



## **ENFORCEMENT AGAINST CARTELS IN SOUTH AFRICAN COMPETITION LAW: ADVANTAGES AND CHALLENGES.**

A research paper submitted in partial fulfillment of the requirements for the LLM Degree in  
Mercantile Law, University of Pretoria, South Africa.

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## DECLARATION

I declare that this mini dissertation is my original work and all sources of information from other authors have been acknowledged. I also declare that this dissertation has never been submitted to any other institution. I hereby present this work in partial fulfillment for the award of the LLM Degree in Mercantile Law.

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## DEDICATIONS

This research paper is dedicated to my late mother, Judith Jane Motsa.

## ACKNOWLEDGEMENTS

Firstly, I would like to thank the Lord Almighty God for giving me enough strength to pursue my dissertation until its finality. It is also my great pleasure to thank my supervisor and mentor, Professor Corlia Van Heerden, for her guidance and supervision, without which, this academic paper would not have been realised.

Special thanks to my fiancé Thabo Simelane, for being the pillar of my strength and for his continual support throughout the pursuance of my degree. To my loving and good friend Konrad Urbanski and my wonderful family, especially Vicky Magagula, thank you so much for your prayers and support, I will be forever grateful for your support.

## SUMMARY

Cartels have been manipulating economies for centuries and over the years many jurisdictions have fashioned mechanisms to combat cartel activity. In South Africa, the Competition Commission concedes that cartel activity does not only impede economic growth, but it is also harmful to the welfare of consumers as it leads to price increase, limits the consumer's choice of product and leads to poor quality of products. It is for this reason that the Competition Commission has implemented the Corporate Leniency Policy to detect sophisticated and secretive cartels.

The Competition Commission through its Corporate Leniency has been successful in detecting a number of cartels which were secretive and would not have otherwise been detected without the Policy. In enforcing stringent penalties for cartel participants, the South African legislature introduced criminal sanctions for directors or officers in management authority who cause or acquiesce in cartel participation. While this development in competition law is welcomed by some with both hands but it has been criticized by many.

The focus of this research therefore, is to give an insight on how the introduction of criminal sanctions can be implemented in a way that will not erode the effectiveness of the Corporate Leniency Policy which is a successful tool utilized by the Competition Commission to detect cartels. Comparison will be made to Australia which is a jurisdiction that has a successful Leniency Policy framework and has also introduced criminal sanctions to punish cartel participants. This research then will conclude by making recommendations on how the introduction of criminal sanction must be introduced to work hand in hand with the Corporate Leniency Policy and taking the successes of other jurisdictions.

## ACRONYMS AND ABBREVIATIONS

<b>ACCC</b>	: Australian Competition and Consumer Commission
<b>CAU</b>	: Contract, Arrangement or Understanding
<b>CCA</b>	: Cartel Conduct Act
<b>CCR</b>	: Competition Commission Rules
<b>CDPP</b>	: Commonwealth Director of Public Prosecutions
<b>CLP</b>	: Corporate Leniency Policy
<b>CR</b>	: Competition Review
<b>CT</b>	: Competition Tribunal
<b>CTR</b>	: Competition Tribunal Rules
<b>CWI</b>	: Consolidated Wire Industries
<b>ED</b>	: Edition
<b>EU</b>	: European Union
<b>MOU</b>	: Memorandum of Understanding
<b>NPA</b>	: National Prosecuting Authority
<b>RSA</b>	: Republic of South Africa
<b>SAPS</b>	: South African Police Service
<b>SCCU</b>	: Specialized Commercial Crimes Unit
<b>TPA</b>	: Trade Practices Act
<b>UK</b>	: United Kingdom
<b>USA</b>	: United States of America

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## CHAPTER 1

### INTRODUCTION

#### 1.1 BACKGROUND

Historically, South Africa was engulfed by monopolies and high levels of concentration,<sup>1</sup> which resulted in reduced competition between firms. During the apartheid era, South Africa was isolated from the outside world markets, therefore, large corporations concentrated on the extraction of natural resources.<sup>2</sup> The state subsidized key industries and private businesses accumulated at that period, resulting to an inward-looking economy. It was during this period that anti-competitive business practices materialized and it continues to have an effect on many sectors of our economy.<sup>3</sup>

Today, South Africa is characterised as a capitalist country and has a free market. A free market structure therefore, requires competitive markets to avert the use of economic powers to exploit.<sup>4</sup> In as much as South Africa has a free market, it still consists of highly concentrated markets.<sup>5</sup> This is the reason therefore, that there are significant barriers to entry into the markets.<sup>6</sup>

This historic overview of competition evolution is paramount so as to render an insight into how competition law was developed to rectify the concentration of economic power that emerged during the apartheid era. Over the years, South Africa had to develop competition policies to regulate and foster economic growth in the competition sector.

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<sup>1</sup> Louise Jordaan and Phumudzo S. Munyani, “The Constitutional implications of the New Section 73A of the Competition Act of 1998” 2011 (23) *South African Mercantile Law Journal*, p 197.

<sup>2</sup> Dennis Davis and Lara Granville, *The Competition System and The Country’s Norms*, (2013) 1<sup>st</sup> ed, p266.

<sup>3</sup> Kasturi Moodaliyar and Simon Roberts, *The Development of Competition Law and Economics in South Africa*, 2012, p ix (introductory page).

<sup>4</sup> Peter Havenga, Michelle Havenga and Others, *General Principles of Commercial Law*, (2013) 7<sup>th</sup> ed, p331.

<sup>5</sup> *Supra* n 1 at 197.

<sup>6</sup> Some industries are so saturated and large firms have large market shares thus limiting potential competitor’s entry into that particular industry.

### 1.1.1 Competition Law

Competition law is concerned with the promotion and maintenance of competition for the benefit of market effectiveness and consumers.<sup>7</sup> Therefore, competition law regulates such markets for the maximal benefits of the society. The logic behind competition law is that competition benefits the whole society and such benefit is lost in a market concentrated with monopolies, since monopolistic markets does not apportion resources efficiently for the benefit of consumers.<sup>8</sup> In competition, the legal control is reduced and the welfare of the society improves, unlike in markets filled with monopolies.<sup>9</sup> Competition law therefore, consists of rules and regulations that help to intervene in the market place when there are challenges that have to be addressed by the competition law or where there is a market failure.<sup>10</sup>

The instrument to regulate competition law in South Africa is the Competition Act,<sup>11</sup> which was promulgated to promote and protect competition in South Africa. The Act came into force in October 20, 1998. Before the Competition Act, there were other legislation that were developed over the years to regulate the competition industry,<sup>12</sup> however, such legislation were ineffective to meet the desired purpose, hence the need for the Competition Act.<sup>13</sup>

### 1.1.2 Cartels

Chapter 2 of the Act prohibits uncompetitive practices.<sup>14</sup> Uncompetitive practices like cartels are prohibited by section 4(1)(b) the Act,<sup>15</sup> which prohibits horizontal practices. Cartels are

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<sup>7</sup> Martyn Taylor, *International Competition Law*, 2006, p8.

<sup>8</sup> Phillip Sutherland and Katharine Kemp, *Competition Law of South Africa*, 2013, p1-14.

<sup>9</sup> John G. Agnew, *Competition Law*, 1985, p1.

<sup>10</sup> Barry J. Rodger and Angus MacCulloch, *Competition Law and Policy in the European Community and United Kingdom*, (2001) 2<sup>nd</sup> ed, p1.

<sup>11</sup> Act no. 89 of 1998.

<sup>12</sup> Such as the Maintenance and Promotion of the Competition Act of 1979, this Act which regulated competition among corporations was repealed by the Competition Act.

<sup>13</sup> *Supra* n 1 at 198.

<sup>14</sup> Sasha-Lee Africa and Sasha-Dominic Bachmann, "Cartel regulation in the three emerging BRICS economies: Cartel and competition policies in South Africa, Brazil, and India- A comparative overview" 2011(45) *International Law Journal*, p 990.

<sup>15</sup> This section prohibits horizontal practices which involves (i) directly or indirectly fixing a purchase or selling price or any other trading condition, (ii) dividing markets by allocating customers, suppliers, territories, or specific types of goods or services or, (iii) collusive tendering.

considered the most grave violations of anti-competitive practices.<sup>16</sup> In essence they consist of collusions between firms where they agree not to compete with each other.<sup>17</sup> Cartels involving price fixing, dividing markets and bid-rigging, are categorized as restrictive practices because they have the effect of lessening and preventing competition in a relevant market.<sup>18</sup> They are prohibited because they damage the economy and they deny the rights of consumers to purchase their choice of goods at lower prices, and they also reduce the supply of goods.

Cartels have been manipulating economies for centuries as they are not easily detected because they operate in secrecy.<sup>19</sup> Therefore, the Competition Act has established the Competition Authorities to enforce competition laws and *inter alia* fashion mechanisms to detect cartels.<sup>20</sup> The Competition Commission, the Competition Tribunal and the Competition Appeal Court were established by the Competition Act, and they have the responsibility for the enforcement of the competition legislation, policies and domestic compliance.<sup>21</sup>

In its efforts to detect cartels, the Competition Commission has developed the Corporate Leniency Policy (CLP) in 2004, which policy was subsequently amended in 2008.<sup>22</sup> The Corporate Leniency Policy was adopted as a weapon to combat the injurious effects of cartels and to assist the Commission in prosecuting cartels under section 4(1)(b) of the Act. The CLP provides for immunity to a cartel member from prosecution before the Competition Tribunal and the payment of administrative fines, in exchange for disclosing all pertinent information and disclosure of all documents relating to the operations of the cartel.<sup>23</sup>

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<sup>16</sup> Decide Makhubele, "Fighting over breadcrumbs-cartels and the Competition Act 89 of 1998", 2014 (539) *De Rebus*, p 22.

<sup>17</sup> Meijer Jean and Angumutho Maryanne, "Whistle-blowing under review: Competition Law", 2011 (7) *without prejudice*, p 10.

<sup>18</sup> Martin Brassey, *Competition Law*, 2002, p 139.

<sup>19</sup> John M. Connor and Others, "Criminalizing cartels an American perspective", 2010 (1) *New Journal of the European Criminal Law*, p 203.

<sup>20</sup> Section 19(1) of the Competition Act.

<sup>21</sup> *Supra* n 14 at 992.

<sup>22</sup> Kasturi Moodaliyar and Others, "The relationship between public and private enforcement in the competition law-a comparative analysis of South African, European Union and Swiss Law" 2014 (127) *South African Law Journal*, p 143.

<sup>23</sup> *Supra* n 3 at 137.

Immunity is granted to a self confessing member of a cartel who is first to the door<sup>24</sup> by rewarding such a member that is self confessing, and is first to approach the Commission about the participation to the cartel activity.<sup>25</sup>

Corporations involved in cartel activities may be penalised by an administrative fine of up to 10% of annual turnover in South Africa or their exports from South Africa during the firm's financial year.<sup>26</sup>

The Competition Act was amended in 2009<sup>27</sup> and section 73(A)<sup>28</sup> of the amendment introduces personal criminal liability to individuals involved in cartel conducts.<sup>29</sup> The sanctions for contravening the proposed section 73(A) include a fine not exceeding R500 000 or imprisonment term not exceeding ten years or both.<sup>30</sup>

## 1. 2 PROBLEM STATEMENT

The Commission has been successful in detecting cartels<sup>31</sup> using the Corporate Leniency Policy and there has been an increase usage of the leniency programme and a number of successful detection of cartels.<sup>32</sup>

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<sup>24</sup> The first-to-door principle is whereby the first person to run to the door (to the Commission) to report his participation to a cartel conduct will be granted immunity.

<sup>25</sup> Wilson Roberts and Avivi Lital, "When leniency is uncertain: Competition Law" 2009 (9) *Without Prejudice*, p2.

<sup>26</sup> See section 61(2) of the Competition Act. In the case of *Southern Pipeline Contractors v The Competition Commission* 23/CR/Feb 09, the Competition Tribunal on appeal held that Southern Pipeline Contractors had contravened section 4(1)(b)(i)(ii)(iii) of the Competition Act and it imposed an administrative penalty of R16 882 597.00, calculated on the basis of 10% of the company's turnover for its 2008 financial year, that turnover being R168 825 969.00.

<sup>27</sup>The President assented to the Competition Amendment Act 1 of 2009, however, most provisions of the Amendment Act has not yet become effective.

<sup>28</sup> Section 12 of the Competition Amendment Act provides for the insertion of the proposed section 73(A) into the Competition Act.

<sup>29</sup> In terms of the proposed section 73(A) and (b) of the Competition Amendment Act, "a director or person having management authority within a company commits an offence when he/she causes the firm to become engaged in a prohibited practice in terms of Section 4(1)(b) of the Act or knowingly acquiesces to the prohibited practice".

<sup>30</sup> Luke Kelly, "The introduction of a 'cartel offence' into South African law" 2010 (21) *Stellenbosch Law Review*, p 321.

<sup>31</sup> A lot of applicants came forward and used the Corporate Leniency Policy channel and paid administrative fees for participating in Cartels. In *Competition Commission v Cobro Concrete* 2009 (23) CR 1 (CT), Cape Concrete Works (Pty) Ltd applied for leniency and paid ZAR 4.371.386, same as Pioneer Foods (Pty) Ltd (*Competition Commission v Pioneer Foods (Pty) Ltd* 15/CR/Feb 07) and Clover industries (*Competition Commission v Clover Industries and others* 2006 (103) CR 1), these companies all utilised the Leniency and paid administrative fines.

