



A Comparative Analysis of the Criminalisation of Cartel Conduct in South Africa

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Abstract

Cartels within the international competition law framework have been labelled “the most egregious of competition law violations”,¹ and competition authorities worldwide have mounted a robust fight against the proliferation of cartels. In South Africa, the fight against cartels saw an amendment to the Competition Act² to allow for criminal prosecution of individuals who cause their firms to take part in cartels. Section 73A was inserted into the principal Competition Act, making engaging in cartel conduct a criminal offence.³ This article discusses the rationale for criminalising cartel conduct, identifies the challenges associated with criminalisation, and evaluates its efficacy. It assesses whether criminal sanctions for cartel conduct as a competition enforcement tool aimed at deterring such behaviour are effective. This will be done through a comparative look at the United States of America and Australia to assess their successes and identify how enforcement may be enhanced in South Africa. It concludes by offering recommendations on effectively prosecuting cartels under South Africa’s criminal law regime.

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1 Kelly *et al Principles of Competition Law in South Africa* (2017) 86.

2 89 of 1998.

3 See s 12 of the Competition Amendment Act 1 of 2009.

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1 INTRODUCTION

The main aim of competition law in various jurisdictions around the world, specifically in South Africa, is to safeguard the process of competition, which, in turn, increases consumer welfare while promoting efficiency, adaptability, and development of the economy through the efficient regulation of markets.⁴ To this end, one of the most significant challenges for competition authorities across the globe is that of investigating and prosecuting hard-core cartels and cartel conduct, which pose an inherent threat to consumer welfare. Cartel conduct occurs when competitors decide to cooperate rather than compete.⁵ It seeks to achieve the same degree of market power as the monopolist through cooperation, which reduces uncertainty, one of the key drivers of rivalry, from the market.⁶

Through collusion, competitors distort the market by fixing purchase or selling prices, altering trading conditions, and constraining the supply of goods and services. By artificially limiting competition that would typically prevail between them, firms avoid the pressures that lead them to innovate in product development and production methods.⁷ Coordination rather than competition enables a group of firms to collectively exert and abuse market power, which the firms otherwise would have been unable to attain individually.⁸ Market power refers to the ability of a firm to control prices, exclude competition, or behave to an appreciable extent independently of its competitors, customers, and suppliers.⁹ With increased and unchecked market power, colluding firms could manipulate the market with latitude, the effect of which would be higher prices for consumers. A well-operated cartel ensures that consumers are affected adversely as they face higher prices, smaller product ranges, and inferior quality goods and services.¹⁰ The adverse effects of cartel conduct on consumer welfare are why eradicating cartels is a priority not only in South Africa but globally as well. As noted by the Organisation for Economic Cooperation and Development (OECD):

Hard-core cartels (when firms agree not to compete with one another) are the most serious violations of competition law. They injure customers by raising prices and restricting supply, thus making goods and services completely unavailable to some purchasers and unnecessarily expensive for others.¹¹

The sentiments the OECD expresses are echoed globally, from the United States of America to the European Union (EU) to Australia and South Africa. A former Deputy Assistant Attorney General of the United States Department of Justice once remarked that:

Cartels have no legitimate purposes and serve only to rob consumers of the tangible blessings of competition. Participation in a cartel is seen in the US as ‘a property crime, akin to burglary

4 See s 2 of the Competition Act; Kelly *Principles of Competition Law* 2–3.

5 Neuhoﬀ *et al A Practical Guide to the South African Competition Act* 2 edn (2017) 74.

6 Kelly “The introduction of a ‘Cartel Offence’ into South African Law” 2010 *Stellenbosch Law Review* 321.

7 Competition Commission “Cartels” <http://www.compcom.co.za/cartels/> (accessed 28-03-2023).

8 Neuhoﬀ *A Practical Guide* 74.

9 See s 1(1)(xiv) of the Competition Act.

10 OECD “Report on the Nature and Impact of Hardcore Cartels and Sanctions against Cartels under National Competition Laws” <http://www.oecd.org/dataoecd/16/20/2081831.pdf> (accessed 28-03-2023).

11 OECD “Cartels and Anti-Competitive Agreements” <http://www.oecd.org/competition/cartels/> (accessed 10-03-2023).

or larceny,' and should be treated accordingly.¹²

The prioritisation of eradicating cartel conduct is evidenced by how competition authorities deal with cartels worldwide.¹³ South Africa is no exception to the prevalence of cartels and their negative impact on consumers, which is why the Competition Act prohibits cartel conduct.¹⁴ While the term “cartel conduct” is not explicitly used, section 4(1)(b) of the Act prohibits restrictive horizontal practices between competitors, which is considered and referred to as cartel conduct in other jurisdictions.

Although the Competition Act prohibited cartel conduct from its promulgation, the need for more stringent regulation came about half a decade into its existence in light of the prominent bread cartels.¹⁵ In his 2007 State of the Nation Address, the erstwhile President of the Republic of South Africa, Mr Thabo Mbeki, referred to the need to improve competition in the economy and strengthen the effectiveness of competition authorities.¹⁶ A year later, the Competition Amendment Bill¹⁷ was introduced into parliament through the Portfolio Committee on Trade and Industry. The Bill sought to introduce amendments to the Competition Act regarding:

- i. concurrent jurisdiction between the Competition Commission and other sectors;
- ii. market enquiries;
- iii. personal criminal liability for cartel conduct;
- iv. complex monopolies; and
- v. amendment of the Competition Commission’s Corporate Leniency Policy.

The Bill was passed and enacted on 28 August 2009 as the Competition Amendment Act.¹⁸ The Competition Amendment Act inserted a new section into the existing Competition Act, the effect of which was to criminalise cartel conduct.¹⁹ On 1 May 2016, through a proclamation by the then President of the Republic of South Africa, Mr Jacob Zuma, section 12 of the Competition Amendment Act came into commencement, bringing section 73A of the Competition Act into effect.²⁰ The import of section 73A is that engaging in a horizontal practice, as prohibited by section 4(1)(b) of the Competition Act, is now a statutory criminal offence in South Africa. The directors or managers of firms implicated in cartel conduct can be criminally prosecuted and, if found guilty, face severe penalties in the form of a fine of up to R500 000 or imprisonment not exceeding ten years, or both a fine and imprisonment.²¹ In criminalising cartel conduct, South Africa joined many jurisdictions such as the United States of America, Canada, Australia, the UK, and other European Union States in using criminal sanctions against individuals as a competition enforcement tool to deter the formation and prevalence of cartels.

This article builds on the academic discourse of several authors who wrote lengthily on the subject when criminal sanctions were introduced.²² It seeks to revisit the rationale for criminalisation and examine its effectiveness in deterring cartel conduct in South Africa. The overarching research enquiry that will guide the article is whether introducing criminal sanctions for cartel conduct

18 1 of 2009.

20 Proclamation No. 25 of 2016. While an investigation into the causes of the delay in bringing s 73A into commencement is beyond the scope of this article, it is apposite to note that such a delay could have been due to a number of reasons including but not limited to the bureaucratic nature of law making in South Africa or to a political strategy involving the use of industrial policy to advance a specific political ideology or protect certain political interests.

21 See s 74(a) of the Competition Act.

22 Jordaan and Munyai “The Constitutional Implications of the New Section 73A of the Competition Act 89 of 1998” 2011 *SA Merc LJ* 197–213; Kelly 2010 *Stell LR* 321–333.

as a competition enforcement tool aimed at deterring such behaviour is generally effective and whether it has been effective in South Africa specifically. To address the enquiry, the article will take a comparative look at other jurisdictions where criminalisation has been in effect before its introduction in South Africa through section 73A. It will assess and evaluate whether the criminal sanctions in those jurisdictions have been successful in combating cartel conduct. If so, what lessons may South Africa draw from those countries?

