



**Chartered
Secretaries**
Southern Africa

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**Criminalisation of cartel behaviour:
Implications for corporates in South
Africa**



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Criminalisation of Cartel Behaviour implications for Corporates in

South Africa

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Overview

- An introduction to Cartel Conduct
- Administrative Penalties
- The Introduction of Criminalisation
- Criminalisation of Cartel Conduct
- The National Prosecuting Authority
- Criminalisation and the CLP
- Criminalisation and the Screening Process
- Criminalisation in the USA
- Criminalisation in the UK and EU
- Criminalisation in certain EU member states
- Criminalisation in Australia and New Zealand
- A Summary of the Implications



An Introduction to Cartel Conduct

- Cartel conduct includes price fixing, market division and collusive tendering, which are prohibited in terms of section 4(1)(b) of the Competition Act.
- Section 4(1)(b) provides:

An agreement between or concerted practice by, firms, or a decisions by an association of firms is prohibited if –

(b) it involves any of the following restrictive horizontal practices:

 - (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.*
- Section 4(1)(b) of the Competition Act is a *per se* prohibition which means that conduct in the form of price-fixing, market division or collusive tendering between competitors is incapable of justification.



Cartel Conduct – Administrative Penalties

- In terms of section 58(1)(a)(iii) and (b) of the Act, read together with section 59, the Competition Tribunal may impose an administrative penalty for a prohibited practice in contravention of sections 4(1)(b), 5(2), 8(a), (b),(d) of the Act.
- An administrative penalty of not more than **10%** of the firm's annual turnover in South Africa and its exports from South Africa during the firm's preceding financial year may be imposed.



Cartel Conduct – Administrative Penalties

- When determining an appropriate penalty, the Competition Tribunal must consider the following factors:
 - (a) the nature, duration, gravity and extent of the contravention;
 - (b) any loss or damage suffered as a result of the contravention;
 - (c) the behaviour of the respondent;
 - (d) the market circumstances in which the contravention took place;
 - (e) the level of profit derived from the contravention;
 - (f) the degree to which the respondent has cooperated with the Competition Commission and the Competition Tribunal; and
 - (g) whether the respondent has previously been found in contravention of this Act.



The Introduction of Criminalisation

- On **1 May 2016** section 73A of the Competition Act came into operation.
- Section 73A introduces **criminal liability** for **directors** or **those individuals holding management authority** in respect of companies which engage in **cartel conduct** (fixing of prices, division of markets and collusive tendering).



Criminalisation of Cartel Conduct

Section 73A provides:

- 1) A person commits an offence if, **while being a 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 –
 - 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).
- 2) For the purpose of subsection (1)(b), ‘knowingly acquiesced’ means having acquiesced while having actual knowledge of the relevant conduct by the firm.
- 3) No definition in the Act of what constitutes “management authority”.



Criminalisation of Cartel Conduct

Section 73A also provides:

- 3) Subject to subsection (4), a person may be prosecuted for an offence 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 49D, that it engaged in a *prohibited practice* in terms of section 4(1)(b);
or
 - b) the Competition Tribunal or Competition Appeal Court has made a finding that the relevant *firm* engaged in a *prohibited practice* in terms of section 4(1)(b).

- 4) The Competition 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; and
 - b) may make **submissions** to the National Prosecuting Authority in support of leniency for an 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.



Criminalisation of Cartel Conduct

- A person convicted of an offence in terms of section 73A is liable to pay a **fine not exceeding R500 000-00** or **imprisonment for a period not exceeding 10 years**, or to pay both a fine and such imprisonment.



The National Prosecuting Authority

- The introduction of criminal liability adds a new dimension to competition law enforcement, namely the jurisdiction of the **National Prosecution Authority (“NPA”)** and criminal courts in the enforcement of criminal sanctions against individuals.
- Section 179(2) of the Constitution provides for the establishment of a single National Prosecuting Authority, with sole authority to institute criminal proceedings on behalf of the State.
- The exact process which has to be followed when intertwining the two administrative bodies, namely the NPA and Competition Commission, has yet to be established.
- This is of a particular concern when dealing with the Competition Commission’s Corporate Leniency Policy (“**CLP**”).



