

Competition Law and Policy Institute of New Zealand

Chair's Report 2023

33rd CLPINZ Workshop

On Friday 23 and Saturday 24 September 2022, 88 CLPINZ members gathered at Simpson Grierson's offices in Auckland for one and a half days of collegiality, confabulation, and competition law. A small number of members also attended online, although this option was not as popular as in 2021.

With significant amendments to New Zealand's misuse of market power laws due to come into effect in April 2023, and 2022 marking the 10-year anniversary of the Commerce Commission's last section 36 prosecution, the 2022 keynote session addressed the topical subject of "Misuse of Market Power Enforcement". Our keynote speaker was Professor Fiona Scott Morton, who joined us remotely from Scotland where she was teaching at the University of Edinburgh. Professor Scott Morton spoke broadly about the economic theories that had informed misuse of market power enforcement in the US from the 1970s onwards, and argued that new theories of harm and risk-taking from agencies are needed to respond to the shift from the "industrial economy" to the "new economy" where software, platforms, pharmaceuticals, digital media and financial services feature heavily. The keynote session was ably commentated by Ben Hamlin, barrister, who sounded a note of caution about rushing into section 36 litigation, reflecting that the right time to determine what to do with a tiger is *before* you have grabbed it by its tail. In selecting cases, Ben suggested that it would be appropriate to focus on pressure points in the New Zealand economy, such as data holders and gatekeepers, along with those who stand to win and lose from decarbonisation.

Session 2 saw speaker Sarah Keene, barrister, exercise her thoughts on the Commerce Commission's declination of Anytime Fitness' collaborative activity clearance application. Sarah's fitness-themed presentation kept the audience entertained, and Emma Ihaia of Link Economics was an insightful commentator. The session generated a lot of discussion amongst workshop participants regarding the collaborative activity exemption and the clearance tool.

After lunch, we heard from Antonia Horrocks and Andrew Riseley, General Managers of Competition and Legal Services, respectively, at the Commerce Commission. Antonia and Andrew kindly stepped in at short notice after our originally scheduled speaker, outgoing Commission Chair Anna Rawlings, was sadly forced to withdraw due to a family bereavement. Despite Antonia describing the speaker-swap as "like expecting a Trumpet and getting a couple of Frujus", she and Andrew proved more than worthy substitutes. They provided a fascinating insight into the Commission's inner workings, functions, responsibilities and priorities. Hayden Green from Axiom Economics chaired the session.

Following a brief afternoon tea break, the workshop resumed with Session 4, on unfair contract terms. Professor Jeannie Paterson from the University of Melbourne Law School was our speaker for this session, which was commentated by Jennifer Hambleton, Partner at Minter Ellison. The session covered how the Australian Consumer Law provisions regarding unfair contract terms apply to B2B contracts, the Australian experience with enforcing those provisions, the differences between the New Zealand and Australian regimes as they apply to B2B contracts, and lessons that New Zealand can draw from the Australian experience.

The first-day formalities concluded with what was undisputedly the highlight of the 33rd workshop programme, the 2022 AGM. With it being a non-election year, the key item on the agenda was the approval of the financial accounts. With CLPINZ's finances in good health, the members in attendance agreed that the Board should put together a proposal for the establishment of a competition law scholarship or writing prize, for consideration at the 2023 AGM.

The 2022 workshop dinner was held on Friday night at the Limani room in QT Auckland, which proved an excellent venue for the occasion. Our highly engaging after dinner speaker, Neale Jones, Managing Director of government relations firm Capital, shared several interesting anecdotes about the law-making process and provided some fascinating insights into the formulation of government policy.

Day 2 opened with a high-octane session on “Market studies: Looking back and looking forward” with speakers Dr Eric Crampton, Chief Economist at the New Zealand Initiative, and Lucy Cooper, Partner at Chapman Tripp. With session chair Dr Will Taylor of NERA regrettably unable to attend the workshop due to illness, our keynote commentator Ben Hamlin stepped into the breach to direct the lively proceedings. Eric and Lucy raised interesting questions around the selection process and appropriate focus of market studies (barriers to entry being a big one in Eric’s view, including the cumulative impacts of regulation and statutory protections).