2 CARTEL PROHIBITION AND CRIMINALISATION

2.1 Prohibition of Cartel Conduct

Cartel conduct involves an agreement or concerted practice between two or more competitors to fix prices or trading conditions, dividing markets, and collusive tendering. A concerted practice refers to cooperative or coordinated conduct between firms, achieved through direct or indirect contact, that replaces their independent action but does not amount to an agreement.²³ A “cartel” is an anti-competitive agreement by competitors to fix prices, restrict output, submit collusive tenders, or divide or share markets.²⁴ While the Competition Act does not define the term cartel or specifically refer to conduct as “cartel conduct”, it prohibits restrictive horizontal practices.²⁵ The Act prohibits an agreement, concerted practice by firms, or a decision by an association of firms if it is between parties in a horizontal relationship and if it substantially prevents or lessens competition in a market.²⁶

Further, an agreement or concerted practice by firms or a decision by an association of firms is prohibited if it is between parties in a horizontal relationship and if it involves a direct or indirect fixing of a purchase price or selling price or any other trading condition; market division by allocating market shares,²⁷ customers, suppliers, territories, or specific types of goods or services; or collusive tendering.²⁸ An “agreement” in the context of the Act refers to a contract, an arrangement or understanding, whether or not legally enforceable, between parties in a horizontal relationship.²⁹ Such conduct in most jurisdictions worldwide is referred to as hard-core cartels.³⁰ The rationale behind the prohibition of such behaviour is that where firms behave in a collusive manner, they can indirectly act like a monopoly and increase prices, reduce output, and earn higher profits collectively and individually to the detriment of consumers.³¹

The application of section 4(1) seems inverted from a contextual reading of the section. Section 4(1)(a) prohibits an agreement or concerted practice that substantially prevents or lessens competition. However, such an agreement or concerted practice is subject to a “rule of reason” justification. This means that if a firm is found to be in contravention of section 4(1)(a) but proves that such conduct resulted or will result in a technological, efficiency, or pro-competitive gain, such conduct will be justified, and the natural consequences of violating the section will not ensue.³² Section 4(1)(b), however, is a *per se* prohibition. This means that the prohibition of

23 See s 1(1)(viii) of the Competition Act.

24 See OECD “Hardcore Cartels” <https://www.oecd.org/daf/competition/cartels/2752129.pdf> (accessed 27-11-2023).

25 See s 4 of the Competition Act.

26 See s 4(1)(a) of the Competition Act.

27 The term “market shares” was added to s 4(1)(b)(ii) through s 3(a) of the Competition Amendment Act 18 of 2018.

28 See s 4(1)(b) of the Competition Act.

29 See s 1(1)(ii) of the Competition Act.

30 OECD “Hardcore Cartels”.

31 Neuhoﬀ *A Practical Guide* 74.

32 Neuhoﬀ *A Practical Guide* 73.

practices in the section cannot be validated or justified.³³ They are outright prohibited; therefore, a firm that engages in the prohibited practices cannot escape the consequences of such violation as illegality is established by the mere occurrence of the conduct.³⁴ In practice, therefore, the default is to assess violations of prohibited horizontal practices by looking at section 4(1)(b) first, and only insofar as practices fall outside the ambit of section 4(1)(b) will section 4(1)(a) come into operation.³⁵ Be that as it may, this article focuses on section 4(1)(b), which aptly provides a closed list of practices that fall under the “cartel” banner. The below section outlines the specific conduct prohibited under section 4(1)(b).

2 1 1 Section 4(1)(b)(i) — Fixing of Prices and Trade Conditions

“Price fixing” entails an agreement to fix, control, or maintain prices, discounts, allowances, rebates, or credits concerning goods or services bought or sold by parties in competition with one another.³⁶ It contemplates collaboration in some form between competitors with the design of eliminating competition regarding price.³⁷ The agreement need not be in writing as a simple “meeting of the minds” is what is required to establish the offence.³⁸ Price fixing as a prohibited practice goes against the fundamental competition principle of promoting a free market economy, where competitors fight for customers by innovating and offering quality goods and services at the lowest possible price. Since price fixing misrepresents the market, it is automatically prohibited.

Regarding “trading conditions”, its meaning depends on the context. Still, it must be construed to mean aspects of a particular trade or transaction intimately related to price, such as an agreement to limit output, regulate discount structure, or regulate repayment conditions.³⁹ Trading conditions may also include aspects such as delivery charges, delivery schedules, minimum product quantities, and interest charges.⁴⁰ Whether the agreement is to fix prices or any other trading condition, it has the same effect: distorting the market with an adverse impact on consumers. There can be no technological, efficiency, or pro-competitive gain argument to justify fixing prices or other trading conditions. Thus, a violation of section 4(1)(b)(i) is *per se* prohibited.

2 1 2 Section 4(1)(b)(ii) — Market Division

Any agreement dividing markets by allocating market shares, customers, suppliers, territories, or specific types of goods or services is also *per se* prohibited.⁴¹ Market division occurs when competitors agree not to conduct business in a particular geographical location or regarding a specific product, allowing one competitor to operate therein. The effect is that the remaining market occupant gains a “monopoly” over that product or geographical region.⁴² The monopoly will allow the occupant to sell their products without constraints from rivals, which may lead

33 Brassey *et al.* *Competition Law* (2002) 139.

34 Neuhoff *A Practical Guide* 75.

35 Brassey *Competition Law* 141.

36 Neuhoff *A Practical Guide* 76.

37 See *American Natural Soda Ash Corporation and Another v Competition Commission of South Africa* 2005 ZASCA 42 para 48.

38 Neuhoff *A Practical Guide* 78.

39 See *Competition Commission v Patensie Sitrus Beherend; Bezuidenhout and Another v Patensie Sitrus Beherend Beperk* 2002 ZACT 18 para 35.

40 Neuhoff *A Practical Guide* 82.

41 See s 4(1)(b)(ii) of the Competition Act.

42 Neuhoff *A Practical Guide* 84; see also *Competition Commission v Pioneer Foods* 2010 ZACT 9 where there was an agreement between bakeries to stay out of certain areas by not distributing bread in those areas thus amounting to an agreement not to compete in the identified territories.

to higher prices for lower-quality products.⁴³ The creation of a monopoly is contra one of the main objectives of the Competition Act: prevention of monopolies.⁴⁴ The practice of division of markets is so abhorrent that it is not even necessary to establish market control or that a monopoly exists. One only needs to demonstrate that there has been a market division, and it is presumed to be harmful.⁴⁵ The Competition Tribunal also dispelled the notion that there must be reciprocity for market division to occur. It decided that while a restraint of trade in the ordinary course of business aimed at protecting the goodwill of a firm did not constitute a division of the market, a market division restraint disguised as a restraint of trade was in contravention of section 4(1)(b)(ii).⁴⁶

2 1 3 Section 4(1)(b)(iii) — Collusive Tendering

In the ordinary course of business an entity requires goods or services, it is common practice that such goods or services may be procured by way of tender. The tender process is an open invitation for suppliers to submit bids for the supply of the required commodity, and the buyer chooses the lowest bid according to the tender specification.⁴⁷ In certain instances where the tender's size is substantial, supplier firms may be pressured to win the bidding for that tender out of a need for growth or survival. In such circumstances, there is an incentive for supplier firms that may have otherwise competed to cooperate and coordinate their conduct to get a share of the tender(s) on offer.⁴⁸ This cooperation or coordination is known as collusive tendering. Thus, collusive tendering involves an agreement by firms for one firm to win the bid through other firms abstaining from bidding or making sure their bids do not meet the tender specifications — with the understanding that when the next tender opens, it will be the turn of the following firm in line to win the bid.⁴⁹ As a result of the cooperation, collusive tendering has the net effect of market division and allows prices to be determined by the allocated firm instead of through competition.⁵⁰

2 2 Criminalisation of Cartel Conduct

Over the last two decades, there has been a robust debate on whether criminalising cartel conduct is the most effective way to detect and deter cartel conduct. On the one hand, it has been argued that the best way to disincentivise behaviour that is harmful to competition or outright prohibited by competition laws is to provide a strict punitive regime for contravention.⁵¹ Kolasky even argues that “there is no more effective deterrent to cartel behaviour than the knowledge that, if caught, the individuals involved will have to serve jail time.”⁵² However, on the other hand, some scholars offer diverging opinions on the effectiveness of criminal sanctions. For example, Ezrachi and Kindl argue that the “deterrent card” for justifying criminal sanctions may have been overplayed. Instead, they posit that high financial penalties supported by adequate enforcement

43 Kelly *Principles of Competition Law* 90.

44 Jordaan and Munyai 2011 *SA Merc LJ* 199.

45 Sutherland and Kemp *Competition Law of South Africa* (2000) 5–54.

46 See *Replication Technology Group (Pty) Ltd v Gallo Africa Ltd* 2007 ZACT 99; and *Nedschroef Johannesburg (Pty) Ltd and Teamcor Ltd/ Waco International Ltd/CBC Fasteners (Pty) Ltd/ Avlock International (Pty) Ltd* 2006 ZACT 7.

47 Neuhoﬀ *A Practical Guide* 89.

48 Neuhoﬀ *A Practical Guide* 90.

49 Also known as “Bid Rigging”; see discussion regarding the construction cartel during the period 2010–2011 in Kelly *Principles of Competition Law* 93.