<sup>32</sup> Kasturi Moodaliyar, "Are cartels skating on thin ice? An insight into the South African Corporate Leniency Policy", 2008 (125) *South African Law Journal*, p158

The introduction of the criminal sanction of individuals for involvement in cartel conduct is a controversial topic especially if one looks at the effects that it may have in the Corporate Leniency Policy which the Commission has used successfully to detect cartels and punish offenders.

Some schools of thought support the criminalisation of cartels in that, it is well intentioned and such criminalisation of anti-competitive behaviour is directed at protection of the competitive character of the economic system.<sup>33</sup> However, it may be asked as to what extent the proposed section 73(A) will impact the operations of the Corporate Leniency Policy.

The critical question is whether there is need for personal criminal liability to be levied to punish cartel offenders? If the answer to this conundrum is to the affirmative, then it needs to be considered how such cartel offence can be introduced into South African law in a manner that will not erode the effectiveness of the Corporate Leniency Policy?

### **1.3 RESEARCH OBJECTIVES**

The objectives of this research is to analyse the relevant provisions of the Competition Act that relate to cartels and examine the current mechanism put in place by the Competition Commission to enforce cartels in South Africa. The research also aims to examine the introduction of criminal sanctions in cartel offence and make recommendations where necessary on how South African competition law can be reformed to bring it line with other jurisdictions where cartel offences form part of their competition law.

The Competition Commission through the Corporate Leniency Policy requires that as applicants for immunity, managers, directors and executives of a firm must sign consent orders on behalf of the firm in admission to the participation in a cartel activity.<sup>34</sup> Such directors will however, not be willing to sign such orders on behalf of the firms as the evidence in those consent orders may possibly be used as *prima facie* evidence and a basis for securing a later criminal conviction against those very same directors.<sup>35</sup> Some writers argue that due to the constitutional right against self incrimination, any self-incriminating statement provided to the Commission is inadmissible as evidence against that very same person in

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<sup>33</sup> Jennifer A. Quad, "Making sense of the shift in paradigm on cartel enforcement: The case for applying a desert perspective" 2012-2013 (58) *McGill Law Journal*, p157.

<sup>34</sup> *Supra* n 30 at 328.

<sup>35</sup> Edward Elgar, *Enforcing Competition Rules in South Africa*, 2013, p 212.

criminal proceedings.<sup>36</sup> However, there is a concern, as protection is granted to those summoned to provide evidence to the commission and not to those who provide evidence voluntarily.<sup>37</sup>

Therefore it appears that the introduction of a cartel offence will deter directors from utilising the Corporate Leniency Policy as a result of fear for incriminating themselves in respect of a criminal prosecution. The specific objective of this research is to conduct a proper analysis of the ramifications of the proposed section 73(A) which seeks to criminalize cartel activities. Its proposed implementation will also be considered in order to ascertain whether the rationale for the introduction of criminal penalties for cartel participants is sound and if so to investigate how such penalties can be put into effect without affecting the Corporate Leniency Policy.

#### **1.4 LIMITATIONS OF THE STUDY**

This research is limited to the prohibition of cartel activity under section 4(1)(b) of the Competition Act. It focuses on proposed section 73A as contained in the Competition Amendment Act which proposes to introduce criminal liability in respect of individuals participating in cartel activities.

Moreover, the research will focus on the South African Corporate Leniency Policy and will look for guidance to Australia where the criminal prosecution of cartel offenders operates effectively side by side with their Leniency Policy.

#### **1.5 SIGNIFICANCE OF THE RESEARCH**

As highlighted above, the legislature enacted the Competition Amendment Act, which proposes the introduction of section 73A that provides for directors who cause the firm to participate in cartel conduct to be liable to a fine of up to R500 00 or imprisonment not

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<sup>36</sup> Natalia Lopes and Others, “Cartel Enforcement, the CLP and Criminal Liability—are competition regulators hamstrung by the Competition Act from co-operating with the NPA, and is this a problem for competition law enforcement?” Accessed on 13 January 2014 from [www.compcom.co.za/assets/uploads/events/seventh-annual-conference-on-competition-law-Economics-policy/parallel-2B/cartele-enforcement-paper-final-2013-08-20.pdf](http://www.compcom.co.za/assets/uploads/events/seventh-annual-conference-on-competition-law-Economics-policy/parallel-2B/cartele-enforcement-paper-final-2013-08-20.pdf).

<sup>37</sup> Section 49A(3) of the Competition Act protects a person summoned to provide evidence to the commission and has made self-incriminating statements, that person is afforded protection from criminal prosecution. However, it is unclear if same protection is extended to a person who has voluntarily submitted information to the commission.



exceeding 10 years or both. The Act was assented to and signed by President Jacob Zuma on 28 August 2009. Since then, the act has not yet come into force because it has not yet been proclaimed as law.<sup>38</sup> Upon coming into effect, the Amendment will introduce major changes to the Corporate Leniency Policy.<sup>39</sup>

From a theoretical point of view, the research undertakes to make a valuable contribution on the development of competition law in relation to the enforcement against cartel activities in the Republic of South Africa. The research further contributes views on how a working relationship can be fostered between the Competition Commission and relevant authorities like the National Prosecuting Authorities (NPA), which is the body which will be responsible to conduct criminal prosecutions under the proposed section 73(A).

From a practical point of view, this research will provide directors, executives and managers of firms with insight on the future development with regards to criminal sanctions and how it may affect the Corporate Leniency Policy, so that such directors will know their risks and obligations as applicants of immunity.

## **1.6 RESEARCH METHODOLOGY**

The research will provide a brief historic overview of the evolution of competition law in South Africa, in order for the reader to understand the platform and the concept of the research study. The research will further critically analyse the provision of the proposed section 73(A) of the 2009 Competition Amendment Act and its impact on the Corporate Leniency Policy, by utilising South African legislation and other relevant literature and making comparisons with literature from other jurisdictions.

Therefore, the research is a mixture of historical, critical, analytical and comparative information derived from South African legislation, law reports, primary and secondary sources such as books and law journals. International literature is also derived for the comparative study.

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<sup>38</sup> However, some sections are now in effect. On 8 March 2013, the presidency promulgated that the market enquiries chapter of the Amendment Act be effective from 1 April 2013. Therefore, the chapter which provides the Competition Commission with formal powers to conduct market inquiries is now in force and effect.

<sup>39</sup> It was suggested that section 50 of the Amendment Act will deal with the Corporate Leniency Policy.

## 1.7 CHAPTER OVERVIEW

### Chapter 1: Orientation

This chapter introduces the research and traces the South African historic evolution of competition law so that the reader will be familiar with the competition law concept. It will also furnish the reader with adequate information on the concept and principles of competition law and why there is a need for competition. It will further highlight on what constitutes cartels, discuss the categories of cartels and interrogate on why cartels are prohibited by the Competition Act. Moreover, it will state the sanctions levied for participating in cartel conducts.

### Chapter 2: Corporate Leniency Policy

This chapter is the mainstay of the research as it states the genesis of enforcement challenges of cartels in South Africa. It focuses on the establishment of the Corporate Leniency Policy, the objectives of the Policy and the motivation behind its establishment. Substantive content will be derived from competition law literature and case law, with special emphasis on the case of *AgriWire (Pty) Ltd and AgriWire Upington (Pty) Ltd*<sup>40</sup> which deals with the Commission's Corporate Leniency Policy.

The chapter examines broadly the effects and contributions of the Corporate Leniency Policy to the Competition Law enforcement mechanisms. The chapter concludes on determining whether such a mechanism has been a successful tool in detecting cartels and whether there is any need for reform.

### Chapter 3: The proposed section 73(A) as contained in the Competition Amendment Act.

This chapter is more critical in nature and commences by looking at the origins of section 73(A) as proposed in the Amendment Act, and further scrutinizes the motives leading to such

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<sup>40</sup> *Agri Wire (Pty) Ltd and Another v Commissioner of the Competition and others* 2013 (5) SA 484 (SCA)

an Amendment. The objective is to determine the effects that the proposed section 73(A) will have on the Corporate Leniency Policy which the Commission has been using successfully to detect cartels.

A crucial examination of the proposed section 73(A) will be undertaken and the challenges that will be faced by the Competition Commission and the National Prosecuting Authority in a quest to foster a working relationship to prosecute cartel offenders will be addressed.

#### **Chapter 4: Comparative overview**

This chapter investigates the criminalization of cartel activity in Australia. It examines the institutions that are responsible for such enforcement as well as the fines and terms of imprisonment that can be levied and also the impact of such criminalization on the Australian Leniency Policy.

#### **Chapter 5: Conclusion and recommendations**

The chapter is the final chapter of the research and it will constitute the findings and conclusions of the research. It determines whether there is need for criminal liability to be levied on individuals who participate in cartel activities. The chapter concludes on drawing a road map for future developments and making recommendations where necessary.

## CHAPTER 2

### THE CORPORATE LENIENCY POLICY

#### 2.1 INTRODUCTION

Many jurisdictions have conceded that cartels inflict grave harm to any country's economy.<sup>41</sup> In general, cartels constitute the most egregious form of anti-competitive practices,<sup>42</sup> and in fact some writers even refer to cartels as the "supreme evil of antitrust".<sup>43</sup> This practice of firms colluding with one another and agreeing to sabotage the competitive process is against the central purpose of what competition law and policy seeks to achieve.<sup>44</sup>

It is for this reason that many jurisdictions fashion certain preventative legislative enforcement mechanisms to alleviate the formation of cartels and to detect cartels and prosecute offenders who participate in cartels.

#### 2.2 BACKGROUND ON CARTELS

A cartel is an association by agreement between competing firms where they agree not to compete with each other and they engage into prohibited practices such as price fixing, division or allocation of markets and bid-rigging.<sup>45</sup> Cartels are prohibited by section 4(1)(b) of the Competition Act.<sup>46</sup>

Cartels are prohibited because they hamper economic growth and innovation.<sup>47</sup> Cartels result to higher prices and limited product choice, whereof they deny the rights of customers to purchase their preferred products and thus consumers end up purchasing inferior products which they would not have otherwise purchased in a competitive market.<sup>48</sup>

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<sup>41</sup> Supra n 32 at 157.

<sup>42</sup> Supra n 16 at 22.

<sup>43</sup> Supra n 14 at 976.

<sup>44</sup> Supra n 36

<sup>45</sup> Supra n 17 at 11.

<sup>46</sup> The Competition Act No. 89 of 1998, prohibits horizontal practices which involves (i) directly or indirectly fixing a purchase or selling price or any other trading condition, (ii) dividing markets by allocating customers, suppliers, territories, or specific types of goods or services or, (iii) collusive tendering.

<sup>47</sup> Supra n 7 at 5-82(6).

<sup>48</sup> Supra n 16 at 21.

The end result of this collusion is that there is no distribution of resources because the profits are shared among the joint members in the circle of cartels, therefore they operate collectively as if they were in a monopoly.<sup>49</sup> The CLP also maintain that cartels are harmful to the economy and they have a negative effect to the welfare of the society at large.<sup>50</sup>

In the bread cartel case, *Competition Commission v Pioneer Foods (Pty) Ltd*,<sup>51</sup> Pioneer Foods (Pty) Ltd and other companies appeared before the Commission Tribunal for the alleged contravention of section 4(1)(b), in that the bread producer companies entered into a prohibited horizontal agreement where they agreed to divide markets between the companies and fix bread prices.<sup>52</sup> The Tribunal held that these companies in fact contravened section 4(1)(b)(i) and (ii) of the Competition Act and after utilising the CLP mechanism they were fined administrative fines for their involvement in the cartel.<sup>53</sup> The Tribunal conceded that the cartel affected the poorest of the poor, in that the bread cartel resulted into the closure of bakeries who were trying to survive in the bakery market, thus resulting in job losses.<sup>54</sup> It is thus evident that cartels also affect job creation, thus impeding economic development.

Corporations involved in cartel activities may be penalised by an administrative fine of up to 10% of annual turnover in South Africa or their exports from South Africa during the firm's financial year.<sup>55</sup> In terms of the Act, victims of cartel conduct may also institute damages claims.<sup>56</sup>

### **2.3 THE COMPETITION COMMISSION'S CORPORATE LENIENCY POLICY**

As mentioned earlier, the Competition Commission has issued the Corporate Leniency Policy to aid it in its efforts to detect and prosecute cartels.<sup>57</sup> The CLP has been issued in terms of

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<sup>49</sup> Supra n 8 at 1-14.

<sup>50</sup> Corporate Leniency Policy par 2.3. (take note that reference to the CLP hereafter will be referred to paragraphs of the 2008 Policy and not the 2004 Policy).

<sup>51</sup> *Competition Commission v Pioneer Foods (Pty) Ltd* 2010 (15/CR/Feb07)

<sup>52</sup> These companies include Premier Foods, Tiger Brands, Foodcorp (Pty) Ltd and Pioneer Foods. They were involved in a cartel in contravention of section 4(1)(b) of the Competition Act.

<sup>53</sup> Supra n 15 at 994.

<sup>54</sup> Supra n 16 at 22.

<sup>55</sup> See section 61(2) of the Competition Act. In the case of *Southern Pipeline Contractors v The Competition Commission* 23/CR/Feb 09, the Competition Tribunal on appeal held that Southern Pipeline Contractors had contravened section 4(1)(b)(i)(ii)(iii) of the Competition Act and it imposed an administrative penalty of R16 882 597.00, calculated on the basis of 10% of the company's turnover for its 2008 financial year, that turnover being R168 825 969.00.