Criminalisation and the CLP

- The Corporate Leniency Policy (“**CLP**”) outlines a process through which the Commission will grant a self-confessing cartel member, who is first to approach the Commission, immunity for its participation in cartel activity upon the cartel member fulfilling specific requirements and conditions set out under the CLP.
- The CLP is a compliance mechanism devised to “*encourage cartel participants to disclose to the Commission cartel activity, to discourage or prevent the formation of cartels and to eradicate this harmful conduct.*”
- The CLP applies to a firm, which includes a person, partnership or trust. A person, in this instance, refers to both a natural and juristic person.
- The CLP, however, expressly provides that “*the immunity granted pursuant to the CLP does not protect the applicant from criminal or civil liability resulting from its participation in a cartel infringing the Act.*”
- The criminalisation of cartel conduct may therefore affect the efficiency of the CLP.



Criminalisation and the CLP

- Corporates may be more hesitant to make use of the CLP as although section 73A(4)(b) permits the Competition Commission to make submissions to the NPA supporting leniency for someone prosecuted in terms of the section, the extent to which the NPA will ultimately accept any submissions or recommendations from the Commission is not clear.
- Due to the fact that no clarity has, to date, been provided on the interplay between the NPA and the Commission, corporates who are considering making use of the CLP have to consider the risk that their directors or managers involved in the cartel conduct may face prosecution by the NPA.



Criminalisation and the Screening Process

- The Commission investigates contraventions to the Act on the basis of complaints received from the public or through its own initiation of a complaint.
- Once a complaint has been received, it is screened by the Screening Unit within the Enforcement and Exemptions division for an assessment of its merit, in order to determine whether a full investigation should occur.
- The screening process is a crucial step in the process, as it is a *prima facie* test of the case- thus enabling the Commission to determine whether to allocate further resources through a detailed investigation or to curtail the investigation.
- During an interview with Classic Business FM, the Commissioner, Mr Tembinkosi Bonakele*, indicated that it would be preferable for the NPA to be an active body at the commencement of the investigation and play an active role in the screening process. This will therefore enable Competition Commission and NPA to make a conclusive decision as to whether leniency should be granted.

*The Commissioner indicated that this is subject to on-going discussions with the NPA.



Criminalisation in the USA

- The USA has criminalised agreements and conspiracies to restrict competition since the 1890 Sherman Act.
- In 1974, Congress passed the Antitrust Procedures and Penalties Act which upgraded criminal antitrust offences from misdemeanours to felonies and substantially increased the penalties for these crimes.



Criminalisation in the USA

- In addition, the Antitrust Criminal Penalty Enhancement and Reform Act of 2004 aimed to enhance criminal antitrust enforcement by dramatically increasing maximum penalties and maximum jail terms for individuals and corporations involved in price-fixing, bid-rigging and other Sherman Act offences.
- The Act increased the maximum corporate fine from \$10 million to \$100 million, increased the maximum individual fine to \$1 million and increased the prison maximum sentence from 3 years to 10 years.
- The increased penalties appear to reflect a belief that criminal competition law violations should be treated as serious white-collar crimes, as the changes bring the consequences for price-fixing, bid-rigging and other Sherman Act violations into line with those for other white-collar offences, such as the accounting-fraud crimes established under the Sarbanes-Oxley Act of 2002.



Criminalisation in the USA – Some Interesting Cases

- In early 2013, the former president of Sea Star Line LLC, was sentenced to serve 5 years in prison and pay a \$25 000 criminal fine for his participation in a conspiracy to fix rates and surcharges for freight transported by water between the United States and Puerto Rico.
- In 2012, AU Optronics Corporation, based in Taiwan and its American subsidiary, were found guilty of fixing the prices of LCD panels sold in the United States. The company and its American subsidiary were sentenced to pay a \$500 million criminal fine, and two executives were each sentenced to serve three years in prison and to each pay a \$200 000 criminal fine.