50 *Ibid.*

51 Kelly *Principles of Competition Law* 95.

52 Kolasky “Criminalising Cartel Activity: Lessons from the US Experience” 2004 *Competition & Consumer Law Journal* 211.

capacity and a strong leniency programme may be able to provide a sufficient deterrent effect. There may be no need for criminalisation in a regime where the likelihood of detecting and successfully prosecuting cartels is high, and the penalties imposed are also high.⁵³ They also offer examples of countries such as France, Austria, Luxemburg, and the Netherlands, which have decriminalised cartel conduct due to strong administrative and civil regimes.⁵⁴ Further, when it comes to the extraterritorial effects of the imposition of criminal sanctions by national criminal authorities, Ezrachi and Kindl cite another challenge to the global acceptance of criminalisation of cartel conduct. They highlight the potential adverse effects of the imposition of powerful sanctions by one jurisdiction, which may potentially undermine the administrative or criminal leniency procedures in another jurisdiction.⁵⁵

Notwithstanding the above, South Africa followed several countries, such as the United States of America, the United Kingdom, Australia, and New Zealand, in introducing criminal sanctions for cartel conduct. This was done by amending the Competition Act to insert a new section 73A. The essence of section 73A is that it is now a statutory criminal offence for directors or managers of firms to allow or enable the firm to engage in practices prohibited by section 4(1)(b) of the Competition Act. The rationale for providing criminal sanctions for individuals in a management position is that a firm while being a juristic person and having the capacity to conclude contracts, own assets, and incur rights and obligations, cannot think and make decisions. The firm's directors or managers are responsible for making decisions on behalf of the firm. They should be held liable where the firm engages in prohibited conduct.⁵⁶

2 2 1 Section 73A

In response to the pervasiveness of the bread and pharmaceutical cartels, President Mbeki called for amendments to the Competition Act to bolster enforcement of competition law, which amendments included the creation of a “cartel offence”.⁵⁷ While the legislature amended the Competition Act to provide for criminal sanctions for cartel conduct through section 73A of the Competition Act in 2009, the amendment only came into force by proclamation of the President on 1 May 2016.⁵⁸ In terms of section 73A;

A person commits an offence if while being director of a firm or while engaging or purporting to be engaged by a firm in a position having management authority –

(a) caused the firm to engage in a prohibited practice in terms of section 4(1)(b) or

(b) knowingly acquiesced in the firm engaging in a prohibited practice in terms of section 4(1)(b).⁵⁹

The above section creates a “catch-all” provision in that it targets an individual who had the direct intention of causing the firm to engage in the prohibited practice and an individual who had an indirect intention through acquiescence. The direct intention provision is explicit;

53 Ezrachi and Kindl “Criminalization of Cartel Activity – A Desirable Goal for India’s Competition Regime?” 2011 *National Law School of India Review* 11–12.

54 Ezrachi and Kindl “Cartels as Criminal? The Long Road from Unilateral Enforcement to International Consensus” in Beaton-Wells and Ezrachi (eds) *Criminalising Cartels: Critical Studies of an International Regulatory Movement* (2011) 423.

55 Ezrachi and Kindl “Cartels as Criminal?” 425.

56 This position is like the common law principle of “Piercing of the corporate veil” in company law which was codified under s 20(9) of the Companies Act 71 of 2008.

57 Lewis *Thieves at the Dinner Table: Enforcing the Competition Act, A Personal Account* (2012) 225.

58 At the time of writing, only s 73A subsecs 1–4 had come into effect and subsecs 5 and 6 are yet to be given force.

59 See s 73A(1) of the Competition Act.

however, regarding acquiescence, the individual must have “knowingly acquiesced” while having actual knowledge of the relevant conduct of the firm.⁶⁰ This means that knowledge of the conduct cannot be imputed by virtue of a person’s position in the firm.⁶¹ Where conduct prohibited in terms of section 4(1)(b) has taken place, a person can only be prosecuted if one of two jurisdictional facts has been established:

- (a) The firm must have acknowledged through a consent order [settlement agreement] in terms of section 49D that it engaged in a prohibited practice in terms of section 4(1)(b)⁶² or
- (b) The Competition Tribunal or Competition Appeal Court has made a finding that the firm engaged in a prohibited practice in contravention of section 4(1)(b).⁶³

In essence, the courts with the relevant jurisdiction to hear and try criminal cases regarding the cartel offence may only do so where there is no factual dispute regarding a firm’s engagement in a practice prohibited by section 4(1)(b). Put differently, criminal charges can only be laid against responsible individuals and prosecuted where it is a fact by acknowledgement by the firm or pronouncement by the Competition Tribunal (Tribunal) or Competition Appeal Court (CAC) that a prohibited practice occurred. For the Tribunal to pronounce on section 73A(3)(b), the Commission must have conducted a thorough investigation into the alleged prohibited conduct. Based on the findings, the Commission may then refer the matter to the Tribunal for prosecution. The Tribunal will then determine the firm’s guilt and issue a ruling accordingly. The powers of the Commission in respect of criminal prosecution are summarised thus the Commission:

- (a) may not seek or request the prosecution of a person for an offence in terms of this section if the Competition Commission has certified that the person is deserving of leniency in the circumstances;⁶⁴ and
- (b) may make submissions to the National Prosecuting Authority in support of leniency for any person prosecuted for an offence in terms of this section, if the Competition Commission has certified that the person is deserving of leniency in the circumstances.⁶⁵

The above may be seen as an attempt to preserve the Commission’s Corporate Leniency Policy (CLP), where leniency may be granted to firms or individuals cooperating with investigations into cartel activity.⁶⁶ It can be deduced from the above section that the Commission has the power or authority to request that an individual be prosecuted where it deems them undeserving of leniency. It is also apposite to note that while the Commission may make submissions to the National Prosecuting Authority (NPA), criminal prosecution is the individual domain of the NPA,⁶⁷ and the Director of Public Prosecutions (DPP) is not under any obligation to consider the Commission’s submissions. This point will be further explicated in section three of the article.

⁶⁰ See s 73A(2) of the Competition Act.

⁶¹ Kelly 2010 *Stell LR* 243.

⁶² See s 73A(3)(a) of the Competition Act.

⁶³ See s 73A(3)(b) of the Competition Act.

⁶⁴ See s 73A(4)(a) of the Competition Act.

⁶⁵ See s 73A(4)(b) of the Competition Act.

⁶⁶ Competition Commission “Corporate Leniency” <https://www.compcom.co.za/corporate-leniency/> (accessed 14-03-2023).

⁶⁷ See s 179 of the Constitution of the Republic of South Africa, 1996.

2 2 2 Sanctions for Contravention of Section 73A

An individual convicted of the cartel offence under section 73A will be liable to a penalty of imprisonment for a period not exceeding ten years, or a fine not exceeding R500 000, or both imprisonment and a fine.⁶⁸ The penalty imposed for contravention of section 4(1)(b) is substantial, intending to deter individuals controlling firms from further contraventions while also serving as a warning to other firms and individuals managing those firms. Whereas some may view the imposition of a fine as only a pecuniary loss that can be replenished, adding a custodial sentence signals the legislature's no-compromise stance on rooting out cartels. The prospect of imprisonment is enough to give would-be contraveners pause, as imprisonment affects various individual freedoms such as movement, trade, occupation, and the general dignity of the individual. Further, an individual convicted of the cartel offence will not only have a criminal record against their name but also carry the stigma of being imprisoned.

Notwithstanding the introduction of the cartel offence, it is noteworthy that over half a decade since section 73A came into effect, there have not been any criminal prosecutions of the cartel offence.⁶⁹ The prevalence of cartels has not seen any significant decrease despite the threat of criminal liability for individuals in charge of companies that engage in cartel activity.⁷⁰ Due to the continued prevalence of cartels and cartel conduct, this article argues that the criminalisation of cartel activity has not effectively deterred cartel conduct in South Africa. The question then arises, why haven't there been any prosecutions, and what are the challenges to investigation and successful prosecution?. To answer the above question, the following section investigates challenges to effectively enforcing section 73A of the Competition Act.

68 See s 74(a) of the Competition Act.

69 Oxenham and Currie "Cartels Laws and Regulations 2023" <https://www.globallegalinsights.com/practice-areas/cartels-laws-and-regulations/south-africa#chaptercontent11> (accessed 27-11-2023); see also COSATU "COSATU Calls for the Senior Executives of Irvin & Johnson (I&J) and Karan Beef to be Criminally Prosecuted for their Respective Company's Alleged Cartel Conduct" <https://mediadon.co.za/2018/10/31/cosatu-calls-for-the-senior-executives-of-irvin-johnson-ij-and-karan-beef-to-be-criminally-prosecuted-for-their-respective-companys-alleged-cartel-conduct/> (accessed 27-11-2023) where there were strong calls from the trade union for the criminal prosecution of executives of Irvin & Johnson and Karan Beef for alleged cartel conduct relating to the parties entering a manufacturing agreement wherein they agreed not to compete in the market for processed beef products. This, however, did not go anywhere as the Competition Commission referred the matter (which they argued contravened s 4(1)(b)(ii) of the Competition Act) to the Competition Tribunal under case number CR198Oct18, where it was dismissed. The Competition Commission then appealed that decision in the Competition Appeal Court under cases 188/CAC/SEP20 and 196/CAC/NOV21, where the appeal was dismissed.

70 See Competition Commission "Competition Commission Prosecutes Two PPE Companies for Price Fixing and Collusion" <https://www.compcom.co.za/wp-content/uploads/2023/01/Competition-Commission-charges-face-masks-sellers-for-price-fixings-26-January-2023-.pdf> (accessed 26-01-2023); *BusinessTech* "Takealot Sellers Nailed for Alleged Price Fixing" <https://businesstech.co.za/news/business/659807/takealot-sellers-nailed-for-alleged-price-fixing/> (accessed 26-01-2023); see *SABCNews* "Two Competing Companies Referred to Competition Tribunal for Price Fixing, Collusion" <https://www.sabcnews.com/sabcnews/two-competing-companies-referred-to-competition-tribunal-for-price-fixing-collusion/> (accessed 26-01-2023) about the latest investigation by the competition authorities over collusion and price fixing.