<sup>56</sup> In terms of section 65 of the Competition Act.

<sup>57</sup> Supra n 22 at 143.

section 79 of the Competition Act.<sup>58</sup> It came into force on 6 February 2004 upon publication in the Government Gazette and it was subsequently reviewed in 2008.<sup>59</sup>

The CLP applies only to cartel conduct as listed under section 4 (1)(b)<sup>60</sup> of the Competition Act. The Policy applies to cartel conduct that takes place within and outside South Africa, as long as the cartel conduct has a negative impact on the South African economy.<sup>61</sup>

The 2004 CLP was reviewed in 2008 because it did not have much effect, and it lacked transparency and clarity. The CLP procedure was considered as uncertain because the platform was unpredictable and therefore it led to the lack of confidence in the process by firms and legal representatives.<sup>62</sup> The 2008 policy does not modify the original purpose of the 2004 policy, but it removes its flaws so as to offer greater certainty in regard to a number of issues.<sup>63</sup>

The revised CLP introduced a number of changes such as the introduction of a marker system. The marker system is a process whereby a potential applicant may apply to the Commission to reserve its space in the immunity queue, while it gathers enough information and evidence to make an official application.<sup>64</sup> The applicant will be granted a certain period of time in which to gather the information and the Commission has the discretion to determine whether or not to grant the marker.<sup>65</sup> Once the information has been submitted and the marker is granted, then the applicant for immunity will be considered to have been made on the date the marker was granted.<sup>66</sup>

The 2008 policy also removed the unfettered discretion conferred to the Commission in respect of granting leniency to applicants. This move has promoted more applicants to come forward and apply for leniency since the uncertainty related with the Commission's discretionary power has been removed.<sup>67</sup>

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<sup>58</sup> This is provided in section 79(1) which states that “the Competition Commission may prepare guidelines to indicate the Commission’s approach to any matter within its jurisdiction in terms of this Act”.

<sup>59</sup> The 2004 CLP was published in Government Gazette No. GN 195 GG 25963 of 6 February 2004 and the revised version on Government Gazette No. GN 628 GG 31064 of May 2008.

<sup>60</sup> The Competition Act No. 89 of 1998.

<sup>61</sup> Supra n 50, par 5.2.

<sup>62</sup> Supra n 22 at 143.

<sup>63</sup> Lee Mendelsohn and another, “Whistle-blowers and corporate leniency: competition law”, 2008 (8) *without prejudice*, p12.

<sup>64</sup> Supra n 8 at 5-82(15).

<sup>65</sup> Supra n 50, par 12.2.

<sup>66</sup> Supra n 50, par 12.2.

<sup>67</sup> Supra n 63 at 12.

In the past the CLP required that a firm applying for immunity should not be an instigator or a leader of a cartel.<sup>68</sup> However, under the current CLP, instigators and leaders of a cartel are now entitled to apply for immunity on the basis that “granting of immunity under the CLP is not based on the fact that the applicant is viewed as less of a cartel member than the other member, but on the fact that the applicant is the first to approach the Commission with information and evidence regarding the cartel”.<sup>69</sup>

The eligibility of coercers and leaders of a cartel to apply for immunity has however raised a controversial debate. Some writers argue that this move may lead to the lack of fairness especially where large firms coerce small firms into participating into a cartel, and then the small firm is prosecuted and fined under the Act whilst the coercer is granted immunity by the Commission.<sup>70</sup>

Another development introduced by the 2008 CLP is the provision that allows oral-statements that enables applicants to submit orally information concerning the alleged cartel.<sup>71</sup> However, this provision does not replace the requirement to submit to the Commission all existing written information, evidence and documents in the applicant’s possession concerning the alleged cartel.<sup>72</sup>

### **2.3.1 Purpose of the Corporate Leniency Policy**

It is believed that an effective CLP will encourage cartel participants to approach the Commission and confess their own participation in the cartel even before the commencement of the investigation by the Commission towards that particular cartel. Alternatively it will encourage firms that are already under investigation to cease participating in such conduct and race to the Commission to offer information and provide evidence in relation to the cartel.<sup>73</sup>

Therefore, the main aim of the CLP is to encourage firms who are involved in cartel activities to confess their involvement in that unlawful conduct so that the cartel conspiracies will be

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<sup>68</sup> See the 2004 Corporate Leniency Policy, par 9.1.2.1

<sup>69</sup> Supra n 50, par 3.9.

<sup>70</sup> Chantal Lavoie, “South Africa’s Corporate Leniency Policy: A Five-Year Review” Accessed on 13 January 2014 from [www.compcom.co.za/.../clp-paper-conference-Chantal-Lavoie.docx](http://www.compcom.co.za/.../clp-paper-conference-Chantal-Lavoie.docx).

<sup>71</sup> Supra n 50, par 15.1.

<sup>72</sup> Supra n 50, par 12.1.

<sup>73</sup> Supra n 17 at 10.

disclosed.<sup>74</sup> The CLP is utilised by the Commission to collect information relating to a cartel and initiate investigations to expose the cartel, which the Commission would not have otherwise discovered because of their secrecy, and to prosecute participants in the cartel to discourage future formation of cartels.<sup>75</sup>

As an incentive for co-operation, the Commission grants immunity to a cartel member who is first to approach the Commission and self-confess about its participation in the cartel conduct.<sup>76</sup> According to the CLP, immunity means that the Commission will not subject the successful applicant to adjudication before the Tribunal and no administrative penalties will be levied on that successful applicant.<sup>77</sup> According to Zondo J, who granted the decision in the court *a quo* in the *Agri Wire* case,<sup>78</sup> immunity involves the Commission granting a promise to an applicant whom it awards immunity that it will not surrender that applicant to adjudication before the Tribunal for its involvement in the prohibited conduct and that the Commission will not call for the Tribunal to impose a fine upon that applicant. However, a firm who is awarded immunity by the Commission is not considered to be less of a wrongdoer than its fellow cartel members, but it is granted immunity in return for its co-operation with the Commission for full disclosure of information requested by the Commission to assist it to uncover the anti-competitive conduct.<sup>79</sup>

The CLP distinguishes conditional immunity and total immunity. Conditional immunity means that the Commission's promise not to prosecute an applicant who has received immunity, is made provisionally pending the finalization of the process and on condition that the applicant co-operates fully with the Commission.<sup>80</sup> When the applicant has co-operated fully with the Commission and the Tribunal has reached a final decision with regards to the offence, then total immunity is granted to a successful applicant.<sup>81</sup>

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<sup>74</sup> Neil Mackenzie and another, "Learning about leniency" 2011, *without prejudice*, p8.

<sup>75</sup> *Supra* n 32 at 158.

<sup>76</sup> Nkondo Hlatshwayo, "South African chapter- cartels and leniency", accessed on 3 March 2014 on <http://www.iclg.co.uk/practice-areas/cartels-leniency/cartels-and-leniency-2014/south-africa>.

<sup>77</sup> *Supra* n 50, par 3.3

<sup>78</sup> *Agri Wire (Pty) Ltd v Commissioner of the Competition Commission* (7585/2010) [2011] ZAGPPHC 117 (1 July 2011), pars 15, 50 and 55.

<sup>79</sup> *Supra* n 63 at 12.

<sup>80</sup> *Supra* n 8 at 5-82(12).

<sup>81</sup> *Supra* n 50, par 9.1.2.1



### 2.3.2 Guidelines for granting immunity

The CLP states that immunity will be granted when certain requirements and conditions are fulfilled.<sup>82</sup> Therefore, the CLP lays down instances where it will apply and where it will not apply and it prescribes the requirements that applicants have to meet before they are granted immunity.

Only firms may apply for immunity and as indicated a firm must be first to approach the Commission and confess its involvement in the cartel and furnish relevant information regarding the cartel.<sup>83</sup> This doctrine is known as the ‘first-to-door’ principle and it entails that in order for firms to utilise the CLP when applying for leniency, the firms must be ‘first to the door’, to report a cartel activity and furnish sufficient information to qualify them for leniency.<sup>84</sup> Only one member of a cartel (thus only one firm) can qualify for immunity in terms of the CLP, therefore the ‘first to the door’ principle serves to encourage cartel participants to race to the Commission to report the cartel conduct in exchange for immunity.<sup>85</sup>

The CLP provides that immunity will be available only to the first applicant, however the ‘first-to-door’ principle does not preclude other firms to co-operate with the Commission and benefit from their co-operation.<sup>86</sup> In this regard the CLP provides that if any other members of a cartel wish to confess their involvement in the cartel, the Commission may explore other processes outside the CLP as reciprocation for attaining co-operation from parties who do not receive leniency.<sup>87</sup> It is thus clear that the South African CLP does not offer partial immunity to second or third applicants for immunity and does not set out mechanisms for determining an applicable reduction in the fine.<sup>88</sup>

It is further stated that the CLP is intended to apply to activities in respect of which the Commission has no knowledge of its existence and if it is already aware of the activity, then

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<sup>82</sup> Supra n 50, paras 3.1, 7.1.3, 9.1.3.2, 10.1.

<sup>83</sup> Corporate Leniency Policy, par 5.7, 3.1. The CLP defines a firm as a natural person, a partnership or trust, and a company. It further states that “the CLP will apply to a natural person to an extent that such person is involved in an economic activity, for instance, a sole trader or a partner in a business partnership. Furthermore, it is important that a person making the application be the person authorised to act for a firm in question.”

<sup>84</sup> Supra n 32 at 160.

<sup>85</sup> Supra n 70.

<sup>86</sup> Supra n 8 at 5-82(12).

<sup>87</sup> Supra n 50, par 5.6.

<sup>88</sup> This provision makes the South African CLP distinct from other jurisdictions, because other jurisdictions offer partial leniency to applicants who did not secure the first place to qualify for immunity but they are willing to co-operate. These jurisdictions grant partial reduction of fines as incentive for co-operation to second and third applicants.

it does not have sufficient information to prosecute the firms in the cartel.<sup>89</sup> Therefore, firms who provide information to the Commission about the existence of a cartel that the Commission is not aware of, may be granted immunity by the Commission upon fulfilling certain requirements and conditions.

The applicant must co-operate with the Commission during the whole process and provide full and prompt assistance until the finalisation of the investigations and the decision by the Tribunal or Appeal Court.<sup>90</sup> During this period the applicant must be honest with the Commission and not destroy, falsify or conceal any relevant material as the applicant who does so may be guilty of a criminal offence.<sup>91</sup>

Another requirement for the grant of immunity is that the applicant must cease its participation to the cartel immediately or act as directed by the Commission.<sup>92</sup> This however must be done in a discrete way and confidential so as not to alert other cartel members that the applicant has in fact applied for immunity.

### **2.3.3 Procedure for obtaining immunity**

The CLP sets out detailed procedures to be followed in order for an applicant to obtain immunity. However, it provides that the Commission may be flexible when applying these procedures in order to achieve the desired purpose of the policy.<sup>93</sup>

An application for immunity must be made in writing to the Commission in order to enable the Commission to ascertain if the applicant is first in the queue with regard to that particular cartel.<sup>94</sup> The Commission will thereafter inform the applicant within 5 days or within a reasonable period, if no other firm has made an application and therefore, the applicant is the first in the queue.<sup>95</sup>

After which, the Commission must arrange a first meeting with the applicant. The applicant must bring all the relevant information, documents and evidence to the Commission in order

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<sup>89</sup> Supra n 50, par 5.5.

<sup>90</sup> Supra n 50, par 10.1(c).

<sup>91</sup> Supra n 50, par 10.1 (f) and (g), section 73(2)(d) and 74(1)(b) of the Competition Act.

<sup>92</sup> Supra n 50, par 10.1(d).

<sup>93</sup> Supra n 50, par 11.1.

<sup>94</sup> Supra n 17 at 10.

<sup>95</sup> Supra n 50, par 11.1.1.3

to persuade the Commission that the applicant qualifies for immunity.<sup>96</sup> The rationale for the first meeting is to figure out if the applicant qualifies for immunity and if the applicant meets the conditions and requirements for immunity, this should be communicated in writing by the Commission to the applicant within 5 days.<sup>97</sup> However, if the firm does not qualify for immunity, the Commission will also communicate it to the applicant.<sup>98</sup>

Once the applicant has been successful in acquiring immunity a second meeting will then follow. The purpose of the second meeting will be to furnish further information that may still be in the custody of the applicant so as to allow the Commission to make copies of those documents.<sup>99</sup> The Commission then will prepare a conditional immunity agreement to be entered between the Commission and the applicant, subject to the conditions and requirements of the CLP.<sup>100</sup>

After the conditional immunity has been granted, the next step is for the Commission to carry on with its investigations. The Commission will therefore, scrutinize and verify information or documents submitted by the applicant and in order to fulfil its purpose, the Commission may utilise any method conferred to it by the Competition Act.<sup>101</sup>

It is imperative at this stage that the applicant must fully co-operate with the Commission because the Commission may still revoke conditional immunity on the grounds that the applicant no longer conforms to the requirements of the CLP.<sup>102</sup> If conditional immunity is revoked, the Commission can call a meeting to relate this to the applicant, and once immunity is revoked the applicant will be treated the same way as a firm who does not have immunity.<sup>103</sup>

However, if the Commission is fully satisfied with the continued co-operation of the applicant and has thus acquired enough information to institute proceedings, the Commission will then call for a final meeting. The point of the last meeting is to notify the applicant that the Commission intends to institute proceedings and to further request the applicant to

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<sup>96</sup> Supra n 8 at 5-82(16).