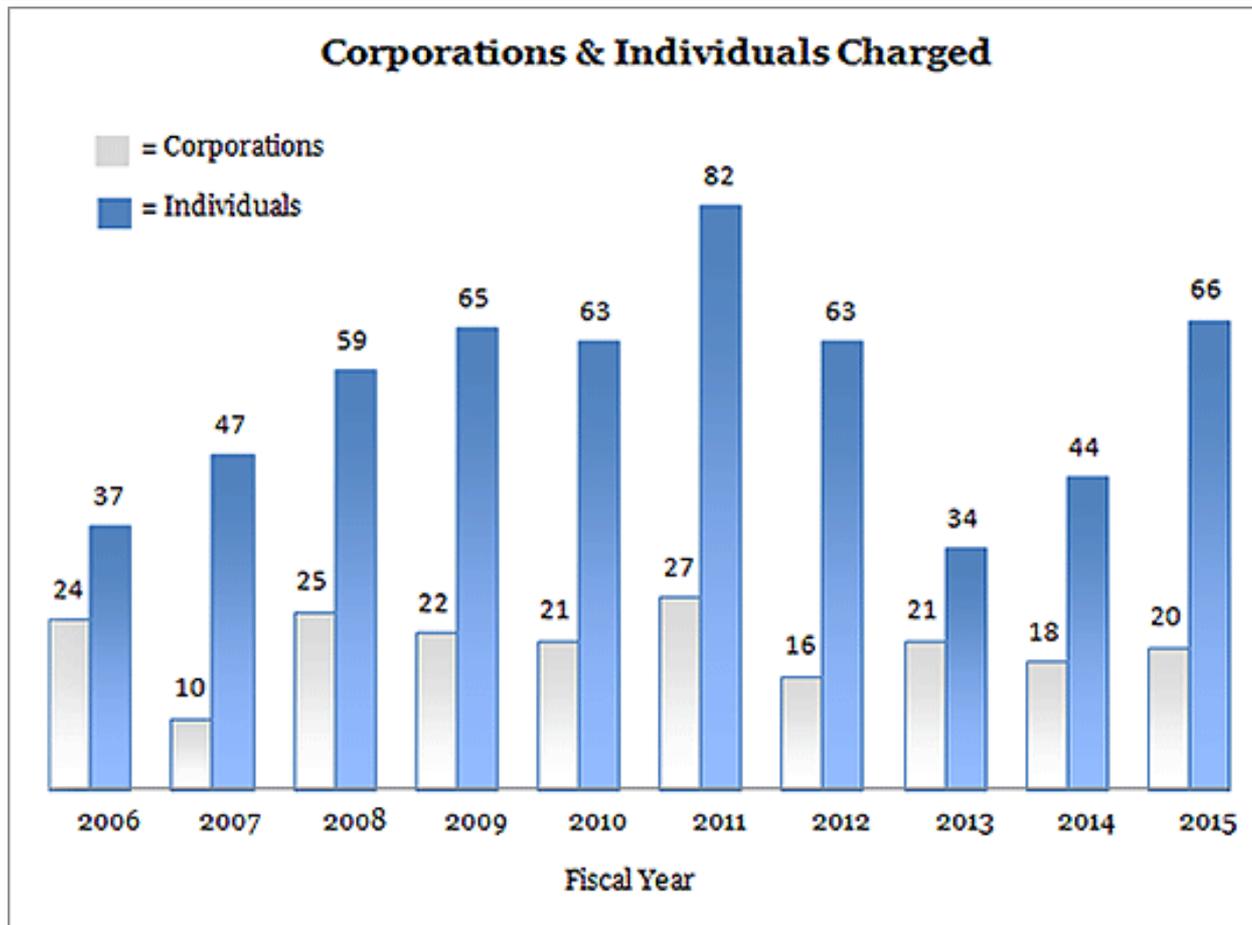


Criminalisation in the USA – Statistics

- In FY2014, 44 executives and 18 companies were charged by the Department of Justice's Antitrust Division with price-fixing, bid-rigging, and fraud offences.
- The 22 individuals included 22 executives in the auto parts industry and 11 real estate investors.
- Twenty-one individuals were sentenced to serve time in jail in FY 2014.