3 CHALLENGES ARISING OUT OF THE CRIMINALISATION OF CARTEL CONDUCT

While there were sound justifications for the creation of the cartel offence, its introduction was not without controversy. For example, there were protracted disagreements between the Department of Trade and Industry (DTI) and the competition authorities on how the cartel offence would operate, particularly in light of the Commission's CLP.⁷¹ Lewis even goes as far as to state that he was not entirely sure why the department officials chose to pursue an amendment to introduce criminalisation in the face of the steadfast opposition of the competition authorities.⁷² However, the amendment was passed, and at the time of promulgation, scholars such as Lewis, Kelly, Jordaan, and Munyai foreshadowed potential problems with the criminalisation of cartel conduct. Some of the issues identified by the above scholars have come to fruition and have potentially contributed to the lack of progress regarding criminal prosecution. This section discusses the shortcomings of section 73A concerning its enforcement and, consequently, its effectiveness. It will also lay a foundation for the following section, which will contain a comparative analysis and identify potential solutions to the lack of criminal prosecutions.

3.1 The Question of Prosecutorial Mandate

Before the enactment of section 73A, the Commission's role in the detection, investigation, and civil prosecution of cartels was clear. Its responsibilities included investigating and prosecuting alleged cartel conduct and administering its CLP through the specialised Cartels Division.⁷³ However, with the advent of the criminal element introduced through Section 73A, one is left wondering about the extent of the Commission's responsibilities in detecting, investigating, and prosecuting individuals. In terms of the Constitution, there is a single criminal prosecuting authority in South Africa, the NPA,⁷⁴ which is structured in terms of an Act of Parliament.⁷⁵ The duties and responsibilities of the NPA are outlined in Chapter 4 of the NPA Act. They include the power, as contemplated in section 179(2) and all other relevant sections of the Constitution, to:

- (a) institute and conduct criminal proceedings on behalf of the State;
- (b) carry out any necessary functions incidental to instituting and conducting such criminal proceedings; and
- (c) discontinue criminal proceedings.⁷⁶

It can be deduced that prosecution of any crime, including the cartel offence, is the NPA's responsibility.⁷⁷ However, with competition law, including cartel conduct, being a complex and specialised field, the practicality of successful prosecution of cartel conduct by the NPA can be questioned. Further, the NPA's success record is anything but stellar, with recent prosecution

71 Lewis *Thieves at the Dinner Table* 209; Kelly 2010 *Stell LR* 242.

72 Lewis *Thieves at the Dinner Table* 210.

73 Competition Commission "Cartels".

74 See s 179 of the Constitution.

75 National Prosecuting Authority Act 32 of 1998.

76 See s 20(1) of the NPA Act.

77 This position was confirmed by the erstwhile Commissioner of the Competition Commission, Mr Tembinkosi Bonakele during a 2016 Parliamentary Economic Development Committee meeting where he acknowledged the role of the NPA as the *dominus litis* in South Africa, addressed potential challenges, and offered suggested solutions to those challenges. See Parliamentary Monitoring Group "Competition Commission Legislation Implementation Challenges" [Competition Commission legislation implementation challenges | PMG](#) (accessed 27-11-2023).

rates for serious offences as low as two per cent.⁷⁸ Such low numbers make a grim reading and are of particular concern regarding the successful prosecution of the cartel offence. If the NPA struggles with traditional crimes, including murder, rape, theft, and financial violations, what more with the new and complex cartel offence?

An additional problem that comes to the fore regarding prosecutorial mandate is the sequence of events and the roles that the competition authorities and the NPA play in that sequence. Criminal prosecution can only occur where one of two things has happened: either the firm accused of engaging in cartel conduct confessed to such behaviour; or the competition authorities have made a substantive determination that a prohibited practice occurred. Section 73A, therefore, does not kick in until one of the two factual scenarios above is present, meaning that, to an extent, the competition authorities have some power to dictate criminal prosecution of the cartel offence.⁷⁹ Jordaan and Munyai support the notion that the competition authorities can institute prosecution as they can request the NPA to institute criminal proceedings against a director and that it is unlikely that the NPA would institute proceedings unless the Commission makes a request or recommendation.⁸⁰ This raises a serious constitutional concern: should the exercise of power or authority of the NPA depend on any individual person or body? In terms of the Constitution, the NPA is independent and can institute, carry on, or discontinue criminal proceedings. Yet, it seems that without the involvement of the competition authorities, the NPA cannot prosecute the cartel offence.

Lastly, where the NPA assumes the duty of criminal prosecution of individuals involved in cartel conduct, the question of which court has jurisdiction to hear the matter arises. There are three possibilities regarding court jurisdiction: the Magistrates' Court,⁸¹ the High Court,⁸² and the Specialized Commercial Crimes Court.⁸³ However, section 73A does not provide any guidance as to which court would have jurisdiction, which is understandable as criminal prosecution falls under the purview of the NPA. At the time of writing, while cartel investigations by the Competition Commission are continuing, no criminal investigations or prosecutions have occurred.⁸⁴ Since there have not been any prosecutions, these questions of prosecutorial mandate and court jurisdiction are yet to be answered.

3 2 Impact on the Commissions Leniency Policy

The CLP is a mechanism devised to encourage cartel participants to disclose to the Commission details of any ongoing cartel activity, and discourage and prevent the formation and proliferation of cartels. In terms of the policy, the first firm to report cartel activity to the Commission that it was

78 Versluis and De Lange "Rising Crime, Low Prosecution Rates: How Law Enforcement in SA has all but Collapsed" <https://www.news24.com/citypress/news/rising-crime-low-prosecution-rates-how-law-enforcement-in-sa-has-all-but-collapsed-20191021> (accessed 28-01-2023).

79 Jordaan and Munyai 2011 *SA Merc LJ* 201–202.

80 Jordaan and Munyai 2011 *SA Merc LJ* 202.

81 See s 1 and part 1 of the Magistrates' Court Act 32 of 1944.

82 See s 6 of the Superior Courts Act No 10 of 2013.

83 Which forms part of the Magistrates' Court system, see Altbeker "A Model for Justice Delivery? The Specialised Commercial Crime Court" 2002 *South African Crime Quarterly* 31–34.

84 See Competition Commission's 2021/2022 Annual Report where it is detailed that the Commission received and investigated 29 complaints from third parties, initiated five investigations and proceeded with the prosecution of 14 out of the 35 cases investigated: Competition Commission "Annual Report 2021/22" 53 https://www.compcom.co.za/wp-content/uploads/2022/10/CC_Annual-Report-2021_22_Proof16_signed.pdf (accessed 27-11-2023).

not aware of or was aware of but did not have sufficient evidence would be granted immunity.⁸⁵ The above provision raises concerns about how an individual director or manager responsible for such reporting to the Commission would be susceptible, on the strength of such confession, to being criminally prosecuted. Although the Act stipulates that the Commission may not seek criminal prosecution of an individual deserving of leniency,⁸⁶ it remains the prerogative of the NPA under the direction of the DPP to decide what matters to pursue. Therefore, the NPA may, of its own volition, choose to prosecute an individual otherwise deemed deserving of leniency. Further, while the Act makes provision for the Commission to recommend leniency for a cooperative individual to the NPA,⁸⁷ there is no suggestion that the recommendation would be binding. There is, therefore, no guarantee that the NPA will give immunity from prosecution to the concerned person or that the presiding officer will be lenient in the sentencing phase where that individual is found guilty.

Moreover, the introduction of criminal sanctions places the directors or managers of firms involved in cartel conduct in a position of conflict, considering the procedure that needs to be followed and the specific chain of events. First, the director or manager of a firm must make disclosures to the Commission to secure leniency on behalf of the firm, then the Commission must determine whether the director or manager deserves leniency for their part in the firm's involvement in cartel conduct. The absence of guaranteed immunity for individual directors or managers when they make self-incriminating disclosures on behalf of the company presents a significant challenge to their forthrightness. Such disclosures may expose them to the possibility of criminal charges, creating a disincentive for transparency. If anything, the introduction of criminal sanctions seems to have chilled the effectiveness of the Commission's CLP. According to Steyn, there has been a trend since 2016 (which is the time when section 73A(1)–(4) came into effect), where firms are increasingly opposing cases by the Commission because directors are not guaranteed immunity.⁸⁸ Absent guarantees of immunity from prosecution or leniency in sentencing, directors of companies involved in cartel conduct will not be lining up to apply for the Commission's CLP.