<sup>97</sup> Supra n 50, par 11.1.2.2.

<sup>98</sup> Supra n 50, par 11.1.2.4.

<sup>99</sup> Supra n 50, par 11.1.3.1.

<sup>100</sup> Supra n 50, par 11.1.3.2.

<sup>101</sup> Corporate Leniency Policy, par 11.1.4.1. Such methods include interview, subpoena, search or summon any firm which it believes could assist in connection with the matter.

<sup>102</sup> Supra n 8 at 5-82(17).

<sup>103</sup> Supra n 50, par 11.1.4.2.

continue to co-operate fully and expeditiously in the proceedings.<sup>104</sup> Conditional immunity will still apply until the final decision in the matter has been rendered.<sup>105</sup>

### **2.3.4 The lawfulness of the Competition Commission's CLP**

The lawfulness of the Competition Commission's CLP was elucidated in the case of *Agri Wire (Pty) and Another v Commissioner of the Competition Commission and others*,<sup>106</sup> where an application was brought against the Commission before the Northern Gauteng High Court by Agri Wire (Pty) Ltd and Agri Wire Upington, who were competitors in the manufacturing and distribution of wire and wire related products in South Africa.<sup>107</sup> The Commission had brought the case before the Competition Tribunal on allegations that 12 competing companies in the specified industry, were involved in prohibited conduct by fixing prices, allocation of markets and collusive tendering.<sup>108</sup>

This cartel activity was brought to the attention of the Commission after Consolidated Wire Industries (CWI) applied and received immunity from the Commission in 2008.<sup>109</sup> As a result Agri Wire disrupted the pending proceedings of the Tribunal and made an application to the High Court to review and set aside the Commission's decision to grant immunity to CWI under the CLP.<sup>110</sup> Agri Wire brought an application challenging the validity of the Commission's CLP, also challenging the powers under which the Commission may grant conditional immunity to applicants of immunity, which has met all the necessary requirements and conditions as set out in the CLP.

Agri Wire contested that the Commission had no authority in terms of the Act to grant immunity to CWI, by extension had no right in terms of the Act to make such a promise to CWI, therefore the grant of immunity was unlawful.<sup>111</sup> Agri Wire further challenged the decision of the Commission in respect of failing to seek relief against CWI in its referral of

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<sup>104</sup> Supra n 50, par 11.1.5.1.

<sup>105</sup> Supra n 50, par 11.1.5.1.

<sup>106</sup> *Agri Wire (Pty) and Another v Commissioner of the Competition Commission and others*, (7585/2010) [2011] ZAGPPHC 117 (5 July 2011).

<sup>107</sup> Supra n 106, par 9.

<sup>108</sup> Supra n 106, par 10.

<sup>109</sup> Supra n 106, par 10.

<sup>110</sup> Supra n 106, par 12.

<sup>111</sup> Supra n 106, par 30.

the complaint to the Tribunal, while it sought relief against it and other participants.<sup>112</sup> Agri Wire therefore, contends that the Commission had acted selectively and it had no authority in terms of the Act to “prosecute” some of the participants to the cartel and not to prosecute others.<sup>113</sup>

The North Gauteng High Court validated the Competition Commission’s CLP, in that the Commission under the CLP has authority to negotiate and conclude an immunity agreement with an applicant for immunity. The court classified the nature of such agreement as a consent agreement in terms of section 49D of the Act.<sup>114</sup> The High Court further held that the Commission had done nothing wrong in law for not seeking any relief against CWI and has in fact acted within its authority.<sup>115</sup> The Court authenticated the legal basis of the CLP and provided guidance to competition law practitioners on the basis and extent of immunity awarded by the Commission under the CLP.<sup>116</sup>

This notion was confirmed on appeal by the Supreme Court when Agri Wire brought an appeal against the decision of the Court *a quo*. In the matter before the Supreme Court of Appeal, Agri Wire challenged the Commission’s grant of conditional leniency to CWI as unauthorised by any law and unlawful.<sup>117</sup> It was argued that the Commission is a creature of statute and has only those powers bestowed to it under the Act.<sup>118</sup> It was further argued that when the Commission refers a complaint to the Tribunal under section 51 of the Act, the Commission is obliged to refer the entire complaint and it is obligated to refer all members of the cartel to the Tribunal.<sup>119</sup>

The court however held that the Act empowers the Commission to adopt the CLP.<sup>120</sup> The Court observed that the main objective of the Act, as set out in section 2 is to promote competition in South Africa.<sup>121</sup> The Commission is entrusted with the responsibility to promote market transparency and to investigate and alleged infringement of Chapter 2 of the Act.<sup>122</sup> Therefore, the Commission must be able to establish mechanisms to promote market

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<sup>112</sup> Supra n 106, par 30.

<sup>113</sup> Supra n 106, par 30.

<sup>114</sup> Supra n 106, par 64.

<sup>115</sup> Supra n 106, par 72.

<sup>116</sup> Supra n 74 at 8.

<sup>117</sup> *Agri Wire (Pty) Ltd v The Commissioner of the Competition Commission* [2012] 4 ALL SA 365 (SCA), par 5.

<sup>118</sup> Supra n 117, par 5.

<sup>119</sup> Supra n 117, par 23.

<sup>120</sup> Supra n 117, par 21.

<sup>121</sup> Supra n 117, par 21.

<sup>122</sup> Supra n 116, par 21.

transparency.<sup>123</sup> The Court further held that the Commission was empowered under the Act to adopt and implement the CLP by granting conditional and total immunity to parties who aid the Commission by providing evidence to enable it to tail cartels and stop them.<sup>124</sup>

The *Agri Wire* case is thus significant in the enforcement against cartels in South Africa as it gives the legal basis of leniency granted by the Commission under the CLP, and such a case set as a precedent in confirming the power of the Commission to grant immunity.<sup>125</sup> However, there seem to be lack of clarity in respect of who has a final say between the Commission and the Tribunal when it comes to immunity under the CLP. Sutherland is of the view that the notion of immunity against adjudication and the imposition of a fine is narrowly construed, meaning that the Tribunal is not obligated to follow the observation of the Commission that leniency applicants should not be fined but will at most attach significant weight to the views of the Commission.<sup>126</sup>

## 2.4 CONCLUSION

The CLP has been an effective tool to combat cartels in South Africa and since its adoption it has proved to be a formidable mechanism for cartel detection. The revised CLP has even brought a number of leniency applicants to come forward and utilise the CLP platform and thus has led to the disclosure of many cartels which the Commission would not have discovered due to their nature of secrecy.<sup>127</sup>

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<sup>123</sup> Supra n 116, par 21.

<sup>124</sup> Supra n 116, par 22.

<sup>125</sup> Supra n 74 at 8.

<sup>126</sup> Supra n 50, par 5.9.1.3.

<sup>127</sup> Many companies have utilised the CLP and the Commission prosecuted such companies. In the case of the *Competition Commission v Cape Concrete Works (Pty) Ltd*, the Commission found that pipe and construction industries had formed a cartel for bid rigging, price fixing and allocation of markets and Cape Concrete Works (Pty) Ltd admitted its involvement in the cartel and paid fine of ZAR4.371.386. Same as Pioneer Foods (Pty) Ltd (*Competition Commission v Pioneer Foods (Pty) Ltd* 15/CR/Feb 07) and Clover industries (*Competition Commission v Clover Industries and others* 2006 (103) CR 1), these companies all utilised the Leniency and paid administrative fines.

## CHAPTER 3

### THE INTRODUCTION OF CRIMINAL LIABILITY IN TERMS OF THE INSERTION OF SECTION 73A IN THE COMPETITION ACT

#### 3.1 INTRODUCTION

A need to strengthen competition regulations among different jurisdiction has accumulated to a debate whether or not to criminalise anti-competitive conducts like cartels.<sup>128</sup> The rationale behind the concept of criminalising cartels is that the threat of imprisonment to directors of a firm or persons in management positions is likely to be more effective in deterring such individuals from causing a firm to participate in cartel activities.<sup>129</sup> The credence of criminal liability is that such punishment will send a message to the business community at large that Competition Authorities perceives cartel activity as serious conduct and that individuals may risk serving a prison sentence.<sup>130</sup>

It is worth mentioning that while the impetus to this move in South Africa is well intentioned, it should however, be introduced with caution and it should be ensured that its implementation does not erode the effectiveness of the Corporate Leniency Policy (CLP), which is currently a successful tool to combat cartels.

#### 3.2 THE GENESIS OF SECTION 73A

South African legislators made an audacious move when drafting the Amendment Act that introduces criminal liability of individuals who cause firms to participate in cartels.<sup>131</sup> Section 12 of the Amendment Act provides for the insertion of section 73A into the Act which introduces individual criminal liability for directors and managers of a firm involved in cartel activity.<sup>132</sup> Section 73A makes it an offence for directors or persons in a position of

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<sup>128</sup> Segoane L Monnye and Sasha Lee, “Prison beckons directors involved in cartels”, 2008 (16) *Juta’s Business Law Journal*, p13.

<sup>129</sup> Macgregor Kufa, “Bribe and prejudice”, 2008 (8) *Without prejudice*, p 30.

<sup>130</sup> *Supra* n 32 at 176.

<sup>131</sup> *Supra* n 14 at 991.

<sup>132</sup> *Supra* n 36.

management authority to cause a firm to engage or knowingly acquiesce<sup>133</sup> in the firm engaging in a prohibited conduct in terms of section 4(1)(b).<sup>134</sup> The sanctions for the contravention of section 73A includes a fine not exceeding R500 000 or a term of imprisonment not exceeding ten years, or both.<sup>135</sup>

This provision struck a controversial debate which led to the then Bill to undergo scrutiny by the legal profession. The Amendment Bill was passed by the National Assembly on 28 October 2008.<sup>136</sup> This occurred during the brief change of presidencies between former President Thabo Mbeki and current President Jacob Zuma. The acting president of the time President Kgalema Motlanthe refused to sign the Bill and referred it back to the National Assembly because of the constitutional ramifications of the Bill.<sup>137</sup>

Despite the concerns about the Bill, President Jacob Zuma when he assumed office assented to and signed the unaltered Bill into law on 28 August 2009.<sup>138</sup> However, the President has not yet proclaimed the date when the Act will come into force, therefore at the moment the Amendment Act is not yet in effect and only section 6 which deals with market inquiries has come into effect on 1 April 2008.<sup>139</sup>

### 3.2.1 The rationale for cartel criminalization

The introduction of individual criminal liability in terms of the proposed section 73A of the Amendment Act is the South African government's response to the public outcry to punish individuals responsible for involving their firms in cartel conduct.<sup>140</sup> It is believed that price fixing of staple household supplies as basic as bread has adverse effect on the most

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<sup>133</sup> According to section 73A (2), knowingly acquiesce in this provision means "having acquiesced while having actual knowledge of the relevant conduct by the firm".

<sup>134</sup> Section 73A clearly states that "a person commits an offence if, while being the director of a firm or while engaged or purporting to be engaged by a firm in a position having management authority within the firm, such person caused the firm to engage in a prohibited practice in terms of section 4(1)(b) or knowingly acquiesced in the firm engaging in a prohibited practice in terms of section 4(1)(b)".

<sup>135</sup> Section 13(b) of the Amendment Act provides that "in the case of contravention of section 73(1) or section 73A, to a fine not exceeding R500 000-00 or to imprisonment for a period not exceeding 10 years, or to both a fine and such imprisonment".

<sup>136</sup> David Lewis, *Thieves at Dinner Table-Enforcing the Competition Act*, 2012, p230.

<sup>137</sup> Supra n 14 at 991.

<sup>138</sup> Supra n 30 at 321.

<sup>139</sup> Section 6 of the Amendment Act grants the Competition Commission with formal powers to conduct market inquiries and it is the only section that is effective, the rest of the Act has not yet been proclaimed.

<sup>140</sup> Supra n 70.



vulnerable and poor population of South Africa.<sup>141</sup> In fact one writer refers to cartel conduct as tantamount to theft, which is a criminal offence and remarks that it is unwarranted that consumers suffer financial loss as a result of cartel behaviour and will not be reimbursed for the loss suffered.<sup>142</sup>

It is common cause that most cartels are engaged in deliberately by individuals who are aware of the consequences that it has for consumers and the impediment of economic growth, therefore, a threat of jail to individuals who play a decisive role in engaging a firm in cartel conduct is likely to deter such individuals from such actions.<sup>143</sup>

Therefore, it is believed that a threat of criminal sanctions will send a strong message to individuals who may desire to participate in cartel conduct, and will impose responsible behaviour on directors or persons responsible for making decisions in a firm.<sup>144</sup>

### **3.3 THE IMPACT OF THE PROPOSED SECTION 73A ON THE CLP**

It cannot be denied that in principle, the introduction of criminal sanctions for cartel conduct is a great improvement that provides more emphasis on deterrence to cartel conduct, however it should be implemented thoroughly in a way that compliments and integrates with existing efforts to combat cartels.<sup>145</sup>

As already alluded to in previous chapters, the CLP has proved to be a formidable mechanism for cartel detection and enforcement and it is therefore imperative that the development introduced by section 73A should be implemented in a way that will not affect or dilute the effectiveness of the CLP.<sup>146</sup>

#### **3.3.1 The National Prosecuting Authority (NPA)**

The downside of criminalising cartels is the introduction of a new body to cartel enforcement, namely the National Prosecuting Authority (NPA) which has the sole responsibility for

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<sup>141</sup> Supra n 30 at 323.

