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**COMPETITION CLASS ACTION DAMAGES AND THE
CORPORATE LENIENCY POLICY**

by

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I hereby declare that I have read and understood the regulations governing the submission of LL.M. dissertations, including those relating to length and plagiarism, as contained in the rules of this University, and that this dissertation conforms to those regulations.

Cape Town, _____ 2014

Matt van Eden

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I would like to dedicate this dissertation to my friends and family, who have supported me throughout this process. I will always be grateful.

Table of Contents

CHAPTER 1 INTRODUCTION	1
CHAPTER 2 DEFINITIONS	6
I. ‘CLASS ACTION’	6
II. ‘CORPORATE LENIENCY POLICY’	7
CHAPTER 3 THE AMERICAN EXPERIENCE	8
I. INTRODUCTION	8
II. CLASS ACTIONS	9
(a) <i>Introduction</i>	9
(b) <i>The requirements for the certification of a class action seeking damages</i>	11
(c) <i>Current trend regarding the certification of a class action seeking damages</i>	12
III. THE CLP	16
(a) <i>Introduction</i>	16
(b) <i>Transparency and predictability</i>	17
(c) <i>Perception of likelihood of detection</i>	17
(d) <i>Criminal & Civil Sanctions and the possibility of immunity</i>	18
IV. CONCLUSION.....	23
CHAPTER 4 THE SOUTH AFRICAN EXPERIENCE	24
I. CLASS ACTIONS	24
(a) <i>Introduction</i>	24
(b) <i>The possibility of certifying a class action for damages for damage caused by cartel conduct, prior to the case of Children’s Resource Centre</i>	25
(c) <i>The possibility of certifying a class action for damages for damage caused by cartel conduct, after Children’s Resource Centre:</i>	29
(d) <i>The Problem of Inconsistency and Lack of Uniformity</i>	34
(e) <i>Conclusion</i>	39
II. THE CLP	40
(a) <i>Introduction</i>	40
(b) <i>Structure and concepts of the CLP</i>	42
(c) <i>Extent and success of the use of the CLP</i>	52

III. EFFECT OF THE OPERATION OF COMMON LAW CLASS ACTION ON THE EFFECTIVE OPERATION OF THE COMPETITION COMMISSION’S ‘CORPORATE LENIENCY POLICY’	55
(a) <i>Introduction</i>	55
(b) <i>Prior to the introduction of the common law class action</i>	57
(c) <i>After the introduction of the common law class action</i>	61
CHAPTER 5 THE NEED FOR REFORM	66
I. INTRODUCTION	66
II. THE INTRODUCTION OF A STATUTORY CLASS ACTION	67
III. THE INTRODUCTION OF A STATUTORY REFERENCE TO THE CLP, AND THE EXCLUSION OF PRIVATE ACTIONS FOR DAMAGES AGAINST A SUCCESSFUL LENIENCY APPLICANT.....	67
CHAPTER 6 PROPOSED AMENDMENTS TO THE ACT:.....	68
I. DEFINITIONS:	68
II. THE INTRODUCTION OF SECTION 49E. LENIENCY AGREEMENTS	69
III. THE AMENDMENT OF SECTION 65. CIVIL ACTIONS AND JURISDICTION.....	70
CHAPTER 7 CONCLUSION	70
CHAPTER 8 APPENDIX A.....	72
CHAPTER 9 APPENDIX B.....	75
CHAPTER 10 BIBLIOGRAPHY.....	76

CHAPTER 1 INTRODUCTION

Cartel conduct constitutes one of the most serious threats to the maintenance of competition in markets. Due to the secretive nature of cartels, and their conduct, they are extremely difficult for the Competition Commission¹ ('the Commission') to detect, investigate and prosecute.² Cartels therefore pose a grave threat to the maintenance of competition in markets. Section 4(1)(b) of the Act imposes a *per se* prohibition on such conduct. Consequently, cartel conduct is treated as one of the most serious breaches of the Act.

However, given the nature of the threat posed by cartel conduct to competition in markets, it is insufficient that the Act merely considers the deterrence a priority. The combined public and private enforcement of the Act has an invaluable role to play in the ultimate goal of completely eradicating cartel conduct from markets. The correct balance of public and private enforcement of the Act has the potential to form a powerful deterrent for cartel members/potential cartel members against participating in cartel conduct, by facilitating the effective and efficient detection, investigation, and prosecution (accompanied by severe sanctions) of those firms who refuse to abstain from cartel conduct.

In order to assist the public enforcement authorities with the detection, investigation, and prosecution of cartels, the Commission developed, in accordance with, and after a comparative review of, the leniency policies of other jurisdictions competition authorities, a 'Corporate Leniency Policy' ('the CLP').³ The aim of the CLP is to encourage members of cartels to provide the Commission with information in exchange for *immunity* from prosecution.⁴

¹The Competition Commission ('the Commission') is established by s19 of the Competition Act 89 of 1998 ('the Act').

² The Commission has the power to investigate alleged contraventions of Chapter 2 (s.21(c) of the Act), refer matters to the Competition Tribunal (s. 21(g) of the Act) and appear before the Tribunal, as required by the Act. By virtue of these provisions the Commission has powers to prosecute cartel activities.

³ The South African Competition Commission's 'Corporate Leniency Policy' (2004). At para 16.1 of the CLP the Commission makes note of the fact that in developing the CLP, the Commission reviewed and compared the leniency policies adopted by the European Union (EU), Canada, Australia, United Kingdom (UK) and United States of America (USA).

⁴ South African Competition Commission op cit (n3) at para 16.1

This tool has proven to be instrumental in the competition authorities' fight to thwart cartel conduct. But, a common law class action is now poised to undermine this most important public enforcement tool, and in doing so, undermine the effective and efficient public enforcement of the Act against cartels.

The introduction of a common law class action into South African law by the High Court in the case of *The Trustees for the Time Being of the Children's Resource Centre Trust v Pioneer Foods (Pty) Ltd*⁵ (which was confirmed by the Supreme Court of Appeal in *Children's Resource Centre Trust v Pioneer Foods*⁶) will in theory provide the public with a greater degree of access to private redress for damages suffered as a result of cartel conduct. However, in its present form, and given its current scope of operation, it also poses a significant threat to the CLP, and therefore poses a significant threat to the public enforcement authorities' ability to detect, investigate and prosecute cartels. Consequently, by threatening the ability of the competition authorities to detect, investigate and prosecute cartels, the common law class action may not necessarily lead to increased access to private redress, due to fewer cartels being detected.

The theoretical justification for the introduction of a common law class action for damages, namely that they will provide consumers and businesses with far greater access to the mechanisms of the Act, by allowing them to 'get back money that is rightfully theirs - as well as acting as a further deterrent to anyone thinking of breaking the law',⁷ succinctly sums up the appropriate role that class actions for damages should play in the enforcement of the Act.

However, this proposition presupposes that the private enforcement mechanisms (class action claims for damages) of the Act are reconcilable with the public enforcement mechanisms (the CLP) of the Act. At the present moment these two mechanisms are not reconcilable. Therefore private class actions for damages cannot fulfil their appropriate role.

As will become apparent from this dissertation, in order to combat cartel conduct successfully, private enforcement of the Act must effectively and efficiently

⁵ 2011 JDR 0498 (WCC); [2011] ZAWCHC, ('Trustees for the time being').

⁶ 2013 (2) SA 213 (SCA), ('*Children's Resource Centre*')

⁷ Department for Business Innovation & Skills Government Response 'Private Actions in Competition Law: A consultation on options for reform' (2013) 6.

supplement the public enforcement of the Act. Until this role is realised, cartel conduct cannot be successfully prevented.

At the present moment, the introduction of the common law class action for damages undermines, rather than supplements, the public enforcement mechanisms of the Act. In particular, the common law class action for damages acts to deter, cartel members from applying, rather than encouraging them to apply, for immunity in terms of the CLP.

The British Department of Business, Innovations and Skills ('BIS') reiterated the importance of establishing a supplementary relationship between these two mechanisms. The BIS cautioned, as the United Kingdom seeks to reform the private enforcement of competition law in their jurisdiction, that sight must not be lost of the fact that:

'The possibility of leniency significantly increases the likelihood of detection - and ultimately prevention - of cartel conduct. This can also directly benefit private claimants, as follow-on actions rely on the detection of anticompetitive behaviour by the competition authorities in order to proceed. The Government therefore considers it important that the reforms to private actions do not inadvertently undermine the leniency regime.'⁸

Before the South African competition authorities can begin to quash cartel conduct with effectiveness and efficiency, the private and public enforcement mechanisms must be reconciled. In my opinion, two prerequisites are required for the reconciliation of these mechanisms. Firstly, the institution of private class actions for damages resulting from cartel conduct must only be promoted in appropriate circumstances. Secondly, safeguards to prevent these class actions from undermining the CLP must be put in place.

It is in order to achieve these prerequisites, I propose the following:

- (1) the introduction of a statutory class action procedure;
- (2) the introduction of a section into the Act, providing for statutory recognition of the CLP;

⁸ Department for Business Innovation & Skills op cit (n7) 57-58

- (3) the exclusion of the possibility of instituting a claim for civil damages against a cartel member who has been granted Total Immunity in terms of the CLP, by way of amendment to the Act.

However, before the implementation of the abovementioned proposal can be properly considered, the current position of class actions, the leniency regime, as well as the existing interaction of these two concepts must be evaluated. Furthermore, the United States of America's experience regarding the recognition of these two concepts, their development, as well as their interaction will be evaluated as a means of comparison.

These evaluations endeavour to establish the necessity of the type of amendments which I propose, as well as whether the proposed amendments are suitable to achieve the goals stated above.

Firstly, I will evaluate the current trend in America regarding the recognition of the concepts of antitrust class actions for damages and leniency, as well as how the interaction of these two concepts is regulated. The aim of this evaluation is to provide a point of comparison against which South Africa's current position can be evaluated, by looking at the current trend of the foreign jurisdiction which leads the way in this field. After this evaluation is completed, it will be established whether the current trends in this comparable jurisdictions are supportive of South Africa's current approach to class actions, as well as leniency, or whether they are suggestive that a need exists for a different approach to be followed.

Secondly, I will briefly discuss the South African pre-constitutional position relating to class actions, followed by a similarly brief discussion of the post-constitutional position (as prescribed by both the Interim Constitution⁹ and the Constitution¹⁰) relating to class actions, as well as how the legislature's stance towards this issue was formed.

Thirdly, the South African trend regarding the recognition of class actions outside of the Constitution in the post-constitutional era will be examined. I will specifically focus on the recent ground-breaking decision of the High Court, in the case of *The Trustees for the Time Being*,¹¹ to recognise a common law class action

⁹ The Interim Constitution of the Republic of South Africa, Act 200 of 1993.

¹⁰ The Constitution of the Republic of South Africa, 1996

¹¹ *The Trustees for the Time Being* supra (n5).

outside of the Constitution, which was approved by the Supreme Court of appeal in the case of *Children's Resource Centre Trust v Pioneer Foods*.¹²

Fourthly, the extent and success of the Commission's use of their CLP, as well as the rationale behind such utilisation, as mechanism for counteracting cartels will be analysed. This will indicate the CLP's importance in the successful prosecution of cartels by the Commission, and therefore whether it deserves to be protected against the potential threats posed to its effective operation by the introduction of a common law class action by the court in the two cases referred to above.

Fifthly, I will establish, at least in my opinion, the central ways in which the operation of common law class action will most likely affect the efficient operation of the CLP. This aspect will be illustrated by way of a hypothetical case study, wherein the position of a firm, whose involvement in the cartel is minimal, and would therefore ordinarily be inclined to apply for leniency early in the process, will be examined in order to establish the effect that the common law class action has, if any, on such a party's decision to apply for leniency.

Lastly, in light of the above findings I shall put forward my proposed legislative amendments to the Act, providing for a statutory indemnity clause as well as a statutory class action, with the aim of ensuring that private enforcement mechanisms are extended in appropriate circumstances, without risk of the public enforcement mechanisms of the competition authorities being undermined.

As a point of departure I shall define the concept of a 'class action' (establishing with the necessary clarity the essential nature of a class action)¹³ as well as that of the term 'corporate leniency policy', in order to ascertain the precise boundaries of the discussion.

¹² *Children's Resource Centre* supra (n6).

¹³ *Children's Resource Centre* supra (n6) at para 15

CHAPTER 2 DEFINITIONS

I. ‘Class action’

In the case of *Children’s Resource Centre*¹⁴ the Supreme Court of Appeal refers to Professor Mulheron’s definition of the concept of a ‘class action’ with approval. Mulheron defines the concept of a ‘class action’ as a ‘legal procedure’:

‘...which enables the claims (or parts of the claims) of a number of persons against the same defendant to be determined in the one suit. In a class action, one or more persons (representative plaintiff) may sue on his or her own behalf and on behalf of a number of other persons (the class) who have a claim to a remedy for the same or a similar alleged wrong to that alleged by the representative plaintiff, and who have claims that share questions of law or fact in common with those of the representative plaintiff (common issues). Only the representative plaintiff is a party to the action. The class members are not usually identified as individual parties but are merely described. The class members are bound by the outcome of the litigation on the common issues, whether favourable or adverse to the class, although they do not, for the most part, take any active part in that litigation.’¹⁵

The court goes on to state that the concept of a ‘class action’ performs a further function, in that it acts as a ‘representational device’.¹⁶ It is:

‘... a procedural device that expands a court’s jurisdiction, empowering it to enter a judgment that is binding upon everyone with covered claims. This includes claimants who, not being named as parties, would not ordinarily be bound. A class wide judgment extinguishes the claims of all persons meeting the class definition rather than just those of named parties and persons in privity with them, as normally is the case.

Judges and scholars sometimes treat the class action as a procedure for joining absent claimants to a lawsuit rather than as one that permits a court to treat a named party as standing in judgment on behalf of them. This is a mistake ... ‘Class members neither start out as parties nor become parties when a class is certified.’¹⁷

¹⁴ *Children’s Resource Centre* supra (n6) at para 16

¹⁵ R Mulheron, *The Class Action in Common Law Legal Systems: A Comparative Perspective* (2004) 3.

¹⁶ *Children’s Resource Centre* supra (n6) at para 17

¹⁷ C Silver ‘Class Actions-Representative Proceedings’ in B. Bouckaert & G De Geest (eds) *Encyclopedia of Law and Economics* vol 5 (2000) 194.

The court concludes that the nature and scope of a class action, as evidenced by the above definitions is: Firstly, a ‘class action’ allows for the aggregation of claims. This aspect demands that although not all the claims need to have an identical factual or legal basis, they at least need to share common issues of fact or law, which if resolved would resolve all the claims, or at least allow for all of the claims to be resolved. Secondly, the result of an action brought by way of representation, from a requirements point of view, is that it becomes critical to identify those who are being represented (at least by description), to identify the representative, to determine whether they are suitable to represent the class, and on what basis they will be representing the class.¹⁸

If the requirements of the definition are satisfied, the court will certify the class, with the result that the representative will have *locus standi* to conduct the class action on behalf of all members of the class.¹⁹

II. ‘Corporate leniency policy’

There is no express reference to a leniency process by which the Commission can indemnify a cartel member from prosecution in the Act itself. However, the Commission developed the CLP with the aim of encouraging firms participating in cartels to provide the Commission with information in exchange for immunity from prosecution.²⁰ This development was embarked on in accordance with, and after the comparison and review of, the leniency policies of other jurisdictions’ competition authorities.²¹ The CLP sets out the ‘benefits, procedure and requirements’²² for the process by which a self-confessed cartel member can attain *immunity* for their participation in cartel activity, by satisfying the conditions and requirements of the CLP.²³ Immunity in this framework is defined in paragraph 3.3 of the CLP as meaning that:

¹⁸ *Children’s Resource Centre at para (n6) 18*

¹⁹ South African Law Commission Report (Project 88) ‘The recognition of class actions and public interest actions in South African law’ (1998) 33-34, (‘the Report’)

²⁰ South African Competition Commission (n3) at para 2.5

²¹ See footnote (n3).

²² South African Competition Commission (n3) at para 2.6

²³ South African Competition Commission (n3) at para 3.1

‘...the Commission would not subject the successful applicant²⁴ to adjudication²⁵ before the Tribunal for its involvement in the cartel activity, which is part of the application under consideration. Furthermore, the Commission would not propose to have any fines imposed to that successful applicant.’²⁶

The extent of the immunity from prosecution granted in terms of the CLP is however qualified. Immunity excludes the applicant who is granted immunity from protection against criminal or civil²⁷ liability that results from their participation in the cartel conduct which breaches the provisions of the Act.

It is this qualification that conceivably “opens the door” for the institution of criminal sanctions, as well as a common law class action for damages. It is this possibility, that not only a member found guilty of cartel conduct by the Tribunal, but also a member who has been granted Total Immunity from prosecution in terms of the CLP, may yet face criminal and civil sanctions, which threatens to undermine the efficient detection, investigation, and prosecution of cartels, by undermining the enforcement mechanisms of the Act.²⁸

CHAPTER 3 THE AMERICAN EXPERIENCE

I. Introduction

The United States of America’s historical experience regarding the enforcement of antitrust law is both longstanding, and extensive. The interaction that has been established between the public and private enforcement of Antitrust law (competition law) provides a salient example of what can be achieved, if the correct balance is found between providing private persons with redress (by way of class action) in appropriate circumstances, and protecting the public enforcement mechanisms (particularly the

²⁴ South African Competition Commission (n3) at para 3.3, footnote 4: A ‘Successful applicant’ means a firm that meets all the conditions and requirements under the CLP.

²⁵ South African Competition Commission (n3) at para 3.3, footnote 5: ‘Adjudication’ means a referral of a contravention of chapter 2 of the Act to the Tribunal by the Commission with a view of getting an Administrative fine imposed on the offender.

²⁶ South African Competition Commission (n3) at para 3.3

²⁷ A right to bring a civil claim for damages arising from a prohibited practice comes into existence on the date that the Tribunal made a determination in respect of a matter that affects that person, or in case of an appeal, on the date that the appeal process in respect of that matter is concluded (see section 65(9) of the Act).

²⁸ South African Competition Commission (n3) at para 3.6

Department of Justice's 'Corporate Leniency Policy' ('the American CLP')²⁹) used by the authorities.

The recent trend in America in fighting against cartel conduct makes use of the 'carrot and stick' approach. It involves the extensive use of the American CLP (which forms the 'carrot'), in combination with severe sanctions (which form the 'stick'), both public and private (including an antitrust class action for damages). This system has attained great success in recent years, due in large part to three main factors. Firstly, the granting of immunity is automatic, and the American CLP process is therefore predictable and transparent. Secondly, the sanctions are extremely severe. Thirdly, the protection offered by immunity is complete, offering protection against any prosecution and all of the sanctions that accompany such prosecution. It therefore stretches not only to protection against prosecution, criminal fines, and imprisonment, but also against antitrust class actions for damages.

II. **Class Actions**

(a) Introduction

In terms of s 1 of the Sherman Anti-Trust Act ('the Sherman Act'),³⁰ cartel conduct is prohibited.³¹ The prohibition is publicly enforced by criminal sanctions. Cartel members are subject to felony prosecution and criminal fines in terms of s 1 of the Sherman Act.

To succeed with a public action to prosecute a member for cartel conduct, based on a breach of s 1 of the Sherman Act, the Government must prove: (1) the existence of a horizontal agreement between two or more separate parties; that (2) unreasonably restricts competition, by conspiring to fix prices, restricting output, rigging bids, or allocating markets; and (3) affects interstate or foreign commerce.³²

Furthermore, since the enactment of the Sherman Act, private actions for damages suffered as a result of cartel conduct are not only allowed, but play a crucial

²⁹ U.S. Department of Justice, Corporate Leniency Policy (Aug. 10, 1993)

³⁰ Sherman Anti-Trust Act of 1890; as amended by the Antitrust Penalties and Procedures Act of 1974; as amended by Antitrust Criminal Penalty Enhancement and Reform Act of 2004.

³¹ The Sherman Act (n30) s1: '[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal.'

³² BE Sweeney 'Defining antitrust violations in the United State' in Albert A. Foer, Randy Stutz (eds) *Private Enforcement of Antitrust Law in the United States: A Handbook* (2012) 15-16.

role in the enforcement of anti-trust laws in U.S. The provision of a private action for damages is, to a large degree, viewed as an extension of the public enforcement mechanism, furthering the interests of the public, rather than simply a means of providing private relief. The Supreme Court recognised this function in the case of *Zenith Radio Corp. v. Hazeltine Research, Inc.*,³³ when the court stated that:

‘The purpose of giving private parties treble-damages³⁴...was not merely to provide private relief, but was to serve as well the high purpose of enforcing the antitrust laws.’³⁵

In order to succeed with private action for damages suffered as a result of cartel conduct, a private party must prove, in addition to the three requirements listed above, that he (4) has been ‘injured in his business or property’³⁶ by the cartel conduct in question. Thereafter the party may bring an action for treble damages.