3 3 Infringement of the Right to a Fair Trial

The introduction of criminal sanctions for the cartel offence also came with potential constitutional challenges, particularly relating to the presumption of guilt and the creation of a reverse onus.⁸⁹ The Constitution provides rights for arrested, detained, and accused persons, chief among them: the right to remain silent; the right to be presumed innocent; and the right against self-incrimination.⁹⁰ However, the amendment challenges the core of section 35 of the Constitution. During deliberations, it had actually been suggested that section 73A(4) of the Amendment Bill provide for a criminal court to treat a firm's admission in a consent order or the finding of the Tribunal or the CAC as "conclusive evidence" that the firm had participated

85 For a detailed reading on the CLP, see Botha and Van Heerden "Challenges to the South African Corporate Leniency Policy and Cartel Enforcement" 2015 *Journal of South African Law* 311–312; and Competition Commission "Corporate Leniency Policy" <https://www.compcom.co.za/wp-content/uploads/2020/03/CLP-public-version-12052008.pdf> (accessed 28-01-2023).

86 See s 73A(4)(a) of the Competition Act.

87 See s 73A(4)(b) of the Competition Act.

88 Steyn "South Africa: Three Cartel Cases Lost by the Competition Commission before the Competition Tribunal – what are the Implications for Future Cases?" <https://www.mondaq.com/southafrica/corporatecommercial-law/893832/three-cartel-cases-lost-by-the-competition-commission-before-the-competition-tribunal--what-are-the-implications-for-future-cases> (accessed 27-11-2023).

89 Lewis *Thieves at the Dinner Table* 211.

90 See s 35(1) of the Constitution.

in a cartel.⁹¹ There was vigorous opposition to the initial version regarding the deeming of admissions in a consent order as conclusive evidence, and the section was amended accordingly to read as follows:

In any court proceedings against a person in terms of this section, an acknowledgement 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 *prima facie* proof of the fact that the firm engaged in that conduct.⁹²

Lewis notes that while the constitutional shortcomings of the initial formulation of section 73A(5) are unimpeachable, it is not clear that the revised provision will pass constitutional muster either.⁹³ Section 73A(5) poses two distinct issues that affect the right to a fair trial. First, it seems to create a presumption of guilt, albeit rebuttable. However, an attempt to rebut the presumption of guilt leads to the second issue, the creation of a reverse onus on the part of the accused.

Every accused person has the right to a fair trial, which includes the right to be presumed innocent until the contrary is proven.⁹⁴ Section 73A(5) of the Competition Act goes against this right and may face constitutional challenges where the Constitutional Court must decide. Section 73A(5) provides that where a firm concludes a consent order, this constitutes *prima facie* evidence that the person responsible for running the firm is presumed to have been behind the firm's decisions. Thus, they are presumed guilty of engaging in cartel conduct until the contrary is proven.

This completely goes against the right to be presumed innocent, as the burden should be on the State to prove each element of the criminal offence without assistance from the accused.⁹⁵ Prosecution that is therefore premised on the guilt of the accused threatens the fundamental principle of presumption of innocence.⁹⁶ Where the presumption of innocence is violated, this also affects a further residual right to the right to be presumed innocent, which is the right to remain silent. Since an accused person has the right to be presumed innocent and the burden falls on the State to prove otherwise, the accused has a right to remain silent and not to testify during criminal proceedings.⁹⁷ As there is no responsibility to prove their innocence. However, where a presumption of guilt is created, it calls on the accused to defend themselves and thus repudiate their right to remain silent. This is because, as noted by Adv. Semanya SC during deliberations of the Amendment Bill, "it would be perilous for an accused person to remain silent in the face of a *prima facie* proof."⁹⁸ It is unconstitutional to force the accused out of the comfort of their right to remain silent and defend themselves because a presumption of guilt has been made.

A presumption of guilt leads to the second challenge, creating a reverse onus on the accused. In

91 Lewis *Thieves at the Dinner Table* 211–212.

92 See s 73A(5) of the Competition Act.

93 Lewis *Thieves at the Dinner Table* 212.

94 See s 35(3)(h) of the Constitution; Woolman and Bishop *Constitutional Law of South Africa* 2 ed (2013) 51–100.

95 See *Scagell & Others v Attorney-General of the Western Cape & Others* 1997 2 SA 368 (CC) where the Constitutional Court interpreted the imposition of an evidential burden on an accused as a violation of the right to a fair trial.

96 Woolman and Bishop *Constitutional Law* 51–101, 103.

97 See ss 35(1)(a) and 35(3)(h) of the Constitution.

98 Ostrovsky and Boniwell "Shifting the Burden of Proof: The Nature of Director's Liability" <https://www.polity.org.za/article/shifting-the-burden-of-proof-the-nature-of-directors-liability-2009-05-14> (accessed 28-01-2023).

criminal proceedings, the burden of proving the accused's guilt beyond reasonable doubt lies on the State. However, where a presumption of guilt is created, this shifts the burden of proof to the accused to prove their innocence, thus creating a reverse onus.

A reverse onus is unconstitutional, where it creates a risk that an innocent party could be found guilty or where there is a possibility of a conviction despite the existence of reasonable doubt.⁹⁹ This means there may be instances where a reverse onus is not automatically unconstitutional. To determine the constitutionality of a reverse onus, two key questions have to be asked. First, does the provision violate the right to be presumed innocent and the requirement that the accused's guilt be proven beyond a reasonable doubt? Second, is the violation of the right to be presumed innocent a justifiable limitation of the accused's rights in terms of the limitation clause?¹⁰⁰

In the case of section 73A(5), the provision violates the right to be presumed innocent, as argued above. It creates the possibility of an individual being convicted based on the evidence provided in an administrative process (consent order) and nothing else. It is noted that the imposition of section 73A(5) may serve a legitimate purpose: connecting South African competition law to criminal law and that similar examples of corporate contraventions exist that attributes the company's crime to the directors.¹⁰¹ While directors can always protest allegations of involvement in cartel conduct and prove their innocence, a significant question hangs over this undue burden placed on an individual, and even if it passes constitutional scrutiny, the additional burden on a director may have a chilling effect on the usefulness of investigative tools such as the CLP discussed above.

Moving on to stage two of the enquiry, section 73A(5) does not provide a reasonable limitation of an accused's rights. This is because the initial aim of the reverse onus in the Competition Act was to ensure that competition authorities had help in finding that prohibited conduct occurred in the Tribunal or CAC, where the standard of proof is on a balance of probabilities and not beyond reasonable doubt as in criminal court. As such, section 73A(5) fails to pass the constitutional test for creating a reverse onus. As noted by Lewis, what determinations the Constitutional Court will make regarding the infringement or non-infringement of the above constitutional rights remains to be seen. As of now, however, the provisions are yet to be tested.

It has been established that although section 73A came into effect in 2016, there haven't been any criminal prosecutions for the cartel offence. This section has discussed some of the challenges that may be responsible for the lack of traction regarding criminal prosecutions. In the following section, the article discusses two jurisdictions where the cartel offence has been successfully prosecuted. The section aims to establish why criminal prosecutions have been successfully undertaken and what South Africa can learn from these systems.

4 A COMPARATIVE ANALYSIS OF CARTEL CRIMINALISATION

As alluded to in the introduction of this contribution, South Africa is not the first country to consider and introduce criminal sanctions for cartel conduct. Several jurisdictions have long relied on criminalisation to deter cartel formation and proliferation. This section studies the enforcement of criminal sanctions in two jurisdictions, the United States of America (US) and

99 Woolman and Bishop *Constitutional Law* 52–113; see also *S v Zuma* 1995 2 SA 642 (CC) in which s 217(1)(b)(ii) of the Criminal Procedure Act 51 of 1977 contained a statutory presumption placing the burden on the accused to prove a fact on a balance of probabilities was declared unconstitutional and *S v Coetzee* 1997 3 SA 527 (CC) where s 332(5) of the Criminal Procedure Act was also declared unconstitutional for creating a reverse onus.

100 See s 36(1) of the Constitution.

101 See ss 213 to 217 of the Companies Act 71 of 2008.

Australia. The two jurisdictions have been selected as comparators for several reasons. First, the US has had criminal sanctions as part of its competition law regime since the promulgation of the Sherman Act. It, therefore, has the longest-running criminalisation model in the world. It is a leading example concerning the successful utilisation of criminal sanctions, as by 2001, over 99 per cent of all prison time served for antitrust violations worldwide had been in the US alone.¹⁰² The above reasons present a valuable learning opportunity as the longevity of the use of criminal sanctions in the US points to its success. Second, the Australian competition regime is much like the South African one, where separate agencies are responsible for investigating alleged cartel conduct and criminal prosecution of cartel offenders. Criminal sanctions for competition law infringements were also introduced in 2009, when the Competition Amendment Act which criminalises cartel conduct, was promulgated in South Africa. For the above reasons, the US and Australia present suitable comparators for this investigation. The two jurisdictions are discussed in detail below.