Criminalisation in the USA – Statistics



Source: United States Department of Justice, Antitrust Division – updated 11 December 2015

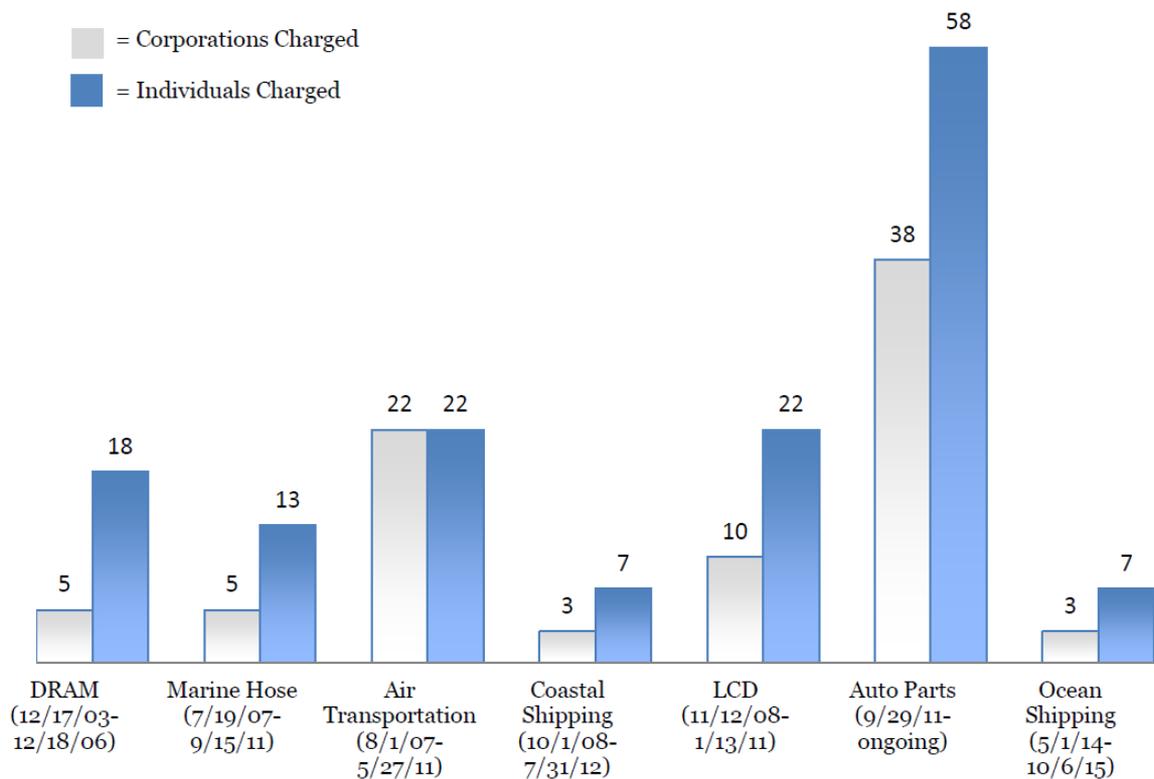


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Criminalisation in the USA – Statistics

