1A) of the Sentencing Procedure Act.

283 My reasons for considering that it is appropriate to make an intensive correction order in Mr Tartak’s case may be briefly stated. In my view, community safety would be better served by Mr Tartak serving his sentences in the community subject to supervision and conditions. I am also of the view that an intensive correction order is more likely to address any risk of Mr Tartak reoffending rather than full-time detention. I consider that both the community and Mr Tartak would be better served by Mr Tartak serving his imprisonment by way of intensive correction in the community as opposed to full-time custody.

284 As discussed in detail earlier in these reasons, I am satisfied that there is a low risk of Mr Tartak reoffending and that Mr Tartak’s prospects of rehabilitation are good. Mr Tartak’s prospects of rehabilitation are in my view likely to be enhanced by the standard conditions of an intensive correction order, which are that the offender must not commit any offence and must submit to supervision by a community corrections officer.

285 I also consider that it is appropriate to impose an additional condition that Mr Tartak perform 400 hours of community service: see s 73A(2)(d) of the Sentencing Procedure Act. I note in that regard, that the assessment report indicates that Community Corrections can provide up to 21 hours of community service work per month. As noted earlier, the assessment report states that Mr Tartak has been assessed as suitable to undertake community service work: see s 73A(3) of the Sentencing Procedure Act. In my view, the requirement to perform community service work is likely to further enhance Mr Tartak’s prospects of rehabilitation. The requirement to submit to supervision and engage in community work is likely to cause Mr Tartak to pause and reflect on his wrongdoing in a way which is positive and likely to deter any future reoffending. I doubt that the same could be said if Mr Tartak is subject to full-time custody. I doubt that full-time custody would be more likely to positively address any risk that Mr Tartak might reoffend, particularly given the nature of Mr Tartak’s offending and his subjective circumstances.

286 I should reiterate that, while Mr Tartak submitted that the Court could not, or would not, be satisfied that no sentence other than imprisonment would be appropriate in all the circumstances of the case, he did not submit that, if the Court was so satisfied and imposed a term of imprisonment, it would not be open to the Court or appropriate to make an intensive corrections order. The Prosecutor also did not submit that the Court could not, or should not, make an intensive correction order and effectively conceded that the Court would not err if it made such an order.

287 I should also note in that context that, while issues and qualifications have been raised about the availability of intensive correction orders in the exercise of federal jurisdiction (see in particular *Mourtada* at [15]-[17]), neither party raised any such issues or qualifications. That may well have been because an intensive correction order was made by Abraham J in *CDPP v Joyce*. In any event, I have proceeded on the basis that there was no issue as to the availability of an intensive correction order in the circumstances of this case.

288 I do not consider that any other special conditions should be imposed under s 73A(2) of the Sentencing Procedure Act.

289 Given that I have determined that Mr Tartak’s imprisonment be served by way of an intensive correction order, I do not consider that it is appropriate to make a recognizance order under s 20(1)(b) of the Crimes Act directing that he be released after serving a specified term of imprisonment. As noted earlier, I have also determined that it would not be appropriate to order or direct that Mr Tartak be released immediately pursuant to a recognizance release order.

### Imposition of a fine

290 As has already been noted, the maximum penalty for the offence committed by Mr Tartak is a term of imprisonment not exceeding 10 years, or a fine not exceeding $420,000, or both. In my view, Mr Tartak should be required to pay a fine in addition to the term of imprisonment to be served by way of intensive corrections order. That is appropriate and necessary to ensure that the overall sentence imposed on Mr Tartak is of a severity appropriate in all the circumstances.

291 Cartel offences are essentially economic crimes. Many economic crimes are motivated by greed, self-interest, and financial gain. While there is no direct evidence that Mr Tartak was motivated by his own financial gain, it may readily be inferred that he was motivated by Bingo’s economic interests and the indirect benefits he might thereby derive as Bingo’s chief executive officer. That perhaps might explain why he advised the community corrections officer who prepared the assessment report that his offence was “mainly committed for financial gain”. A fine is often an effective way of deterring economic crimes because it strikes at the heart of the motivation for the offending.