Notably, it is not required that a cartel member be found guilty of cartel conduct in terms of the Sherman Act, or indeed that the Antitrust Division has even launched an investigation into the suspected cartel conduct for a private party to institute a claim for damages. So long as the requirements listed above are met, a private action for treble-damages may be instituted, irrespective of whether a member has been found guilty of cartel conduct (as a follow-on action) or not (as a non-follow-on action).

However, if private antitrust claims for damages are to fulfil the role of enforcing antitrust law effectively, as envisaged by Congress and the Supreme Court, the Americans realised early on that claims instituted in multiple courts by multiple parties, against the same defendants, must be combined into one or at least fewer claims, in order for private enforcement of antitrust law to be feasible and efficient.³⁷ Therefore U.S law provides for a mechanism which enables related claims to be aggregated into class actions.³⁸

³³ *Zenith Radio Corp. v. Hazeltine Research, Inc* 395 U.S. 100 (1969)

³⁴ The treble-damage remedy is provided to private parties by Congress, and entitles a party to claim three times the value of damage that they have suffered.

³⁵ *Zenith Radio Corp. v. Hazeltine Research, Inc* supra (n34)130-131, 133

³⁶ Section 4 of the Clayton Antitrust Act of 1914 (15 U.S.C.)

³⁷ J Douglas Richards, MB Eisenkraft & AE Shafroth ‘Class Actions’ in Albert A. Foer, Randy Stutz (eds) *Private Enforcement of Antitrust Law in the United States: A Handbook* (2012)109

³⁸ J Douglas Richards *et al* op cit (n37) 109-111

(b) *The requirements for the certification of a class action seeking damages*

In the U.S., class actions are governed by Rule 23 of the Federal Rules of Civil Procedure. The Rule provides for three types of class actions, one of which is a class action for damages.³⁹ Rule 23 provides an extensive procedural framework within which a class action must be certified and conducted.

In order for a class action for damages to be certified, the cumulative requirements set out in Rule 23(a) and 23(b)(3) must first be satisfied. In terms of Rule 23(a) and 23(b)(3) it is required that:

- (1) The class is so *numerous* that joinder of all members is impracticable;
- (2) there are questions of law or fact *common* to the class;
- (3) the claims or defences of the representative parties are *typical* of the claims or defences of the class;
- (4) the representative parties will fairly and *adequately* protect the interests of the class;
- (5) the questions of law or fact common to class members *predominate* over any questions affecting only individual members; and
- (6) a class action is *superior* to other available methods for fairly and efficiently adjudicating the controversy.

Rule 23 ‘creates a categorical rule entitling a plaintiff whose suit meets the specified criteria to pursue his claim as a class action.’⁴⁰ Therefore if the requirements of Rule 23 are met, then the class *must* be certified. The court is afforded no discretion in this regard; certification is automatic.

The requirements for certification in their current form, as listed above, are a product of the 1966 revision of Rule 23.⁴¹ Importantly, this revision was enacted in the belief that class actions would only be invoked in the context of asserting civil rights claims and contesting segregation.⁴² Consequently the focus of the revision was

³⁹ Federal Rule of Civil Procedure 23 (b)(3).

⁴⁰ *Shady Grove Orthopedic Associates, P.A. v. Allstate Ins. Co.* 559 U. S. (2010) 4

⁴¹ See Federal Rule of Civil Procedure 23 (a)-(h).

⁴² Prepared Statement of John P. Frank, Hearings on S. 353 Before the Sub Commission on Administrative Oversight and the Courts of the Senate Commission Of the Judiciary, 106th (Cong 1999): ‘If there was a single, undoubted goal of the committee, the energizing force which motivated the whole rule, it was the firm determination to create a class action system which could deal with civil rights and, explicitly, segregation.’

simply to enable more cases to be certified as class actions, more easily, as this was the most efficient way to decide cases of this nature.⁴³

However, after the introduction of the revised American CLP by the Department of Justice ('DOJ'), a class action 'boom' has been experienced in the private enforcement of antitrust law in the context of cases of cartel conduct. The problem is that although the courts have encouraged such cases to be brought as class actions,⁴⁴ they remain very different from the desegregation civil rights cases around which the revised Rule 23 was framed.

Rule 23 was not designed to provide a procedure for antitrust class actions for damages, and the current trend regarding the certification a class action seeking damages seems to reflect defence counsels' increasing affinity for taking advantage of this as a 'defence' against antitrust class action claims for damages.

(c) *Current trend regarding the certification of a class action seeking damages*

In recent years the trend in the approach of the courts towards the use of class actions in the private enforcement of antitrust law, has become far less favourable. The most profound manifestation of this turnaround is to be found in the approach of the courts in relation to the determination of whether the certification requirements for a class have been satisfied or not.

The requirements for certification have historically not been at all contentious (save, perhaps, the predominance requirement). However, the recent judgments of the various courts are fostering controversy and confusion around the question of what is required in order for the certification requirements of Rule 23 to be met.

This seems to be a direct result of a deliberate tactic of defence counsels, to discourage the private enforcement of antitrust law by way of class action which, worryingly, is being entertained, and at times even supported, by the courts, in circumstances where class actions are appropriate. For example:

⁴³ J Resnik, 'From "Cases" to "Litigation"' (1991) 54 *Law and Contemporary Problems* 9

⁴⁴ Hon G. Calabresi 'Class actions in the U.S. Experience: the legal perspective' in J G. Backhaus, A Cassone & G B. Ramello (Eds) *The Law and Economics of Class Actions in Europe: Lessons from America* (2012) 15: The decisions of the Supreme Court 1970's and 1980's supported a wider spread of application of class actions for damages, as a general means of providing redress to individuals who otherwise would not have been able to bring their claim. The court was of the opinion that class actions saved resources (*Califano v. Yamasaki*, 442 U.S. 682 (1979) 701-702), protected the interests of absentees, spread the cost of litigation, by avoiding multiplicity of claims (*United States Parole Comm'n v. Geraghty*, 445 U.S. 388 (1988) 402-403) and encouraged settlement. Thus trial courts were even permitted to actively manage and assist in creating classes and certifying the actions.

(i) *Commonality*

Traditionally the commonality requirement⁴⁵ is satisfied by the plaintiffs' need to plausibly plea unlawful conduct.⁴⁶ However, in the recent case of *Wal-Mart Stores, Inc. v. Dukes*⁴⁷ the court upset the status quo, deciding that the commonality requirement is only satisfied when the class's claims 'depend on a common contention' and the 'determination of its truth or falsity will resolve an issue that is central to the validity of each of the claims in one stroke.'⁴⁸ Whilst the applicability of this judgment going forward is debatable,⁴⁹ it none the less illustrates the courts' willingness to allow class actions to be disrupted at the certification stage (on the basis of a failure to satisfy the commonality requirement), despite the existence of lengthy precedent in favour of concluding that the commonality requirement is satisfied despite the absence of such a common contention.

(ii) *Typicality*

The typicality requirement⁵⁰ is usually easily satisfied in cases involving price fixing. In such cases consumers normally suffer the damages in the same way, from the same conduct of the defendant, due to increased prices in the market. However, counsel for the defence has begun to developed ways of creating an apparent divergence of interests between claimants, in an effort to reduce the number of claimants. In *Dieter v. Microsoft Corporation*⁵¹ the court excluded Enterprise Purchasers from the class on the basis that they, as opposed to individual purchasers, purchased licenses at prices unique to each purchase.

(iii) *Predominance*

Given that the predominance⁵² requirement has historically been the most contested requirement in antitrust class action cases for damages, it is unsurprising that defence

⁴⁵ Federal Rule of Civil Procedure 23(a)(2).

⁴⁶ See J. Douglas Richards *et al* op cit (n37) 114

⁴⁷ *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2531 (2011)

⁴⁸ *Wal-Mart Stores v. Dukes* supra (n48) 9

⁴⁹ See, e.g. *Public Employees' Retirement System of Mississippi v. Merrill Lynch & Co* 08-10841 (2011) 6-7; see also *Churchill v. Cigna Corp* 10-6911 (2011) 3-4.

⁵⁰ Federal Rule of Civil Procedure 23(a)(3).

⁵¹ *Dieter v. Microsoft Corporation* 436 F.3d 461 (2006) 464

⁵² Federal Rule of Civil Procedure 23(b)(3).

counsels in recent decisions, have adopted this requirement as the spearhead for arguing for the refusal to certify class actions. Consequently a number of recent proposed class actions have been refused certification on the basis of a failure to satisfy the predominance requirement. In the process counsel and courts have fostered ‘widespread and deep confusion concerning basic principles governing predominance analysis.’⁵³ Defendants have begun to challenge (admittedly, with varying success), what were established definitions, such as what constitutes ‘individual issues’⁵⁴ and ‘predominance’⁵⁵ in the context of Rule 23(b)(3).

In antitrust cases involving price fixing it is common for a few members of a class not to have suffered a loss purely for personal reasons. In the past it was widely accepted that the presence of a small number of such members in a class would not prevent certification of the class.⁵⁶ However, the court in *In re New Motor Vehicles*⁵⁷ was of the opinion that the plaintiff did indeed need to prove that *all* of the members of the class suffered damage as a result of the price fixing. Consequently, the presence of a group of members which the plaintiff could not prove had suffered damage, albeit only due to their personal reasons, precluded the certification of the entire class. Notably, such reasoning precludes almost every antitrust class action for damages relating to price fixing from certification.

Rule 23(b)(3)(D), identifies ‘the likely difficulties in managing a class action’ as a factor to be considered in the predominance enquiry. There is clear authority that ‘managing a class action’ relates to the managing of a class action at trial.⁵⁸ Therefore issues that can be resolved prior to trial should not form part of the considerations

⁵³ J Douglas Richards *et al* op cit (n37) 117

⁵⁴ Defendants have reasoned that because the case includes questions that are not common to the *entire* class, the requirement is not met. This reasoning is not commensurate with the definition of ‘individual’ in Rule 23(b)(3). Rule 23(b)(3) defines ‘individual’ as pertaining to ‘questions affecting only individual members’ of the class.

⁵⁵ Defendants have argued that the presence of a single individual issue is enough to refuse certification, in spite of the wording of s23(b)(3), as well as established precedent to the contrary. See *In re Ford Motor Co. Ignition Switch Products Liability Litigation* 174 F.R.D. (1997)340, where the court stated ‘[t]hat common issues must be shown to ‘predominate’ does not mean that individual issues need be nonexistent. All class members need not be identically situated upon all issues, so long as their claims are not in conflict with each other... The individual differences however, must be of lesser overall significance and they must be manageable in a single class action.’

⁵⁶ In *Kohen v Pacific Investment Management Co. LLC, No. 08- 1075* (7th Cir. July7, 2009) Posner J acknowledges the ‘possibility or indeed inevitability’ that a class ‘will often include persons who have not been injured by the defendant[’s]’ conduct does not preclude class certification.

⁵⁷ *In re New Motor Vehicles* 522 F.3d (2008)

⁵⁸ See *Amchem Products, inc. v. Windsor*, 521 U.S. 591 (1997)

when determining predominance.⁵⁹ Despite this, recent case law has produced a number of instances where issues that can be dealt with at pretrial have been included as evidence of a lack of predominance of common questions.⁶⁰

(iv) *Conclusion*

It is my belief that the turnaround in approach (particularly of the courts) can in large be attributed as a response to two factors: first, the undeniably detrimental effect that class actions for damages in general have had on the American economy;⁶¹ second, the fact that Rule 23 was not designed to conduct large class action claims for damages in the context of antitrust law. The procedure provided by Rule 23 is simply not sufficient to deal effectively and efficiently with these types of class actions. Consequently the manifestations of the change in approach shown by the courts and counsel can be seen as being the product of procedure that is simply inadequate. They give evidence of the confusion, loss of efficiency and loss of effectiveness that results where class action procedures are not adequately provided for in statute or Court Rules.

I do not believe that the change in approach is due to a perception that class actions are ill-suited for the effective and efficient enforcement of antitrust law. Class actions have proved successful in America not only in providing an efficient way to provide for private redress, but also in fulfilling important public enforcement functions.

The American experience illustrates that class actions play a significant role in the public enforcement of antitrust law on two levels. Firstly, the threat of a class action for treble-damages provides a burly deterrent from, and punishment for, cartel conduct, increasing the size of the sanctioning ‘stick’ available. Secondly, the threat of antitrust class actions for damages sweetens the ‘carrot’ of applying for corporate leniency (due

⁵⁹ *Waste Management Holdings, Inc. v. Mowbray* 208 F.3d 288 (2000)

⁶⁰ See for example *Telecomm Technical Services Inc. v Siemens Rolm Communications Inc.* 172 F.R.D. 532 (1997).

⁶¹ The 2013 Carlton Fields Class Action Survey revealed that: ‘Approximately 11 percent of all litigation spending, or \$2.1 billion, goes towards class actions’; ‘...Annual spending [Nationally on class actions] is expected to climb slightly, to \$2.13 billion, in 2013’; ‘Fifty percent of major companies have class actions pending, down slightly from 53 percent in 2011’; ‘Aggregate spending on class actions increased 10 percent from 2011 to 2012, by nearly \$300,000. One in three companies expect their 2013 class action spending to increase in 2013, with the average spend being \$3.3 million, up from \$3.19 million in 2012.’

to the fact that the American CLP provides for the exclusion of the possibility of instituting private claims for treble damages against successful leniency applicants).

III. The CLP

(a) Introduction

In 1978, the DOJ introduced the American CLP⁶², in an effort to more effectively and efficiently detect, investigate and prosecute cartels. The main thrust of the American CLP was providing applicants the possibility of reduced administrative fines, and amnesty from criminal prosecutions under the Sherman Act,⁶³ in return for their complete cooperation with the Antitrust Division. However, the application of the 1978 American CLP was inherently unpredictable, and therefore failed to attract applicants.

This position has changed immeasurably since 1993, when a revision of the American CLP, aimed at making it easier and more attractive to apply for leniency, was undertaken by the Antitrust Division. The revision resulted in three major changes:⁶⁴

- (1) Immunity is automatic before an investigation has begun (provided six conditions are met.).⁶⁵
- (2) Immunity can be attained after an investigation has begun (provided seven conditions are complied with.).⁶⁶
- (3) All directors, officers, and employees of the corporation who admit their involvement in the illegal antitrust activity will not be charged criminally for the illegal activity.⁶⁷

⁶² U.S. Department of Justice op cit (n29)

⁶³ C J. Ellis & W. Wilson *Cartels, Price-Fixing, and Corporate Leniency Policy: What Doesn't Kill Us Makes Us Stronger* (2003) 6.

⁶⁴ SD Hammond 'The Evolution of Criminal Antitrust Enforcement Over the Last Two Decades' (2010) Speech presented at the 24th Annual National Institute on White Collar Crime and presented by the ABA Criminal Justice Section and the ABA Center for Continuing Legal Education at Eden Roc Renaissance Miami, Florida, 25 February 2013, available at <http://www.justice.gov/atr/public/speeches/255515.htm>, accessed on 14 May 2013. 2.

⁶⁵ U.S. Department of Justice op cit (n29) para A

⁶⁶ U.S. Department of Justice op cit (n29) para B

⁶⁷ U.S. Department of Justice op cit (n29) para C

The former Deputy Assistant Attorney General for Criminal Enforcement Antitrust Division of the U.S. Department of Justice, S D Hammond, is of the opinion that there are three pillars that must first be in place before any jurisdiction's CLP can be enforced efficiently, and consequently, before any jurisdiction's antitrust law can be enforced effectively:

- (1) The CLP must be transparent and predictable, so that cartel members can accurately predict how they will be treated if they choose to self-report, or fail to do so.
- (2) Cartel members must perceive the threat of detection to be high, if they do not self-report.
- (3) The antitrust law must provide severe sanctions for cartel members who do not self-report, and complete reprieve from such sanctions for those who are first to self-report.⁶⁸

(b) Transparency and predictability

The revised American CLP has successfully increases the transparency and predictability of the program. This has been achieved principally by making the granting of immunity automatic upon compliance with the requirements of the American CLP. Consequently, confidence in the predictability of the treatment that cartel members will receive in terms of the program has grown dramatically. As a result, the Antitrust Division has enjoyed a 'nearly twenty-fold increase in the leniency application rate, making the Leniency Program the Antitrust Division's most effective investigative tool.'⁶⁹

(c) Perception of likelihood of detection

In order for a CLP to effectively destabilise a cartel, the threat of detection must be perceived to be imminent. In this regard the American authorities make use of a number of different investigative tools in their investigation of cartels. Tools such as wire taps, search warrants, border watches, and more recently INTERPOL Red Notices and extradition requests are regularly used to assist the Antitrust division in gathering

⁶⁸ SD Hammond op cit (n64) 4-5

⁶⁹ SD Hammond op cit (n64) 3

evidence against cartel members, providing further incentive for cartel members to self-report, and avoid prosecution.

However, the number one driver of self-reporting remains the American CLP, which creates a perceived threat of detection among cartel members, albeit not in the traditional ways of the other tools. The American CLP creates a perceived threat of detection by increasing the incentives of firms to self-report, which increases the risk for firms in the cartel that another member may self-report, and in doing so, expose the activities of the other firms to investigation by the competition authorities.

(d) Criminal & Civil Sanctions and the possibility of immunity

If the potential sanctions of being convicted of cartel conduct do not outweigh the gains realised by cartel members from the cartel conduct in question, sanctions are simply perceived as a cost of doing business, rather than a deterrent. The perceived threat of detection also ceases to have its desired effect where the potential sanctions for being detected do not perform the requisite deterrent function.

The Antitrust Division makes use of criminal antitrust corporate fines, individual criminal antitrust fines, as well as individual jail sentences to sanction offenders. Furthermore, the American CLP also provides for the possibility of the institution of private claims for treble damages for damage suffered as a result of cartel conduct. However, for a number of reasons, this part of the dissertation will only focus on the monetary sanctions employed by the American competition authorities to thwart cartel conduct.⁷⁰

The Antitrust Division has ‘steadfastly emphasized the importance of ...stiff corporate fines to induce leniency applications and optimize deterrence of cartel

⁷⁰ I shall focus solely on monetary sanctions for three reasons. Firstly, this section of the dissertation is aimed specifically at illustrating how the efficient interaction between antitrust class action claims for damages and the CLP, alone, successfully deters and punishes members who fail to be deterred from cartel conduct, in the American jurisdiction. Secondly, although the Competition Amendment Act 1 of 2009 criminalises cartel conduct in South African law by inserting s73A into the Act, it has not yet been brought into effect, more than four years after it was assented to by the President. It therefore seems doubtful that s73A will be enacted, at least in the near future. Lastly, there is empirical evidence which supports the view that monetary sanctions for criminal conduct act forms a more efficient deterrent than non-monetary sanctions, particularly imprisonment (in this regard see R Posner *Economic Analysis of Law* 7 ed (2007) 223–224; G Becker ‘Crime and Punishment: An Economic Approach’ (1969) 76 *Journal of Political Economy* 169.; K Elzinga & W Breit ‘Antitrust Penalties and Attitudes Toward Risk: An Economic Analysis’ (1973) 86 *Harvard Law Review* 693.; R Posner ‘Optimal Sentences for White-Collar Criminals’ (1980) 17 *American Criminal Law Review* 409.).

conduct.’ The trend in reform over the past (almost) thirty years reflects this belief. Over the past (almost) thirty years America has seen exponential increases in the maximum limitations of monetary sanctions.⁷¹ In addition, since 1984, a fine of up to twice the amount gained by, or twice the loss caused by, the cartel, is allowed in certain circumstances, and in spite of the prescribed maximum fines.⁷²

This trend has provided a ‘stick’ of exponentially increasing size, with which the Antitrust Division is able to deter firms from cartel conduct and punish cartel members who fail to self-report. However, these fines alone are not sufficient to effectively deter and punish cartel conduct. When monetary penalties are awarded against large companies (particularly large international companies), the fines on average only constitute 4% to 13% of affected sales, which is simply too small a sanction to achieve the desired deterrent effect, and is likely to be treated as a cost of doing business.⁷³

The task of adding to the size of this ‘stick’ has therefore been given to the private enforcement tools of the act, namely antitrust class action claims for damages. The most notable in this regard has been the trend of exponentially increasing settlement/award amounts in antitrust class action damages claims. Private damages recoveries amounted to \$38.7 billion for the period between 1990 and August 2012, and accounted for 93% of worldwide private damages recoveries over the same period.⁷⁴

Although the nature of the way in which settlements are classified makes it difficult to accurately establish a trend in the increase of private class action damages recoveries,⁷⁵ by looking at the increase in the largest settlements since 1998, a clear trend emerges. Initially, settlement amounts increase slowly, resulting in a cumulative amount of \$300 million in damages being recovered up until 1997. However, from

⁷¹ In 1974, the maximum sanctions for being found guilty of cartel conduct in terms of the Sherman Act were as follows: a maximum fine of \$1 million for firms and \$100,000 for individual defendants, and a maximum prison sentence of three years. In 1984, the introduction of the Omnibus Crime Control Act of 1984 and the Criminal Fines Enforcement Act of 1984 resulted in an increase of the maximum fine for individual defendants to \$250,000. In 1990, the Sherman Act itself was amended, increasing the maximum fine for firms to \$10 million and \$350,000 for individual defendants. In the latest amendment, in June 2004, Congress showed just how seriously they view antitrust crimes, amending the Sherman Act to provide for a maximum fine to \$100 million for firms and \$1 million for individual defendants, and a maximum jail term of 10 years.

