

Competition Law and Policy Institute of New Zealand

Chair's Report 2021

The 2020/2021 year in review

Attendees of the Competition Law and Policy Institute of New Zealand's ("CLPINZ") 30th annual workshop in Christchurch in September 2019 may recall that the keynote speaker, Dr David Evans, was unavoidably detained in Boston, USA, and delivered his address via Zoom. This was, insofar as anyone could recall, the first time that a presentation at a CLPINZ workshop had been delivered remotely.

Fast forward a year to CLPINZ's 31st workshop in 2020, and what a trailblazer Dr Evans proved to be! Only 4 months after the 2019 workshop the World Health Organisation declared a global health emergency, as cases of COVID-19 began to proliferate around the globe. In late March 2020, in a bid to halt the spread of the virus, New Zealand took the unprecedented steps of closing its border to most foreigners and imposing a national lockdown. These measures thankfully succeeded in stamping out community transmission in New Zealand, allowing those in New Zealand to enjoy relatively unrestricted freedom of movement for the remainder of 2020 (and 2021 so far). Nevertheless, throughout 2020 localised outbreaks still necessitated Auckland cycling in and out of additional lockdowns, and across New Zealand restrictions were periodically placed on the number of people able to attend events. These exceptionally challenging conditions unsurprisingly resulted in the cancellation of many conferences. Against this backdrop, the CLPINZ Board was delighted to be able to proceed with the 31st CLPINZ workshop as an all-digital event over three mainly morning sessions between Wednesday 19 August – Friday 21 August 2020. The virtual format of the 2020 workshop enabled us to invite an array of international speakers, and also proved invaluable from a logistical perspective when Auckland was placed back into lockdown shortly before the start of the workshop (which would have forced the cancellation, or at the very least, the postponement, of a physical workshop).

The 31st CLPINZ workshop

CLPINZ's much anticipated virtual workshop commenced at 9am NZT on Wednesday 19 August 2020 with a topical keynote address on '*Antitrust in times of crisis and emerging from the crisis*' by Maureen Ohlhausen, Chair of Global Antitrust Practice and Partner at Baker Botts in Washington D.C., USA. Maureen's observations drew on the extensive advice that she had been providing clients during the pandemic on issues such as pricing, joint ventures, mergers involving distressed assets, and platform competition topics. Maureen's perspective on these issues was also informed by her experience as a former competition regulator, Maureen having previously served as a Commissioner of the FTC and the Acting Chairman of the Federal Trade Commission. Subjects canvassed in the keynote address included the US antitrust enforcers' response to the pandemic, the rise in pandemic-related bankruptcies (and the antitrust challenges they can present) and the importance of the US's ongoing antitrust investigations in the technology and digital sectors, as evidenced by the increased reliance on technology as a result of the pandemic. Our commentator for the keynote session was Ayman Guirguis, head of the Policy and Regulatory practice of K&L Gates in Australia and also former director of the merger branch and a senior officer in the enforcement branch of the ACCC. Ayman discussed how, like its US counterparts, the ACCC had to rapidly shift both its operations and priorities in response to the pandemic. Topics discussed by Ayman included competitor collaboration, price gauging and the ACCC's ongoing work in the tech space including a newly established enforcement branch of the ACCC focusing specifically on digital platforms.

In Session 2, Dr Katharine Kemp from the University of New South Wales presented on *'Misuse of market power – what an 'effects test' would mean for New Zealand'*. This again was a very topical subject, with the Government having confirmed two months prior its intention to align New Zealand's section 36 with the equivalent Australian provision which was amended in 2017. Katharine traced the origins of New Zealand's current law back to Australia's Trade Practices Act 1965 and unpacked the current issues with the 'taking advantage' counterfactual. She also highlighted the plethora of Government reviews into the operation of the Australian provision (s 46) prior to the eventual adoption of an effects test, and the calls by big business and their advisors that the law change would 'chill' competitive behaviour. In response, commentator Brent Fisse raised a number of concerns around the potential overreach of Australia's newly minted law. This session was chaired by John Land from Bankside Chambers.

The first day of the workshop concluded on a convivial note, with Justice Goddard chairing an entertaining panel discussion which saw John Small (Commissioner, NZCC), Lilla Csorgo (Senior Consultant, Charles River Associates) and Kieran Murray (Managing Director, Sapere Research Group) debating a number of topics under the banner of *"Hipster Economists? Values, welfare and evidence"*. Somehow Dr James Every-Palmer, QC also managed to wade into the virtual 'hot tub' (despite being neither a hipster nor an economist).