<sup>142</sup> Supra n 16 at 22.

<sup>143</sup> Supra n 36.

<sup>144</sup> Supra n 128 at 18.

<sup>145</sup> Supra n 30 at 324.

<sup>146</sup> Supra n 146.

criminal prosecution in South Africa.<sup>147</sup> The NPA is vested with authority for criminal prosecution of directors in contravention of section 73A, as it has exclusive jurisdiction over the enforcement of section 73A.<sup>148</sup> This vesting of power in the NPA is entrenched in the Constitution of South Africa and the National Prosecuting Authority Act, which confers the NPA with power to institute all criminal prosecutions on behalf of the state.<sup>149</sup>

The relationship between the provisions dealing with criminal liability and the CLP, also the relationship as to the cooperation between the NPA and the Commission leads to intricate questions.<sup>150</sup> The main inquiry is whether the Commission is capable of cooperation in respect of the enforcement of the Competition Act and the probable overlap in the functions of the NPA and the Commission.<sup>151</sup>

Most important is the question regarding the suitability of the use of criminal law sanctions in competition law, since the Competition Act has the characteristics of being a quasi-civil piece of legislation with the objective of achieving socio-economic objectives rather than criminal prosecution of individuals.<sup>152</sup>

However, at this point it is worth mentioning that the Competition Commission as an administrative agency, whose purpose is to administer and enforce the Competition Act will continue to remain responsible for civil cartel enforcement.<sup>153</sup> As a result, it is submitted that it is crucial to foster a close relationship and develop an effective cooperation mechanism with all pertinent authorities, namely the Commission, NPA and the South African Police Service (SAPS), which will assist the NPA.<sup>154</sup>

In particular, numerous issues need to be addressed to ensure smooth collaboration with all relevant bodies. If this is not done then it may lead to time delays in liaising between the

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<sup>147</sup> Supra n 70.

<sup>148</sup> Supra n 1 at 200.

<sup>149</sup> This is construed from the wording of section 179 (1) and (2) Constitution of South Africa and section 2 and 20(1) of the National prosecution Authority Act 32 of 1999. These two pieces of legislations provides that there is a single National Prosecution Authority in the Republic with the power to institute all criminal prosecutions on behalf of the State.

<sup>150</sup> Wilson Roberts and Avivi Lital, "When leniency is uncertain: Competition Law" 2009 (9) *Without Prejudice*, p6.

<sup>151</sup> Supra n 1 at 201.

<sup>152</sup> Supra n 36.

<sup>153</sup> Supra n 1 at 201.

<sup>154</sup> Supra n 70.

NPA and Commission, more so if cases will be placed in court rolls which are well known for heavy backlogs.<sup>155</sup>

Kelly remarks that the greatest fear with the exclusive jurisdiction granted to the NPA over criminal enforcement in terms of section 73A is that the NPA has no expertise in handling Competition law and cartel enforcement.<sup>156</sup> This raises concerns of expertise, coordination and the manner upon which the NPA will prosecute individuals.<sup>157</sup> He mentions that it is suspected that within the NPA there will be a fairly small Specialised Commercial Crimes Unit (SCCU) that will have the responsibility of prosecuting individuals under section 73A. It is therefore a concern that such Unit with no formal framework to facilitate coordination with the Commission will not have resources and expertise to prosecute cartel offences.<sup>158</sup>

### 3.3.2 Consent orders

In order for a director or a person in management authority to be prosecuted for an offence in terms of section 73A, their firm must have acknowledged in a consent order that it has contravened section 4(1)(b) in that it has fixed prices, allocated markets or tendered collusively.<sup>159</sup> This acknowledgment in a consent order by a firm, or a finding by the Tribunal or the Competition Appeal Court that the firm has engaged in a prohibited practice is a *prima facie* proof in criminal proceedings against the director of the firm or manager.<sup>160</sup>

Before the Act was passed into law, section 12 that contained section 73A(4) of the then Bill provided that a firm's admission in a consent order or the finding of the Competition Tribunal or the Competition Appeal Court shall be treated as conclusive evidence that the firm had engaged in a cartel.<sup>161</sup> However, that provision was softened and for purposes of any

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<sup>155</sup> Supra n 32 at 176.

<sup>156</sup> Supra n 30 at 328.

<sup>157</sup> Supra n 70.

<sup>158</sup> Supra n 30 at 328.

<sup>159</sup> This provision is stated in section 73A(3) of the Competition Act which states that "a person may be prosecuted in terms of this section only if, (a) the relevant firm has acknowledged in a consent order contemplated in section 49D, that it engaged in a prohibited practice in terms of section 4(1)(b), or (b) the Competition Tribunal or the Competition Appeal Court has made a finding that the relevant firm engaged in a prohibited practice in terms of section 4(1)(b)".

<sup>160</sup> Supra n 150 at 6.

<sup>161</sup> Supra n 136 at 226.

successive criminal proceedings, section 73A(5) states that it should be treated as a *prima facie* proof as opposed to conclusive evidence.<sup>162</sup>

The Act does not explicitly dictate the contents of a consent order, it just establishes that with the consent of the applicant, a consent order may include an award of damages in favour of the complainant.<sup>163</sup> However, the Competition Commission Rules (CCR) and the Competition Tribunal Rules (CTR) provide details of what a draft consent order must encompass.

The Rules provide that, “the Commission must affix to the referral a draft order; setting out the section of the Act that has been contravened; setting out the terms agreed to by the Commission and the respondent, including, if applicable, the amount of damages agreed to by the respondent and the complainant; and signed by the Commission and the respondent indicating their consent to the draft order”.<sup>164</sup>

Section 73A creates a presumption that a firm has engaged in a cartel conduct if it has admitted thereto in a consent order or has been found to have done so by the Competition Tribunal or the Competition Appeal Court.<sup>165</sup> This however, creates a reverse onus of proof in a criminal proceeding and the reverse onus created by section 73A has sparked a controversial debate in relation to the constitutional ramifications of the section.<sup>166</sup>

This research however, will not deal with the question whether section 73A will pass constitutional muster when it is promulgated, but it will focus on the impact that section 73A will have on consent orders and the CLP.

It is submitted that the introduction of criminal sanctions will negatively impact on the use of consent orders in that directors and managers will likely be less willing to conclude consent orders on behalf of their firms, as such an admission may be used as *prima facie* basis for securing a later criminal conviction against those directors.<sup>167</sup> Therefore, this will be hugely

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<sup>162</sup> The revised Section 73A(5) states that “in any court proceedings against a person in terms of this section, an acknowledgment in a consent order contemplated in section 49D by the firm or a finding by the Competition Tribunal or the Competition Appeal Court that the firm has engaged in a prohibited practice in terms of section 4(1)(b), is a *prima facie* proof of the fact that the firm engaged in that conduct.”

<sup>163</sup>Supra n 8 at 11-54.

<sup>164</sup>See section 24(4) of the Competition Tribunal Rules of 2001 (set up in terms of section 27(2) of the Competition Act No. 89 of 1998), also refer to section 18(2) Competition Commission Rules of 2001 (set up in terms of section 21(4) of the Competition Act No. 89 of 1998).

<sup>165</sup> Supra n 30 at 331.

<sup>166</sup> Supra n 8 at 12-25.

<sup>167</sup> Supra n 136 at 227.

detrimental to the Competition Commission's CLP as many cartel prosecution has been in the form of admissions encompassed in the consent orders.

Some writers contend that directors or managers that admit in the consent order to the firm's participation in the cartel conduct may not be liable for criminal conviction. They argue that there is a distinction that exists in law between a company and its members, making it impracticable (except in very few cases) to hold individual members liable for acts performed by the company.<sup>168</sup>

It is evident that the introduction of criminal liability in a competition law environment is controversial as one may argue that criminal sanctions are not justified in the corporate cartel environment as hefty administrative fines ought to be sufficient in deterring future cartelisation.<sup>169</sup>

It has been contended that the Competition Act was not originally envisaged as a piece of legislation that sought to punish firms and further criminalise the conducts of its directors involved in prohibited practices.<sup>170</sup> It is thus evident that the Competition Act cannot be amended in a piecemeal fashion and the objectives of the Competition Act must be upheld.<sup>171</sup>

The drafters of the original text of the 1998 Act for infringement of its substantial provisions, applied solely to firms and not to natural persons associated with those firms, such as directors or persons in management positions.<sup>172</sup> The original purpose of the Competition Act was the development of a greater policy objective for open, efficient and competitive markets and not criminal penalisation of individuals, thus the criminalisation of cartel conduct is not an objective of the Competition Act currently in force.<sup>173</sup>

### **3.3.3 Self incrimination**

Another issue that may have a negative effect on the CLP if it is not well addressed, relates to self incriminating statements provided by applicants of immunity to the Competition Authorities. There is uncertainty as to the question whether evidence attained during a

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<sup>168</sup> Supra n 1 at 200.

<sup>169</sup> Supra n 30 at 321.

<sup>170</sup> Supra n 1 at 200.

<sup>171</sup> Supra n 36.

<sup>172</sup> Supra n 1 at 200.

<sup>173</sup> Supra n 36.

hearing before the Competition Authorities, could be utilized by the NPA in a subsequent criminal proceeding against directors.<sup>174</sup>

Section 49A of the Competition Act states that any person summoned by the Commission to provide evidence and has made a self incriminating statement in relation to his/her conduct is granted protection from criminal prosecution as such evidence is inadmissible in criminal proceedings.<sup>175</sup> This provision is also entrenched in the Constitution of South Africa which guarantees a person's right against self-incrimination.<sup>176</sup>

The Commission through the CLP grants immunity to an applicant who voluntarily provides evidence to the Commission (as opposed to an applicant that is summoned), hence a question arises as to whether an individual who voluntarily presents evidence to the Commission in terms of the CLP shall be exposed to criminal prosecution, while an individual summoned by the Commission is immune from criminal prosecution on the basis of section 49A(3).<sup>177</sup> The answer to this conundrum has potentially drastic and unfair results as applicants of immunity who voluntarily provide evidence to the Commission may be liable for criminal prosecution while individuals summoned by the Commission may not be prosecuted because they are protected against self-incrimination in a criminal proceeding.

This may however, affect the CLP as the Commission rely on applicants for full disclosure of information and cooperation and it is likely that directors from now on will be guarded during testimony with the Tribunal for fear that they may self-incriminate themselves by providing evidence that may be subsequently used against them by the NPA in criminal proceedings.<sup>178</sup>

The introduction of criminal liability has further generated a lot of confusion with regards to the legal relationship between prosecutions under the Competition Act and those under the Criminal Procedure Act.<sup>179</sup> The Competition Commission is an administrative body whose purpose is to administer and enforce economic statute, it therefore has completely different

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<sup>174</sup> Supra n 14 at 991.

<sup>175</sup> This is provided by section 49A(3) of the Competition Act No. 89 of 1998 which states that "no self-incrimination answer given or statement made to a person exercising any power in terms of this section is admissible as evidence against the person who gave the answer or the statement in criminal proceedings, except in criminal proceedings for perjury or in which that person is tried for an offence contemplated in section 72 or section 73(2)(d), and then only to the extent that the answer or statement is relevant to prove the offence charged"

<sup>176</sup> Section 35(3)(j) of the Constitution of the Republic of South Africa.

<sup>177</sup> Supra n 36.

<sup>178</sup> Supra n 30 at 329.

<sup>179</sup> Criminal Procedure Act No. 51 of 1977.

functions from the NPA whose function is to prosecute general crimes.<sup>180</sup> This leads to a complex question as to how can evidence gathered on the balance of probabilities by the Commission which is quasi-civil in nature, be used by the NPA in criminal proceedings where the standard of proof is beyond reasonable doubt.<sup>181</sup>

### 3.3.4 Immunity

An apparent confusion likely to alter the effectiveness of the CLP is the extent of personal immunity which applicants may enjoy in exchange of information. The question arises as to the extent of immunity granted by the Commission and to what extent the NPA is required to take into account the Commission's submissions in deciding whether or not to prosecute directors or managers concerned?<sup>182</sup>

Immunity is granted by the Commission to those first to report a cartel conduct, subject to strict requirements of cooperation and on condition that evidence provided clearly enhances prospects of successful prosecution of other participants to a cartel.<sup>183</sup> Therefore, the Commission has authority to grant applicants immunity from prosecution, as this is a successful mechanism intended to serve as a means to aid detection and investigations of cartels.<sup>184</sup>

The Commission has no authority or power to grant any form of criminal immunity, therefore the CLP does not provide for individual immunity from criminal prosecution.<sup>185</sup> As such, section 73A vests the NPA with sole discretion as to leniency and prosecution of criminal conduct in South Africa.<sup>186</sup> The Competition Commission may make submissions to the NPA in support of leniency for an individual prosecuted for an offence in terms of section 73A.<sup>187</sup>

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<sup>180</sup> Supra n 1 at 201.

<sup>181</sup> Supra n 36.

<sup>182</sup> Supra n 25 at 6.

<sup>183</sup> Supra n 136 at 227.

<sup>184</sup> Supra n 30 at 321.

<sup>185</sup> Supra n 63 at 13.

<sup>186</sup> Supra n 36.

<sup>187</sup>This provision is asserted in section 73A(4)(a).