⁷² See 18 U.S.C s 3571(d).

⁷³ JM. Connor ‘Private Recoveries in International Cartel Cases Worldwide: What do the Data Show?’ AAI Working Paper No. 12-03 (2012) 13

⁷⁴ JM. Connor op cit (n73) 7

⁷⁵ Settlements are classified according to the year in which the *first* firm decides to settle.

1998 onwards, where just over \$1 billion in damages was recovered in the *In re NASDAQ Market-Makers Antitrust Litigation*,⁷⁶ the trend in the amounts being recovered through private actions increase exponentially.⁷⁷ In 2000, \$1.85 billion was recovered in the settlement with the five largest tobacco manufacturers. In 2003, \$3.38 billion was recovered in *Wal-Mart Stores, Inc. v. Visa U.S.A. Inc.*⁷⁸ (the first of three settlements in the bank cards' transaction fee cartel cases). In 2008, \$6.65 billion was recovered by *AmEx & Discover* from Visa and MasterCard, in the second of the bank cards' transaction fees cases. In 2012, \$7.8 billion was recovered in *In re Payment Card Interchange Fee and Merchant Discount Antitrust Litigation*⁷⁹ (the last of the three settlements in the bank cards' transaction fee cartel cases).

As a result of these increasingly severe sanctions, the U.S. has seen monetary penalties (criminal fines and private claims for damages) for cartel conduct exceed \$50 billion for the first time in 2012, and accounting for 50% of the total worldwide antitrust penalties for the same period.⁸⁰

It is therefore the addition of private damages claims and administrative penalties that provides the true 'severity' to these sanctions. Notably, the compilation of these monetary penalties is not what one might expect. The compilation illustrates the enormous role that antitrust class actions for damages now play in the public enforcement of antitrust law in America. The criminal antitrust fines for cartel conduct imposed by the DOJ make up a comparatively meagre \$11.2 billion of the total monetary penalties, when compared with the reported settlements received through antitrust class actions for damages, which amount to \$ 41.8 billion dollars.⁸¹

However, severity of monetary penalties alone does not necessarily provide a sufficient deterrent against cartel conduct. Whether monetary penalties act as a deterrent depends on their ability to disgorge the profits made by firms from cartel monopolistic conduct. The greater the disgorgement, the greater the deterrent effect the monetary penalty will have. In order to determine the extent of disgorgement, the damage ratio must be calculated. The damage ratio indicates the percentage of

⁷⁶ *In re NASDAQ Market-Makers Antitrust Litigation* 894 F.Supp. 703 (1995)

⁷⁷ Appendix B Table 1

⁷⁸ *Wal-Mart Stores, Inc. v. Visa U.S.A. Inc.*, 396 F.3d 96, 100-01 (2d Cir. 2005)

⁷⁹ *In re Payment Card Interchange Fee and Merchant Discount Antitrust Litigation* MDL No. 1720 (E.D.N.Y.) (2012)

⁸⁰ JM Connor op cit (n73) 1

⁸¹ JM Connor op cit (n73) 9

damages disgorged by the fines,⁸² private damages,⁸³ or both, and therefore determines their effectiveness of the penalties as deterrents.

From a sample of 45 international cartels convicted in America of price-fixing, Connor⁸⁴ established that U.S. fines alone disgorged, on average, approximately 42% of the profits derived from the cartel activity in the U.S.⁸⁵ However, when viewed in combination with the average disgorgement of 30% of the profits derived from the cartel activity by antitrust class actions for damages, an average of 90% of the profits obtained through cartel conduct were successfully disgorged by U.S. monetary penalties.⁸⁶ Therefore it is clear that a combination of private and public sanctions is necessary to ensure that sanctions are not only perceived as providing severe punishment, but also a successful deterrent to cartel conduct.

While sanctions form the ‘stick’ of the Antitrust Division’s system of enforcing antitrust laws against cartels, given the inherent nature of cartel conduct, a ‘carrot’ is needed in order to create an opportunity for the ‘stick’ to be used. The ‘carrot’ must induce cartel members to self-report, and assist the Antitrust Division in detecting, investigating, and prosecuting cartels. This carrot is provided by the American CLP, and more specifically the recognition therein given to the concept of ‘full immunity’.

There are three key factors of the revised American CLP, which inform the concept of ‘full immunity’, and provide the American CLP with the perceived transparency and predictability necessary to entice cartel members to self-report. The three factors can be summarised as follows:

- (1) the American CLP provides a successful applicant with automatic immunity;
- (2) immunity can be attained before an investigation is instituted, as well as afterwards;

⁸² To determine the extent of disgorgement by U.S fines alone, fines (Penalties/sales) were divided by the overcharge (Damage/sales), and this calculation resulted in a “Damage ratio” of 42%; see also Appendix A Figure 1.

⁸³ To determine the extent of disgorgement by U.S Private damages settlements alone, Private damages (Private damages/sales) were divided by the overcharge (Damage/sales), resulting in a “Damage ratio” of 30%; see also Appendix A Figure 2.

⁸⁴ John M. Connor, Professor Emeritus, Purdue University

⁸⁵ See Appendix A Figure 2.

⁸⁶ JM Connor op cit (n73) 14; see also Figure 3

- (3) Immunity exempts the firm, its directors, and its employees from prosecution, and *all* of the abovementioned sanctions, including antitrust class actions for damages.⁸⁷

Whilst prosecutors were initially uneasy with the idea of allowing cartel members to escape prosecution, and the sanctions that went with it, the ‘Antitrust Division recognized that the grant of full immunity was necessary to induce cartel participants to turn on each other and self-report...’⁸⁸ And, given the success of this policy, I suspect that the prosecutors no longer harbour such apprehensions.

When the prospect that ‘full immunity’ only applies to the first applicant is combined with sufficiently severe sanctions (which as has been illustrated above necessarily consists of both public sanctions and private sanctions), the concept of the ‘stick’ and ‘carrot’ comes together, to form an effective and efficient complete enforcement mechanism, capable of successfully deterring firms from participating in cartel conduct.

The sanctions reinforce the benefits of applying for leniency; while the provision of ‘full immunity’ to the first successful applicant reinforces the consequences of not applying for leniency (i.e. the possibility of facing severe sanctions).

Furthermore, by excluding the possibility of instituting antitrust class action claims for damages against a successful applicant, a balance is struck between protecting the efficient operation of the American CLP, and with it the public enforcement of antitrust laws, (if a successful applicant is able to escape civil claims, he is more likely to self-report), and the private enforcement of antitrust law (by allowing private parties to seek redress in appropriate circumstances). This ultimately leads to a complete enforcement system, which is balanced, and therefore effective and efficient.

The facilitated interaction of the American CLP and the sanctions (both public and private) for participating in cartel conduct, has allowed the American competition authorities to destabilize cartels to such a degree that applying for leniency is likely to be perceived as a necessity rather than a choice in the near future.

⁸⁷ U.S. Department of Justice op cit (n29) para A-C

⁸⁸ SD Hammond op cit (n64) 2

IV. Conclusion

There are many lessons that can be drawn from the American experience. The balanced and efficient approach that the U.S. employs in the enforcement of antitrust laws to combat cartel conduct in particular provides some useful and positive lessons towards assessing South Africa's approach to these concepts.

Firstly, public enforcement mechanisms (spearheaded by the American CLP) and the public sanctions provided by antitrust laws alone are insufficient to combat cartel conduct effectively and efficiently. There exists a need for concurrent (and complementary) private enforcement of antitrust laws, in order to deter firms from participating in cartel conduct, and punish firms who fail to be deterred from participating in cartel conduct, effectively.

Secondly, for the private enforcement of antitrust laws by way of civil claims for damages to be effective, efficient, and feasible, these claims must be brought as class actions. In this regard, Rule 23 provides a comprehensive procedure for the institution of an antitrust class action for damages.

Thirdly, a balance must be achieved between the public enforcement mechanisms and the private enforcement mechanism if the overall enforcement of antitrust laws is to be effective and efficient. It is imperative to the success of the public enforcement of antitrust laws that the antitrust class action for damages procedure complements the American CLP's functioning as the primary tool of the competition authorities for detecting, investigating, and prosecuting cartels. This necessitates that the threat of the institution of class actions does not deter cartel members from applying for leniency, but induces them to apply. At the same time, private parties must have recourse to institute such class actions where it is appropriate (otherwise they may simply refuse to partake in the private enforcement of antitrust laws). Such a balance is achieved by the provision for 'full immunity' in the American CLP.

However, there are certain elements of the American experience which should be dealt with, with prudence. The question as to the suitability of Rule 23 to provide the procedure for antitrust class actions for damages is one such element.

As discussed above, the revised rule 23 was enacted in the belief that class actions would only be invoked in the context of asserting civil rights claims and

contesting segregation.⁸⁹ The problem with antitrust class action for damages is that they are very different from the desegregation civil rights cases around which the revised Rule 23 was framed and designed to operate.

Given the historical framing of Rule 23, the widespread criticism of its direct application to regulate antitrust law class actions for damages, as well as the recent trend regarding the certification of class actions seeking damages, I question the appropriateness of Rule 23, as well as the verbatim adoption of its provisions by the court in the *Children's Resource Centre* case, to regulate antitrust class action claims for damages.

CHAPTER 4 THE SOUTH AFRICAN EXPERIENCE

I. Class Actions

(a) Introduction

Private claims for damages resulting from cartel conduct were practically non-existent in South Africa prior to the recognition of class actions in matters outside of the Constitution. This is chiefly due to the fact that the harm caused by cartel conduct is usually of such a nature that the damage suffered by the individuals is too small to warrant the adjudication of an individual claims.

It can therefore be said that private claims for damages played no consequential role in the enforcement of the Act, and had no effect (either positive or negative) on the operation of the CLP prior to the recognition of a common law class action outside of Constitutional matters, and therefore within competition matters, by the High Court in the case of *Trustees for the Time Being*.⁹⁰

Historically, in the Pre-Constitutional era, the concept of the class action in the American form⁹¹ was an unknown procedure in South African common law.⁹² The traditional position regarding standing was, that, excepting the very limited scope of a

⁸⁹ See footnote (n42).

⁹⁰ *The Trustees for the Time Being* supra (n5).

⁹¹ As regulated by Rule 23 of the Federal Rules of Civil Procedure.

⁹² E Gericke 'Can a class action be instituted for breach of contract?' 2009 *THRHR* 304; *Permanent Secretary, Department of Welfare, Eastern Cape, and Another v Ngxuza and Others* 2001 (4) SA 1184 (SCA) ('Ngxuza').

voluntary association's *locus standi* to act on behalf of its members, collective actions were not allowed in South African law.⁹³ In order for a litigant to acquire the requisite standing to litigate on behalf of another, and for that other person to be bound by the judgment, joinder had to take place.⁹⁴ In order for a valid joinder to occur two requirements had to be satisfied. First, the litigant had to show a sufficiently direct and substantial interest in the case.⁹⁵ Secondly, the party on behalf of whom he wished to litigate was required to be joined as a co-litigant by way of a prescribed joinder procedure.⁹⁶

Therefore outside of joinder there was no procedure which allowed for a representative to act on behalf of another. Moreover there was no procedure whatsoever through which a person's rights and interests could be determined, unless they were a party to the proceedings. This position was altered in constitutional matters by the advent of the Constitutional era.⁹⁷

(b) *The possibility of certifying a class action for damages for damage caused by cartel conduct, prior to the case of Children's Resource Centre*⁹⁸

The Interim Constitution gave rise to the first legislative recognition of the concept of a class action in South African law regarding standing, but only in constitutional matters.⁹⁹ The result was that South Africa's common law substantive position regarding class actions underwent substantial changes.¹⁰⁰ However in a jurisdiction such as South Africa, where substantive law originates from Roman Dutch law, and procedural law originates from English law, it is important that the introduction of substantive law concepts are met either by existing commensurate procedural

⁹³ W De Vos 'Is a class action a "classy act" to implement outside the ambit of the Constitution?' 2012 *TSAR* 738

⁹⁴ W De Vos *Verteenwoordiging van Groepsbelange in die Siviele Proses* (unpublished LLM thesis RAU, 1984) 118

⁹⁵ See *P E Bosman Transport Works Committee and Others v Piet Bosman Transport (Pty) Ltd* 1980 4 SA 801 (T) at 804 B-F; *Dalrymple v Colonial Treasurer* 1910 T.S. 372; *United Watch and Diamond Co (Pty) Ltd v Disa Hotels Ltd* 1972 4 SA 409 (C) at 415 B; *Ahmadiyya Anjuman Ishaati-Islam Lahore (South Africa) v Muslim Judicial Council (Cape)* 1983 (4) SA 855 (C); *Natal Fresh Produce Growers' Association v Agrosolve (Pty) Ltd* 1990 4 SA 749 (N).

⁹⁶ *Standard General Insurance Co v Gutman NO* 1981 2 SA 426 (C); *Christian League of Southern Africa v Rail* 1981 2 SA 821(O).

⁹⁷ South African Competition Commission op cit (n3) at para 5.9; *Vryenhoek v Powell NO* 1996 (1) SA 984 (CC) at para 167

⁹⁸ *Trustees for the Time Being* supra (n5)

⁹⁹ Section 7(4)(b)(iv) of the Interim Constitution of the Republic of South Africa, Act 200 of 1993.

¹⁰⁰ *Beukes v Krugersdorp Transitional Local Council and Another* A 1996 (3) SA 467 (W) at 473C

provisions, or by the introduction of such provisions, to facilitate the proper functioning of the substantive law being introduced. For instance, the U.S. introduced Rule 23 of the Federal Rules of Court to regulate the procedure regarding the institution of class actions in Federal courts. This was not done in South Africa. Therefore class actions under the Interim Constitution had a very limited scope of application, and in addition their usefulness was marred by a lack of adequate procedural provisions.

The pressure for the scope of class actions to be extended beyond constitutional matters gained traction in the mid-nineties. Influenced largely by the position in comparable foreign jurisdictions, which, led by the United States, had all provided for such a class action (either in legislation or court rules) by this time, the South African Law Commission ('the Law Commission') prepared a 'Working Paper'¹⁰¹ in 1995 recommending the adoption of a class action outside of constitutional matters.

In the Working Paper the Law Commission recommended the introduction of a class action, and class action procedure,¹⁰² throughout civil litigation by way of an Act of Parliament.¹⁰³ This recommendation went unchallenged.¹⁰⁴ The suggested procedure was modelled largely within the well-established mould of the American model of class action proceedings.¹⁰⁵ It is clear that the Commission was of the opinion that firstly it was necessary, given the inadequate provision for class actions in the s7(4) of the interim Constitution,¹⁰⁶ to introduce a class action in matters outside of the Constitution by way of legislation; and secondly that it should not be left to the courts to develop the necessary guidelines, principles and procedures to accompany the introduction of such a class action.¹⁰⁷

The legislature did not follow the proposals of the Law Commission to extend the scope of class actions when promulgating s38 of the Constitution, and instead preferred the same formulation as s7(4) of the Interim Constitution. Section 38 of the Constitution states:

¹⁰¹ South African Law Commission Working Paper 57 (Project 88) 'The recognition of a class action in South African law' (1995)

¹⁰² South African Law Commission op cit (n19) at para 3.1.2

¹⁰³ South African Law Commission op cit (n101) at para 6.1

¹⁰⁴ South African Law Commission op cit (n19) at para 3.1.1

¹⁰⁵ As regulated by Rule 23 of the Federal Rules of Civil Procedure.

¹⁰⁶ South African Law Commission op cit (n101) at para 1.11; South African Law Commission op cit (n19) at para 3.1.1

¹⁰⁷ South African Law Commission op cit (n19) at para 3.1.1

‘Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. The persons who may approach a court are -

- (a) anyone acting in their own interest;
- (b) anyone acting on behalf of another person who cannot act in their own name;
- (c) anyone acting as a member of, or in the interest of, a group or class of persons;
- (d) anyone acting in the public interest;
- (e) an association acting in the interest of its members.’

If the wording of s38 of the Constitution is given its ordinary meaning (in line with the rules of interpretation) it is apparent that the class action described in s38 of the Constitution can only be invoked to enforce a right entrenched in the bill of rights.¹⁰⁸

Notably, the procedure for such invocation is not dealt with in the s38, or elsewhere in the Constitution. Instead, the procedure to be followed in order to enforce constitutional rights by way of a class action brought in terms of s38(c) of the Constitution was developed by the courts. Specifically, Froneman J in his court *a quo* judgment in the case of *Ngxuza and Others v Permanent Secretary, Department of Welfare, Eastern Cape, and Others*,¹⁰⁹ which was confirmed on appeal in Cameron JA’s judgment in the Supreme Court of Appeal in the case of *Ngxuza*.¹¹⁰

The court *a quo* developed, and the court of appeal accepted, guideline requirements for the invocation of a class action in terms of s38 of the Constitution, which mirrored the requirements of Rule 23 (a) of the US Federal Rules of Civil Procedure, as well as the recommendations of the Law Commission.¹¹¹ In addition, Froneman J expelled the practical objections to such a procedure relating to the ‘floodgates objection’¹¹², as well as the ‘classification problem’.¹¹³ The guideline requirements established by Froneman J, as well as his opinion regarding the practical

¹⁰⁸ W De Vos op cit (n93) 739

¹⁰⁹ 2001 (2) SA 609 (ECD)

¹¹⁰ *Permanent Secretary, Department of Welfare, Eastern Cape v Ngxuza* supra (n92)

¹¹¹ South African Law Commission op cit (n19) at paras 1,8-29.

¹¹² *Ngxuza v Permanent Secretary, Department of Welfare, Eastern Cape* supra (n109) at 624D-E

¹¹³ *Ngxuza v Permanent Secretary, Department of Welfare, Eastern Cape* supra (n109) at 624F-G

objections to the procedure for class actions, were supported by the court in the subsequent case of *Firststrand Bank Limited v Chaucer Publications (Pty) Limited*.¹¹⁴

A possible criticism of this approach to the procedure to be followed in class actions, is that such an adoption requires the judges of the superior courts to exercise their discretion in each case, and to regulate the guidelines (set out by the court *a quo* in *Ngxuza v Permanent Secretary, Department of Welfare, Eastern Cape*) as applicable to the particular s 38¹¹⁵ class action case brought before them.¹¹⁶ By leaving the subsequent development of the procedure to be followed in class action cases to the courts, the problem of a ‘lack of uniformity and consistency of approach’¹¹⁷ can arise, and has arisen in the superior courts. This problem forms one of the reasons why I submit that a similar approach should not be followed when developing a class action procedure outside of the Constitution (*This aspect will be dealt with in greater detail in Chapter 4, paragraph I, sub-paragraph (e)*).

It is thus clear that both the Interim and Final constitutions provide for class actions in the context of constitutional matters.¹¹⁸ However, neither have abolished the common law regarding standing in matters outside of constitutional matters.¹¹⁹ Furthermore, from the *Ngxuza* judgment it is clear that the courts will apply the American style procedure to class actions brought in terms of s38(c) of the Constitution, but no legislation regarding the procedure to be followed has been promulgated.

Therefore, prior to the case of *Children’s Resource Centre*, it was unclear as to how provision would be made for a class action outside of constitutional matters, and therefore within the realm of competition law, and how such a class action would be regulated, procedurally.

¹¹⁴ *Firststrand Bank Limited v Chaucer Publications (Pty) Limited* 2008 (2) SA592 (C) at paras 25-26 (*‘Firststrand Bank Limited’*).