Day 2 comprised Sessions 4 and 5. In Session 4, Troy Pilkington of Russell McVeagh chaired a panel discussion on *"Handy Hints For Practice – Joint Ventures and Commercial Agreements"* with Sasha Daniels, Bradley Aburn and Chris Bowden. This was a practical hands-on session with two very well regarded in-house competition counsel, with experience in two of New Zealand's largest corporates, and an experienced private practice lawyer. While a departure from CLPINZ's usual type of session, it was very interesting and informative hearing about the day-to-day strategies for advising businesses on competition law at the coal face.

Session 5 saw Sarah Court and Anna Rawlings discuss *"Unconscionability and Unfair Contract Terms"*, with the session being chaired by James Craig of Simpson Grierson. Sarah was appointed a Commissioner of the ACCC in May 2008, and reappointed for a third term in 2018. She is also an Associate Commissioner of the NZCC. Anna was appointed Chair of the NZCC in June 2019, and has been a Commissioner since June 2014.

The session was timely given the introduction of the Fair Trading Amendment Bill to Parliament in December 2019 which proposes the introduction of a prohibition against unconscionable conduct, and also extends the existing prohibition against unfair contract terms to apply also to standard form B2B contracts.

The focus for Sarah's part of the presentation was lessons for NZ from Australia's experience with unconscionability and unfair contract terms. Sarah took us through the current legislative regimes in Australia for these provisions, before running through the ACCC's enforcement experience to date and the challenges they have faced. There was a particular focus on the recent High Court of Australia decision in *Kobelt*, which will make enforcement of the unconscionability regime that much harder. This leads to the question whether Australia should introduce an unfair trading prohibition.

Anna then took attendees through the long history of unconscionability as an idea for New Zealand, including the alternative ideas of oppression and unfair practices. She provided an update on where the Bill is up to, and summarised the NZCC's position throughout which has been to support Trans-Tasman alignment in this way. It was then interesting to get Anna's thoughts on past cases where the NZCC feels that this would have provided an

avenue of redress or enforcement where they have had none before, or where it might have comfortably sat alongside some other action we have or could have taken. In the remaining time available, Anna then went on to discuss the unfair contract terms regime, and discussed some quirks with its implementation (some of which has come through submissions), i.e., the challenge of defining a threshold for small business.

The final day of the workshop opened with Session 6 on *'Killer acquisitions, nascent competition and merger enforcement'*. This session commenced with speaker Renata Hesse, Co-Head of the Antitrust Group at Sullivan & Cromwell in Washington, D.C outlining some of the theories of harm that relate to 'killer acquisitions'. Renata noted that while the current dialogue is focused on technology and innovation, the concept of needing to take into account likely potential constraints on exercise of market power is not new. Despite this, theories of harm that centre on the elimination of 'actual potential competition' are difficult due to their very prospective and sometimes speculative nature and the challenges of modelling harm. Session Chair Dr William Taylor of NERA Economic Consulting then led a discussion between Renata and commentator Iain Thain, Partner at DLA Piper, which examined in more detail why killer acquisition cases are difficult for enforcers, whether the analysis changes in tech/digital markets where network effects and/or two-sidedness are present, whether merger law needs to change to deal with killer acquisitions, and the potential role of merger retrospectives.

The title for our final session, Session 7, *"Cartels – criminalisation – lessons from the Australian experience"* did not really do it justice. Speaker Marcus Bezzi is the Executive General Manager with responsibility for the Specialised Enforcement and Advocacy Division at the ACCC. Marcus has been instrumental in developing the ACCC's approach to criminal cartel enforcement since its introduction in 2009. More than just lessons from his experience, Marcus was able to offer deep insights into the challenges the ACCC has faced along the way and the approaches it has implemented to adapt to the regime. Equally, Marc Corlett QC's commentary gave deep insight into the unique position of individuals facing "white collar" criminal sanctions in New Zealand. This insight was eye-opening for those of us whose practices are based firmly in civil law.

A key point of Marcus' presentation was the difference between civil and criminal investigations and the specific skills required of a criminal investigator. The ACCC has established its capacity since 2009 to carry out effective criminal investigations, including detection (including data screening and mining), preparing evidence to a criminal standard and working alongside other agencies, such as the Australian Federal Police. The ACCC established a specialised branch in 2014, led by a former securities investigator and police detective. At the same time, more traditional mechanisms continue to play a part, such as the leniency regime, which has been updated to remove disincentives to seeking leniency. The ACCC has also launched a sophisticated whistleblower tool, "Whisplii", that allows ongoing, anonymous communication with whistleblowers.