4 1 United States of America

Criminal sanctions have been part of the US's antitrust system since it came into existence in 1890 when the US criminalised agreements and conspiracies to restrict competition.¹⁰³ Under the Sherman Act, cartel activity was categorised as a misdemeanour and attracted a maximum fine of \$5 000 or a prison sentence of up to a year.¹⁰⁴ Since then, the US has strongly advocated for prison sentences as the most effective deterrent to hard-core cartels.¹⁰⁵ This is because cartels have been labelled as “the supreme evil of antitrust”¹⁰⁶ and were not viewed as crimes of “moral turpitude” but were classified as immoral because they were illegal rather than classified as illegal because they were immoral.¹⁰⁷ The rationale for imposing criminal sanctions on individuals is that companies only commit cartel offences through individual employees, and prison is a penalty that the employer cannot reimburse.¹⁰⁸ In the same vein, prison presents a personal penalty as it takes away the individual's liberty, which a company cannot repay.¹⁰⁹

In 1974, US Congress passed specific legislation to upgrade criminal antitrust offences from misdemeanours to felonies.¹¹⁰ Through the Tunney Act, the fine for cartel involvement was increased from \$50, 000 to \$1 million,¹¹¹ and the length of a prison sentence was raised from a maximum of one year to three years.¹¹² Fines were again increased by statute in 1990 from \$1 million to \$10 million for corporations and from \$100, 000 to \$350, 000 for individuals.¹¹³ In 2004, the US again passed specific legislation to enhance antitrust enforcement. The maximum corporate fine increased from \$10 million to \$100 million, the maximum individual fine increased to \$1 million, and the maximum jail sentence increased from three years to ten

102 Baker “The Use of Criminal Law Remedies to Deter and Punish Cartels and Bid-rigging” 2001 *George Washington Law Review* 693.

103 See s 1 of the Sherman Antitrust Act of 1890 15 U.S.C §§1–38.

104 *Ibid.*

105 Barnett “Criminalization of Cartel Conduct – The Changing Landscape” <https://www.justice.gov/sites/default/files/atr/legacy/2009/07/10/247824.pdf> (accessed 28-01-2023).

106 *Verizon Communications, Inc. v Law Offices of Curtis V. Trinko, LLP* 540 US 398, 408 (2004).

107 Werden “Sanctioning Cartel Activity: Let the Punishment Fit the Crime” 2009 *European Competition Journal* 20.

108 Barnett “Criminalization of Cartel Conduct” 2.

109 Baker *George Wash. LR* 705.

110 See s 3(1) of the Antitrust Procedures and Penalties Act, Public Law 93–528, 88 Stat. 1706 (1974) (“Tunney Act”).

111 See s 3(2) of the Tunney Act.

112 See s 3(3) of the Tunney Act.

113 See s 4(c) of the Antitrust Amendments Act of 1990, Public Law 101–588, 104 Stat. 2879.

years.¹¹⁴ The longest prison sentence imposed for cartel conduct was five years, imposed on the executive of a company involved in price fixing for ocean transport services between the US and Puerto Rico.¹¹⁵

When it comes to enforcement of the antitrust legislation criminalising cartel conduct, the Antitrust Division (AD) under the Department of Justice (DOJ) is both an antitrust agency and a prosecutorial board. The Antitrust Division can pursue criminal or civil/administrative prosecutions of antitrust violations, including the cartel offence.¹¹⁶ This system is unique as the AD is the sole agency that can investigate and authorise criminal enforcement of antitrust legislation.¹¹⁷ The Division can institute an investigation pursuant to a tip-off or of their own initiative using the authority of a grand jury, which is constituted to meet in secret and hear evidence of suspected criminal activity. Where the grand jury is satisfied that there is sufficient evidence for a criminal prosecution, an indictment will be drafted, and the AD can proceed with prosecuting a matter.¹¹⁸

For the decade leading up to 2015, the AD and the DOJ focused more on securing corporate plea agreements before going after recalcitrant company executives for criminal prosecution. However, since 2015, the AD has shifted its focus and embarked on a campaign of charging corporate executives before taking on companies, although they still secure penalties against companies. For example, in 2017, the AD announced plea agreements for two former traders in connection with an antitrust conspiracy involving emerging market prices, and in 2019, a former currency trader was convicted for his participation in an antitrust conspiracy to manipulate prices for emerging-market currencies in the global foreign currency exchange market.¹¹⁹ In 2019, a food manufacturing company executive was tried and convicted of an antitrust conspiracy to fix the prices of canned tuna.¹²⁰ In 2020, the senior vice president for cargo sales and marketing for Martinair was extradited to the US after ten years on the run, and was charged, tried, and convicted of an air cargo price-fixing conspiracy and was sentenced to 14 months imprisonment plus a \$20,000 fine.¹²¹

In 2021, the AD imposed a penalty of \$107.9 million on Pilgrim's Pride Corp for conspiring to fix the price of broiler chicken products in the US to suppress sales and secure lucrative supply deals with the fast-food chain KFC. It also indicted ten executives over the same alleged cartel conduct.¹²² Lastly, in 2022, criminal charges were brought against company executives for

114 See s 215 of the Anti-trust Criminal Penalty Enhancement and Reform Act of 2004, Public Law 108–237, 118 Stat. 668.

115 See *United States v Frank Peake* 804 F.3d 81 (1st Cir. 2015).

116 Department of Justice “Antitrust Division” <https://www.justice.gov/atr/about-division> (accessed 27-03-2023).

117 OECD “Criminalisation of Cartels and Bid-rigging Conspiracies – Note by the United States” https://www.ftc.gov/system/files/attachments/us-submissions-oecd-2010-present-other-international-competition-fora/oecd-criminalization_of_cartels_us_submission.pdf para 5 (accessed 27-03-2023).

118 A detailed discussion of the process of constituting a grand jury as well as its powers is beyond the scope of this article. The processes that are followed as well as all the requirements that must be met to move forward with criminal prosecution are available in the DOJ Manual, see US DOJ Antitrust Division “Antitrust Division Manual” <https://www.justice.gov/atr/file/761166/download> (accessed 28-03-2023).

119 Department of Justice “Former Trader for Major Multinational Bank Convicted for Price Fixing and Bid Rigging in FX Market” <https://www.justice.gov/opa/pr/former-trader-major-multinational-bank-convicted-price-fixing-and-bid-rigging-fx-market> (accessed 27-11-2023).

120 Department of Justice “Former CEO Convicted of Fixing Prices For Canned Tuna” <https://www.justice.gov/opa/pr/former-ceo-convicted-fixing-prices-canned-tuna> (accessed 27-11-2023).

121 DLA Piper “Cartel Enforcement – Global Review 2022” https://www.dlapiper.com/-/media/project/dlapiper-tenant/dlapiper/pdf/965731_1_global-enforcement-guide-022.pdf?rev=123060399cc046afbac48a0fcec146d5 41 (accessed 27-11-2023).

122 DLA Piper “Cartel Enforcement” 41.

anticompetitive conduct regarding no-poach and non-solicitation agreements, which amounted to market allocation within the labour industry. The accused filed a motion to dismiss, which was rejected, meaning that the indictment stood.¹²³ The above cases illustrate that the Antitrust Division is resolute in its fight against cartel proliferation and that the prospect of a prison sentence for individuals is not merely a threat. What is noteworthy from the US's system is that the Antitrust Division is empowered to initiate and conduct investigations into alleged cartel activity and then criminally prosecute matters where they are satisfied with having sufficient evidence to obtain a conviction.

To this end, the US system has four distinct advantages: first, having both investigative and prosecutorial powers ensure certainty and consistent application of the law. This is because no external parties or agencies are “meddling” with investigations and prosecutions. Further, there are no potential conflicts of interest or competing mandates between different agencies as the Division runs the process from start to finish.

Second, the process is more streamlined, eliminating potential administrative red tape and avoidable delays. Where multiple agencies are involved, often the capacity of one agency depends on another agency's performance or progress. An example would be the new section 73A of the South African Competition Act, which provides that criminal prosecution can only commence once the competition authorities have determined that a firm is guilty of cartel conduct. It stands to reason that criminal prosecution will never ensue when the competition authorities fail to make a conclusive determination. Therefore, the work of the NPA depends on the performance of the competition authorities.

Third, having one division handle the investigation and prosecution of the cartel offence may also provide a cost-saving benefit. Where two agencies are responsible for investigation and prosecution, they must be allocated independent resources ranging from human capital to technological and other physical resources to execute their mandate properly. Even where the agencies may depend on each other or share information and findings, each agency will still have to conduct its investigation and follow due process, which may duplicate some of the work. However, where one agency is responsible for both functions, there is no need for dual investigations and, thus, two budget allocations.