¹¹⁵ Section 38 of the Constitution

¹¹⁶ P Conradie ‘South Africa’ in *The International Comparative Legal Guide to: Class & Group Actions 2011 A practical cross-border insight into class and group actions work* (2011) 135.

¹¹⁷ South African Law Commission op cit (n19) at para 3.4

¹¹⁸ South African Law Commission op cit (n19) at para 3.3.3

¹¹⁹ *Congress of Traditional Leaders of South Africa v Minister for Local Government, Eastern Cape* 1996 2 SA 898 (TKA) at 905 E-H

(c) *The possibility of certifying a class action for damages for damage caused by cartel conduct, after Children’s Resource Centre:*

In 1998, after it became apparent that the class action redress offered by both the Constitution and its predecessor was inadequate,¹²⁰ the Law Commission submitted a report, entitled *The recognition of class actions and public interest actions in South African law* (‘the Report’), to the Minister of Justice for his consideration. In the Report, the Law Commission, based on their earlier Working Paper, submitted that there was an urgent need for legislation introducing a class action throughout civil litigation,¹²¹ as well as rules of court to provide a special procedure for class actions outside of the Constitution.¹²² The recommendations of the Law commission, in brief, are as follows:¹²³

- (1) The principles underlying class actions should be introduced by way of legislation, while the necessary procedures should be introduced by way of rules of court. The Commission was of the opinion that even though it is possible to leave the development of a class action outside of constitutional matters to the courts,¹²⁴ it should not be left to the courts alone due to their propensity to follow approaches which lacked uniformity and consistency.
- (2) The act should define the term ‘class action’. The definition should provide for the concept of a general class action, rather than categories of class actions.
- (3) The person instituting the class action as representative need not be a member of the class.

¹²⁰ W De Vos ‘Reflections on the introduction of a class action in South Africa’ 1996 *TSAR* 639: ‘Since the constitutional provisions only countenance these procedures in the context of the enforcement of the fundamental rights enshrined in the Constitution, the Law Commission rightly proposed ... that their scope should be extended by means of legislation to include other areas’; South African Law Commission op cit (n101) at para 1.3: ‘...the Constitution of the Republic of South Africa Act 108 of 1996, as did the Constitution, 1993, specifically provides for class actions and actions in the public interest and it is logical that the same principle should apply in non-Bill of Rights cases.’; South African Law Commission op cit (n19) at para 3.3.5: ‘Regrettably, section 7(4)(b) of the Constitution, 1993, (as well as section 38 of the Constitution, 1996) only permits the bringing of representative or class actions in circumstances where a right in the Bill of Rights has been infringed or threatened.’

¹²¹ South African Law Commission op cit (n19) at para 3.1.1-3.1.2

¹²² South African Law Commission op cit (n19) at para 3.1.3

¹²³ South African Law Commission op cit (n19) at paras 1,8-29.

¹²⁴ C Loots ‘Locus standi to claim relief in the public interest in matters involving the enforcement of legislation’ (1987) 104 *SALJ* 148; See also *Roberts v Chairman, Local Road Transportation Board* (1) 1980 2 SA 472 (C); *Dawnlaan Beleggings (Edms) Bpk v Johannesburg Stock Exchange* 1983 3 SA 344 (W).

- (4) A preliminary application for the certification of a class action must be made, requesting leave to institute a class action proceeding and to ask for directions as to procedure.
- (5) The commission set out suggested requirements that the courts should consider in deciding whether a certification application is likely to succeed:
 - a. whether the class of persons are identifiable;
 - b. whether a cause of action is disclosed;
 - c. whether there are issues of fact common to the class;
 - d. whether a suitable representative is available;
 - e. whether the interests of justice will be served; and
 - f. whether the class action is the most appropriate method of proceeding with the action.
- (6) The court should be given a wide discretion in determining the procedure to be followed in the application for certification.
- (7) The piece of legislation should deal with the questions of when, by whom, to whom, and how notice should be given. In general notice must be given to members of the class and prospective members. However the court should have the discretion to make opt-in, opt-out or no notice orders.
- (8) In general the court's decision binds all members of the class. However the court should be afforded discretion in respect of the binding effect of its judgment on the members of the class.
- (9) For a class action to be instituted there must be issues of fact or law common to all members. However the existence of further issues which will require individual determination should not pose a threat to certification.
- (10) If a claim for damages is instituted by way of class action, the court may make an aggregate assessment or individual assessments. The Act should make provision for the disposal of any undistributed residue of an aggregate award.
- (11) The court should retain its discretion to apply the general rule that costs follow the result.
- (12) A legal practitioner may, subject to the Contingency Fees Act 66 of 1997, enter into a contingency fee arrangement with the representative, in which case the payment of his fees and disbursements, by the class members, are contingent upon the success of the action.

- (13) In order to settle, the parties must first obtain the consent of the court.
- (14) The decision to certify an action as a class action should not be subject to appeal. However the decision not to certify should be subject to an appeal.

These recommendations are almost identical to the provisions set out in Rule 23(a) of the US Federal Rules of Civil Procedure. Responses to the recommendations of the Law Commission have largely been positive from academic commentators.¹²⁵ However the legislature has not yet shared the Law Commission's enthusiasm for the introduction of a class action outside of constitutional matters. Consequently, there is no legislation at present regulating class actions outside of Constitutional matters, and therefore in competition law matters.

Perhaps the legislature's hesitancy stems from the potential threat that the introduction of an unrestricted class action poses to the entire economic sector.¹²⁶ There is much to be said for this view, and as seen above, the American economy has suffered dearly as a result of the introduction of the unrestricted class action. Class actions have unusually large financial stakes, and therefore possess the potential to transfer large amounts of wealth and even compel the restructuring of important institutions.

For purposes of this dissertation, I will concentrate on the large two-dimensional threat posed to the economic sector by unrestricted class actions in the competition law sphere:

- (1) Directly, via the potential created for large claims, by potentially large classes, based on breaches of the Act.
- (2) Indirectly, by threatening to undermine the operation of the Commission's CLP (Which, represents the most important tool possessed by the Commission in protecting markets against anti-competitive behaviour in the

¹²⁵ W De Vos op cit (n120) 639 ; E Hurter 'The draft legislation concerning public interest actions and class actions: the answer to all class ills?' 1997 *CILSA* 304; E Hurter 'Some thoughts on current developments relating to class actions in South African law as viewed against leading foreign jurisdictions' 2006 *CILSA* 485; De Bruin 'Groepgedingvoering- die voorstel van die Suid-Afrikaanse Regskommissie vir die sertifisering van 'n groepgeding' 2003 *TRW* 133; C Plasket 'Representative standing in South African law' unpublished paper, Rhodes University (2009), available at http://globalclassactions.stanford.edu/sites/default/files/documents/south_africa_national_report.pdf, accessed on 2 August 2013; C Plasket 'The ANNALS of the American Academy of Political and Social Science' (2009) Vol 622 No 1 256-268, available at www.sagepublications.com, accessed on 2 August 2013.

¹²⁶ W De Vos op cit (n93) 742

form of cartel conduct. And as submitted in the introductory paragraph, was not threatened by individual damages claims.).

Thus the consequential economic and policy implications of an unrestricted class action are complex, highly problematic, and may well justify the legislature's tentativeness towards introducing legislation recognising such class actions.

However, despite the possibility of legitimate reasons for the legislature's inaction, the court *a quo* in the case of *The Trustees for the Time Being*¹²⁷ recognised a common law class action outside of constitutional matters. The *Appeal Court* in the case of *Children's Resource Centre* was subsequently of the opinion that given the constitutional endorsement of the class action in s38 of the Constitution, and the failure to pass legislation dealing with the issue, the court was obliged to invoke its inherent power to protect and regulate its own process to develop the common law in this regard, in the interests of justice.¹²⁸

The facts of the *Children's Resource Centre* case are briefly as follows: in December 2006 the Commission instituted an investigation after receiving a complaint alleging that the three respondents¹²⁹ were operating a bread cartel in the Western Cape (referred to as the 'the Western Cape' complaint). Hereafter Premier applied for, and was granted, immunity by the Commission in terms of the CLP, and disclosed that the respondents were fixing the price of bread in the Western Cape.¹³⁰ Additionally, Premier provided the Commission with information that led to them initiating a second complaint, regarding the operation of the bread cartel in other parts of the country (referred to as 'the National' complaint).

The complaint against Tiger Brands and Pioneer Foods was referred to the Competition Tribunal. Tiger Brands entered into a settlement agreement with the Commission in relation to their unlawful conduct. A penalty of nearly R99 million was imposed on Tiger Brands. Pioneer Foods were found guilty of contravening the Act and received an administrative penalty of approximately R196 million. The complaint against Premier was not referred to the Competition Tribunal as they had been granted

¹²⁷ *The Trustees for the Time Being* supra (n5)

¹²⁸ Section 173 of the Constitution

¹²⁹ Pioneer Foods (Pty) Limited ('First Respondent'), Tiger Consumer Brands Limited ('Second Respondent'), and Premier Foods Limited ('third Respondent')

¹³⁰ Which amounted to cartel conduct in terms of section 4(l)(b)(i) of the Act.

immunity by the Commission. Based on the decision of the Tribunal, the applicants¹³¹ instituted class action proceedings in the *court a quo* against the Respondents.¹³²

The question that arose before Van Zyl J in the *court a quo*, was whether the applicants had the requisite standing to bring a class action for damages, outside of the Constitution, against the Respondents for breaching of the Competition Act by participating in cartel conduct. Van Zyl J accepted, without deciding, that the applicants had standing to bring such a class action for damages,¹³³ and then proceeded to apply the certification requirements as set out in the Law Commission's Report.¹³⁴

It cannot thus be said that the *court a quo*'s judgment can per se be seen as authority for the recognition of a class action for damages in competition law matters, as the issue was not decided.

However the applicants' leave to appeal to the Supreme Court of Appeal ('SCA') was granted. In the SCA, Wallis J reasoned, relying heavily on the duty imposed on the court by s39(2) of the Constitution to develop the common law in line with the ethos of the Constitution, and with reference to the apparent absence of a parliamentary prescribed procedure applicable to class actions outside of constitutional matters (such as the procedure suggested by the Law Commission in their Report¹³⁵, the judicial commission of enquiry,¹³⁶ as well as Academics.¹³⁷),¹³⁸ that in his judgment it would be:

'...irrational for the court to sanction a class action in cases where a constitutional right is invoked,¹³⁹ but to deny it in equally appropriate circumstances, merely because of the claimants' inability to point to the infringement of a right protected under the Bill of Rights. The procedural requirements that will be determined in relation to the one type of case can equally easily be applied in the other. Class actions are a particularly

¹³¹ The Trustees for The Time Being of the Children's Resource Centre Trust; The Trustees for the Time Being of the Black Sash Trust; Congress of South African Trade Unions; National Consumer Forum; Tasneem Bassier; Brian Mpahlele; Trevor Ronald; George Benjamin; Nomthandazo Mvana; Farreed Albertus.

¹³² See Footnote 129.

¹³³ *The Trustees for the Time Being* supra (n5) at para 39

¹³⁴ South African Law Commission op cit (n19) at paras 1, 8-29

¹³⁵ South African Law Commission op cit (n19) at paras 1, 8-29

¹³⁶ Mr Justice HC Nel 'Class Actions and Public Interest Actions' in *Commission of Inquiry Into the Affairs of the Masterbond Group and Investor Protection* (2001) 51-63.

¹³⁷ F R Malan 'Siviele proses, verbruikersbeskerming en kollektiewe optrede' (1982) *TSAR* 1; W De Vos op cit (n120) 642; W De Vos op cit (n93) 737

¹³⁸ *Reasons in terms of rule 49(1)(c)* at para 33.

¹³⁹ As was done in *Ngxuza* supra (n92)

appropriate way in which to vindicate some types of constitutional rights, but they are equally useful in the context of mass personal injury cases or consumer litigation. I accordingly reject the suggestion advanced in some of the academic writing, and in some of the heads of argument, that we should await legislative action before determining the requirements for instituting a class action in our law. The legislature will be free to make its own determination when it turns its attention to this matter and in doing so it may adopt an approach different from ours. In the meantime the courts must prescribe appropriate procedures to enable litigants to pursue claims by this means.¹⁴⁰

Wallis J does enter one caveat, namely that the court is only concerned with determining the broad procedural requirements which form the parameters within which a class action outside of the Constitution may be brought. The court is not prepared to make policy choices that:

‘...may impinge upon or even remove, existing rights. That would be to trespass on the domain of the legislature, which the doctrine of the separation of powers...does not permit us to do.’¹⁴¹

The SCA was therefore prepared, largely on the basis of the court’s interpretation of s39(2) of the Constitution, to extend the scope of class actions beyond the realm of constitutional matters, via the recognition of a common law class action for damages. Furthermore, the SCA prescribed the same procedure for the institution of class actions as recommended by the Law Commission in their Report.¹⁴²

As shall become apparent in the following subparagraphs, I find the extension of the scope of a class action for damages beyond constitutional matters both undesirable, and unwarranted.

(d) *The Problem of Inconsistency and Lack of Uniformity*

By introducing a class action outside of the Constitution in the manner chosen by the SCA, the court has perpetuated the trend of inconsistency in the approach to class actions, by using an incompatible interpretation and application of the judgments handed down by Froneman J in the court *a quo*¹⁴³ and Cameron JA in the Supreme

¹⁴⁰ *Children’s Resource Centre* supra (n6) at para 21

¹⁴¹ *Children’s Resource Centre* supra (n6) at para 22

¹⁴² *Children’s Resource Centre* supra (n6) at paras 23-48; *see also* South African Law Commission op cit (n19) at paras 1, 8-29.

¹⁴³ *Ngxuza v Permanent Secretary, Department of Welfare, Eastern Cape* supra (n109)

Court of Appeal in *Ngxuza*, to effectively manufacture support for the court's interpretation of s39(2) of the Constitution.

The *Ngxuza* judgment provides obvious authority for the view that a Superior court may allow¹⁴⁴ a class action to be invoked by a party to enforce a constitutional right, in spite of the absence of legislation or court rules governing the process. But in my opinion it does not provide support for the recognition of a class action in competition law matters.¹⁴⁵ The judgment does however inform the manner in which such a class action should be developed.

The court approves of the adoption (at least in material respects) of the 'American-style class action' procedure, concluding that section 38(c) of the Constitution authorised the use of an 'American-style class action' procedure in circumstances where constitutional rights are infringed or threatened.¹⁴⁶

Furthermore, the court asserts that (largely) the same requirements for a class action as that of Rule 23(a) of the US Federal Rules of Civil Procedure are applicable. The court in *Ngxuza* thus recognised the need, when introducing a class action, to prescribe a procedural framework for the invocation of such an action. However the adoption of a statutorily based, or court rule based, procedural framework is in my opinion preferable to the ad hoc common law procedure which was followed by the court.¹⁴⁷

Following a statutory approach to the provision for a class action procedure outside of the Constitution is therefore in line with both the Law Commission's recommendation that the development of a class action outside of constitutional matters should not be left to the courts, but rather to the legislature,¹⁴⁸ and the judgment of the court in *Ngxuza*.

Furthermore, and perhaps more importantly, following a statutory approach to the provision for a class action procedure outside of the Constitution is, by the court's own admission, necessary. The court states that international literature has alluded to

¹⁴⁴ Presumably based on their inherent power granted by section 173 of the Constitution: 'to protect and regulate their own process, and to develop the common law, taking into account the interests of justice.'

¹⁴⁵ See also *W De Vos* op cit (n93) 751

¹⁴⁶ *Ngxuza* supra (n92) at para 14

¹⁴⁷ *Ngxuza* supra (n92) at para 16

¹⁴⁸ South African Law Commission op cit (n101) at para 6.1; South African Law Commission op cit (n19) at para3.1.1

the fact that determining the structure regulating class action procedures, and its consequences, gives rise to difficult policy issues (the resolution of which ‘involves difficult policy choices that have received differing answers in different jurisdictions.’)¹⁴⁹The court concludes that, in order to avoid ‘trespass[ing] upon the domain of the legislature, which the doctrine of the separation of powers – fundamental to our constitutional order – does not permit us to do’,¹⁵⁰ a statutory approach to the provision for a class action procedure outside of the Constitution is necessary.

The decision of the court in *Children’s Resource Centre* to introduce a common law class action outside of constitutional matters seems to stem from a notion that there existed an obligation stemming from s39(2) of the Constitution, read with s 173 of the Constitution, for such an introduction to be conducted by the court, and is a departure from the earlier submissions made by the court.

Furthermore, the court seems to suggest that judgment in *Ngxuza* provides rational and authoritative support for the notion held by the court in *Children’s Resource Centre* that they were obliged by s39(2) of the Constitution to introduce a class action outside of constitutional matters.¹⁵¹ This is incorrect. In my opinion the court in *Children’s Resource Centre* misinterpreted, and extended the application of the judgment in *Ngxuza* beyond its inherent limit (i.e. beyond matters involving constitutional issues), and in doing so, lent unwarranted justification to the court’s decision to extend the scope of class actions in terms of s 39(1).

Evidence of this misinterpretation, and extension of the application of the judgments in *Ngxuza* can be found in Van Zyl AJ’s *reasons in terms of rule 49(1)(c)*, which provides the rationale of his decision in the court *a quo*, in *Trustees for the Time Being*. Van Zyl AJ, after pointing out the absence of parliamentary prescribed procedures (as suggested by the Law Commission in their Report)¹⁵² applicable to class actions outside of constitutional matters,¹⁵³ refers to the case of *Ngxuza*.

More specifically Van Zyl AJ refers to judgment of Froneman J. Van Zyl AJ refers authoritatively to Froneman J’s view that there is no rational reason for interpreting s38 narrowly, especially in light of the narrow approach to standing under

¹⁴⁹ *Children’s Resource Centre* supra (n6) at para 22

¹⁵⁰ *Ibid.*

¹⁵¹ *Children’s Resource Centre* supra (n6) at paras 13, 21, 22

¹⁵² South African Law Commission op cit (n19) at paras 1,8-29.

¹⁵³ *Reasons in terms of rule 49(1)(c)* para 33.

the common law;¹⁵⁴ as well as to Froneman J's statement, with reference to *Maluleke v MEC, Health and Welfare, Northern Province*¹⁵⁵ that the so-called classification difficulty and floodgates argument that may arise in class actions; '...cannot justify the denial of such action when the Constitution makes specific provision for it.'¹⁵⁶

Thereafter Van Zyl AJ claims that:

'Although it was stressed in *Permanent Secretary Department of Welfare, Eastern Cape v Ngxuza [supra]* that the only issue before that court was the issue of standing in terms of section 38(c) (at 1191E), the remarks referred to hereinabove indicate that a general class action, not limited to Bill of Rights cases should be available in our law.'¹⁵⁷ (*Own emphasis*)

Wallis J takes the idea that the judgment in *Ngxuza* provides support to the notion of the court that it is obliged to develop the common law class action further, in the court of appeal. Wallis J makes reference to the absence of a parliamentary prescribed procedure applicable to class actions outside of constitutional matters,¹⁵⁸ as suggested by the Law Commission in their Report¹⁵⁹, the judicial commission of enquiry,¹⁶⁰ as well as Academics.¹⁶¹ Against this background, and in further support of the decision of the court *a quo*, Wallis states that:

'We are thus confronted with a situation where the class action is given express constitutional recognition, but nothing has been done to regulate it. The courts *must* therefore address the issue in the exercise of their inherent power to protect and regulate their own process and to develop the common law in the interests of justice.¹⁶² This may on some occasions involve us, and courts that will follow the guidance we give, in having to devise ad hoc solutions to procedural complexities on a case by case basis – a possibility referred to by the Supreme Court of Canada¹⁶³ – but the failure to pass appropriate legislation dealing with this topic leaves us little alternative in the face of the constitutional endorsement of class actions.'¹⁶⁴ (*Own emphasis*)

¹⁵⁴ *Ngxuza v Permanent Secretary, Department of Welfare, Eastern Cape supra* (n109) at 619 A-D
¹⁵⁵ 1999 (4) SA 367 (T)

¹⁵⁶ *Ngxuza v Permanent Secretary, Department of Welfare, Eastern Cape supra* (n109) at 623D

¹⁵⁷ *Reasons in terms of rule 49(1)(c)* para 36.

¹⁵⁸ *Reasons in terms of rule 49(1)(c)* at para 33.

¹⁵⁹ South African Law Commission op cit (n19) at paras 1,8-29.

¹⁶⁰ Mr Justice HC Nel op cit (n136)

¹⁶¹ F R Malan op cit (n137) 1; W De Vos op cit (n120) 642; W De Vos op cit (n93) 737

¹⁶² At Footnote 13 of *Children's Resource Centre Wallis* makes reference to the *Ngxuza* judgment as a source of support for the court in the present matter to develop a common law class action in terms of section 39 of the Constitution.