Major Investigations in Last Decade

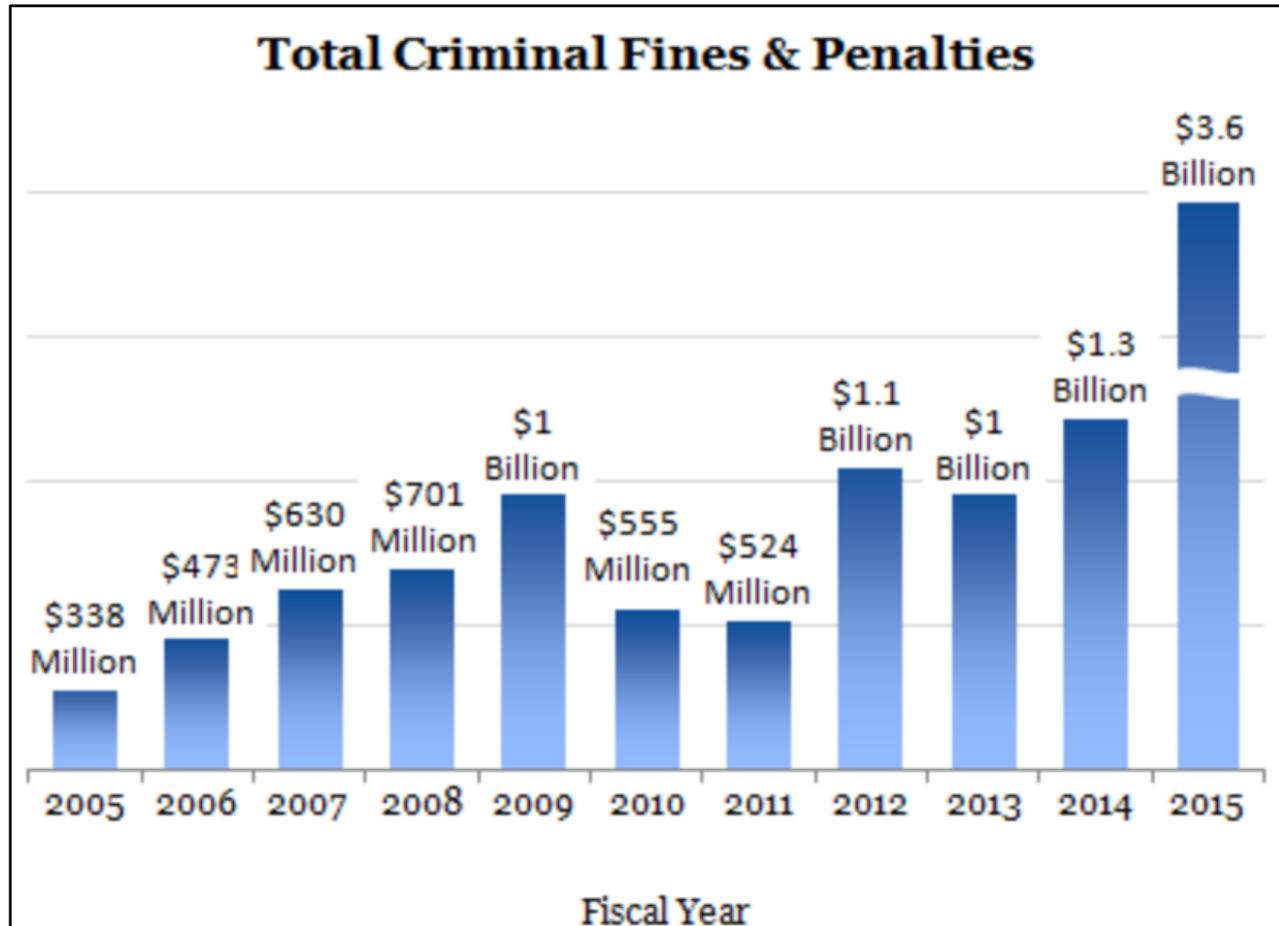
■ = Corporations Charged
■ = Individuals Charged



Source: United States Department of Justice, Antitrust Division – updated 11 December 2015