Lastly, when securing criminal convictions, having one agency conduct the investigations and criminal prosecution may also prove advantageous regarding incentives. Where one agency is responsible, such as in the case of the Antitrust Division, officials may be able to incentivise suspects during the investigation stage by offering them immunity from criminal prosecution. In such instances, individuals may be more inclined to provide proof or evidence of cartel activity in return for immunity from criminal prosecution or leniency in sentencing.¹²⁴ However, where multiple agencies are responsible for different processes, they can rarely speak on behalf of another independent agency or bind another agency to their word. Therefore, the investigating agency may not offer an individual immunity or leniency to incentivise them to cooperate. Where an individual has no guarantee of immunity or leniency, they “have little incentive to work hard to recall awkward facts about meetings and understandings; they, like their employers, hope that the whole thing blows over.”¹²⁵

Section 73A provides that the competition authorities may recommend immunity or leniency to the NPA where an individual cooperated and assisted in the investigation stage. However, as highlighted earlier in this article, the recommendation is not binding on the NPA as it is a separate and independent body with sole prosecutorial authority. This may pose a challenge where there

123 *United States v Patel* 3:21-cr-220 (VAB).

124 Baker *George Wash. LR* 709.

125 *Ibid.*

is very little physical evidence, and a criminal conviction may hinge on the testimony of a cooperating witness. Without the guarantee of immunity, such cooperation will be hard to come by. In contrast to provisions of section 73A, the US system of having a single agency has been effective mainly because investigators in the Antitrust Division are in a better position to put together details of conspiracies where there is very little documentary evidence by persuading individuals to provide testimonies critical to the State's case through the appeal of immunity from criminal prosecution.

4.2 Australia

The provision for and imposition of criminal sanctions for individuals involved in cartel activity is not an altogether new development in Australia.¹²⁶ Criminal sanctions for individuals implicated in cartel activity were re-introduced in Australia through the enactment of the Trade Practices Amendment Act,¹²⁷ which amended the Trade Practices Act of 1974 (TPA).¹²⁸ The introduction of criminal sanctions followed a rigorous feasibility study conducted by the "Dawson Committee", which the government had constituted at the behest of the then Chairman of the Australian Competition and Consumer Commission (ACCC).¹²⁹ The Committee's study culminated in a comprehensive report, the *Review of the Competition Provisions of the Trade Practices Act* ("Dawson Report"), released in April 2003. Chief among the report's recommendations was that criminal sanctions be introduced into the TPA, which was done through the 2009 amendments.

The rationale behind criminalisation was the same as in many jurisdictions, deterrence. Criminal penalties for cartel conduct are believed to be more effective general deterrence than civil penalties for first-time offenders, especially if the penalties for contravening a law exceed the gains from its violation.¹³⁰ The TPA initially provided penalties for engaging in cartel behaviour, with the penalty for a convicted individual being maximum imprisonment for ten years and or a fine of \$220, 000.¹³¹ Australia's cartel provisions are now in the Competition and Consumer Act (CCA),¹³² which regulates competition and consumer protection in Australia. According to the CCA, an individual guilty of the cartel offence as per sections 45AF or 45AG may be imprisoned for a term not exceeding ten years or a fine not exceeding 2000 penalty units (up to \$420, 000) or both.¹³³

The ACCC is responsible for enforcing the CCA and other legislation to promote competition and fair trading and regulate national infrastructure to benefit all Australians.¹³⁴ The ACCC is an independent statutory authority akin to the Competition Commission in South Africa. Due to the dual civil and criminal regime under the CCA and the fact that the ACCC is only a civil, administrative body, it has to cooperate with the centralised prosecuting agency

126 For further exploration of the history of cartel legislation in Australia see OECD Directorate for Financial and Enterprise Affairs Competition Committee "Criminalisation of Cartels and Bid Rigging Conspiracies – Note by Australia" [https://one.oecd.org/document/DAF/COMP/WP3/WD\(2020\)8/en/pdf](https://one.oecd.org/document/DAF/COMP/WP3/WD(2020)8/en/pdf) para 1, where it is noted that Australia was one of three countries to have criminal cartel laws in the early twentieth century (accessed 28-03-2023).

127 Trade Practice Amendment Act 2009 (Cth) (also known as the "Cartel Conduct and Other Measures Act").

128 Part IV, div 1 of the Trade Practices Act 1974 (Cth) ("TPA").

129 Marshall "Criminalisation of Cartel Conduct: Compelling Compliance with Anti-collusion Laws" 2010 *Journal of the Australasian Law Teachers Association* 12.

130 Marshall *Journal of the Australasian Law Teachers Association* 13.

131 See s 79(1) of the TPA.

132 See s 45AF–45AG of the Competition and Consumer Act 2010 (Cth) ("CCA").

133 See s 79(1)(e) of the CCA.

134 ACCC "About the ACCC" <https://www.accc.gov.au/about-us/australian-competition-and-consumer-commission/about-the-accc> (accessed 28-03-2023).

responsible for the prosecution of federal offences, the Commonwealth Director of Public Prosecutions (CDPP),¹³⁵ for enforcement of the criminal sections of the CCA. The CDPP is an independent prosecution service established by parliament to prosecute alleged offences against Commonwealth law under the auspices of the Criminal Code Act.¹³⁶ To this end, the ACCC and the CDPP concluded a Memorandum of Understanding (MOU) to outline their respective roles and the relationship between the agencies.¹³⁷

According to the MOU, the ACCC is responsible for investigating cartel conduct and gathering evidence, managing the immunity process, and referring serious cartel conduct to the CDPP for consideration and prosecution.¹³⁸ The ACCC does not have the power to decide whether cartel conduct contravenes the CCA and is only responsible for providing a dossier of evidence to the CDPP.¹³⁹ The CDPP is responsible for prosecuting offences against Commonwealth law, including serious cartel offences under the CCA and State and Territory Competition Codes, under the Prosecution Policy of the Commonwealth, and seeking associated remedies, including by taking certain proceedings under the Proceeds of Crime Act 1987 and Proceeds of Crime Act 2002.¹⁴⁰ The ACCC retains coercive powers to gather information in criminal investigations and consider referrals. It will consult with the CDPP to obtain preliminary advice on possible prosecution.¹⁴¹ The provision of consultation between the agencies is of cardinal importance as it ensures that both agencies share their expertise while moving towards the same goal: eradicating cartel conduct. It may also assist in efficiently using resources as it avoids a situation where the ACCC expends energy and resources in investigating and building up a case only for the CDPP to refuse or decline to prosecute the matter. Lastly, the system of a coordinated approach gives the ACCC some control over which matters are to be criminally prosecuted, as the CDPP will not pursue prosecution unless it is on the recommendation of the ACCC or after it has consulted the ACCC.

An essential provision in the CDPP/ACCC MOU relates to immunity. The ACCC manages requests for immunity from both criminal and civil proceedings and makes recommendations to the CDPP based on its assessment as to whether the applicant for immunity meets the criteria set out in the ACCC's Immunity and Cooperation Policy.¹⁴² The CDPP will decide whether to grant immunity from criminal proceedings to a party who meets the criteria for conditional immunity under the ACCC's Immunity and Cooperation Policy upon the recommendation of the ACCC.¹⁴³ A party that does not meet the criteria for conditional immunity under the ACCC's Immunity and Cooperation Policy may still apply for immunity from prosecution, but the CDPP will determine that application following consultation with the ACCC.¹⁴⁴ It is important to note that whether immunity is applied for from the ACCC or the CDPP, both agencies consult each other in line with consultations in view of referrals under paragraph 4 of the MOU. This cooperation is commendable as it provides for the sharing of expertise and may also assist the agencies in establishing standards by which they jointly consider applications for immunity,

135 The CDPP was established under the Director of Public Prosecutions Act 1983 (Cth).

136 12 of 1995 (Cth).

137 CCDP "MOU between CDPP and ACCC regarding Serious Cartel Conduct" ("CDPP/ACCC MOU"), <https://www.cdpp.gov.au/sites/default/files/MR-20140910-MOU-Serious-Cartel-Conduct.pdf> (accessed 28-03-2023).

138 See para 2.3 of the CDPP/ACCC MOU.

139 OECD "Note by Australia" para 57.

140 See para 2.2 of the CDPP/ACCC MOU.

141 See para 4.3 of the CDPP/ACCC MOU.

142 See para 7.3 of the CDPP/ACCC MOU.

143 See para 7.4 of the CDPP/ACCC MOU.

144 See para 8.1 of the CDPP/ACCC MOU.

thus ensuring a uniform application of their principles.