¹⁶³ *Hollick v Toronto (City)* 2001 SCC 68; [2001] 3 SCR 158; 205 DLR (4th) 19 (SCC) para 14

¹⁶⁴ *Children's Resource Centre supra* (n6) at para 15

Furthermore, Wallis J states that in his judgment it would be:

‘...irrational for the court to sanction a class action in cases where a constitutional right is invoked,¹⁶⁵ but to deny it in equally appropriate circumstances, merely because of the claimants’ inability to point to the infringement of a right protected under the Bill of Rights. The procedural requirements that will be determined in relation to the one type of case can equally easily be applied in the other.’¹⁶⁶

The reasoning of the court in their acceptance of the fact that the applicants had standing to bring a class action is thus clearly based on the misapprehension that s39(2) of the Constitution obliged the court to develop the common law in this instance, despite this being an instance devoid of constitutional rights. Similarly, the idea that that the judgments of Froneman J and Cameron AJ can lend support to this interpretation of the applicability of s39(2) of the Constitution *in casu*, is misguided.

Hurter states clearly the ‘judgement of the Supreme Court of Appeal cannot be read outside of the context of that of the court *a quo*.’¹⁶⁷ Therefore, the judgment of Cameron JA regarding the appropriateness of the mechanism of class action in the enforcement of constitutional rights (which is the context established by the court *a quo*) cannot, as the court in *Pioneer Food* proposes, be extended in support of the enforcement of non-constitutional rights. Similarly, the judgment of Froneman J in the court *a quo* cannot be read outside of the same context.

Consequently I am of the opinion that the decision of the court in *Pioneer Food* to extend the scope of class actions beyond constitutional matters was incorrect, and the notion of the court that s39(2) of the Constitution obliged them to do so was ill-founded. Furthermore, the judgments of Froneman J and Cameron AJ do not lend support to the purported existence of an obligation in terms of the Constitution to develop the common law regarding class actions, other than in matters relating to constitutional rights.

This reinforces the recommendation of the Law Commission that given the propensity of the courts to follow an approach to class actions which lacks uniformity and consistency, the development of a class action outside of constitutional matters

¹⁶⁵ As was done in *Ngxuza supra* (n92)

¹⁶⁶ *Children’s Resource Centre supra* (n6) at para 21

¹⁶⁷ E Hurter *op cit* (n125) 502; *see also* W De Vos *op cit* (n93) 751.

should not have been left to the courts, but that legislation is necessary to broaden the scope of class actions outside of constitutional matters.¹⁶⁸

(e) Conclusion

As is evident from the American experience, the recognition of a class action for damages outside of the scope of constitutional matters is necessary for the private enforcement of the Act to be viable. If private individuals could not aggregate their claims for damages into class actions, such claims would arguably never be justiciable, and private enforcement of the Act would not be possible. Therefore, in this context, the decision of the SCA to recognise the existence of a common law class action for damages outside of the scope of constitutional matters is a welcome one.

The private enforcement of the Act *can*, and must, play a major role in the effective and efficient functioning of the CLP (by inducing parties to apply for leniency in order to escape civil liability), if the enforcement of the Act is to be effective and efficient enforcement. I use the word ‘can’, because in order for the private enforcement to induce cartel members to apply for leniency, the possibility of instituting private claims for damages against successful applicants must be excluded, which is currently not the case.

Furthermore, the procedure for certification prescribed by the court in the *Children’s Resource Centre* case, is almost identical to that prescribed by Rule 23, and the requirements for a class action are identical to those set out in the Law Commission’s Report¹⁶⁹ (which largely mirror Rule 23’s requirements). As discussed in the previous chapter, the certification requirements, in the context of damages claims for cartel conduct as prescribed by Rule 23, have become less certain, and more frequently and fiercely contested in recent years. Furthermore, the recent judgment of the Constitutional Court in the case of *Mukaddam v Pioneer Foods (Pty) Ltd and*

¹⁶⁸ South African Law Commission op cit (n19) at para 3.3.3; *See also* J Fudge ‘The public / private distinction: The possibilities of and the limits to the use of Charter litigation to further feminist struggles’ 1987 25 *OHLJ* 485; MA Grant ‘The right not to sue: A First Amendment rationale for opting out of mandatory class actions’ (1996) 63 *UCLR* 239; S J Safranek ‘Do class action plaintiffs lose their constitutional rights?’ (1996) 22 *WLL* 263; J Welch ‘No room at the top: Interest group intervenors and Charter litigation in the Supreme Court of Canada’ (1985) 43 *UTFLR* 204 on the possibilities of and limits to the use of constitutional litigation.

¹⁶⁹ *Children’s Resource Centre* supra (n6) at paras 23-48; *see also* South African Law Commission op cit (n19) at paras 1,8-29.

*Others*¹⁷⁰ has provided further scope for such certifications to be challenged in the South African context.

The court in *Mukaddam* stated that in order to give effect to a litigant's right of access to courts, the rules of court provide litigants with procedural rights, and create certainty as to the procedure which must be followed in order to attain the relief sought.¹⁷¹ However, as in the case of the requirements regarding the certification of class actions for damages outside of constitutional matters, it is the court who must determine the procedure to be followed, in line with s173 of the Constitution. In this regard the court states that the guiding principle which underlines the section, namely 'the interests of justice,' must be the standard for certification of class actions,¹⁷² and the requirements laid down by the court in *Children's Resource Centre* must serve only as 'factors to be taken into account in determining where the interests of justice lie in a particular case.'¹⁷³

Given these recent developments, I do not think it is farfetched to think that attempts to certify class actions for damages caused by cartel conduct in South Africa will suffer similar challenges to those experienced by America.

Therefore, unless the class action procedure, including the requirements for certification, are clarified in legislation, or the Court Rules, the successful classification of a class action for damages cannot be predicted with any certainty by applicants, and their invocation may therefore be discouraged.

II. **The CLP**

(a) *Introduction*

Prior to the introduction of the CLP, which came into force on 6 February 2004 upon publication in the Government Gazette¹⁷⁴, few investigations and prosecutions of cartels occurred under the Act.¹⁷⁵ The reason for this is two-fold:

¹⁷⁰ (CCT 131/12) [2013] ZACC 23 ('*Mukaddam*')

¹⁷¹ *Mukaddam* supra (n170) at para 31

¹⁷² *Mukaddam* supra (n170) at para 34

¹⁷³ *Mukaddam* supra (n170) at para 35

¹⁷⁴ Notice 195 of 2004, Government Gazette No. 25963 of 6 February 2004

¹⁷⁵ C Lavoie 'South Africa's Corporate Leniency Policy: A Five-Year Review' (2009) 2, available at www.compcom.co.za/assets/Uploads/CLP-public-version-12052008.pdf, accessed on 04 May 2013.

- (1) The focus of the Commission ‘for the past five years [had] been the evaluation of mergers and acquisitions as well as enhancing public awareness of the Act and its implications’¹⁷⁶ rather than the detection, investigation, and prosecution of cartels.
- (2) The secretive nature of cartels makes them inherently difficult to detect, investigate, and prosecute.

However in 2003 the Commissioner of the Commission announced a shift of focus. In their annual report, that Commission stated that as part of a shift in focus, more attention and resources were to be dedicated to the prosecution of cartels.¹⁷⁷ Accordingly, the Commission developed, in line with the trend in other jurisdictions,¹⁷⁸ the CLP.¹⁷⁹ The CLP is a tool, assisting the Commission in prosecuting cartels,¹⁸⁰ by encouraging cartel members to provide the Commission with information, in exchange for *immunity* from prosecution¹⁸¹ and fines,¹⁸² provided that the conditions and requirements of the CLP are met.¹⁸³

Initially the CLP did not receive the response anticipated by the Commission. The Commission therefore published a discussion paper in 2007 in which areas of the CLP that were thought to be problematic, were reviewed. The responses to the discussion paper lead the Commission to amend the CLP, and the revised CLP was published in the in the government gazette on 23 May 2008.¹⁸⁴ The revised CLP now forms the focal point of the Commission’s approach to combating cartel conduct in significant sectors of the economy,¹⁸⁵ and has led to a huge increase in the number of cartels investigated, as well as the number of cartel case settlements.¹⁸⁶

¹⁷⁶ South African Competition Commission Report ‘Annual Report 2003-04’ (2004) 1, Competition Commission, Pretoria.

¹⁷⁷ See South African Competition Commission Report ‘Annual Report 2002-03’ (2003) 5-6, Competition Commission, Pretoria.

¹⁷⁸ Including in the European Union (EU), Canada, Australia, United Kingdom (UK) and United States of America (USA)

¹⁷⁹ South African Competition Commission op cit (n176)

¹⁸⁰ Under section 4(1)(b) of the Act.

¹⁸¹ South African Competition Commission op cit (n3) at para 2.5

¹⁸² C Lavoie op cit (n175) 2

¹⁸³ South African Competition Commission op cit (n3) at para 3.1

¹⁸⁴ O Pillay ‘Corporate Leniency - Seeking Refuge From the Consequences of Cartel Activity’ (2013) 1, available at <http://www.bowman.co.za/eazines/Competition/Newsletters/CorporateLeniency.htm>, accessed on 04 May 2013.

¹⁸⁵ C Lavoie op cit (n175) 2

¹⁸⁶ South African Competition Commission and Competition Tribunal ‘Ten years of enforcement by the South African competition authorities Unleashing Rivalry’ (2009)

(b) Structure and concepts of the CLP

The CLP does not possess the force of law; it is a policy document issued by the Commission, and is only applicable in respect of alleged cartels.¹⁸⁷ The policy sets out the ‘benefits, procedure and requirements for co-operation with the Commission in exchange for immunity’¹⁸⁸ in an effort to induce cartel members to apply to the Commission for leniency.

Although it does not possess the force of law, the revised CLP has succeeded in establishing a transparent and predictable process, chiefly by removing the discretion of the Commission regarding the granting of immunity to applicants.¹⁸⁹ The effect hereof is that, provided the conditions and requirements of the CLP¹⁹⁰ are fulfilled, the Commission must grant the self-confessed cartel member immunity for their participation in cartel activity. The CLP therefore may not have the force of law, but compliance with its provisions is obligatory, rather than discretionary, and is therefore of similar effect.

The CLP is structured in such a way, that its conditions can be said to form four ‘guiding principles’.¹⁹¹ These guiding principles will now be analyzed in detail.

(i) First principle: ‘First to the door’

The CLP states that only the firm¹⁹² that is ‘first to the door’ will be granted immunity.¹⁹³ This principle is crucial to the functioning of the entire CLP. By granting immunity to only one firm, an extremely strong incentive for members to cease their participation in the cartel and seek immunity is created. A number of competition authorities in foreign jurisdictions, including the American competition authorities,

¹⁸⁷ South African Competition Commission op cit (n3) at para 5.1: ‘cartel refers to an agreement or concerted practice among competing firms or a decision by an association of firms, to coordinate their competitive behaviour, for instance through conduct such as price fixing, division or allocation of markets, and/or collusive tendering. This conduct typically constitutes a *per se* prohibition in terms of section 4(1)(b) of the Act.’

¹⁸⁸ South African Competition Commission op cit (n3) at para 2.6

¹⁸⁹ O Pillay op cit (n184) 2

¹⁹⁰ South African Competition Commission op cit (n3) at para 3.1

¹⁹¹ C Lavoie op cit (n175) 5-8

¹⁹² South African Competition Commission op cit (n3) at para 5.7: defines a “firm”, as including a person (natural or juristic), partnership, or trust.

¹⁹³ South African Competition Commission op cit (n3) at para 5.6

recognise this principle as an integral part of the functioning of their immunity provisions.¹⁹⁴

However, the ‘first to the door’ principle does not prevent other members from coming forward to confess their involvement in the cartel. The CLP alludes to the fact that the Commission may enter into other undertakings outside of the CLP, which may result in the reduction of a fine, a settlement agreement or a consent order in respect of cartel members who confess, but are not ‘first to the door’. The CLP does not provide for partial immunity (as is the trend in the European Union)¹⁹⁵ for such applicants. Instead the Commission may, on an *ad hoc* basis, grant an applicant a reduced fine (pending confirmation by the Tribunal), outside of the CLP.

The principle of only awarding immunity to the cartel member that is first to successfully apply for immunity in terms of the CLP, creates the opportunity to strike a necessary balance between attaining the cooperation crucial to the detection, investigation, and prosecution of cartels, and ensuring that the cartel members are sufficiently sanctioned for their breaches of the Act.

In my opinion this balance is only achievable, or at least best achieved, by strict adherence to the ‘first to the door approach.’ Providing the Commission with the authority to enter into agreements with applicants who are not first to the door as to a reduced fine, outside of the CLP, allows for a measure of flexibility in the approach the Commission chooses to follow after cartel conduct has been detected.

By introducing flexibility, the transparency and predictability of the process is sacrificed. Given the importance of these two concepts to the effectiveness of the CLP, such a sacrifice is not justified. The introduction of partial immunity, as well as the use of reduced fines should be avoided. They dilute the effectiveness of this principle, by reducing the incentive of members to be the first to apply to the Commission, as well as the severity of the sanctions.¹⁹⁶

¹⁹⁴e.g. U.S Department of Justice op cit (n29).

¹⁹⁵ See European Commission ‘Commission Notice on Immunity from fines and reduction of fines in cartel cases’ (2006) OJ C 298 17-22 at points 23 to 30: where a mechanism for granting a reduction of fines for second and third applicants is set out.

¹⁹⁶ In *Children’s Resource Centre* the Commission imposed a settlement fine of 5.6% of Tiger’s effective turnover. However they imposed a much higher settlement fine of 6.7% of affected turnover on Foodcorp, due to their delay in cooperation. Such flexibility in approach to monetary sanctioning should be avoided.

Furthermore, the introduction of the common law class action has introduced the risk of civil liability, even in cases where parties have successfully been the ‘first to the door’, and have been granted immunity in terms of the CLP.¹⁹⁷ This not only dilutes the incentive to be ‘first to the door’ but also affects the transparency and predictability of the process, and is unacceptable, for the same reasons mentioned above.

(ii) *Second principle: Admission of contravention of Act*

The admission requirement for the granting of immunity to an applicant in the CLP seems to require that the applicant must confess to his participation, or suspected participation in the cartel activity.¹⁹⁸ But whether the applicant has to confess simply to his participation, or to an actual contravention of s4(1)(b) of the Act is uncertain.

Certain academics are of the opinion that it is implicit that immunity in terms of the CLP will be granted only to those who confess to a contravention of the Act.¹⁹⁹ Their argument is that if the applicant does not admit to a contravention of the Act, then the purpose of granting immunity, namely to facilitate the investigation and prosecution of the other cartel members, would be defeated. A number of foreign jurisdictions share this view.²⁰⁰ I do not share this view for the following reasons:

- (1) Until such time as the alleged cartel members are found guilty of a contravention of the Act by the Competition Tribunal and/or the Competition Appeal Court, no contravention of s4(1)(b) of the Act has occurred. Accordingly, at the stage when a firm needs to make such a ‘confession’ they can only confess to having participated in conduct which *may, but may not*, amount to a contravention of s4(1)(b) of the Act.

¹⁹⁷ *Children’s Resource Centre supra* (n6) at para 75

¹⁹⁸ South African Competition Commission op cit (n3) at para 3.5, 5.6

¹⁹⁹ See C Lavoie op cit (n175) 6.

²⁰⁰ In the United Kingdom, the Office for Fair Trade’s adopted CLP requires that the applicant accepts that his conduct constitutes an infringement of Competition rules, in order for them to be granted leniency. In addition, leniency is conditional on the applicant ‘continuing to accept that the reported cartel activity infringed’ the relevant competition provisions (U.K. Office of Fair Trading Consultation Paper ‘Leniency and no-action, OFT guidance note on the handling of applications’ (OFT 803, December 2008) 74, 77, available at http://www.offt.gov.uk/shared_offt/consultations/offt803con.pdf, accessed on 18 July 2013.). Similarly, in America, the admission of participation in conduct which constitutes a breach of the Sherman Act is necessary in order to obtain leniency (Hammond, SD Frequently Asked Questions Regarding The Antitrust Division’s Leniency Program and Model Leniency Letters (2008) 6, available at <http://www.justice.gov/atr/public/criminal/239583.pdf>, accessed on 18 July 2013.). However, I am still of the opinion that in the South African context, admission to a breach of the Act should not be required in order to be granted leniency.

- (2) The purpose of granting leniency is in no way defeated if an applicant only confesses to their participation in the activities of the alleged cartel. The purpose is still fulfilled, so long as the applicant fully cooperates with the Commission, and I fail to see how the extent of the applicant's confession affects this. The granting of conditional immunity will only be made upon the satisfaction of all the requirements of the CLP, which provide sufficient protection against any abuse of the CLP process.
- (3) Such an admission of guilt could form a cause of action, or at least a *prima facie* cause of action, based on which a common law class action could be instituted. This cannot be so, for it alludes to the possibility of instituting a class action for damages, caused by cartel conduct, against a party who has not been found guilty of a cartel conduct in terms the Act, and may never be found to be in contravention thereof.

Thus given the anomalies to which the above approach leads, as well as the cumulative nature of the requirements of the CLP, there is no need to follow such a stringent interpretation of this requirement. I therefore submit that, for the proper functioning of the CLP, the admission principle's requirement need only be interpreted as requiring the applicant to admit to his participation in the alleged cartel conduct.

(iii) *Third principle: Cartel activity covered by leniency*

The CLP is applicable in respect of any alleged cartel conduct, which usually materialises in the form of a s4(1)(b) *per se* prohibition.²⁰¹ However, an application for leniency appears to be subject to certain time restrictions. The CLP provides that an application for leniency can occur either:²⁰²

- (1) Before the Commission is aware of the cartel activity;
- (2) After the Commission become aware of the cartel activity, but they have too little information, and have not instituted an investigation; or
- (3) While the Commission's investigation is pending, or instituted, but the Commission is of the opinion that they do not have sufficient evidence to prosecute the members of the alleged cartel.

²⁰¹ South African Competition Commission op cit (n3) at para 5.1

²⁰² South African Competition Commission op cit (n3) at para 5.5

This approach is in line with the observations made by Hammond with regards to the Second pillar. By allowing applications for leniency to occur at any time, the perceived threat of detection is maintained at all times.

Furthermore, the CLP does not expressly distinguish between leniency applications (as America does)²⁰³ based on whether they were submitted prior to the Commission launching an investigation or at a later stage. So long as the application made fits into one of the three abovementioned scenarios, the treatment of the applicant, and the application, theoretically remains the same. By treating all applications for leniency the same, the transparency and predictability of the process, as well as the perceived threat of detection, is maintained throughout.

In practice the three scenarios do act as a funnelling instrument though, narrowing the gap into which an application must fit. The further into the process of detection, investigation and prosecution the application takes place, the more circumspection the Commission will employ, and the more valuable the contribution of the applicant needs to be, if their application for immunity is to be successful. This prevents against abuse of the CLP.

(iv) *Fourth principle: Immunity*

There are three forms of immunity (Conditional, Total, and No immunity) awarded in terms of the CLP. ‘Conditional Immunity’²⁰⁴ is granted to an applicant at the initial stage of the application, by the Commission. Conditional Immunity can be revoked at any time by the Commission, but only if ‘at any stage, the applicant does not co-operate or fails to fulfil any other condition or requirement set out in the CLP.’²⁰⁵ Therefore the Commission does not have discretion to revoke ‘Conditional Immunity’, only to decline to revoke it.

Immunity remains conditional until such time as the Competition Tribunal or the Competition Appeal Court has made a final decision in respect of the alleged cartel.²⁰⁶ Thereafter, ‘the applicant for immunity under the CLP *will qualify* for [Total]

²⁰³ U.S. Department of Justice op cit (n29) para A-B: a distinction is drawn between leniency applications before, and after, an investigation has begun.