However, the Competition Commission is not vested with any ultimate authority in respect of granting leniency from criminal prosecution.<sup>188</sup> In a nutshell, the Commission does not have jurisdiction to warrant individuals immunity from criminal prosecution.<sup>189</sup>

Based on the above assertion, it is evident that the introduction of criminal sanctions will create uncertainty as to the extent of personal immunity that the Commission may grant and that applicants could enjoy in exchange for information.<sup>190</sup> Since the Commission does not have criminal prosecutorial powers, as such, the authority to certify applicants as deserving of leniency could be meaningless if the Commission cannot provide applicants with immunity from prosecution.<sup>191</sup>

Therefore, this will undermine the CLP in that directors or managers of a firm will be hesitant to apply for leniency from the Commission without guarantees that their own liberty is not at risk.<sup>192</sup> Since the introduction of criminal liability introduces two separate proceedings subject to two independent prosecutors, if no proper coordination is fostered, a firm applying for leniency will have no certainty that the two prosecutors will follow the same approach.<sup>193</sup> Accordingly this may have the effect of deterring potential whistle-blowers from coming forward as it may expose themselves to criminal prosecution.<sup>194</sup>

### 3.4 CONCLUSION

There is no doubt that South Africa's move to criminalise the causing or acquiescing in cartel participation is a bold move that shows the seriousness to cease the financial suffering caused by cartels and fashion new mechanisms to combat cartels in the Republic. However, such move should be introduced with caution as the threat of criminal prosecution will negatively affect the CLP which the Commission has been utilising to detect sophisticated cartels.<sup>195</sup>

Concerns raised by section 73A are born out of genuine fears as the amendment lacks sufficient detail and potentially detracts from the well established CLP.<sup>196</sup> The amendment is

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<sup>188</sup> Supra n 30 at 330.

<sup>189</sup> Supra n 70.

<sup>190</sup> Supra n 136 at 227.

<sup>191</sup> Supra n 70.

<sup>192</sup> Supra n 30 at 320.

<sup>193</sup> Supra n 136 at 228.

<sup>194</sup> Supra n 63 at 13.

<sup>195</sup> Supra n 1 at 203.

<sup>196</sup> Supra n 30 at 332.



vague in respect of the extent of the coordination that has to be fostered between the Competition Authorities and the NPA.

It is therefore imperative that section 73A should be implemented in a way that will not dilute the effectiveness of the CLP and must include a framework which is well detailed as to the manner in which two independent bodies (NPA and Competition Authority) are to coordinate when dealing with cartel prosecution.

## CHAPTER 4

### A COMPARATIVE ANALYSIS OF CARTEL ENFORCEMENT IN AUSTRALIA

#### 4.1 INTRODUCTION

The focus on anti-cartel law and its enforcement has been a feature of competition law across the globe for the last decade.<sup>197</sup> The Australian government and the Australian Competition and Consumer Commission (ACCC) have been active advocates for anti-cartel law and have taken the impact of cartels very seriously.<sup>198</sup> Enforcement of cartels has been a key priority of the ACCC, as cartels have been described in Australia as the ‘cancer of the economy’.<sup>199</sup>

It is for this reason that in trying to combat cartels, the Australian government and the ACCC has over the years developed leniency programmes and introduced tough sanctions such as criminal liability to those who participate in cartels. This research therefore, will examine in this chapter the institutions that are responsible for cartel enforcement in Australia, as well as fines and terms of imprisonment that can be levied.

#### 4.2 THE DEVELOPMENT OF CRIMINAL SANCTIONS IN AUSTRALIA

Australian competition law developed slowly during the 1950s and the 1960s, and remained a minor factor in the Australian society and economy until the 1990s.<sup>200</sup> Prior to 1965, restrictive trade practices were common in Australia, and were regarded as ‘normal business behaviour’.<sup>201</sup> Under the Restrictive Trade Practices Act,<sup>202</sup> collusive practices were prohibited only if they had not been registered on official register of restrictive agreements between competitors.<sup>203</sup> The Trade Practices Act (TPA) of 1974<sup>204</sup> took a diverse approach

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<sup>197</sup> Caron Beaton-Wells and another, “Anti-Cartel Advocacy-How Has the ACCC Fared?”, 2011 (33), *Sydney Law Review*, p 735.

<sup>198</sup> Graeme Samuel, “Cartel enforcement in the spotlight-a major focus for Australia and internationally”, 2006 (2) *Competition Law International*, p 3.

<sup>199</sup> Gina Cass-Gottlieb and Graeme Edgerton, “Application of the Australian Trade Practices Act and ACCC immunity policy to international cartel conduct”, 2006 (2) *Competition Law International*, p 8.

<sup>200</sup> David Gerber, *Global Competition: Law, Markets, and Globalization*, 2010, p261.

<sup>201</sup> Caron Beaton-Wells, “Capturing the Criminality of Hard Core Cartels: The Australian Proposal”, 2007 (31) *Melbourne University Law Review*, p 680.

<sup>202</sup> Act No. 111 of 1965.

<sup>203</sup> *Supra* n 201 at 680.

and prohibited contracts, arrangements or understandings (CAU) between competitors that has the effect, or likely effect of substantially lessening competition.<sup>205</sup>

Australian competition law changed rapidly in 1995 with the creation of the Australian Competition and Consumer Commission (ACCC), and the appointment of its first chairperson, Allan Fels.<sup>206</sup> In June 2001, the then chairman of the ACCC, Allan Fels, initiated and maintained a campaign for the introduction of criminal sanctions for hard core contraventions of part IV of the TPA.<sup>207</sup>

Allan Fels publicly advocated for the first time for the introduction of criminal sanctions for hard core cartel conduct in Australia.<sup>208</sup> The campaign was a high profile one that involved numerous speeches made to specific audiences as well as statements made frequently in the general media to elucidate the justification for criminalising hard core cartels.<sup>209</sup> Fels explained to the public the risks of harm emanating from anti-competitive conducts and the benefits of more vigorous competition law enforcement.<sup>210</sup>

Fels campaign generated a lot of political support and within a year, a Trade Practices Act Review Committee was formed and charged with the responsibility of reviewing Australian competition laws.<sup>211</sup> As a result of this move, the Review of the Competition Provision of the Trade Practices Act (Dawson Review), was established to undertake an examination of issues surrounding the criminalisation of cartel conduct.<sup>212</sup>

A Review of the Competition Provisions of the TPA (Dawson Report) was released in April 2003, which encompassed a critical recommendation on criminal penalties, including imprisonment, to be introduced into the Trade Practices Act<sup>213</sup> for ‘serious cartel behaviour’.<sup>214</sup>

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<sup>204</sup> Act No. 51 of 1974.

<sup>205</sup> Supra n 201 at 680.

<sup>206</sup> Supra n 200 at 261.

<sup>207</sup> Brenda Marshall, “criminalisation of cartel conduct: compelling compliance with anti-collusion laws”, accessed on 15 April 2014 from [www.alta.edu.au/resources/PDFs/2010/2010-jalta-marshall-pdf](http://www.alta.edu.au/resources/PDFs/2010/2010-jalta-marshall-pdf).

<sup>208</sup> Supra n 201 at p 681.

<sup>209</sup> Supra 197 at 737.

<sup>210</sup> Supra n 200 at 261.

<sup>211</sup> Supra n 207.

<sup>212</sup> Mark Pearson, “Criminalisation of cartel conduct in Australia”, 2008 (4) *Competition Law International*, p 18.

<sup>213</sup> Act No. 51 of 1974.

<sup>214</sup> Supra n 207.

In an effort to move towards criminal enforcement of cartels, the Australian government released the ‘exposure draft’ of the Trade Practices Act (Cartel Conduct and Other Measures) Bill of 2008.<sup>215</sup> The Bill proposed the introduction of criminal sanctions for cartel conduct in Australia and prohibited the conduct with both criminal and civil enforcement regimes.<sup>216</sup> The Bill outlined two criminal offences, and provided that it was an offence to; (a) make a contract or an arrangement, or arrive at an understanding with the intention of dishonestly obtaining a benefit where; (b) the contract, arrangement or understanding contains a cartel provision.<sup>217</sup>

According to the draft, the distinction between criminal and civil regimes was based on the dishonest intent of the person making the contract, arrangement or understanding, therefore, dishonesty was the main element to separate the two regimes.<sup>218</sup> The element of ‘dishonesty’ in the Australian offence emanates from the existing statutory definition of ‘dishonesty’ in the Australian Commonwealth Criminal Code Act and the Corporations Act.<sup>219</sup>

Criminalisation of cartel conduct became a reality in Australia when the Trade Practice Act (Cartel Conduct and Other Measures) Act 2009 (Amendment Act) came into effect on 24 July 2009.<sup>220</sup> In terms of the new Trade Practice Act (Cartel Conduct and Other Measures) 2009 (Cartel Conduct Act), cartel provisions are found in Division 1 part IV of the Cartel Conduct Act. This division containing provisions 44ZZRA-44ZZRU was inserted by the Trade Practice Act (Cartel Conduct and Other Measures).

Section 44ZZRF of the Cartel Conduct Act (CCA) makes it an offence to make a contract or arrangement, or arriving at an understanding, that contains a cartel provision and it is also an offence to give effect to a contract or making an arrangement that contains a cartel effect provision.<sup>221</sup> The equivalent civil provision renders it a contravention of the TPA Act to make

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<sup>215</sup> Martin Low QC and Sorcha O’Carroll, “Added complexity - recent developments in criminal cartel law”, 2008 (4), *Competition Law International*, p34.

<sup>216</sup> Anthony Gray, “Criminal sanctions for cartel behaviour”, 2008 (8) *Queensland University of Technology Law and Justice Journal*, p 365.

<sup>217</sup> Section 44ZZRF of the Trade Practices Act 1974.

<sup>218</sup> Mark Pearson, “Criminalisation of cartel conduct in Australia”, 2008 (4) *Competition Law International*, p 20.

<sup>219</sup> Act No.12 of 1995 and Act No. 50 of 2001 respectively.

<sup>220</sup> Simon Uthmeyer, “Australia: the criminalisation of cartels: cartel Bill becomes law”, accessed on 15 April 2014 from [www.mondag.com/austria/x/82318/Trade+Regulation+Practices/The+Criminalisation+Of+Cartel+Cartel+Bill+Becomes+Law](http://www.mondag.com/austria/x/82318/Trade+Regulation+Practices/The+Criminalisation+Of+Cartel+Cartel+Bill+Becomes+Law).

<sup>221</sup> Section 44ZZRF and 44ZZRG of the Trade Practices Act 1974.

a contract or arrangement or arrive at an understanding that contains a cartel provision or give effect to a contract, arrangement or understanding that contains a cartel provision.<sup>222</sup>

Section 44ZZRF, 44ZZRG, 44ZZRJ, and 44ZZRK of the CCA has clearly been drafted with the longstanding civil provisions of section 45(2) of the TPA,<sup>223</sup> however, Division 1 part IV of the CCA has replaced the former section 45A. The civil and criminal provisions are the same except for the fault element of ‘knowledge or belief’ in relation to the criminal offence.<sup>224</sup>

#### **4.2.1 Definition of a cartel in Australia**

The definition of cartel has evolved over the years in Australia. In terms of the new Division 1 part IV of the Act, as introduced by the Cartel Conduct Act, a ‘cartel provision’ is a provision of a contract, arrangement or understanding between parties that are, or are likely to be, in competition with each other which has, or likely to have, the purpose or effect of:

- (a) price fixing; or
- (b) restricting outputs in the production and supply chain; or
- (c) allocating customers, suppliers or territories; or
- (d) bid-rigging.<sup>225</sup>

#### **4.2.2 Rationale for introducing criminal sanctions in Australia**

Simon Ladd remarked that it is a widely accepted view that cartels are extremely harmful to both businesses and consumers hence they must be deterred, detected and defeated.<sup>226</sup> In fact

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<sup>222</sup> Section 44ZZRJ and 44ZZRK of the Trade Practice Act 1974.

<sup>223</sup> Section 45(2)(a)(ii) of the Trade Practices Act prohibits making a contract or arrangement, or arriving at making an understanding, if the provisions of the contract, arrangement or understanding has the purpose, effect or likely effect of substantially lessening competition.

<sup>224</sup> Supra n 220.

<sup>225</sup> Section 44ZZRA and 44ZZRD of the Trade Practices Act 1974.

<sup>226</sup> Simon Ladd, “Cartel criminalisation-where Australia stands we stand”, accessed on 15 April 2014 from [www.bellgully.co.nz/areas/index.asp](http://www.bellgully.co.nz/areas/index.asp).

Allan Fels asserted that hard-core collusion ought to be seen as equivalent to theft or fraud and should be regarded as white-collar crimes.<sup>227</sup>

It has been the ACCC's experience that small penalties and remedies yield no success in deterring the most blatant and collusive agreements, hence the notion that effective deterrence will be greatly achieved if penalties for contravening the TPA exceeds the gains of its violation.<sup>228</sup> There are various factors that influenced the ACCC to strongly support imprisonment of offenders.

