

Competition Law and Policy Institute of New Zealand

Chair's Report 2024

34th CLPINZ Workshop

The 34th CLPINZ workshop was held at Rydges Hotel in Wellington on Friday 18 and Saturday 19 August 2023.

In my last Chair Report, which was written shortly before the 2023 workshop, I recorded that CLPINZ was looking forward to welcoming our first international keynote speaker since 2018 (i.e. pre-pandemic), Professor Joshua D. Wright from George Mason University in the United States.

Three days before the 2023 workshop, CLPINZ learned via international media reports that Dr Wright had recently resigned from George Mason University, in the wake of allegations of misconduct concerning his behaviour towards former students. While Dr Wright strongly denied the allegations, CLPINZ and Dr Wright agreed that he would not deliver the 2023 CLPINZ keynote address.

CLPINZ is deeply indebted to Commerce Commission Chair, John Small, for agreeing to be moved up the workshop programme and into the keynote role at exceptionally short notice, and to Andy Matthews for commentating on the keynote address. This necessitated a reworking of the workshop programme more broadly, and Donal Curtin very kindly agreed to Chair an 11th hour session on competition law and climate change, featuring Mayuresh Prasad from Deloitte Access Economics. I am very grateful to John (and the Commission staff who assisted with the preparation of his keynote address), Andy, Donal and Mayuresh for stepping into the breach, and would like to sincerely thank them for their kindness and collegiality in relatively trying circumstances.

I would like to thank all those speakers who participated in the 2023 workshop, and the 2023 session chairs Bradley Aburn, Jennifer Hambleton, Dr Will Taylor, Ben Hamlin and Donal Curtin.

Further thanks must also go to Donal for generously permitting me to reproduce as an appendix to this report, his review of the 2023 CLPINZ workshop (complete with photographs!) which was published on blog www.economicznz.blogspot.com.

Inaugural essay competition

Those who attended the 2023 AGM may recall that a decision was made at that meeting to launch an annual writing award, with the intention of building interest in competition law and policy, economic regulation and consumer protection amongst students and young practitioners and recognise high quality writing on these subjects.

The CLPINZ Board formed a sub-committee to administer the award, and submissions were invited from:

- undergraduate and postgraduate students enrolled at a New Zealand university in the 12 months prior to the submission deadline; and
- persons who graduated not more than 5 years ago, and were employed in New Zealand in the 12 months prior to the submission deadline.

For the inaugural competition, students could write on a topic of their choice and essays submitted as part of university coursework were eligible for consideration.

The contest attracted numerous submissions, including several of notably high quality, and I am pleased to advise that the winner of CLPINZ's inaugural essay competition was Lydia Christensen. Lydia's winning essay was on "Competition Law and the Environment", in which she provocatively argued that the goals of competition law ought to be broader than achieving economic efficiency – through also including social-political objectives including climate change mitigation. For winning the competition, Lydia received a \$2,000 cash prize, together with an invitation to attend the 2024 workshop. A copy of her essay will also be published in the 2024 workshop workbook.

Upcoming 2024 workshop

At the time of writing this report, CLPINZ's 2024 workshop is fast approaching and I am pleased to note that so far the lead up appears to be smooth and uneventful. Approximately 70 delegates are expected to join us in Auckland at the Northern Club on Friday 16 and Saturday 17 August 2024 for one and a half days of presentations and debates on a wide range of topical competition, consumer and regulatory issues. This year's programme boasts several topics which promise to be of significant practical relevance, including an in-person keynote address by Professor John Asker, Professor of Economics at UCLA, on the economics of information sharing, commentated by Fionnghuala Cuncannon.

The 2024 CLPINZ AGM will be held at the Pullman Hotel, across the road from the Northern Club, at 5.15pm on Friday 16 August. This will be the last CLPINZ AGM that I will preside over as Chair, as I am stepping down from this role after 5 thoroughly enjoyable years. I would like to extend my thanks to all those who have assisted and supported me in the Chair position. In particular I would like to thank Alan Lear, John Land and Laura Meurileto for encouraging my involvement with CLPINZ, my Deputy Chairs Ollie Meech (2019-2020), Glenn Shewan (2020 – 2023) and Ben Hamlin (2023 onwards) for their able assistance (and in Ollie's case, a period of several months serving as acting-Chair while I was on parental leave in late 2019 / early 2020).