²⁰⁴ South African Competition Commission op cit (n3) at para 9.1.1

²⁰⁵ South African Competition Commission op cit (n3) at para 9.1.1.3, 10.1

²⁰⁶ South African Competition Commission op cit (n3) at para 9.1.1

immunity provided it meets the following conditions and requirements [of the CLP].²⁰⁷ (*Own emphasis*)

It is therefore clear that if the requirements and conditions under the CLP are met, the Commission *must* grant the applicant Total Immunity.²⁰⁸ No equitable discretion is afforded to the Commission, Tribunal or Appeal Court in such an instance. However, if the applicant fails to meet the requirements and conditions for immunity under the CLP, ‘No Immunity’ will be granted.²⁰⁹

Once Total Immunity is granted, it cannot be revoked. However, the boundaries of the protection offered by Total Immunity to a successful CLP applicant are not without limits. Currently, Total Immunity will not protect the successful applicant from civil liability²¹⁰ for damages resulting from their participation in the cartel conduct which breaches the provisions of the Act²¹¹ (Such a claim for damages is a follow-on claim). Furthermore, the damage suffered as a result of a *prohibited practice* is classified as pure economic loss.²¹²

The importance of this classification becomes evident when determining whether a valid delictual claim for damages exists. For a valid delictual claim for damages to exist, far more is required than the claimant simply stating that they have suffered a loss as a result of the conduct of another. The claimant must prove, on a balance of probabilities, that all of the elements of the delict in question are present. And in the case of a claim for pure economic loss, it is required that the claimant seeking to claim damages for pure economic loss establishes that the person who caused the harm suffered, was under a legal duty not to cause such harm towards him, and therefore that their failure to do so is ‘wrongful in accordance with the legal convictions of the community’.²¹³

²⁰⁷ South African Competition Commission op cit (n3) at para 10.1

²⁰⁸ South African Competition Commission op cit (n3) at para 9.1.2

²⁰⁹ South African Competition Commission op cit (n3) at para 9.1.3

²¹⁰ A right to bring a civil claim for damages arising from a prohibited practice comes into existence on the date that the Tribunal made a determination in respect of a matter that affects that person, or in case of an appeal, on the date that the appeal process in respect of that matter is concluded (see s.65 (9) of the Act).

²¹¹ South African Competition Commission op cit (n3) at para 5.9

²¹² *Children’s Resource Centre* supra (n6) at para 71

²¹³ *Children’s Resource Centre* supra (n6) at para 71; see also *Minister of Safety and Security v Van Duivenboden* 2002 (6) SA 431 (SCA) at para 21; *Telematrix (Pty) Ltd t/a Matrix Vehicle Tracking v Advertising Standards Authority* SA 2006 (1) SA 461 (SCA) at paras 12-16; *Trustees, Two Oceans Aquarium Trust v Kantey & Templer (Pty) Ltd* 2006 (3) SA 138 (SCA) at paras 10-12.

The wrongfulness enquiry is extremely complex when dealing with delictual damages for pure economic loss.²¹⁴ This is due to the fact that there is no presumption of wrongfulness. Further considerations of public and legal policy dictate whether a party should be held legally liable for the loss resulting from the cartel conduct.²¹⁵ The causing of pure economic loss will only be wrongful where a legal duty to prevent such a loss occurring is proven to have been imposed on the party who caused the loss.

The SCA in *Children's Resource Centre* makes it clear that for purposes of a damages claim in terms of the Act, the prohibition of cartel conduct alone, does not establish a legal duty not to cause pure economic loss:

‘It would be a startling departure from principles that have been recognised as compatible with our new constitutional order, for liability to compensate for loss or damage flowing from a prohibited practice to exist in the absence of any duty to prevent such loss. It would eliminate one of the basic principles by which our law prevents liability for acts causing damage from being extended beyond acceptable limits.’²¹⁶

O'Reagan, with reference to case law, concludes that there are two possible sources of such a duty not to prevent economic loss in the context of the breach of a statutory obligation:

‘An express statutory provision providing for damages will put the matter beyond doubt, but where there is no express provision of this sort, the question is not one of statutory interpretation alone. As the Supreme Court of Appeal stated in *Olitzki*,²¹⁷ ‘it depends less on the application of formulaic approaches to statutory construction than on a broad assessment by the Court whether it is just and reasonable that a civil claim for damages should be accorded.’²¹⁸

In my opinion Section 65 of the Act imposes an express statutory duty not to cause economic loss to another. Section 65 prescribes that a person who has suffered

²¹⁴ *Fourway Haulage SA (Pty) Ltd v South African National Roads Agency Ltd* 2009 (2) SA 150 (SCA) at paras 12-28

²¹⁵ *Cape Empowerment Trust Ltd v Fisher Hoffman Sithole* (200/11) [2013] ZASCA 16 (20 March 2013) at para 21

²¹⁶ *Children's Resource Centre* supra (n6) at para 71; see also *Rail Commuters Action Group & others v Transnet Ltd t/a Metrorail & others* 2005 (2) SA 359 (CC) at para 15; *Steenkamp NO v Provincial Tender Board, Eastern Cape* 2007 (3) SA 121 (CC) at paras 37-47 and 69-70

²¹⁷ *Olitzki Property Holdings v State Tender Board and Another* 2001 (3) SA 1247(SCA) at para 12

²¹⁸ K O' Reagan 'Fashioning constitutional remedies in South Africa: some reflections' (2011) 24 *SABARLJ* at 43.

loss or damage as the result of a prohibited practice may claim damages arising from such prohibited practice, subject to the following requirements:

- (1) In terms of s65(9) of the Act, only once a guilty finding has been made against a successful CLP applicant could the right to institute a claim for damages, due to cartel conduct, possibly arise.
- (2) In terms of s65(6)(a) of the Act, the claimant must not have been awarded damages in a consent order confirmed in terms of s 49D(1) of the Act.
- (3) In terms of s65(6)(b) of the Act, the claimant must have filed with the Registrar or Clerk of the Court a notice from the Chairperson of the Competition Tribunal, or the Judge President of the Competition Appeal Court. This notice must *inter alia* certify:
 - (i) ...that the conduct constituting the basis for the action has been found to be a *prohibited practice* in terms of *this Act*;
 - (iii) setting out the section of *this Act* in terms of which the Tribunal or the Competition Appeal Court made its finding.²¹⁹

In the case of a class action claim, the notice must be filed at the certification stage of proceedings, in order to establish a '*cause of action raising a triable issue*',²²⁰ as required by the certification requirements.

It would thus seem logical that by expressly providing for damages for pure economic loss, s65 of the Act not only creates a statutory duty not to cause pure economic loss via a *prohibited practice*, but also lays down the requirements for satisfying the wrongfulness enquiry when claiming damages for pure economic loss suffered as a result of a *prohibited practice*.

Consequently, the institution of a class action claim for damages against an applicant who has been granted Total Immunity should not succeed, unless the requirements of s65 of the Act have been satisfied, otherwise the claim will fail as a result of not fulfilling the wrongfulness requirement.

Furthermore, by requiring a cause of action that is sourced in legislation, a manner of protection is afforded to applicants who have been granted Total Immunity in terms of the CLP. This protection not only promotes the transparency, predictability,

²¹⁹ Section 65(6) of the Act.

²²⁰ *Children's Resource Centre* supra (n6) at para 35

and confidence of applicants in the CLP process, but also ensures that only those class actions which advance the interests of justice are certified.²²¹

However, *Premier Foods (Proprietary) Ltd v Manojm N.O and Others*²²² makes it clear that an applicant who has been granted Total Immunity should expect that the Tribunal will issue a s65(6)(b) notice to claimants for the purpose of commencing follow-on damages claims, in spite of the fact that no complaint against them was referred to the Tribunal for adjudication (eroding the protection offered by s65 of the Act). And what is of even greater concern is that *Children's Resource Centre* seems to suggest that a s65 notice is not required to institute a civil class action claim for damages (removing the protection offered by s65 of the Act completely).

In *Manojm N.O* the court held, based on their interpretation of s 27(c) of the Act, s58(1)(a)(v) of the Act, and paragraph 3.4 of the CLP, that the Tribunal may issue a s65(6)(b) notice to claimants for the purpose of commencing follow-on damages claims, in spite of the fact that no complaint against them was referred to the Tribunal for adjudication. Given the American experience, where the likelihood and severity of follow-on damages play a vital role in a cartel member's decision to apply for leniency, the decision of the court in *Manojm N.O* is likely to have a deterrent effect on a cartel member's decision to apply for leniency, and must, in the eyes of the Commission, be viewed as a 'lost opportunity to encourage leniency applicants...'²²³

The SCA in *Children's Resource Centre* had no apparent objections to a class action being instituted against *Premier foods* in spite of the fact that no s65 notice had been filed against *Premier* by the applicants. Furthermore, no such certificate has been, nor can be (in the opinion of the *Premier*), issued by the Competition Tribunal or Competition appeal court in respect of *Premier*, as the case against *Premier* has not

²²¹ 'In the interests of justice' has been identified by the Constitutional Court, in *Mukaddam* supra (n171) at para38, as the standard of certification for class actions. Therefore the compliance with provisions of the Act, such as s65, which serve to ensure that class actions are advanced only in circumstances where it is in the interests of justice to do so, should be seen as a prerequisite for certification.

²²² [2013] ZAGPPHC 236 ('*Manojm N.O*')

²²³ P Smith and A Swan '*Quantifying cartel damages: South African policy and recent developments*' (2013) 9 Paper presented at the Seventh Annual Conference on Competition Law, Economics & Policy at Sandton Sun, Johannesburg 05 September 2013, available at <http://www.compcom.co.za/assets/Uploads/events/Seventh-Annual-Conference-on-Competition-Law-Economics-Policy/Parallel-2A/130821-Smith-and-Swan-Quantification-of-cartel-damages.pdf> accessed 10 September 2013.

been referred to the tribunal, and they can therefore not find Premier's conduct to be a *prohibited practice* in terms of the Act.

Instead the SCA seems to make the startling departure which they earlier warned against. By allowing the appellants claim against *Premier* to proceed simply because the claim was advanced on a 'potentially plausible basis'²²⁴ the SCA seems to have ignored the requirements of the Act. Given the express requirements set out in s65 of the Act, where no claim has been advanced that *prima facie*, or at least plausibly satisfies the requirements of the Act, it cannot be said that a civil claim for damages should proceed.

The court skirts around these requirements by using general statements of fact and presumptions. The court was of the opinion that given the fact that *Premier* was involved in conduct that has a tendency to artificially inflate the price of bread, the consumers would have suffered pure economic loss. In the absence of evidence from the respondents, demonstrating the falsity of that line of reasoning, the appellants' case on the facts could not be rejected by the court at that stage, as the appellants had shown that a 'potentially viable claim for delictual damages vested in a class of consumers.'²²⁵

These statements, in my opinion, do not anchor the claimants' claim within the requirements of section 65, and therefore the claim for delictual damages should have been dismissed on the facts.

The qualification to the granting of Total Immunity, which allows for the institution of claims for civil damages for pure economic loss, provided the elements of a delict can be proven, thus has far-reaching consequences for the effective operation of the CLP. This is particularly so in light of the decisions of the courts in *Children's Resource Centre*, and *Manoim N.O.*, which have created an element of uncertainty as to the requirement of wrongfulness for the institution of civil class action for damages in situations where Total Immunity has been granted. The uncertainty surrounding this requirement, translates into uncertainty in the requirements for certification, and therefore clouds the perceived transparency and predictability of the process.

Furthermore, the qualification and uncertainty, when viewed in conjunction with the admission requirement in the '*Second Principle*', conceivably 'opens the door' for

²²⁴ *Children's Resource Centre* supra (n6) at para 75

²²⁵ *Children's Resource Centre* supra (n6) at para 88

the institution of a common law class action claim for damages not only against a member found guilty of cartel conduct by the Tribunal, but also against a member who has been granted Total Immunity from prosecution, even in spite of the want for a source for legal duty.

The result of allowing civil sanctions to be imposed on firms that have been granted immunity is that a strong disincentive to apply for leniency is created. This disincentive will grow stronger if, as in the American experience, the number of class actions, as well as the amounts recovered through private actions for damages, increases, and the Total Immunity provided by the CLP does not provide successful applicants with complete reprieve from prosecution and monetary sanctions.

(c) Extent and success of the use of the CLP

The introduction of the CLP in 2004 did not have the success in the fight against cartel conduct that the competition authorities had initially hoped for. In fact the Commission only received fourteen CLP applications in its first three years of operation. This prompted a review of the CLP.²²⁶ In reviewing the CLP the Commission drew from the feedback of stakeholders, as well as their own research into the international best practice in fighting cartel conduct.²²⁷ In particular the Commission identified six points of concern that needed to be addressed:²²⁸

- (1) The CLP was not provided for in the Act or in the Rules for the Conduct of Proceedings in the Commission. It was therefore uncertain as to what the legal nature, and binding force of the CLP was. It was suggested that the Act be amended to specifically make provision for the CLP.
- (2) The wording of the CLP conceivably afforded the Commission an unfettered discretion in deciding whether or not they would grant an applicant immunity, despite their compliance with the conditions and requirements of the CLP. It was submitted that such discretion should not

²²⁶ South African Competition Commission ‘Corporate Leniency Review Discussion Paper’ (2007) 3

²²⁷ South African Competition Commission op cit (n226) 3: one of the main source documents considered by the Commission is the Anti-cartel Enforcement Manual of the International Competition Network, of which the Commission is a member. The commission also took cognisance of the experiences of the European Commission, Canada, and Australia, regarding the review of their leniency policies.

²²⁸ South African Competition Commission op cit (n226) 4-7

be afforded, and that any uncertainty in this regard be removed through amendment to the CLP.

- (3) Applicants were required to make written applications. It was proposed that oral or paperless submissions be permitted to alleviate applicants' fear that their submissions might be used against them in civil litigation.
- (4) Firms who instigated or coerced firms to join (or remain in) the cartel were excluded from being granted immunity. It was recommended that this qualification be removed in order to increase anxiety and distrust among cartel members.
- (5) The CLP did not make provision for 'markers' to reserve an applicant's place whilst they compiled necessary information. It was recommended that the CLP be amended to provide for this.
- (6) It was unclear to whom applicants should apply for leniency. It is recommended that the Enforcement & Exemptions manager be contacted.

The revised CLP was subsequently published in the Government Gazette on 23 May 2008. The revised CLP addresses all the concerns with the previous CLP raised in the 2007 discussion paper, except those regarding the first point mentioned above. Therefore the CLP still does not enjoy the force of law. However, through consistent adherence to, and application of, the CLP the Commission seems to have settled any uncertainty created in the minds of applicants by its lack of force of law.²²⁹

Since the abovementioned reforms, the CLP has enjoyed far greater success. The reforms to the CLP have dramatically increased the risk (both perceived and actual) of cartel conduct being detected, and the fear amongst members of not being 'first to the door'.²³⁰ This destabilisation within cartels has led to an exponential increase (albeit a fluctuating one) in the number of leniency applications received by the Commission since the review. The Commission has received in excess of thirteen times the number of applications received prior to the revision.²³¹

Another contributing factor to the success of the CLP has been the shift in attitude shown by the Commission towards the prosecution of cartel conduct, and the punishment of

²²⁹ O Pillay op cit (n184) 2

²³⁰ See Appendix A, Figure 5: the number one driver of leniency applications for applicants in 2009 was the 'Fear that other cartel members are likely to apply first.'

²³¹ See Appendix A, Figure 4.

the participants thereto. The recent introduction of the Cartels Division,²³² increased number of cartel conduct prosecutions, as well as severely higher administrative penalties, has rendered any level of tolerance that may once have existed for firms found guilty of cartel conduct in terms of the Act, a thing of the past.²³³

The increasingly large administrative fines being handed out by the Commission to offenders, have not only shown that the Commission is willing to hit with a bigger ‘stick’, but have also provided the Commission with a juicier looking ‘carrot’ (namely the Total Immunity afforded by the CLP) to attract the cooperation of cartel members.

The CLP is a tool which functions on the basis of mutual benefit. On the one hand, it provides firms with the opportunity, no matter how deeply involved they are in the cartel’s conduct, to attain immunity and escape these increasingly large administrative fines. On the other, it gives the Commission the ability to detect, investigate, and prosecute cartels that would in all likelihood have gone undetected and therefore unpunished.

However, the introduction of the common law class action for damages threatens the balance between the maintenance of sufficiently severe and effective sanctioning in appropriate circumstances, and the provision of immunity to such sanctioning for cartel members ‘first to the door’. The CLP relies on this balance for its proper functioning. Therefore the efficient enforcement of the Act against cartel conduct is largely reliant on the maintenance of this balance. The possibility of class action claims for damages against a firm granted immunity in terms of the CLP, as discussed above, threatens to upset this balance.

Consequently, it is submitted that the possibility of initiating private class actions for damages against firms granted immunity in terms of the CLP, must be excluded by way of a statutory amendment to the Act.

²³² The Cartels division has a strict and focused mandate, aimed solely at detecting, investigating, and prosecuting cartels.

²³³ See Appendix A, Figure 6 and Figure 7: The largest fine imposed by the commission prior to the introduction of the revised CLP was R98 000 000 and constituted only 5.7 % of Tiger Brands’ annual affected turnover. This suggests that the Commission exercised a degree of tolerance towards firms guilty of cartel conduct. However, after the 2007/2008 financial year, the fines imposed have increased dramatically, both in value, and in percentage of annual affected turnover.

III. Effect of the Operation of Common Law Class Action on the effective Operation of the Competition Commission's 'Corporate Leniency Policy'

(a) *Introduction*

As submitted above, the protection afforded by the immunity provisions of the CLP, in its current form, does not extend to protection from civil claims.²³⁴ As a result, the introduction of the common law class action (albeit unintentionally) has resulted in the erosion of the three pillars identified by Hammond as forming the foundation for an effective CLP, and therefore has reduced the effectiveness of the CLP. Given the importance of the effective and efficient functioning of the CLP in the enforcement of the Act, this is not a tolerable result, and corrective action is necessary. By excluding the possibility of instituting private action for damages against a party granted Total Immunity in terms of the CLP, I believe that the introduction of a class action for damages can have a hugely positive effect on the enforcement of the Act against cartels.

As submitted earlier, Hammond identified three pillars that must first be in place before any jurisdiction's CLP can be enforced efficiently, and consequently, before any jurisdiction's antitrust law can be enforced effectively. As a brief reminder, Hammond's three pillars are:²³⁵

- (1) The CLP must be transparent and predictable, so that cartel members can accurately predict how they will be treated if they choose to self-report, or fail to do so.
- (2) Cartel members must perceive the threat of detection to be high, if they do not self-report.
- (3) The antitrust law must provide severe sanctions for cartel members who do not self-report, and complete reprieve from such sanctions for those who are first to self-report.

²³⁴South African Competition Commission op cit (n3) at para 5.9

²³⁵ SD Hammond op cit (n64) 4-5

In this chapter I will examine the effect that the introduction of the common law class action has had on these pillars, and therefore, the ability of the CLP to operate effectively. To aid in this examination, I will make use of a hypothetical case study, to illustrate the practical implications of the introduction of the common law class action, on the three pillars. The hypothetical case study will illustrate how each of the three pillars is affected, by examining how the decision making process of A (Pty) Ltd, a small firm with limited involvement in the cartel conduct in question, is affected by the introduction of the common law class action.

A (Pty) Ltd, B (Pty) Ltd, and C (Pty) Ltd are the sole producers of the 21 billion cigarettes consumed by South Africans annually. Each firm produces its own cigarettes, but they are packaged at, and distributed to the public by, a central facility (D (Pty) Ltd).

In 2012 B and C initiated cartel conduct, and coerced A to enter into agreement with them in terms of which they agreed to increase the price at which they sold cigarettes to D on a particular date. The production values are as follows:

	A(Pty) Ltd	B(Pty) Ltd	C(Pty) Ltd
Units produced	1 000 000 000	10 000 000 000	10 000 000 000
Competitive turnover	R 10 000 000	R 100 000 000	R 100 000 000
Collusive turnover	R 20 000 000	R 200 000 000	R 200 000 000
Maximum monetary sanction prior to the introduction of the common law class action			
If NOT granted Total Immunity: (Maximum Administrative fine)	R 200 000	R 20 000 000	R 20 000 000
If GRANTED Total Immunity: (Maximum Administrative fine)	R 0	R 0	R 0
Maximum monetary sanction after the introduction of the common law class action			
If NOT granted Total Immunity: (Maximum Administrative fine + Private damages)	R 200 000 + x	R 20 000 000 + x	R 20 000 000 + x
If GRANTED Total Immunity: (Maximum Administrative fine + Private damages)	R 0 + x	R 0 + x	R 0 + x

(b) *Prior to the introduction of the common law class action*

Prior to the introduction of the common law class action there has only been a single case where a private claim for damages was pursued for a breach of the Act.²³⁶ The effective operation of a CLP, as stated above, is largely dependent on the three pillars identified by Hammond. The effect of a lack of an effective means of instituting private action on these three pillars, as well as on the decision making process of a potential leniency applicant to apply for leniency or not, will now be examined.