292 There was no evidence concerning Mr Tartak’s financial circumstances. As discussed earlier, while s 16C(1) of the Crimes Act requires the Court to take into account the financial circumstances of an offender before imposing a fine for a federal offence, s 16C(2) provides that the inability to determine an offender’s financial circumstances does not prevent the Court from imposing a fine. Moreover, Mr Tartak did not submit that he did not have the financial capacity to pay a fine and appeared to concede that the imposition of a fine would be within the Court’s sentencing discretion in all the circumstances.

293 I have determined, in all the circumstances, that it is appropriate to fine Mr Tartak $50,000 in respect of each of the offences, in addition to the sentences of imprisonment to be served by way of intensive correction orders. In determining the appropriate amount of the fine, I have taken into account and applied an appropriate discount to reflect Mr Tartak’s plea of guilty and assistance to the authorities. I have also had regard to the principle of totality.

294 I should finally note that I acknowledge that the sentence that I will impose on Mr Tartak is slightly more severe than the sentence I have decided to impose on Mr Roussakis. As discussed earlier in the context of the discussion concerning parity, the difference may be explained on the basis that: Mr Tartak is to be sentenced in respect of two offences, not one as was the case with Mr Roussakis; Mr Tartak asked the Court to take into account two additional offences pursuant to s 16BA of the Crimes Act, whereas Mr Roussakis only asked the Court to take into account one additional offence; the objective seriousness of the offending conduct in the two cases was different; and the offenders’ subjective circumstances were slightly different.

# DISQUALIFICATION

295 The Prosecutor applied for an order pursuant to s 86E of the Competition and Consumer Act disqualifying Mr Tartak from managing a corporation for a period that the Court considers appropriate. Section 86E provides that the Court can make such an order if satisfied that the person against whom the order is sought has been involved in a contravention of Pt IV of the Act. Part IV of the Act includes the cartel offence provisions. I am, in those circumstances, satisfied that the Court can make a disqualification order against Mr Tartak. The only issue is whether the Court should exercise its discretion to make such an order.

296 That issue can be dealt with shortly, particularly because Mr Tartak did not oppose the making of a disqualification order. The primary purpose of a disqualification order is to protect the public, though it has also been said that disqualification orders can be imposed by way of deterrence and punishment: *Australian Competition and Consumer Commission v* ***Renegade Gas*** *Pty Ltd (trading as Supagas NSW)* [2014] FCA 1135 at [90]-[94]. The facts or circumstances that may be relevant to whether a disqualification order should be made include: the nature of the contraventions in question; the risks to the public if, in light of the contraventions, the defendant is permitted to manage a corporation; the interests of shareholders, creditors, and employees of any corporation managed by the defendant; the character of the defendant and his or her honesty and competence; and, any hardship to the defendant and their business interests that would follow from a disqualification order: see *Renegade Gas* at [95]-[96] citing *Commissioner for Corporate Affairs (WA) v Ekamper* (1987) 12 ACLR 519 at 525.

297 The facts and circumstances of this matter are such that it is appropriate for the Court to exercise its discretion in favour of making a disqualification order against Mr Tartak for a period of five years. There are sound reasons to conclude that a disqualification order is appropriate in order to protect the public from any risk that Mr Tartak may be involved in future contraventions if permitted to continue to manage corporations.

298 The offences committed by Mr Tartak were undoubtedly serious and involved a serious departure from the appropriate duties and standards that should be observed by managers of corporations, in particular chief executive officers of publicly listed companies. Mr Tartak unilaterally committed Bingo to unlawful anticompetitive arrangements in circumstances where, it may be inferred, he was aware of the unlawful nature of the arrangements and deliberately concealed them from Bingo’s board of directors. While I accept that Mr Tartak is contrite, the risks of him reoffending are low, and his prospects of rehabilitation are good, the nature of Mr Tartak’s offences are such that there is nevertheless a strong need to protect the public by ensuring that Mr Tartak is unable to occupy any management position for a period of time. That is a powerful consideration which weighs in favour of making a disqualification order.