The ACCC and the CDPP have made significant strides in investigating, prosecuting, and recently convicting cartel conduct under provisions of the CCA. In August 2017, Australia recorded its first criminal conviction for cartel conduct, albeit against a company and not an individual. Nippon Yusen Kabushiki Kaisha (NYK) was fined \$25 million after being found guilty of fixing freight rates, bid rigging, and customer allocation regarding shipping routes for motor vehicles to Australia.¹⁴⁵ In 2018, charges were laid against the Country Care Group Pty Ltd, its managing director, and a former employee, relating to alleged cartel conduct (price fixing and market sharing) involving assistive technology products used in rehabilitation and aged care facilities.¹⁴⁶ This marked the first case in which individuals were prosecuted for the cartel offence. However, on 2 June 2021, the accused were found not guilty of the alleged crimes.¹⁴⁷

In February 2022, a company named Vina Money and three individuals pleaded guilty to cartel offences relating to fixing the exchange rate between the Australian Dollar and the Vietnamese Dong between 2011 and 2016.¹⁴⁸ A fourth individual also pleaded guilty on 17 May 2022, with a fifth individual pleading not guilty. In June 2022, all four accused who pleaded guilty were sentenced to varying custodial sentences (ranging from nine months to two years and six months). The sentences, however, were wholly suspended.¹⁴⁹ In November 2022, Christopher Kenneth Joyce, the former export manager of Alkaloids of Australia Pty Ltd, pleaded guilty to advising and or counselling Alkaloids of Australia Pty Limited to act in contravention of the Trade Practices Act 1974 and the Competition and Consumer Act 2010.¹⁵⁰ Joyce pleaded guilty to conduct that included attempts to engage in price fixing, market allocation, and bid rigging within the pharmaceutical industry.¹⁵¹ He was sentenced to 32 months imprisonment (to be served through intensive correction in the community), community service work for 400 hours, a fine of \$50,000, and was disqualified from managing corporations for five years.¹⁵² The two cases, Vina Money and Joyce, are of enormous significance because they mark the first time custodial sentences have been meted out. They provide a warning to those involved in cartel conduct or contemplating involvement in cartel conduct that prison beckons. This may go some way in achieving the primary goal of criminalisation, deterrence, as the threat of prison time is no longer a myth but a real possibility.

145 Katdare and Hung “Australia’s First Criminal Cartel Conviction: NYK Fined \$25 Million <https://jws.com.au/en/insights/articles/2017-articles/australia%E2%80%99s-first-criminal-cartel-conviction-nyk-f> (accessed 28-03-2023).

146 OECD “Note by Australia” para 12.

147 Australian Competition Law “CDPP v Country Care” <https://www.australiancompetitionlaw.info/cases/cdpp-v-country-care> (accessed 28-03-2023); ACCC “Country Care, CEO and Former Employee Acquitted of Criminal Cartel Offences” <https://www.accc.gov.au/media-release/country-care-ceo-and-former-employee-acquitted-of-criminal-cartel-offences> (accessed 28-01-2023).

148 Herbert Smith Freehills “Australia: First Custodial Sentences for Cartel Conduct in Australia” <https://www.mondaq.com/australia/cartels-monopolies/1202786/first-custodial-sentences-for-cartel-conduct-in-australia> (accessed 28-03-2023).

149 Australian Federal Police “Australian Price Fixing Cartel Sentenced” <https://www.afp.gov.au/news-media/media-releases/australian-price-fixing-cartel-sentenced> (accessed 28-03-2023); see also Australian Competition and Consumer Commission “First Individuals are Sentenced for Criminal Cartel Conduct” <https://www.accc.gov.au/media-release/first-individuals-are-sentenced-for-criminal-cartel-conduct> (accessed 28-11-2023).

150 *Commonwealth Director of Public Prosecutions v Joyce* [2022] FCA 1423 (24 November 2022) (“CDPP v Joyce”).

151 See *CDPP v Joyce* paras 5–6.

152 See *CDPP v Joyce* paras 195–198.

5 CONCLUDING REMARKS

This article has noted with concern that while cartel activity was criminalised in 2009 through the insertion of section 73A into the Competition Act, with the section becoming effective in 2016, no individuals have been criminally prosecuted for cartel conduct. Various reasons have been advanced for this lack of progress, including a lack of clarity regarding the roles of different agencies, the potential impact of criminalisation on corporate leniency and constitutional challenges that may be raised if an individual is accused of and charged with the cartel offence. The article has also noted that the success of criminalising cartel conduct in other jurisdictions may depend on several variables that may not exist in South Africa. For example, in the US, the DOJ is responsible as both an antitrust agency and a prosecutorial agency. In South Africa, however, the duties are split between the Commission and the NPA; the success of the US can, therefore, not be imagined in South Africa as the enforcement models are far from similar. In Australia, the achievements of the ACCC and CDPP are due to cooperation through the MOU concluded by both agencies. The critical takeaway from Australia is that the agencies play distinct and well-delineated roles in the prosecution chain, bolstered by an open sharing of information and expertise. It is apposite to note that South Africa as a sovereign State does not exist in a vacuum. The successful detection and deterrence of cartel activity in South Africa will impact South African consumers, the South African economy, and regional and global trade partners. Therefore, a solution to the lack of traction regarding criminal prosecution must be found.

As suggested by Lewis, the first potential solution would be to run parallel civil and criminal trials. However, the main problem with this approach is that it carries with it the distinct possibility of two adjudicative bodies arriving at two diametrically opposed conclusions regarding the very existence of a cartel.¹⁵³ Further, such an approach would create a substantial administrative burden and the potential of an unfair trial as the same individuals (managers of firms involved in cartel conduct) would have to give testimony and evidence in the civil trial and testify in their defence in a concurrent criminal trial. Lastly, such an approach may negatively impact the Commission's CLP. The strength of the CLP lies in offering a firm the incentive of immunity from prosecution in a civil trial. However, where separate and concurrent trials are embarked on, the motivation falls away. A firm's managers will not have any reason to cooperate with the competition authorities in uncovering further participants or ongoing cartel activity.

The second solution would be to follow the US example and mandate civil and criminal prosecution to one body. As already noted, the DOJ in the US is both an antitrust and criminal enforcer; this results in several advantages, such as the provision of information symmetry. Both divisions within the DOJ share information about civil and criminal charges for cartel conduct. This encourages greater cooperation between antitrust and criminal prosecutors, which can lead to more effective enforcement actions. The single-body approach may also result in the efficient allocation of resources, as cooperation between the two divisions may result in the efficient distribution of caseloads. This will inevitably result in prosecutorial efficiency as allocation, prosecution, and monitoring of cases will be more streamlined in deciding which matters to pursue criminally or in terms of the Competition Act. For instance, civil enforcement actions may be more appropriate for mergers, while criminal enforcement may be more appropriate for cases involving collusion, price fixing, market allocation, or bid rigging. However, as already noted, there is a single prosecuting authority in South Africa, the NPA. Changing the mandate of the NPA to include civil prosecutions or that of the competition authorities to include criminal prosecution would require legislative amendments to the Competition Act, the NPA Act, and

153 Lewis *Thieves at the Dinner Table* 213.

the Constitution itself. It is, therefore, not a practicable solution.

The third solution may be to combine the expertise of the competition authorities, the South African Police Service (SAPS), and the NPA by creating a “cartel task force” or “cartel specialised task team”. The task force would consist of members from the cartel division in the Commission, investigators from the SAPS, and prosecutors with experience in prosecuting white-collar crime. This will allow seamless collaboration between the civil and criminal authorities as they both will be involved in a matter from the complaint or investigation stage. Under the auspices of the specialised task force, the competition authorities would have a say on which cases deserve immunity from criminal prosecution, where parties would have cooperated in the civil investigations through the CLP. Establishing such a task force would not require the arduous process of amending legislation as in the case of a single enforcement body. Instead, cooperation between and coordination of prosecutions by the different agencies may be regulated through an MOU similar to that between the CDPP and the ACCC regarding serious cartel conduct in Australia.¹⁵⁴ This would not be uncommon as the Commission is empowered by the Act to negotiate between authorities and other industry-specific agencies regarding the management of concurrent jurisdiction.¹⁵⁵

Further, cooperation between agencies, which presents the most viable option, was previously mooted when sections 73A (1) to (4) were enacted in May 2016. In November 2016, the then Competition Commissioner, Mr Tembinkosi Bonakele, briefed the National Assembly on challenges to competition enforcement and noted that:

In order to have successful prosecution of cartels under the new provisions, the Commission needed to establish cooperation agreements (MoUs) with the NPA and SAPS. These MoU’s would also be able to address factors related to the Commission’s Corporate Leniency Policy (CLP) – an extremely successful tool in the uncovering and prosecution of cartels thus far.¹⁵⁶

Since the above briefing of parliament by the Commission, the MoUs referred to in that report have not been concluded as yet.¹⁵⁷ This can be viewed as a missed opportunity as cartels are still prevalent, yet no criminal prosecutions have been initiated or concluded.

In conclusion, the framework for establishing a cartel task force is already in place as the Commission is empowered to conclude MoUs with various industry regulators and other agencies. While there may be a few issues to iron out between the agencies concerning each agency’s powers, duties, and responsibilities, this needs to be done urgently if cartel criminalisation is ever going to be effective in South Africa.

154 CDPP/ ACCC MOU.

155 See s 3(1A) of the Competition Act.

156 Parliamentary Monitoring Group “Competition Commission Legislation Implementation Challenges” <https://pmg.org.za/committee-meeting/23749/> (accessed 28-11-2023).

157 Competition Commission “MoU” <https://www.compcom.co.za/mou/> (accessed 28-03-2023) where the current MoUs concluded by the Commission are listed. Notably, there are no MoUs with the SAPS or NPA as previously suggested.