(i) *Transparency and predictability*

Since the revised CLP was introduced in 2008, and prior to the introduction of the common law class action, the transparency and predictability of treatment of the program has increased dramatically. This has been achieved principally by making the granting of immunity automatic upon compliance with the requirements of the CLP.²³⁷ This, in combination with the absence of any threat of potentially facing (large) private actions for damages, has resulted in the number of leniency applications increasingly dramatically.²³⁸

Therefore, the trends experienced in the South African jurisdiction, as well as in the American jurisdiction, indicate that by enabling a cartel member to accurately predict how they will be treated, not only if they apply for leniency, but if they fail to do so, provides a strong driver to the cartel members to apply for leniency.

Importantly, due to the fact that private actions for damages essentially played no role in the enforcement of the Act at this time, the failure of the CLP or the Act to exclude the possibility of instituting a private action for damages had no effect on A's perception of the transparency and predictability of the program, and therefore his decision to apply for leniency.

²³⁶ In 2008 Nationwide Airlines pursued a claim for damages caused by South African Airways' abuse of dominance. However the claim was settled out of court, for an undisclosed amount.

²³⁷ South African Competition Commission op cit (n3) at para 3.1

²³⁸ See Appendix A Figure 4.

(ii) *Perception of detection*

According to Hammond, in order for a CLP to effectively destabilise a cartel, the threat of detection must be perceived to be imminent. Therefore A must perceive that the cartel activity in question will be detected by the authorities at any moment.

The transparency and predictability of the CLP process, as well as the sanctions imposed by authorities for cartel conduct, inform this element to a large degree in the South African context. Unlike the American jurisdiction, who make use of various other investigative tools,²³⁹ the South African authorities are almost entirely dependent on the perceived threat of detection created by the CLP itself, in order to induce cartel members to self-report.

The CLP achieves this perception of detection by maintaining a perceived level of transparency and predictability, and imposing large sanctions on those who fail to report. The combination of the pillars increases the perceived risk that other members will apply for leniency first, and therefore creates a perception of detection.

The success of this pillar as a driver for leniency applications is reflected by the number of applications for leniency received by the Commission in recent years.²⁴⁰ Firm A, given its perception that the level of detection is high (due to chiefly to the perceived risk of another cartel member applying for leniency first.), would be more easily induced into applying for leniency, for two reasons:

- (1) A's lower level of participation in the cartel means that A gains less from the cartel conduct, and therefore has less to lose by applying for leniency.
- (2) Without the presence of the threat of civil sanctioning, A can predict with certainty that if he applies for leniency, he is guaranteed of being granted Total Immunity (provided that he complies with the conditions and requirements of the CLP)²⁴¹ and that he will not face any sanctioning.

Therefore, as with the previous pillar, due to the fact that private actions for damages essentially played no role in the enforcement of the Act at this time, the failure of the CLP or the Act to exclude the possibility of instituting a private action

²³⁹ See Chapter 3 III (c)

²⁴⁰ See Figure 4: The perceived threat of detection ranked as the third highest driver of leniency applications prior to the introduction of the common law class action, in 2009; See also, Figure 5.

²⁴¹ South African Competition Commission *op cit* (n3) at para 3.1

for damages had no effect on firm A's perception of detection, and therefore their decision to apply for leniency.

(iii) *Criminal & Civil Sanctions and the possibility of immunity*

Unlike the American regime, the South African competition law regime does not at present provide for criminal sanctions for cartel conduct. Instead, the competition authorities rely on the imposition of monetary sanctions to enforce the prohibition in the Act, and to act as a deterrent to cartel conduct.

The Commission stated recently in their working paper, that in order for the CLP to be effective, administrative penalties must 'give force to the prohibition [of cartel conduct in the Act] and act as a deterrent, not only against re-offending (specific deterrence), but also against other conduct that has not been investigated (general deterrence).'²⁴² Furthermore, they must be as closely linked as possible to the amount of damage caused by the member in question.²⁴³ The Commission's opinion is thus, that effective enforcement of the CLP requires specific and general deterrence, and proportional sanctioning.²⁴⁴ I agree.

However, as illustrated by the American experience, the monetary sanctions, alone, that are enforced by authorities for cartel conduct, are insufficient. In America, they fail to disgorge a sufficient amount of the profits made by large cartel members for it to be said that they, alone, act as an effective deterrent (which is the primary goal of sanctions).²⁴⁵ The South African experience has been similar in this regard. Although there has been a significant increase in the quantum of administrative penalties granted, they simply do not constitute a sufficient proportion of the damage caused to constitute an effective deterrent to cartel conduct.²⁴⁶

Furthermore, there is a statutory limitation in s59 (2) of 10% of the firm's annual turnover. Therefore, there is a limit to the role that administrative fines can play in

²⁴² P Smith and A Swan op cit (n223)

²⁴³ TP Muzata, S Roberts and T Vilakazi, UJ Centre for Competition Economics (Working Paper) 'Penalties and settlements for cartels in South Africa seen through an economic lens' (2012) 8 available at

<http://www.uj.ac.za/EN/Faculties/ecofin/economics/research/cce/Documents/CCE%20Working%20Paper%2009-2012%20Penalties%20and%20Settlement%20for%20Cartels.pdf>, accessed on 23 August 2013.

²⁴⁴ P Smith and A Swan op cit (n223) 13

²⁴⁵ See Chapter 3 III (d).

²⁴⁶ See Appendix A figure 6.

creating deterrent and proportional sanctions. Without a class action for damages, sanctions may be severe, but they do enforce the prohibition of cartel conduct in the Act, or act as deterrent.

In the hypothetical case study, the lack of a class action for damages causes A's incentive to apply for leniency to decrease in a cyclical manner.

- (1) A maximum fine of R200 000 can be imposed on them, which is relatively little when compared with their turnover of R20 000 000.
- (2) The other members' deeper involvement in the cartel conduct, in the absence of sufficiently deterrent sanctions (a maximum fine of R20 000 000 can be imposed on firm B, and C), makes it more likely for them to perceive prosecution, and administrative penalties as a cost of doing business, rather than a deterrent to participate in the cartel conduct, or an incentive to apply for leniency (as their profit from the collusive conduct amounts to R200 000 000 each), and they are therefore likely to simply continue such conduct.²⁴⁷ In light of thereof, A's perception of detection is likely to decrease, and A is therefore further disincentivised from applying for leniency, which further disincentivises B and C to apply for leniency, and so on.

(iv) *Conclusion*

All things considered, it is submitted that the destabilisation caused by the CLP, in the absence of private enforcement mechanisms, would be sufficient to cause A to apply for leniency in terms of the CLP before the other cartel members considered doing so. However, if the incentive of the other cartel members to self-report could be increased, such self-reporting would be even more likely, and take place much sooner.

The position outlined above is reflective of Hammond's three pillars, and gives rise to a fair result in the event of A applying for leniency. The party least involved in the conduct is immune from prosecution and sanctioning. Both the result and the policy itself are subsequently easily justifiable on public policy grounds.²⁴⁸

²⁴⁷ See Chapter 3 III (d).

²⁴⁸ *In casu*, a maximum fine of 10 % of affected annual turnover, or R1 000 000, could be levied against A, whilst fines of R 20 000 000 could be levied against both B & C. The "loss" of R1 000 000 for not fining A in return for information that leads to the possibility of a return of R40 000 000 in fines, is easily justifiable on the basis of public policy, or a similar argument.

However the position does not wholly reflect the foundation necessary to allow the Act to truly be effectively enforced. Primarily this is due to the inadequacy of the transparency of the process, and the inadequacy of the deterrent effect of the monetary sanctions imposed on cartel members who fail to self-report.

Consequently, it is evident that there exists a need for reform, and the introduction of an effective private enforcement mechanism, to complement the public enforcement mechanism, and ensure that the monetary sanctions imposed on cartel members who fail to self-report act as deterrents to cartel conduct.

(c) After the introduction of the common law class action

The introduction of the common law class action means that A is now faced with a further factor to consider, namely the possibility of facing a further monetary sanction, namely a private class action for damages (x), despite being granted Total Immunity in terms of the CLP. The fourth *Guiding Principle* of the CLP states that Total Immunity will not protect the successful applicant against criminal or civil liability which results from their participation in the cartel conduct which breaches the provisions of the Act. This is likely to create a number of problems regarding the enforcement of the CLP.

The recentness of the introduction of the common law class action for damages in the context of cartel cases, in South African law, means that the full effect of its introduction has yet to be experienced. However, it is the opinion of the Commission that '[s]imilar actions seem likely to feature more prominently in future...'²⁴⁹ This view is in line with trend experienced in America following the introduction by the DOJ of their revised CLP in 1993.²⁵⁰

I therefore submit that as the use of such class actions for damages becomes more prominent, the problems with the enforcement of the CLP referred to above will become more and more prevalent, and have a far reaching, and negative, impact on the effectiveness of the CLP as a tool for combating cartel conduct.

²⁴⁹ P Smith and A Swan op cit (n223) 14

²⁵⁰ See Chapter 3 III (a).

(i) *Transparency and predictability*

The failure to exclude the common law class actions application from operating against a successful leniency applicant has resulted in its introduction causing an erosion of the transparency and predictability of the process.

As previously submitted, class action claims for damages, for damage caused by cartel conduct, is a follow-on claim, which in terms of the Act, must be preceded by a breach of the Act, and compliance with s65 of the Act. However, the SCA in *Children's Resource Centre* alluded to the fact that in order to prove delictual damages, s65 of the Act need not be complied with. The court was content to allow the wrongfulness requirement to be satisfied, without the express statutory requirement for wrongfulness in this context (set out in s65 of the Act) being satisfied.

When the fourth *Guiding Principle* of the CLP, the accompanying relaxed approach to the requirements of the wrongfulness enquiry of the SCA, and the second *Guiding Principle* of the CLP (which requires that the applicant must confess to his participation, or suspected participation in the cartel activity)²⁵¹ are read together, two important and detrimental consequences arise for a successful leniency applicant, which have a negative effect on a cartel member's decision-making process of whether to self-report, and therefore threatens the effective enforcement of the CLP:

- (1) First, it becomes apparent that there exists the very real possibility that an applicant who has been granted Total Immunity could be faced with a class action claim for damages from large, or even multiple classes.
- (2) Secondly, the 'confession' given in their leniency application, alone, could satisfy the wrongfulness enquiry. Thus a class action for damages could succeed with a transgression of the Act neither occurring, nor being required to occur. Such an approach would leave the successful CLP applicant very little, if any, scope to defend against a class action for damages, despite the claim being based on nothing more than the confession, made by an applicant in the process of their application, to partaking in a *prohibited practice*.

This position is not satisfactory. Transparency and predictability of the process must be maintained if the CLP is to be enforced effectively. Instead the current position

²⁵¹ South African Competition Commission op cit (n3) at para 3.5, 5.6

has introduced an element of uncertainty as to how a successful leniency applicant will be treated, and the monetary sanctions that they will face ($R_0 + x$), despite being granted Total Immunity. Such presence of such uncertainties erodes this pillar.

(ii) *Perception of detection*

As submitted above, the failure to exclude the common law class actions application from operating against a successful leniency applicant has resulted in a lack of transparency and predictability of the CLP process, as successful applicants now potentially face civil damages claims with a monetary value (x) that is unknown to the cartel member at the time of deciding whether to apply for leniency or not. One of the effects hereof, is that cartel members will most likely be less inclined to apply for leniency, and the perception of detection is thus likely to decrease.

In our hypothetical case study the following would be reflected: all three of the firms will be less likely to apply for leniency due to the decreased threat of imminent detection, and the increased opportunity cost of applying for leniency for all firms (due to the addition of the monetary sanction ' x ', which firms will be faced with regardless of whether they are granted Total Immunity or not). As submitted above, when the threat of imminent detection through the self-reporting of other cartel members decreases, so too does the perceived threat of detection. A's incentive to self-report is thus exponentially decreased by a combination of two factors:

- (1) The probability that they will face a class action claim for damages.
- (2) A, B and C's incentive to apply for leniency, and thus their perception of an imminent threat of detection, decreases in a cyclical manner. The deeper involvement of firms B and C, as submitted above, results in B and C attaining much higher profits from the cartel conduct, and causes A to be more likely to self-report. However, it now also means that they are likely to face large class action cases for damages, and are therefore even less likely to self-report. This in turn decreases A's perception of detection, causing it to be less-likely to self-report. This results in B and C's perception of detection decreasing, and so on.

(iii) *Criminal & Civil Sanctions and the possibility of immunity*

As submitted above,²⁵² administrative penalties alone are not sufficient for monetary sanctioning to act as an effective manner to enforce the prohibition on cartel conduct in the Act, as well as a deterrent to cartel conduct. But, when the imposition of administrative penalties is combined with private class actions for damages, as in America, monetary sanctions have proven to be effective in both the enforcement of antitrust legislation, as well as the deterrence of cartel conduct.²⁵³

Although South Africa has not yet experienced the effect of the class action claims and settlements, the American experience is evidence of the effectiveness of these actions as a complementary sanction, which in fact enables monetary sanctions to perform this role envisaged above, as an effective enforcement mechanism of the prohibition in the Act, as well as a successful deterrent to cartel conduct.²⁵⁴

Therefore, the introduction of the common law class action provides the *potential* for monetary sanctions to effectively enforce the prohibition in the Act, as well as deter cartel conduct. By functioning as an extension of the public sanctioning of cartel conduct, severely increasing the potential monetary sanctions that a cartel member who failed to self-report would face, the threat of facing a civil claim for damages increases the size of the ‘stick’ with which the competition authorities can fight cartel conduct.

However, as was noted in Chapter 3, in order to be in a position to use the ‘stick’, a ‘carrot’ is needed to enable the competition authorities to effectively detect and investigate cartel conduct, which will then put them in a position to use their ‘stick’, and sanction cartel members for their participation in such conduct. In America this carrot is provided by their CLP, and more specifically, the granting to a successful leniency applicant of protection against civil claims for damages.²⁵⁵ But in the South African system, no such protection is granted to a successful leniency applicant who has been granted Total Immunity in terms of the CLP.²⁵⁶

²⁵² See Chapter 4 III (b) (iii).

²⁵³ See Chapter 3 III (d); see also Appendix A Figures 3, 4, and 5.

²⁵⁴ See Chapter 3 III (d).

²⁵⁵ U.S. Department of Justice op cit (n29) para A-C
South African Competition Commission op cit (n3) at para 5.9

Therefore although the introduction of the common law class action has provided the competition authorities with monetary sanctions that are a potentially effective method to enforce the provisions of the Act, and deter cartel conduct, the failure to exclude the possibility of instituting a private action for damages against a successful leniency applicant means that these monetary sanctions act as incentives to refrain from applying for leniency, rather than inducing firms to apply for leniency.

(iv) Conclusion

The failure to exclude the possibility of instituting a private action for damages against a successful leniency applicant has resulted in the introduction of the common law class action operating (albeit unintentionally) to reduce the destabilisation effect of the CLP on cartels. The CLP relies on destabilising cartel structures in order to function as an effective public enforcement tool of the Act. By allowing class actions to be instituted against successful applicants, the CLP is no longer able to sufficiently destabilise cartels. As was discussed earlier, in order for the private enforcement of the Act to supplement the public enforcement of the Act, the Total Immunity granted by the Act must provide the successful applicant with protection against private actions for damages resulting from the cartel conduct in question.

By not providing for such protection in the Act, the threat of facing a class action for damages acts as a large disincentive to applying for leniency, and consequently the CLP is not able to create the level of fear, distrust and confusion necessary to induce members to apply for leniency, as the threat of facing a potential class action for damages outweighs the benefits of applying for leniency.

The incentive for firms, particularly those that are not so deeply involved in the cartel conduct has therefore begun to lean towards either shying away from the cartel conduct they are involved in (but not alerting authorities to such conduct), or simply continuing to participate in the cartel conduct as they know that it is in the other cartel members' own interests to do the same. This alignment of incentive among cartel members reflects an ineffective CLP, lacking the necessary perceived threat of detection and severe sanctions (Hammond's Second and third pillars of an effective CLP).

Therefore, the introduction of the common law class action results in A's incentive to apply for leniency being dramatically reduced in two ways:

- (1) The cost of applying for leniency is not only the loss in turnover which A receives from the cartel conduct (R 10 000 000) but also the indeterminate cost of a potentially vast private class action for damages (x).
- (2) For the same reasons as above, the incentives for the other members to apply for leniency are proportionally reduced as not only is the loss of turnover they will suffer much larger than A's (R 100 000 000), but they too are faced with the indeterminate cost of a potentially vast private class action for damages (x) which is likely to be even larger civil class action than A. The other members are therefore less likely to apply for leniency, which in turn makes A less likely to apply for leniency, and so on.

Therefore the effect of allowing the common law class action to operate against a firm, regardless of whether they have been granted immunity or not, is to quash the three pillars referred to above, rendering the most important tool in the public enforcement of the Act against Cartel conduct ineffective. This is an unacceptable result.

CHAPTER 5 THE NEED FOR REFORM

I. Introduction

The introduction of the common law class action by way of the court's decision in *Children's Resource Centre*, has resulted in the judiciary acting in defiance of the express recommendation of the Law Commission, who stated in their Report that in their opinion (which I share) the development of a class action outside of constitutional matters should not be left to the courts due to the propensity for the various courts (and even individual judges)²⁵⁷ to follow approaches in relation to the concept of a class action which lack uniformity and consistency.²⁵⁸

²⁵⁷ see *Contralesa v Minister for Local Government, Eastern Cape* 1996 2 SA 898 (TkSC) at 903 A, where Pickering J held that representative action was not possible outside of the scope s 7(4) of the Interim Constitution ; see also *Wildlife Society v Minister of Environmental Affairs and Tourism* 1996 3 SA 1095 (TkSC) at 1105 A- B, where the same judge stated (albeit *obiter*) that where s7(4) of the Interim Constitution was not applicable, but there was a statutory obligation to protect the public interest:, in such circumstances representative action in terms of the common law may be possible.

²⁵⁸ South African Law Commission op cit (n19) 15-20

Furthermore, the introduction of the common law class action, while failing to exclude the possibility of instituting a private action for damages against a successful leniency applicant, has resulted in the introduction of the common law class action operating (albeit unintentionally) to reduce the ‘effectiveness of cartel enforcement through altering the incentives to apply for leniency.’²⁵⁹

II. The Introduction of a Statutory Class Action

For the reasons above, I submit that there is a need for the introduction of a class action by way of statute, or Rule of Court, which abolishes the common law class action. Such an adoption would ensure that procedure surrounding the institution class actions outside of constitutional matters does not receive the same level of contention that the Rules 23 requirements for certification have received in America.

A statutory class action for damages would allow for the institution of class actions to be effective and efficient. A knock-on effect hereof, is that due to the fact that the private enforcement of the Act plays a major role in the effective and efficient operation of the CLP, increased effectiveness and efficiency thereof, will translate into increased effectiveness and efficiency in the enforcement of the CLP.

However, such an introduction would not alter the present position regarding the threat posed by private class actions for damages to the public enforcement of the Act. And for that reason, I will not undertake to discuss the possibility of introducing a statutory class action any further.

III. The Introduction of a Statutory Reference to the CLP, and the Exclusion of Private Actions for Damages Against a Successful Leniency Applicant

The first proposed amendment that I will discuss introduces a statutory reference to the CLP into the Act. The aim of this is to establish an express statutory reference to the conditions and requirements of the CLP which must be satisfied in order for a leniency applicant to be granted Total Immunity. The second proposed amendment will then exclude the possibility of instituting private actions for damages against cartel

²⁵⁹ P Smith and A Swan op cit (n223) 22

members who have been granted Total Immunity in terms of the first proposed amendment.

These amendments are therefore aimed at establishing certainty as to the procedure that is to be followed when granting immunity. They are also aimed at ensuring that the effective operation of the CLP is not undermined. I propose that they will achieve this in the following way:

- (1) Transparency and predictability is restored to the process. If the threat of civil proceedings is removed, potential applicants no longer have to factor in the unknown costs which surround facing a civil claim into their decision of whether to apply for leniency or not, and can therefore better predict the consequences of their application for leniency, as well as the failure to do so.
- (2) The threat of detection is heightened. By providing cartel members the possibility of avoiding civil damages claims (which as was seen in the American experience, constitute severe monetary sanctions), a large incentive is created to self-report, which heightens the threat of detection through the self-reporting of another cartel member.
- (3) By providing reprieve from the severe monetary sanctioning (both administrative penalties and civil damages) only to a successful applicant, the enforcement and deterrent function of the monetary sanction is maintained, and the monetary sanction therefore incentivises cartel members to apply for leniency.