I would also like to acknowledge the contributions of all those who have served on the CLPINZ Board during my tenure as Chair, particularly during the COVID period when courageous decisions needed to be made as to whether to shift our (at that time relatively technologically naïve) workshop to a fully-online format.

Finally, I would like to extend my sincere appreciation to Charlotte Emery and her team at Conference Innovators. In her role at Conference Innovators, Charlotte has provided secretariat services to CLPINZ during my time as Chair, and has organised and delivered CLPINZ's annual workshops. I have been so fortunate to have been

able to entrust the smooth running of CLIPNZ to Charlotte over the past 5 years and it has been a pleasure to work with her.

Anna Ryan

Chair, Competition Law and Policy Institute of New Zealand

CLPINZ 2023
Wednesday 23 August 2023
Donal Curtin
www.economicnz.blogspot.com

After a rapid scramble to reorganise the schedule following the last minute loss of the planned keynote speaker, the 34th annual workshop of the Competition Law and Policy Institute of New Zealand (CLPINZ) successfully got underway in Wellington over the weekend.

Top of the bill - promoted at short notice from the previously planned 'fireside chat' session, and very much appreciated for their willingness to step up and help out - were Commerce Commission chair John Small, on 'The future of antitrust', and [Andy Matthews](#) of Matthews Law as commentator. CLPINZ chair [Anna Ryan](#) of Lane Neave chaired the session.



John Small and his chosen topics; Andy Matthews commenting

John noted a swing in the intellectual competition policy pendulum, with a strong trend of more regulation *for* competition which had started twenty years ago with the Telco Act and has more recently extended to petrol, groceries and retail payment systems: on petrol, he noted that there were some retail "issues", a conclusion you'd tend to agree with after reading [the latest quarterly petrol market monitoring report](#). He signalled that there is likely to be more ComCom activity against restrictive practices, an area which he accepted had been underdone to date, with the likes of retail price maintenance, anti-competitive covenants, cartels - the leniency programme is still "ticking away" - and in the fulness of time the revised s36 provisions against abuse of market power likely to see more playtime. He said that the NZ merger guidelines were due for review in any event, and noted that they're also a hot issue in other jurisdictions (notably in the US and Australia). And he put some emphasis on how ComCom plans to engage with its various stakeholders: "efficiency-based playing nice", as he put it, preferably relying on soft power (such as guidelines) and on "direct, respectful engagement", and avoiding litigation if possible, but going there if ultimately necessary.

Andy agreed that there had been a pronounced trend towards regulation for competition since around 2001 when there had been a "Big Bang" away from the previous reliance on light-handed, or no, regulation, and there could be a big payoff from the latest regulatory initiative, on consumer data rights, which could make competition in banking, for example, more effective. He also agreed with John's view that consumer law can be effectively used to complement competition policy, with for example significantly higher Fair Trading Act penalties over time providing a stronger incentive to be more consumer-friendly. And although the zeitgeist has moved to more hands-on interventionist competition policy, Andy reminded us that (a) the new and globally high-profile FTC/DoJ guidelines are just that, guidelines, and don't change the underlying law, and (b) regulation is all very well, but the first best option is always likely to be more effective competition, as we notably saw when a third mobile telco rolled out its gear.

Session 2 was "The most environmentally friendly carbon neutral CLPINZ session ever! Or is it?". In other words, the currently controversial area of "greenwashing", making misleading claims about the greenness of a business's products, activities, positioning or performance. The speaker was [Charlotte Turner](#), senior associate, climate risk governance with MinterEllison in Melbourne, commentator was [Kirsten Mannix](#), acting general manager - fair trading at ComCom, chair [Bradley Aburn](#) from Russell McVeagh. Charlotte referenced a web-scraping survey of the increased prevalence of green-focused claims, Kirsten referenced another which found an alarmingly high (~40%) proportion of potentially misleading claims. It's self-evidently an area with the potential to bite careless people: that said, as Charlotte said, the fundamentals haven't changed, and there are still well-established tests for 'deceptive' and 'misleading' even if the field they're being applied in is relatively new. And as Kirsten reminded us, one of the established principles is that 'intention' is not the point: *being* misleading will always put you on the wrong side of the law. You may well have read ComCom's own '[Environmental Claims Guidelines: a guide for traders](#)', but might also like to follow up on some references Charlotte provided that originated with ASIC, the Aussie financial markets regulator: '[How to avoid greenwashing when offering or promoting sustainability-related products](#)', and '[REP 763 ASIC's recent greenwashing interventions](#)'.