The central justification for introducing criminal sanctions in Australia was the obvious need for greater deterrence, since the Australian economy was vulnerable to the operations of cartels.<sup>229</sup> The ACCC considered that an effective regime should encompass criminal sanctions, including imprisonment as the threat of jail is often more of a deterrent to participating in a cartel and an incentive to approaching the Commission, as compared to a threat of money.<sup>230</sup> Moreover, the ACCC considered the growing international commitment to criminal enforcement against cartels.<sup>231</sup>

#### 4.2.3 Sanctions

The Australian Constitution states that judicial powers must only be exercised by the courts.<sup>232</sup> Accordingly, the TPA allows the ACCC to bring proceedings in the Federal Court of Australia to seek penalties and make submissions to the court as to what penalties it considers appropriate.<sup>233</sup>

The penalty regime in Australia has evolved over the years. On 21 January 1993, civil pecuniary penalty for corporations was set at \$10 million for each contravention of the Act, and \$500 000 for individuals.<sup>234</sup> With this substantial amount of pecuniary penalties imposed, one would think that it would serve as a great deterrence to cartel participants, but it was certainly not enough to eradicate cartel collusion. As a result, since 21 January 2007, for

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<sup>227</sup> Supra n 201 at 682.

<sup>228</sup> Supra n 207.

<sup>229</sup> Supra n 201 at 681.

<sup>230</sup> Supra n 212 at 18.

<sup>231</sup> Supra n 197 at 737.

<sup>232</sup> Section 71 of the Australian Constitution Act.

<sup>233</sup> Supra n 212 at 19.

<sup>234</sup> David K. Round and Leanne M. Hanna, "Curbing corporate collusion in Australia: the role of section 45A of the Trade Practices Act", 2005 (29) *Melbourne University Law Review*, p 243.

breach of section 45(2) of the TPA, statutory maximum penalties have been increased to allow for greater deterrence.<sup>235</sup>

The Trade Practices Amendment Act<sup>236</sup> increased civil penalties for corporations from a maximum of \$10 million to the greater of \$10 million, or where the value of the benefit can be ascertained, three times the value of the illegal benefit or where the value of the illegal benefit cannot be ascertained, then the penalty is 10% of the turnover of the twelve months ending at the end of the month in which the contravention occurred.<sup>237</sup> An individual may be liable as an accessory involved in contravention of the TPA and may incur a civil penalty of up to \$500 000. Criminal penalties of up to \$220 000 per offence or up to ten years imprisonment are available for individuals found to be involved in the cartel offences in section 44ZZRF and section 44ZZRG.<sup>238</sup>

#### **4.3 THE AUSTRALIAN IMMUNITY POLICY**

Many jurisdictions have utilised some form of immunity policy or leniency policy in support of anti-cartel law enforcement.<sup>239</sup> The ACCC have recognised the imperatives of a sound leniency policy to crack cartels and increase its detection.<sup>240</sup> The ACCC has had an immunity policy in place since 2003 and the Commission described it as the primary source of disclosure of cartel activity and it was the most effective and least costly mechanism for detecting cartel conduct.<sup>241</sup>

The first version of the ACCC immunity policy called, Leniency Policy for Cartel Conduct was established in 2003.<sup>242</sup> The policy provided that the first individual or company to apply and give evidence to the ACCC of the collusion which the Commission was not aware of, would be offered conditional immunity, provided certain conditions were met.<sup>243</sup> The 2003 Leniency Policy was introduced as an incentive to the ACCC's Cooperation Policy for

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<sup>235</sup> Caron Beaton-Wells and Kathryn Tomasic, "Private enforcement of competition law: time for an Australian debate", 2012 (35) *Unisa Law Journal*, p 662.

<sup>236</sup> Act No.1 of 2006.

<sup>237</sup> Section 44ZZRF(3) of the Trade Practices Act of 1974.

<sup>238</sup> See section 44ZZRF(2) and (3), section 44ZZRG(2) of the Act.

<sup>239</sup> *Supra* n 197 at 757.

<sup>240</sup> *Supra* n 216 at 375.

<sup>241</sup> *Supra* n 197 at 757.

<sup>242</sup> *Supra* n 235 at 666.

<sup>243</sup> *Supra* n 234 at 258.

Enforcement Matters of 2002 and each applicant was provided a level of leniency in accordance to the leniency received.<sup>244</sup>

In 2005, the ACCC released a revised Immunity Policy for Cartel Conduct (the Immunity Policy) which introduced a number of key changes.<sup>245</sup> The introduction of the Immunity Policy followed a review of the operation of the 2003 policy and it sought to maximise incentives for cartel participants to report cartel conduct.<sup>246</sup> The revised Immunity Policy introduced amongst other things the following:

- (a) a marker system, which enabled an initial application to be made by describing a certain conduct and then providing additional information at a later stage;
- (b) oral admission rather than written applications was also introduced; and
- (c) full immunity was made available to the first person to report a cartel conduct prior to the ACCC obtaining legal advice that it has enough evidence to initiate proceedings in relation to the alleged conduct.<sup>247</sup>

Since criminal sanctions were introduced in Australia, new immunity policies had been released by the ACCC and the Commonwealth Director of Public Prosecutions (the CDPP) to deal with the introduction of criminal sanctions.<sup>248</sup> It was accepted in Australia that civil and criminal offence would co-exist, therefore, there became a need to advance leniency programmes to cater for both regimes. As stated above, in Australia there are two policies in terms of which leniency may be granted for civil contraventions of the prohibitions of cartel conduct; the ACCC Immunity Policy for Cartel Conduct (ACCC Immunity Policy) and the ACCC Cooperation Policy for Enforcement Matters (Cooperation Policy). The CDPP instituted the Immunity from Prosecution for Serious Cartel Offences (CDPP Immunity Policy) as an incentive to its existing Prosecution Policy of the Commonwealth that provides for the award of immunity from prosecution by the CDPP for the new criminal cartel offence.<sup>249</sup>

The respective roles and responsibilities of the ACCC and CDPP in relation to prosecution of cartel matters are outlined in a memorandum of understanding (MOU) between the ACCC

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<sup>244</sup> Supra n 198 at 5.

<sup>245</sup> Supra n 199 at 8.

<sup>246</sup> Supra n 198 at 5.

<sup>247</sup> Supra n 199 at 8.

<sup>248</sup> Samantha J. Mobley and Ross Denton, *Global Leniency Manual 2010*, 2010, p 11.

<sup>249</sup> Supra n 248 at 11



and the CDPP. The CDPP is an independent prosecuting authority established by the Act of the Commonwealth of Australia which lays out the powers and functions of the CDPP<sup>250</sup> and it has no investigative powers, hence it relies on investigative agencies to refer matters to the CDPP.<sup>251</sup> On the other hand, the ACCC decides on the matter to investigate and then refer it to the CDPP for prosecution and the decision to prosecute rest solely with the CDPP in accordance to the Prosecution Policy of the Commonwealth.<sup>252</sup>

Furthermore, all applications for immunity from criminal prosecutions and civil penalty proceedings are made to the ACCC, which will in turn liaise with the CDPP concerning immunity from criminal prosecution in relation to the cartel offence.<sup>253</sup> Upon the recommendation of the ACCC, the CDPP independently decides whether or not to grant immunity from criminal proceedings in accordance with the Prosecution Policy of the Commonwealth.<sup>254</sup>

The ACCC Immunity Policy and Cooperation Policy do not have any statutory powers, the same applies to the CDPP Immunity Policy, and they are policies issued in the performance of their respective statutory functions.<sup>255</sup> The ACCC oversees both the ACCC Immunity Policy and the Cooperation Policy and is the regulatory body whose responsibility it is to administer the key Australian competition legislation, the Trade Practices Act 1974.<sup>256</sup>

The Immunity Policy applies to conduct in relation to civil contraventions of Division 1 part IV of the Competition and Consumer Act 2010 as amended by the Trade Practices Amendment (Cartel Conduct and Other Measures) Act 2009.<sup>257</sup> The policy thus applies to a cartel conduct in the categories of price fixing, market sharing, bid-rigging and output restriction, however, the Cooperation Policy applies to all anti-competitive conduct in breach of the TPA.<sup>258</sup> The Immunity Policy also provides for full immunity against CDPP and

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<sup>250</sup> In South Africa, prosecutorial power is vested on the National Prosecution Authority in accordance to section 179(1) and (2) of the Constitution of South Africa, and section 20(1) of the National Prosecution Act No. 32 of 1999.

<sup>251</sup> Supra n 212 at 20.

<sup>252</sup> Supra n 207.

<sup>253</sup> ACCC Immunity Policy interpretation guidelines of July 2009.

<sup>254</sup> Memorandum of Understanding between the CDPP and ACCC, Par 7.4.

<sup>255</sup> Supra n 248 at 11.

<sup>256</sup> Supra n 248 at 12.

<sup>257</sup> ACCC Immunity Policy for Cartel Conduct, par 2.

<sup>258</sup> Supra n 199 at 9.

ACCC enforcement proceedings, however, it does not protect a party against civil damages claims for cartel activity.<sup>259</sup>

A corporation who was a party to a cartel will be eligible for immunity where the following conditions are satisfied:

- (a) the cooperation is or was a party to a cartel.
- (b) the corporation admits that its conduct in respect of the cartel may constitute at least one contravention of the TPA.
- (c) the corporation is the first to apply for immunity in respect of the cartel, has not coerced others to participate in the cartel and is not a clear leader in the cartel.
- (d) the corporation has ceased its involvement in the cartel or indicated to the ACCC that it will do so and undertakes to provide full disclosure and cooperation to the ACCC.
- (e) at the time the ACCC receives the application, the ACCC has not received written legal advice that it has sufficient evidence to commence proceedings in relation to at least one contravention of the TPA.<sup>260</sup>

The ACCC grants conditional immunity subject to the applicant providing full disclosure and cooperation to the ACCC and final immunity is then granted where the applicant meets all the requirements.<sup>261</sup> Final immunity may also be granted after the resolution of any proceedings against the participants of a cartel, however, in certain circumstances, the ACCC acting in its discretion may grant final immunity at an earlier stage.<sup>262</sup>

A corporation or an individual who did not qualify for immunity and is not the first to report the conduct, however, wishes to cooperate with the ACCC, may still receive credit for their input under the Cooperation Policy.<sup>263</sup> This position is slightly different from our Corporate Leniency Policy (CLP), since there is no Cooperation Policy in South Africa, however, if a firm did not qualify for immunity but wishes to confess its involvement in the cartel, the

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<sup>259</sup> Supra n 248 at 12.

<sup>260</sup> Supra n 257, par 8.

<sup>261</sup> Supra n 257, par 9.

<sup>262</sup> Supra n 257, par 10.

<sup>263</sup> Supra n 248 at 12.

Commission may explore other processes outside the CLP as reciprocation for the firm's cooperation.<sup>264</sup>

An individual may be eligible for immunity if he/she satisfies the following conditions:

- (a) the individual is or was a director, officer or employee of a corporation that is or was a party to a cartel and the individual admits to have participated or participating in a conduct in contravention of the Act.
- (b) the individual is first to apply for immunity in respect of the cartel, has not coerced persons in other corporations to participate in the cartel and was not a clear leader in the cartel.
- (c) the individual has either ceased his/her involvement in the cartel or indicates to the ACCC that he/she will do so and undertakes to provide full disclosure and cooperation to the ACCC, and
- (d) at the time the ACCC received the application, the ACCC has not received written legal advice that it has sufficient evidence to commence proceedings in relation to at least one contravention of the Act.<sup>265</sup>

The individual must also provide full disclosure of information and cooperate with the ACCC to qualify for conditional immunity and be eligible for final immunity.<sup>266</sup>

In September 2013, the ACCC announced a review of its 2009 ACCC Immunity Policy for Cartel Conduct, as a result of the experience gained since Australia introduced criminal sanctions in 2009.<sup>267</sup> The review focused on the joint roles of the CDPP and the ACCC, since under the concurrent civil and criminal procedures, only the CDPP may grant immunity for criminal prosecution while the ACCC retained the power to grant immunity in respect of civil liability.<sup>268</sup> The review also focused on the carve-out for ringleaders whereby immunity was

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<sup>264</sup> Supra n 50, par 5.6.

<sup>265</sup> Supra n 257, par 17.

<sup>266</sup> Supra n 257, par 19.

<sup>267</sup> Beaton Well, "Australia reviews its Immunity Policy for Cartel Conduct", accessed on 15 April 2014 from [www.claytonutz.com/publications/news/20/305/28/australia-reviews-its-immunity-policy-for-cartel-conduct.page](http://www.claytonutz.com/publications/news/20/305/28/australia-reviews-its-immunity-policy-for-cartel-conduct.page).

<sup>268</sup> Beaton Well, "the ACCC Immunity Policy for Cartel Conduct: due for review", accessed on 15 April 2014 from [www.austlii.edu.au/au/au/journals/UMelbLRS/2013/1.html](http://www.austlii.edu.au/au/au/journals/UMelbLRS/2013/1.html).

not granted to a party who was a clear leader in cartel conduct and which coerced others into joining a cartel.<sup>269</sup>

Subsequent to the Immunity Policy review, on 9 April 2014, the ACCC released a draft version of the Immunity and Cooperation Policy for Cartel Conduct known as the ‘Draft Immunity Policy’.<sup>270</sup> The Draft Immunity Policy addressed the following key issues: (a) the term “clear leader” has been removed from the criteria used to assess a party’s qualification to immunity, however, not coercing other participants remains a criteria; (b) the adoption of a “letter of comfort” approach in relation to granting of conditional criminal immunity from the CDPP; (c) the factors taken into account in the Cooperation Policy for second and subsequent applicants has been clarified; (d) the Draft Immunity Policy outlines the ACCC’s proposed process for revoking and withdrawing immunity and clarification on the closing of an investigation.<sup>271</sup>

#### 4.4 CONCLUSION

In South Africa the definition of cartels is almost similar to that of Australia. In our jurisdiction, section 4(1)(b) provides that an agreement between firms in a horizontal relation is prohibited if it has the effect of substantially preventing or lessening competition in a market, and if it involves:

- (a) price fixing;
- (b) dividing markets by allocating customers, suppliers, territories;
- (c) collusive tendering.