CHAPTER 6 PROPOSED AMENDMENTS TO THE ACT:

I. Definitions:

‘Corporate Leniency Policy’:

The policy sets out the benefits, procedure and requirements for co-operation with the Commission in exchange for immunity.²⁶⁰

‘Immunity’:

²⁶⁰ South African Competition Commission op cit (n3) at para 2.6

Immunity in this context means that the Commission would not subject the successful applicant²⁶¹ to adjudication²⁶² before the Tribunal for its involvement in the cartel activity, which is part of the application under consideration. Furthermore, the Commission would not propose to have any fines imposed on that successful applicant.²⁶³

‘Conditional Immunity’:

This is given to an applicant at the initial stage of the application so as to create a good atmosphere and trust between the applicant and the Commission pending the finalisation of the infringement proceedings. This is done in writing between the applicant and the Commission signalling that immunity has been provisionally granted.²⁶⁴

Total Immunity:

Once the Tribunal or the Appeal Court, as the case may be, has reached a final decision in respect of the alleged cartel, Total Immunity is granted to a successful applicant who has fully met all the conditions and requirements under the CLP.²⁶⁵

‘No immunity’:

This applies in those cases where the applicant fails to meet the conditions and requirements under the CLP.²⁶⁶

II. The Introduction of Section 49E. Leniency Agreements

(1) If before, during, on or after the completion of the investigation of a complaint, the Competition Commission grants the applicant ‘*Conditional Immunity*’ in terms of the ‘*Corporate Leniency Policy*’(CLP)-

(a) Once the Tribunal or the Appeal Court, as the case may be, after it has reached a final decision in respect of the alleged cartel, the Competition Commission must:

²⁶¹ Successful applicant means a firm that meets all the conditions and requirements under the CLP

²⁶² Adjudication means a referral of a contravention of chapter 2 to the Tribunal by the Commission with a view of getting a prescribed fine imposed on the wrongdoer. Prosecution has a similar import to adjudication herein.

²⁶³ South African Competition Commission op cit (n3) at para 3.3

²⁶⁴ South African Competition Commission op cit (n3) at para 9.1.1

²⁶⁵ South African Competition Commission op cit (n3) at para 9.1.2

²⁶⁶ South African Competition Commission op cit (n3) at para 9.1.3

- (i) Grant '*Total Immunity*' to a successful applicant who has fully met all the conditions and requirements under the CLP.
- (ii) Grant '*No immunity*' where the applicant fails to meet the conditions and requirements under the CLP.

III. The Amendment of Section 65. Civil Actions and Jurisdiction

- (1) A person who has suffered loss or damage as a result of a prohibited practice-
 - (a) may not commence an action in a civil court for the assessment of the amount or awarding of damages-
 - (i) if that person has been awarded damages in a consent order confirmed in terms of section 49D(1);
 - (ii) if the person against whom they wish to institute action has been granted Total Immunity in terms of section 49E(1).**
 - (b) if entitled to commence an action referred to in paragraph (a), when instituting proceedings, must file with the Registrar or Clerk of the Court a notice from the Chairperson of the Competition Tribunal, or from the Judge President of the Competition Appeal Court, in the prescribed form –
 - (i) certifying that the conduct constituting the basis for the action has been found to be a prohibited practice in terms of this Act;
 - (ii) stating the date of the Tribunal or Competition Appeal Court finding; and
 - (iii) setting out the section of this Act in terms of which the Tribunal or the Competition Appeal Court made its finding.

CHAPTER 7 CONCLUSION

It has been shown that the private enforcement of any CLP is necessary in order for a CLP to provide an effective and efficient means of enforcing antitrust legislation. Furthermore, the aggregation of such private claims (by way of class action) is necessary in order for such claims to be justiciable. The recognition of a class action for damages outside of constitutional matters, is thus necessary in order to ensure that the proper enforcement the Act in the context of cartel conduct.

However, the introduction of a class action for damages outside of constitutional matters in the manner and form chosen by the *Children's Resource Centre* has undermined the effective operation of the CLP in a number of respects:

- (1) The failure to introduce a class action by way of statute has created the problem of inconsistency and a lack of uniformity arising regarding the procedure for their institution.
- (2) The failure to make specific reference to the CLP in the Act creates uncertainty as to the interaction between the CLP, the Act, and common law class actions.
- (3) The failure to exclude the possibility of instituting a private action for damages against a party granted Total Immunity has resulted in the common law class action forming a deterrent to applying for leniency.

I submit that given the significance of the CLP as a tool for combatting cartel conduct, that the resultant effect on its effective operation is untenable, and that the proposals submitted above in chapter 6 must be adopted by the legislature, in order to correct this position. This position having been corrected, the private enforcement mechanisms (class action claims for damages) of the Act will be reconcilable with the public enforcement mechanisms (the CLP), and the CLP will enable the competition authorities to effectively and efficiently deter, investigate, prosecute cartels.

CHAPTER 8 APPENDIX A

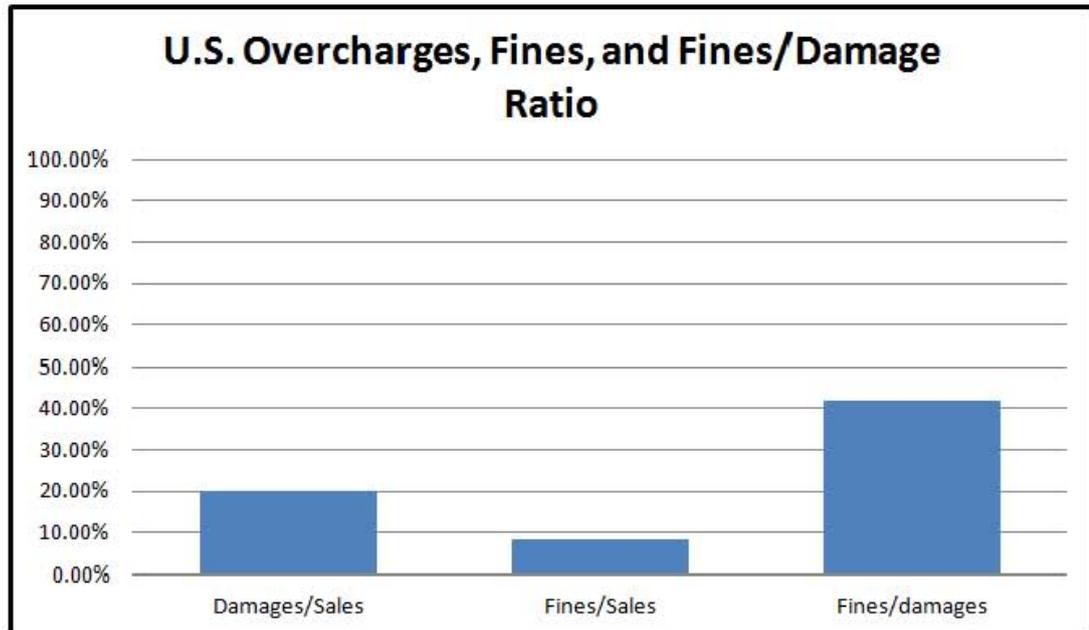


Figure 1

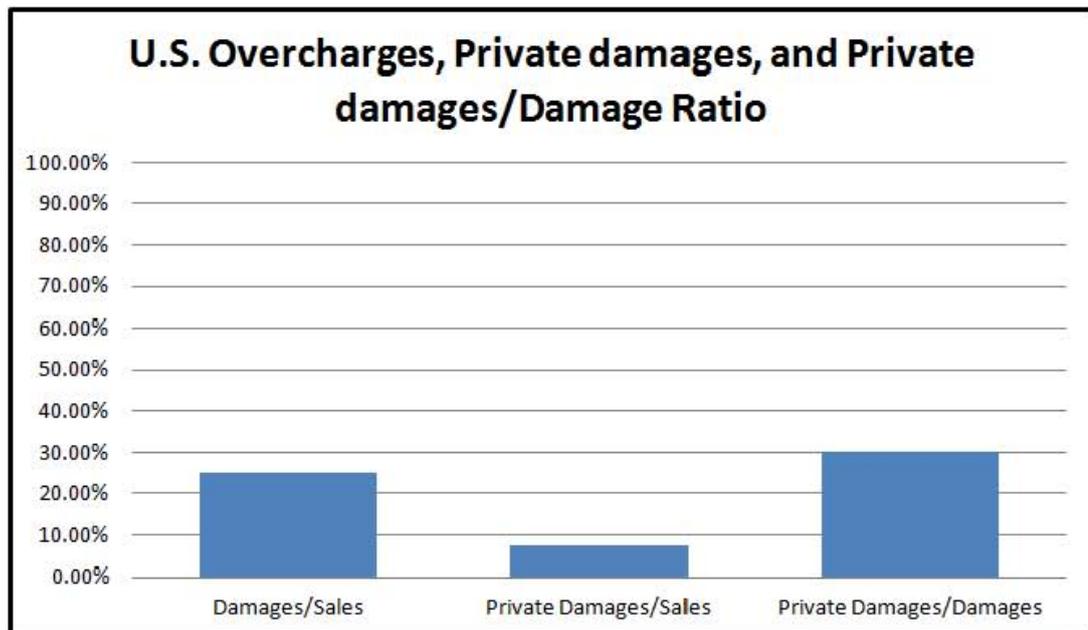


Figure 2

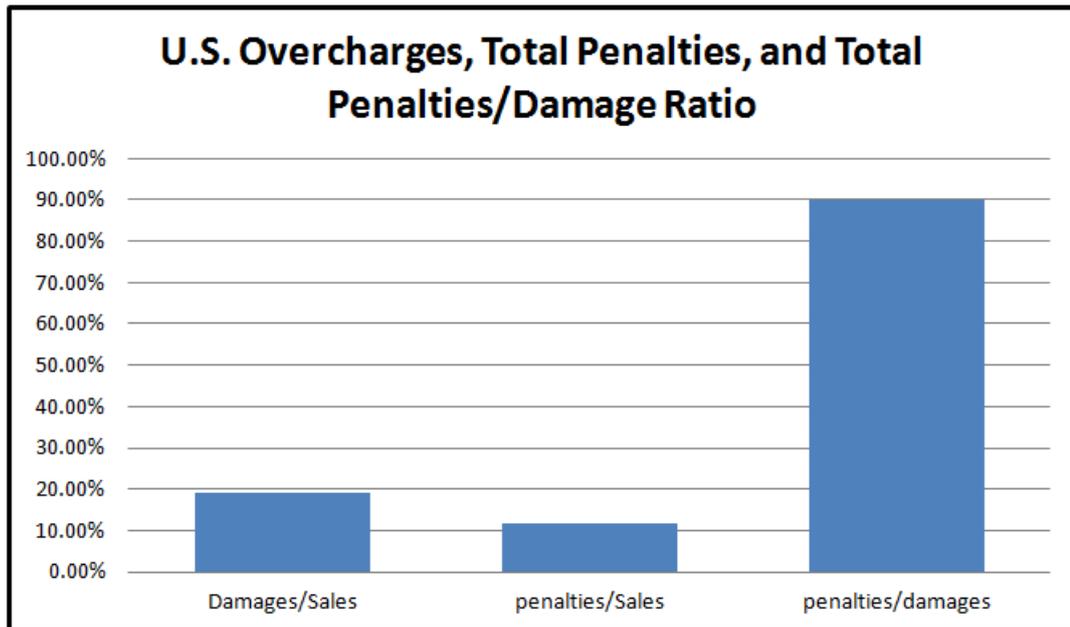


Figure 3

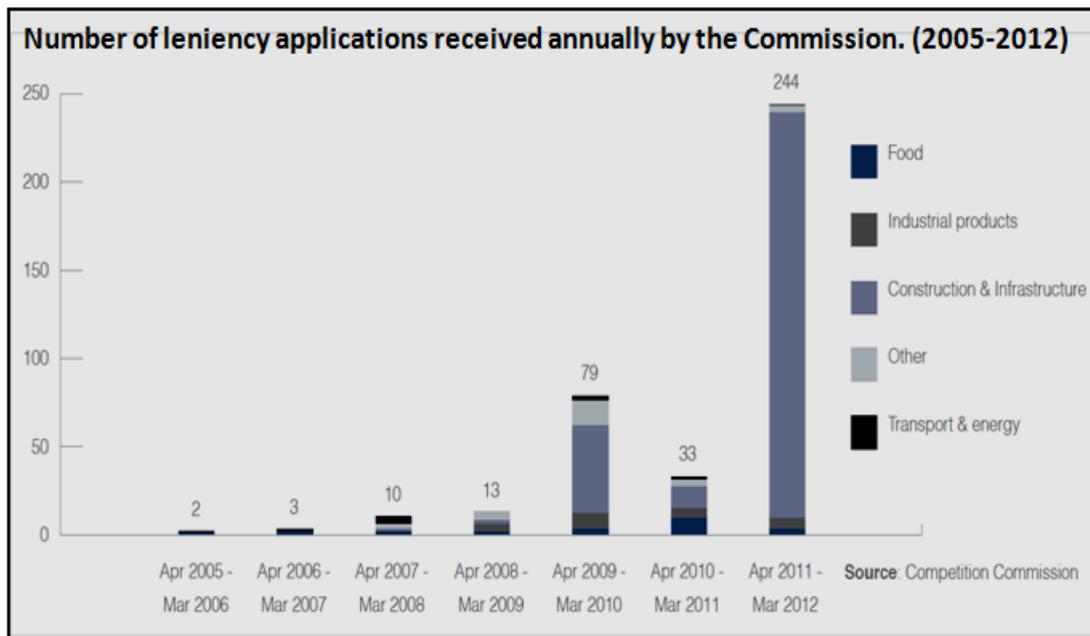


Figure 4

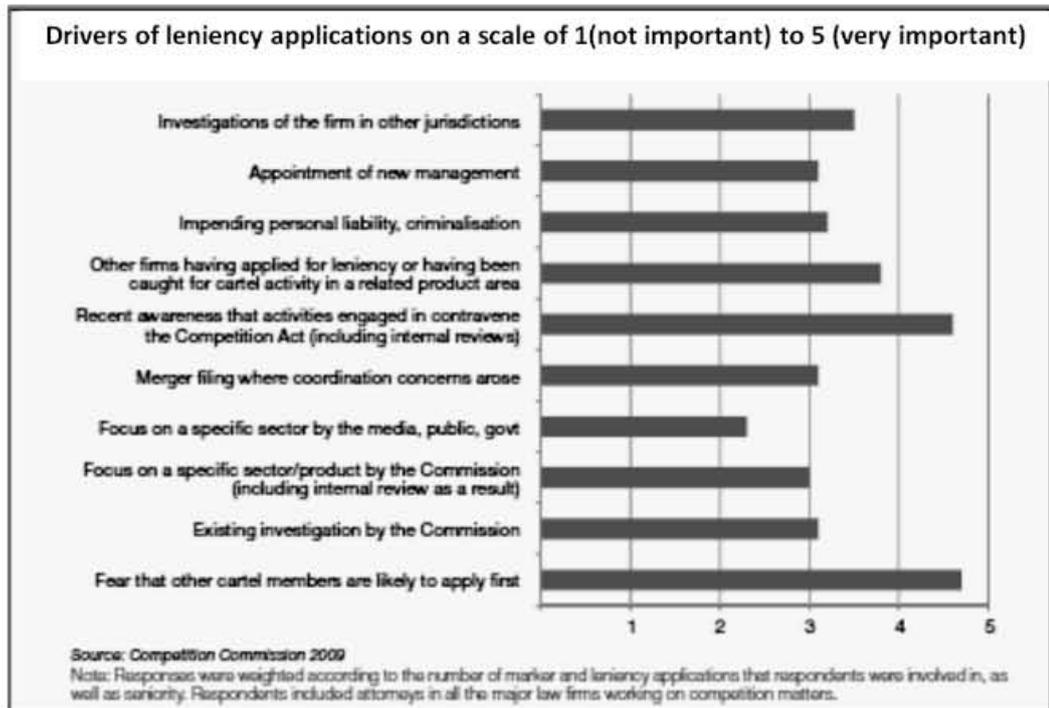


Figure 5

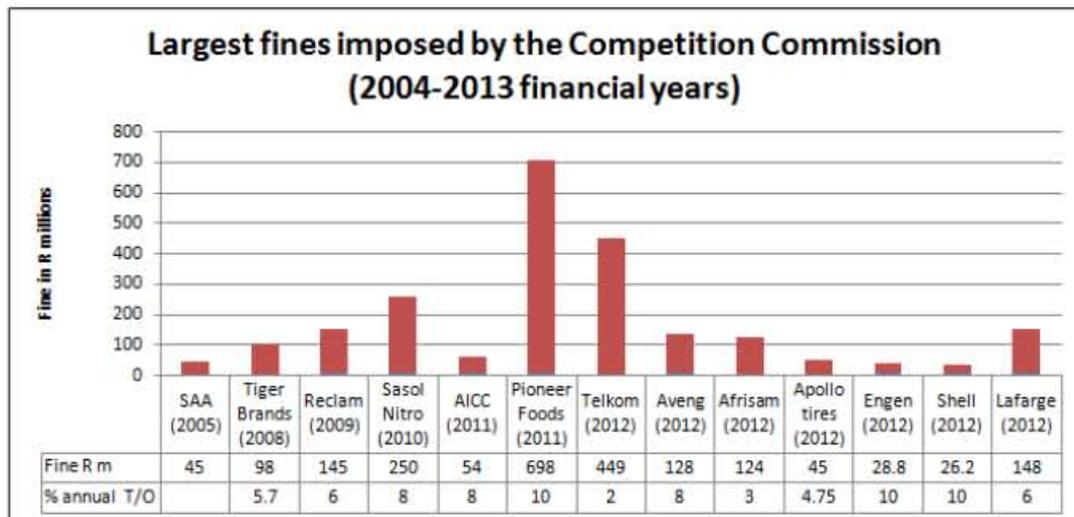


Figure 6

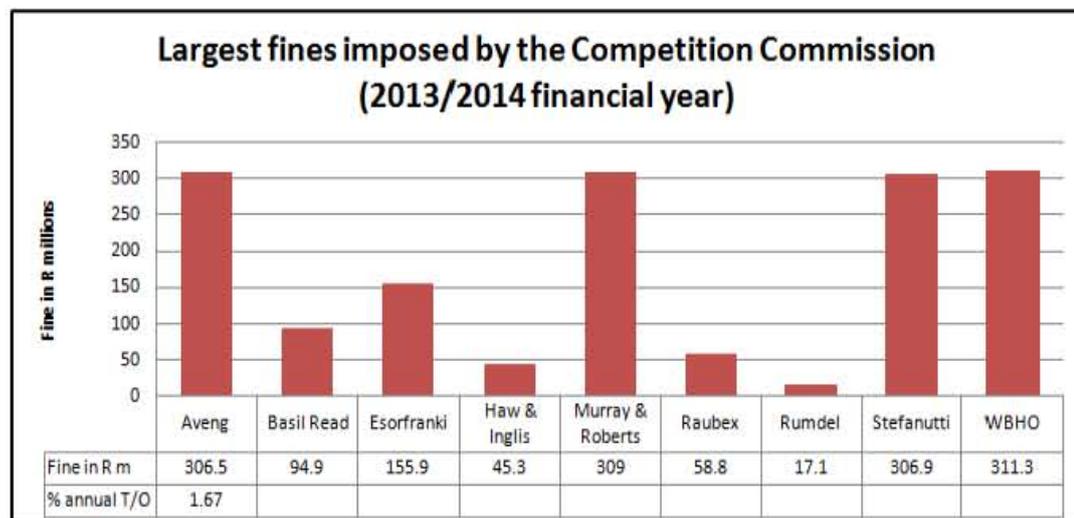


Figure 7

CHAPTER 9 APPENDIX B

Five Largest Private Cartel Damages January 1990-July 2012 (\$ millions)					
Cartel/Market Name, Place	<i>Nominal \$ million</i>	<i>Total/ Sales (Percentage)</i>	Date Settled	Total (\$2012)	Increase in amount recovered (percentage of \$2012)
Bank cards' transaction fees 3 ("Merchant Discount")	7,800	2.4	2012	7800	15.13
Bank cards' transaction fees 2 ("AMEX & Discover")	6650	11.7	2008	6775	42.57
Bank cards' transaction fees 1 ("Wal-Mart" case)	3383	1.2	2003	4752	67.38
Tobacco Leaf	1850	11.9	2000	2839	70.72
Securities, NASDAQ market makers, US	1027	3.12	1998	1663	231.27
Cumulative recovered damages prior to 1998	300	NA	NA	502	
Source: JM. Connor "Private Recoveries in International Cartel Cases Worldwide: What do the Data Show?" AAI Working Paper No. 12-03 (2012) 4					

Table 1

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