The ACCC recognises that good case selection is critical, with only the most serious cases pursued criminally. This was established by reference to a set of specific criteria. The first criminal prosecutions related to international shipping cartels, while more recently the ACCC has taken (or is taking) cases relating to domestic cartel conduct by local Australian companies and individuals.

Marc's commentary offered an excellent perspective on how New Zealand's criminal cartel process might evolve, by reference to our legislative settings and his experience defending "white collar" criminal defendants. A key theme was the often divergent interests of corporate defendants and their employees. While corporates tend to be more eager to

“admit guilt and move on”, the more serious personal consequences for individuals make this a much more fraught decision.

The workshop concluded on Day 3 with CLPINZ first online AGM. Utilising an amendment made to CLPINZ’s rules at the 2019 AGM, the members elected not to appoint an auditor for the coming year, the Board preferring a biennial audit going forward given the costs involved. The Chair’s traditional AGM drinks-shout was deferred until members can convene in person – hopefully at the 2021 workshop!

Financial position

Despite challenges around the delivery of the 2020 workshop, CLPINZ was pleased to still achieve a slightly better than break-even result for the financial year ending March 2021. This was largely due to offsetting the costs of moving the workshop online against savings on flights and other expenses specifically associated with the delivery of a physical workshop. Overall, CLPINZ continues in good financial health, carrying forward \$87,227 in total accumulated funds into the 2021/2022 financial year.

Notes of thanks

In a year where so many plans had to fall by the wayside, I would like to thank CLPINZ’s aptly named conference company, Conference Innovators, for enabling us to deliver the 2020 workshop digitally. Olivia Lynch, in particular, was instrumental in orchestrating the online format. While we subsequently bid farewell to Olivia, who moved on to a role at the Ministry of Foreign Affairs, in the first few months of 2021 we were very ably assisted by Emma Prattley, and more recently have been thrilled to welcome back Charlotte Emery from parental leave.

A very big thank you also to the CLPINZ Board for their determination in delivering the 2020 workshop, and to all our 2020 workshop speakers for supporting CLPINZ in moving the workshop online. For our international speakers, a highlight of participating in the workshop is usually the opportunity to come and visit us in New Zealand, and we are grateful to everyone for embracing the online format in the absence of that usual drawcard.

I would also like to sincerely thank Oliver Meech, my Deputy Chair on the CLPINZ Board, who served as Acting Chair from August 2019 – mid-2020 while I was on parental leave. Oliver did an outstanding job of Chairing the CLPINZ Board through New Zealand’s initial lockdown and guiding the Board through many important decisions necessitated by the pandemic. Since June 2020, the CLPINZ Board has missed having Oliver at our Board meetings, due to him taking a leave of absence timed to coincide with a fixed term role serving as General Counsel at the NZCC. Oliver has since been appointed Principal Adviser at the NZCC and we wish him all the very best in his new role.

Looking to the future

At the time of writing, the CLPINZ Board is very much looking forward to seeing everyone at the CLPINZ 32nd workshop, which is being held at Chapman Tripp in Wellington on Friday 6 and Saturday 7 August 2021. Due to the ongoing uncertainty surrounding the pandemic, we are operating a hybrid model this year with conference delegates having the option of attending virtually or in person.

The keynote speaker for this year’s workshop is Dennis Carlton, the David McDaniel Keller Professor of Economics at the Booth School of Business at the University of Chicago. Dennis will be speaking on the topic of merger retrospectives, with Lin Johnstone, Chief Economist at the NZCC commentating on the session.

Other sessions will cover a range of interesting and topical issues including antitrust and sustainability, the economic regulation of water in New Zealand, and a panel discussion on Australia's News Media Bargaining Code featuring Stuff Editor in Chief Patrick Crewsdon, NZME's General Counsel Allison Whitney, and Facebook's Australian external competition counsel, Wayne Leach, Head of Competition at King & Wood Maleson.

The CLPINZ Board are very excited about the programme and hope that there is something for everyone!

Finally, my sincere thanks to the current Board for all of their work over the past year to bring the 2021 workshop programme together: Laura Meriluoto, John Land, Oliver Meech, Alan Lear, Donal Curtin, Glenn Shewan, James Craig, Troy Pilkington, Simon Peart, Alicia Murray, William Taylor, Chris Noonan, Bradley Aburn, Penny Pasley and Jennifer Hambleton.

Anna Ryan

Chair of the CLPINZ Board