Session 3, 'Section 36: What can we learn from the Australian experience?', gave us incisive insights into how our s36, now amended to be in line with Australia's equivalent s46, will go in trying to deal to abuse of market power, given that our previous formulation of the law had proved ineffective. Chaired by [Jennifer Hambleton](#), it featured two very good speakers - [Simon Muys](#) from Gilbert + Tobin in Melbourne and [Ed Willis](#) from the University of Otago - and even though the 10 cases commenced under the new law in Australia have yet to go the full legal distance, and in some cases are still cantering towards the first fence, we got good ideas on what we might reasonably expect here. While some (including me) had hoped we might have got to a simpler place, compared to the counterfactual complexities of our old s36, both speakers agreed that litigating the new s36 will not be any simpler, just different (though, thankfully, more intellectually coherent). Establishing anti-competitive purpose, and establishing anti-competitive effect, will

remain tricky, which is a bit of a disappointment to those of us who had hoped the Australian 'effects based test' would cut through more easily to the chase, and market definition looks to be at least as crucial as previously.



Simon Muys (L) and Ed Willis (R) reflect on the jurisprudence around abuse of market power

Session 4 was 'The Next Gen' session, a new CLPINZ idea aimed at showcasing some of the talent coming through the younger ranks of the competition and regulation community, and was chaired by NERA's [Will Taylor](#). Left to right below, we got [Sophie Vinicombe](#), solicitor at Russell McVeagh, talking about Ticketmaster antitrust claims in the US (what looks in retrospect to have been a very poor merger clearance); [Sophie Harker](#), senior solicitor at Chapman Tripp on collaborating with competitors in emergencies like Covid; [Luke Archer](#), principal investigator, Commerce Commission, on competition and sustainability; and [Jono Henderson](#), consultant, NERA, on self-preferencing in digital markets (eg when a Google search throws up Google-associated products ahead of others'). All good topics, all well handled, and (going by people's reactions and the discussion at the CLPINZ AGM) I'd guess a 'Next Gen' session is going to be an ongoing feature of future workshops.



Session 5, 'AI and Collusion: Unveiling the Challenges of Tomorrow', featured a bright idea by chair [Ben Hamlin](#): have AI (in the form of ChatGPT) write both the blurb for the session and the biography of the speaker, [James Every-Palmer](#), which ended up crediting James with everything short of the Nobel Prize in Economics (not to downplay his real achievements: let's hat-tip his involvement in [the Lawyers for Climate Action NZ win in the High Court](#), forcing the government to roll back its poor plan to paper the country with cheap emission trading scheme credits). James was surely right to argue that there is a long list of potentially anti-competitive concerns, not only over facilitated collusive conduct, such as tacit algorithmic price-formation, but also over unilateral conduct (including predatory conduct, and anti-competitive tying and bundling) and further issues across a variety of non-price dimensions including quality and privacy. Me, I'm a tech optimist, and inclined to believe the benefits of modern platforms in aggregate far outweigh their downsides, but you have to expect that some of the powerful incumbents will from time to time push their luck too far.

And finally Session 6, 'Aotearoa New Zealand's Turning Point - Competition and Consumer Policy Implications', chaired by moi, featured [Mayuresh Prasad](#) from Deloitte Access Economics in Wellington. Mayuresh gets a big thank-you for stepping in at literally days' notice to fill the gap in the programme after John Small and Andy Matthews moved to the keynote slot. He showed us, first, some modelling of the costs and benefits of what we need to do to keep temperatures rising by no more than 1.5 degrees. In the graph below there's a period where we incur costs to put in place policies like carbon taxes and spend on new renewable energy (and hence our GDP on the green 'do something' track falls below our GDP on the orange 'do nothing' track). After a period - the 'turning point' of his title - we pull ahead of where we would have been otherwise, and Mayuresh put numbers on the initial costs and ultimate payoffs. The costs, for mine, looked a bit on the low side, but otherwise his modelling fits with other attempts along these lines which also show that we can indeed have our cake (a greener sustainable world) and eat it (have a higher standard of living). And secondly Mayuresh explored some of the competition and regulation policy implications, notably around facilitating the necessary collaboration for good stuff to happen, and in particular giving certainty early in the piece as to what is or is not permissible, as we don't have a lot of time to waste.

New Zealand's turning point



Period where decarbonisation in the decisive action scenario creates temporary losses relative to the inadequate action scenario.