299 Mr Tartak did not point to any consideration which weighed against the making of a disqualification order. He is no longer the chief executive officer of Bingo and there is no reason to believe that the shareholders, creditors, and employees of Bingo or its related companies would be worse off if a disqualification order was made against Mr Tartak. While I accept that a disqualification order may cause Mr Tartak some hardship in the future as it will make it more difficult for him to secure employment, the fact that he has committed these offences would in any event most likely make any prospective employer wary of placing Mr Tartak in a position of responsibility without supervision. I doubt that a disqualification order will add considerably to Mr Tartak’s difficulties in that regard. I also accept that the difficulties that Mr Tartak may encounter in securing employment in the future, including by reason of a disqualification order, may result in some hardship to his family. In my view, however, any hardship that may be suffered by Mr Tartak and his family as a result of a disqualification order is significantly outweighed by the need to protect the public.

300 While previous authorities have noted that a disqualification order may be imposed by way of deterrence and punishment, I doubt that it would be appropriate to make a disqualification order for either of those purposes. Punishment and deterrence are objectives or considerations that are highly relevant when determining the appropriate sentences to be imposed on an offender. In my view, however, the predominant, if not only, purpose of a disqualification order is the protection of the public. I do not propose to make the disqualification order for the purpose of punishing or deterring Mr Tartak. I do not consider that the disqualification order is part of the sentence imposed on him in respect of his offences. As previously indicated, however, in determining the appropriate sentences, I have taken into account that I would be making a disqualification order on the basis that it can be seen as a form of extra-curial punishment.

301 It should perhaps be noted in this context that the Prosecutor submitted that Mr Tartak would, in any event, be automatically disqualified from managing a corporation for five years pursuant to s 206B(1)(b) of the ***Corporations Act*** *2001* (Cth). The correctness of that submission would depend on whether the offences committed by Mr Tartak could accurately categorised as either offences concerning “the making, or participation in making, of decisions that affect the whole or a substantial part of the business of the corporation”, or offences concerning “an act that has the capacity to affect significantly the corporation’s financial standing” or as offences involving dishonesty: see s 206B(1)(a)(i) and (ii) and (b)(ii) of the Corporations Act. The offences committed by Mr Tartak, at first blush at least, would appear to fall into one or more of those categories. The Prosecutor nevertheless sought a disqualification order under s 86E of the Competition and Consumer Act to ensure that the ACCC was given notice of any application that Mr Tartak might make for leave to manage a corporation pursuant to s 206G of the Corporations Act.

302 I am satisfied that the disqualification of Mr Tartak from managing corporations is justified and that the appropriate period of disqualification is five years. I accordingly propose to make a disqualification order to that effect pursuant to s 86E of the Competition and Consumer Act.

# CONCLUSION AND DISPOSITION

303 Convictions will be entered against Bingo and Mr Tartak in accordance with their pleas of guilty to the counts in the indictments presented against them.

304 The appropriate sentence to impose on Bingo in respect of each of the two offences it committed is a fine of $15,000,000, which results in an aggregate fine of $30,000,000. An order will be made to that effect.

305 The appropriate sentence to impose on Mr Tartak in respect of each of the two offences he committed is a sentence of imprisonment for 18 months, though those sentences are to be served partly concurrently so that the effective sentence of imprisonment is two years. That sentence is to be served by way of an intensive correction, the conditions of which include that Mr Tartak perform 400 hours of community service. Mr Tartak will also be fined $50,000 in respect of each offence, resulting in an aggregate fine of $100,000. Orders will be made to that effect.

306 Finally, it is appropriate to make an order under s 86E of the Competition and Consumer Act disqualifying Mr Tartak from managing corporations for a period of five years.

|  |
| --- |
| I certify that the preceding three hundred and six (306) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Wigney. |

Associate:

Dated: 23 February 2024