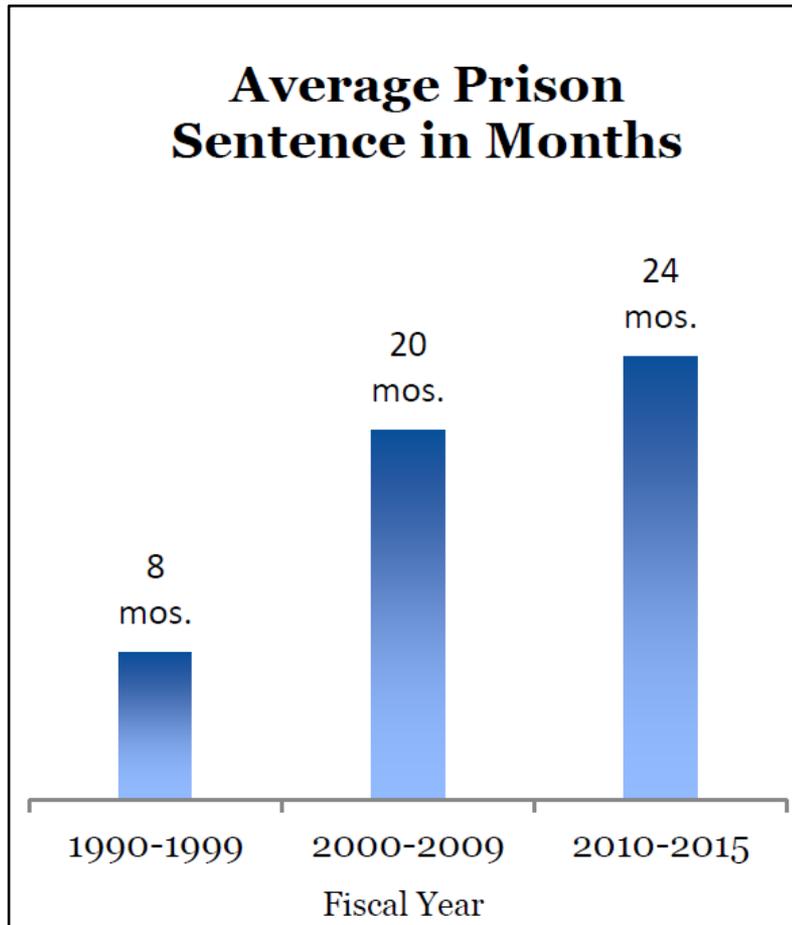
Criminalisation in the USA – Statistics



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Criminalisation in the UK and the EU

- Cartel conduct has **not** been criminalised in the European Union.
- The European Union has a decentralised system in respect of antitrust infringements, giving the European Commission and member state national competition authorities the power to enforce EU competition law.
- The European Commission and member states can impose fines, however, member states remain free to introduce additional penalties for antitrust violations.
- In the UK, the Enterprise Act 2002 provides that individuals guilty of a criminal cartel offence may face **imprisonment** of not more than 5 years and/or an **unlimited** fine.



Criminalisation in certain EU member states?

Austria

- The Austrian Cartel Act 2005 **no** longer provides for criminal sanctions. However, the Austrian Penal Code provides that individuals involved in anti-competitive arrangements in the context of public procurement proceedings may be penalised with a prison sentence of up to **three years**.

Germany

- While the German Act Against Restraints of Competition does not provide for criminal sanctions, the 1997 amendments to the Criminal Code introduced an express provision for bid-rigging, which is only applicable to natural persons (as opposed to legal entities, which may concurrently be subjected to administrative fines). In terms of the Criminal Code, bid-rigging is punishable by up to five years imprisonment or a criminal fine and the Criminal Code also provides that fraud is punishable by up to five years (or in particularly egregious cases, especially where the financial detriment inflicted is severe, up to ten years) imprisonment or a criminal fine.

France

- In terms of the *Commercial Code*, any individual who has fraudulently taken a personal and decisive part in anticompetitive practices faces imprisonment of up to four years **and** a fine of up to EUR 75,000.



Criminalisation in Australia and New Zealand

- Late in 2015, New Zealand's Government announced that the criminal provisions contained in the Commerce (Cartels and Other Matters) Amendment Bill would be dropped on grounds that it would have an adverse effect on pro-competitive behaviour.
- The Minister of Commerce and Consumer Affairs, expressed the view that directors of companies should be cautious in their decision making involving competition, however, an economic loss may occur if directors are forced to be "ultra-cautious" due to fear of imprisonment.
- On 18 July 2016, a Japanese Shipping company, Nippon Yusen Kabushiki Kaisha, pleaded guilty to criminal cartel conduct charges in the Federal Court of Australia. A further directions hearing is to be held on 12 September 2016.
- This is the first criminal charge laid against a corporation in terms of the criminal provisions of the Australian Competition and Consumer Act.



A Summary of the Implications

- The following summarises the implications of the criminalisation of cartel conduct for corporates in South Africa:
 1. Directors or individuals with a management position who have been found guilty of cartel conduct, as set out in section 73A of the Act, may face criminal prosecution;
 2. Corporates and individuals will have to take into account the criminalisation of cartel conduct when applying for leniency;
 3. Corporates will have to take into consideration the fact that the NPA may be a part of the investigation of a complaint from as early as the screening process; and
 4. Criminal prosecution will have a negative impact on both an individual and a corporation's reputation and may also lead to significant financial loss.