Our final session, chaired by Glenn Shewan, Partner at Bell Gully, considered the perennial question of whether it is time for New Zealand to allow behavioural remedies for mergers. Our speaker, Linda Evans from Herbert Smith Freehills Sydney, argued that the experience, particularly in the US, but also from Australia and Europe, indicates that behavioural undertakings may be appropriate in some circumstances. While noting that claimed efficiencies should be treated with caution and acceptable standalone remedies are likely to be rare, commentator Michael Tilley, Mergers Manager at the Commerce Commission, conceded that there was a case for change. However, Michael argued, if the Commission were to have the power to accept behavioural undertakings, it would need to be satisfied that the consumer benefits would outweigh the costs and the Commission would need to have the ability to reject proposed undertakings.

Acknowledgements

I would like to thank all of the speakers who participated in our 2022 workshop, and particularly Professor Jeannie Paterson of the University of Melbourne and Linda Evans of Herbert Smith Freehills for travelling from Australia to be with us in person. I also extend my thanks to our 2022 session chairs John Land, Hayden Green, Alicia Murray, Ben Hamlin, and Glenn Shewan, and the other members of the CLPINZ Board – Laura Meriluoto, James Craig, Donal Curtin, Alan Lear, Chris Noonan, Troy Pilkington, Will Taylor, Bradley Aburn, Jennifer Hambleton and Jessica White for their significant work behind the scenes in developing the workshop programme.

Sincere thanks also to James Craig and the team at Simpson Grierson for their generous hosting of the 2022 CLPINZ workshop, and to Rachel Cook, Shannon Woodward and the highly capable team at Conference Innovators for their smooth delivery of the workshop and the top-notch administrative support provided to the CLPINZ Board throughout the year.

Speaker gender balance

I would like to take this opportunity to acknowledge the work of the CLPINZ Board over the past few years to improve speaker gender balance at its annual workshops.

CLPINZ has traditionally had a well-balanced Board from a gender perspective – since 2003, five of its seven Chairs have been women. Despite this, workshop programmes tended to feature more male speakers. From the available information, it appears that on average approximately 20% of speakers at each CLPINZ workshop from 2003 - 2018 were female.

In more recent years, the CLPINZ Board has actively worked to address this balance, and I am delighted to report that in the past four years the percentage of female speakers represented at CLPINZ workshops has more than doubled. Notably, at the 2022 workshop, 66% of speakers were female, and for the first time ever, all of our international speakers – including keynote speaker Professor Scott Morton – were women.

With no shortage of female talent in the fields of competition law and economics, from a practical perspective 'moving the needle' on gender balance in our workshop programmes has been very straightforward. Nevertheless, I feel it is worth noting the achievement and commend the CLPINZ Board for identifying and addressing this important issue.

Upcoming 2023 workshop

With only two weeks to go, the CLPINZ Board is currently in the final stages of preparing for the upcoming CLPINZ 34th workshop, which is being held at Rydges hotel in Wellington on Friday 18 and Saturday 19 August 2023.

We are particularly excited that, for the first time since 2018, our keynote address will be delivered in person (rather than online), with Professor Joshua D Wright from George Mason University flying out to New Zealand with his family specially to join us. Together with commentator Andy Matthews of Matthews Law, Professor Wright will be speaking on 'The Future of Antitrust', in a session that promises to explore the frontiers of competition policy.

The 2023 workshop agenda also boasts numerous other topical sessions including greenwashing, AI and collusion, and a "fireside chat" with Commerce Commission Chair, Dr John Small. The CLPINZ Board is also looking forward to debuting a "Next Gen" session featuring several up-and-coming practitioners, each speaking on a thought-provoking subject of their choosing.

I would like to extend my sincere appreciation to all those have worked so hard over the last few months to make the 2023 workshop a success. I look forward to seeing you all in Wellington in a couple of weeks' time.

Anna Ryan, Chair of the CLPINZ Board