The prohibition is the same as that of Australia, however, the Australian legislature went a step further to prohibit the restriction of output in the production and supply chain.

South Africa also holds the same position with regard to the percentages levied in a corporation who participated in a cartel conduct. A corporation involved in cartel activity may be penalised by an administrative fine of up to 10% of annual turnover in South Africa or their exports from South Africa during the firm’s financial year. In terms of the

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<sup>269</sup> Supra 267.

<sup>270</sup> See the draft ACCC Immunity and Cooperation Policy for Cartel Conduct, April 2014.

<sup>271</sup> Supra 268.

Competition Act, victims of cartel conduct may also institute damages claims. With the introduction of criminal sanctions in South Africa, section 73A introduced a fine of R5000 000 Or a term of imprisonment not exceeding ten years or both, to a director who cause a firm to engage or knowingly acquiesce in the firm engaging in a prohibited conduct in terms of section 4(1)(b).

In conclusion therefore, Australia has significantly stepped up its fight against cartels by introducing criminal sanctions in 2009 and instituting tougher penalties. This move, in conjunction with the ACCC's Immunity Policy has been considered a great achievement in curbing cartel activity in Australia. There is a strong body of opinion that the imposition of individual consequences is a critical component of the message of public repression and positive deterrence of cartels.

## CHAPTER 5

### CONCLUSION AND RECOMMENDATIONS

#### 5.1 INTRODUCTION

The main purpose of the Competition Act is to promote free and fair competition in different markets, hence punishment of those who contravenes the Act is not the main objective of the Act. However, since it has been established that cartels are harmful in nature. The Competition Commission and the legislature must enforce stringent penalties to deter cartel participants. In doing so the legislature must ensure that any effected changes must co-exist with existing mechanisms to detect cartels. Therefore, amendments must not be effected in a piecemeal fashion but must be done holistically, taking into consideration existing legal frameworks.

#### 5.2 RESEARCH OVERVIEW

The objectives of the research was to analyze the relevant provisions of the Competition Act that relates to cartels and examine the Corporate Leniency Policy put in place by the Competition Commission to enforce cartels in South Africa and determine how the introduction of criminal sanctions may be effected without diluting the effectiveness the CLP. The preceding chapters has introduced the subject matter of the research and it has clearly established that cartel activity does not only stifle economic growth but it is also harmful to consumers as it leads to high prices, limits the consumer's choice of products and results in lower qualities of products. The research has also demonstrated that Competition Authorities in South Africa take cartel conduct very seriously and has formulated mechanisms to enforce cartel in the Republic. It has been further pointed out how the legislature has made developments to strengthen the existing mechanism to combat cartels.

In doing this analysis, an investigation has been done on how other jurisdictions such as Australia has dealt with the enforcement of cartels. Following the manner of cartel enforcement in Australia and the South African Corporate Leniency Policy, which is an effective tool to combat cartels, the central issue is whether there is need for criminal sanctions in the context of cartels to be introduced in South Africa and how such introduction

should be implemented in a way that will not erode the effectiveness of the CLP. The answer to this conundrum will be answered in this chapter by drawing a map for future developments, having regard to the successes of other jurisdictions and taking lessons from the comparative jurisdiction.

### **5.3 RECOMMENDATIONS**

In order for the effective introduction of criminal sanctions to a director or manager who has caused or acquiesced in cartel participation, it is imperative that due regard should be given to the CLP. As it has been demonstrated in the previous chapters how the Competition Commission's CLP has been successful in detecting sophisticated and secretive cartels, it should be emphasized that the introduction of criminal sanctions should be in line with the CLP. Therefore, the following recommendations should be taken into considerations for an effective introduction of the criminal sanctions that will operate hand in hand with the CLP, including, also recommendations on how the CLP may be revised to accommodate effective change.

#### **5.3.1 Immunity Policies**

Granting of immunity to applicants under the CLP has been the cornerstone of the success of the CLP, however, the policy needs to be supplemented. It is recommended that an additional "Cooperation Policy" and "Prosecution Policy" should be implemented. The Cooperation Policy will be a Policy to supplement the CLP for civil contraventions of the prohibitions of cartel conduct, while the Prosecution Policy will be a Policy issued by the National Prosecution Authority to offer immunity for directors and managers from criminal contraventions of the prohibitions of the cartel conduct.

Currently in South Africa, only one member of a cartel may be granted immunity. The CLP through its 'first-to-door' principle provides that for a firm to be granted immunity, it must be the first to approach the Commission to confess its involvement in the cartel activity.<sup>272</sup> This means that only one firm who is first to approach the Commission may qualify for

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<sup>272</sup> Supra n 32 at 160.

immunity.<sup>273</sup> The CLP does not make provision for awarding partial immunity to second or third applicants, however, it provides that other firms who wishes to co-operate with the Commission may benefit from their co-operation in that the Commission may explore other processes outside the CLP.<sup>274</sup>

It is worth noting that it is not clear on what exactly the other processes are which the Commission may explore and what criteria is used to determine the reduction of fines. It is therefore, submitted that there is need for a Cooperation Policy which will lay down the exact process for granting immunity to second and subsequent applicants of immunity and clearly state the specific percentages of the reduced fine.

In Australia, the Australian Competition and Consumer Commission has established a Cooperation Policy for Enforcement Matters which offers immunity to second and subsequent applicants of immunity who did not qualify for leniency but still wishes to cooperate with the ACCC.<sup>275</sup> However, the strength of immunity granted depends on whether an applicant is second or subsequent and the value of the information provided.<sup>276</sup> It is my conclusion that a Cooperation Policy will further increase the number of applicants to the CLP and enhance the strength of the CLP especially in cases where the first firm to approach the CLP lacks valuable information or evidence or does not fully cooperate with the Commission.

It is also recommended for the NPA to adopt a Prosecution Policy which will offer immunity from criminal prosecution for directors and managers who have caused their firms to engage in cartel participation or knowingly acquiesced in such conduct. The Prosecution Policy must contain a framework in which the Prosecution Policy may operate hand in hand with the Corporate Leniency Policy, for example, the framework must address issues such as which authority between the Competition Commission and the National Prosecution Authority will receive applications of criminal immunity, the procedures to be followed and the conditions attached to grant immunity. The extent of immunity granted under the Prosecution Policy must be clearly established so that directors and officers in management positions will be clear on what immunity they are granted.

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<sup>273</sup> Minette Neuhoff, *A practical guide to the South African Competition Act*, 2006, p371.

<sup>274</sup> *Supra* n 50, par 7.3.

<sup>275</sup> *Supra* n 248 at 12.

<sup>276</sup> *Supra* n 248 at 12.



This Policy is fundamental since it will complement the CLP in that once the introduction of criminal sanctions takes effect, a number of applicants will refrain from applying for immunity since they will not be certain of their fate. However, if they are aware that there is a criminal immunity policy in place, then those directors will continue to utilize the CLP knowing that they are protected from going to jail.

### 5.3.2 Memorandum of Understanding

The National Prosecution Authority has been given exclusive jurisdiction over the criminal prosecution of a director under section 73A.<sup>277</sup> As such the Competition Commission does not have legal authority to conduct the criminal prosecution of directors or managers in contravention of the provisions of section 73A. The unfortunate situation is that the two independent bodies have been given little guidance on how the cooperation between them shall be fostered.<sup>278</sup>

It is recommended that a Memorandum of Understanding be entered into by the Competition Commission and the National Prosecution Authority, to provide a framework that deals in detail with the manner in which the two bodies are to coordinate the level of cooperation. The Competition Act provides for the Competition Authorities and other industry-specific regulatory to negotiate and enter into Memorandum of Understanding in respect of concurrent jurisdiction.<sup>279</sup> However, the Act goes no further in outlining a framework of cooperation between the Commission and the NPA.<sup>280</sup> Therefore, this will lead to a lot of inference and confusion on what extent of authority each body is vested.

As has been stated in the previous chapter in Australia, the Australian Competition and Consumer Commission and the Commonwealth Director of Public Prosecution have entered into an MOU which outlines the extent of cooperation between the parties.<sup>281</sup> For instance, in accordance with the MOU, all applications of immunity from criminal prosecution are received by the ACCC who assesses the application and makes recommendations to the

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<sup>277</sup> This position is underpinned by the Constitution of South Africa and the National Prosecuting Authority Act No. 32 of 1998, which provides that there is a single national prosecuting authority in the Republic with the power to institute all criminal prosecutions on behalf of the state.

<sup>278</sup> For instance, it is not clear whether evidence acquired by the Commission through its investigation is admissible in court and can be used by the NPA when prosecuting directors involved in a cartel.

<sup>279</sup> Section 3(1A)(1) of the Competition Act.

<sup>280</sup> *Supra* n 36.

<sup>281</sup> *Supra* n 248 at 13.

CDPP as to whether immunity from criminal prosecution should be granted.<sup>282</sup> It is submitted that an MOU which will provide guidelines of the cooperation between the authorities that should be adopted in South Africa.

Since the Commission has already established some Memorandum of Understanding with other institutions in areas of concurrent jurisdiction, there is no reason to believe that the Commission will not be able to conclude similar arrangement with the NPA on matters concerning the implementation of section 73A.<sup>283</sup>

### 5.3.3 The Competition Commission

The Competition Commission has been given a limited role in the enforcement of section 73A, since the NPA has been given exclusive jurisdiction over such enforcement.<sup>284</sup> There is no ultimate authority vested with the Competition Commission in respect of granting any form of criminal immunity, hence the Competition Commission is at the mercy of the NPA in respect of a decision to prosecute in terms of section 73A.<sup>285</sup> The Competition Commission does not have legal authority to conduct the prosecution of directors under section 73A, since the Constitution has vested exclusive jurisdiction over such enforcement with the NPA.<sup>286</sup>

It is recommended that it would be preferable if the Competition Commission will be granted a greater role in the enforcement of the provision. Such can be attained if the relevant provisions of the Constitution, the Competition Act and NPA Act are amended accordingly so as to grant more power to the Competition Commission in respect of enforcing criminal prosecutions of the provision. The amendment process of the relevant legislation may take longer to draft and implement, however, it would vastly benefit competition law in the long run.

More power given to the NPA raises concerns since the NPA may be ill equipped to prosecute on competition matters and has no expertise on such matters.<sup>287</sup> As of now the NPA is overburdened with criminal prosecution of matters on behalf of the state, so adding more responsibility to the NPA will make the criminal prosecution of directors ineffective. It is

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<sup>282</sup> Supra n 248 at 13.

<sup>283</sup> Supra n 1 at 203.

<sup>284</sup> Supra n 30 at 332.

<sup>285</sup> Supra n 30 at 330.

<sup>286</sup> Section 179 of the Constitution.

<sup>287</sup> Supra n 1 at 204.

emphasized that for the criminal liability to act as deterrent, there should be actual prosecution of directors and they should serve jail time so that people may get the picture on how cartel conduct is taken serious in our jurisdiction.

It is submitted that issues of competition law must be dealt with by the Competition Commission which exhibits vast experience in competition related matters. In the United Kingdom (UK), issues of expertise in competition law enforcement are dealt with by Competition Authorities who handles both the administrative and criminal component of the competition law enforcement.<sup>288</sup> In the UK, the United States of America (USA) and the European Union (EU), Competition Authorities are legally authorized to conduct criminal prosecutions relating to contraventions of their competition statutes.<sup>289</sup>

The same position should be held in South Africa and the Competition Authorities should be given ultimate power to deal with the contraventions on section 73A. This will bring certainty and avoid time delays in liaising between different authorities. In fact one writer even opined that cartels should be prosecuted in a specialized competition law court because ordinary courts are well known for their notorious for heavy backlogs.<sup>290</sup>

#### **5.4. CONCLUSION**

In view of the above recommendations, it is clear that the Competition Act cannot be amended in a piecemeal fashion but it must be amended holistically taking into account existing legal frameworks. The amendment contains vague thresholds and lacks sufficient detail on how the different institutions should cooperate with one another in the prosecution for cartel participants. The legislature also did not implement a framework that vests greater investigative and prosecutorial authority to the Competition Commission in respect of section 73A.

In order for the Corporate Leniency Policy to continue enjoy its success, it is vital for applicants to be clear on the extent of immunity offered under the Policy and be clear on whether they are immune from criminal prosecution. Furthermore, for the CLP to be effective it must be certain, predictable and transparent. To retain confidence in the CLP, it is

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<sup>288</sup> Supra n 30 at 339.

<sup>289</sup> Supra n 1 at 201.

<sup>290</sup> Supra n 32 at 176.

imperative that applicants are fully informed on how the introduction of criminal sanctions will operate hand in hand with the CLP.

Information with regard to the introduction of criminal sanctions must be easily accessible and available to directors and anyone who may need to clarify certain issues concerning the Corporate Leniency Policy and the introduction of criminal sanctions. If applicants are clear on the operations of the immunity process and assured that applying for immunity under the CLP will not expose them to criminal liability, then the CLP will withstand its success.

It should be noted that the amendment is not yet in force and effect, therefore, in the meantime, the legislature and the Competition Authorities should utilize this time to come up with a comprehensive framework on how the introduction of criminal liability should be effected. It is submitted that if the amendment can be implemented as recommended in the research paper then it would be victory not only for Competition Authorities but also to the South African society at large.

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