

# Competition Law & Policy Institute of New Zealand

## CHAIR'S REPORT

### **The 2019/2020 year in review**

#### *The elephant that has meant we will not be in a room for the 2020 Workshop*

1. It is an understatement to say that this past year, particularly the 2020 calendar year to date, has been unusual. Far from it, remembering the nervousness and uncertainty of late February/March 2020 and the weeks prior to, and the four weeks of, the “Level 4” national lockdown from 25 March to 27 April as a result of the Covid-19 global pandemic.
2. Seeing the prospect for a variety of longer-term tail impacts from the global pandemic, and following the very successful online (via Zoom) delivery of David Evans’ keynote talk at the 2019 Workshop, masterfully delivered by David, the CLPINZ Board decided during the national lockdown to pivot planning and adapt the format for an entirely virtual/online 2020 Workshop.
3. Hence we will not, for the first time in the 31 year history of the Institute, all be in a room together for the 2020 Workshop. Having acknowledged the elephant, let us briefly recap the year.

#### *The 30th Anniversary Workshop, Christchurch, September 2019*

4. The occasion of the 30<sup>th</sup> Anniversary of the CLPINZ Workshop was an unmissable opportunity to bring the Workshop back to its origins in Christchurch, where the Institute was formed and the first workshop was held in 1989. September, Spring, in the Garden City.

#### *The keynote session*

5. The keynote talk was delivered by Dr David Evans, Chair of the Global Economics Group, based in Boston. Due to a family emergency, Dr Evans was unfortunately unable to travel to New Zealand for the Workshop. He, Charlotte (Conference Innovators) and Laura, worked very hard and last minute to enable Dr Evans to deliver the keynote session by Zoom.
6. Dr Evans discussed the antitrust analysis of two-sided transaction platforms.
7. In his introductory comments, he noted that some of the most valuable firms operate multi-sided platforms, frequently in digital environments. He explained why these firms are different. This is so for a number of reasons, including that customers are the “raw materials”, the customers are inter-dependent with a role of the platform to connect two types of customers. The platforms need critical mass. The profit-maximising price is different. Pricing is different – priced on both sides, balancing the participation on each side. Pricing can be below cost, even “free” to one side or the other. Dr Evans posited that the rules to deter undesirable conduct by these firms may need to be different.
8. The body of Dr Evans’ very engaging talk traversed the judgment of the US Supreme Court in *American Express*, and why market definition was determinative in that case.
9. On the correct market definition – for platform services (i.e. schemes competing for the transactions) – the Department of Justice had not established anticompetitive harm through either a reduction in transactions or an increase in the overall price of transactions.
10. As Dr Evans noted, the *Amex* decision puts market definition front and centre in platform cases. Dr Evans noted that the majority decision of the Supreme Court leaves open the question of whether ad-supported media platforms (which compete for attention) should be treated in the same way as transaction platforms. A key challenge is developing administrable rules.
11. Jennifer Fish, Principal with Charles River Associates, gave the commentary on Dr Evans’ paper.

12. Jennifer noted the multi-faceted issues being raised by two-sided platforms, including “the curse of bigness”. She focused on several European cases and investigations in relation to Apple, Amazon, Google and Facebook. Jennifer queried whether agencies are being over-cautious with the application of competition law enforcement for these platforms, or possibly too permissive in approving mergers.
13. Challenging issues include the potential for preferential treatment (self-preferring the platform’s service offering), and issues around the fairness of contract terms. Can we define effective remedies for abuses? Does merger assessment need modification? Dr Laura Meriluoto chaired the session.

Other highlights

14. Other highlights of the 30<sup>th</sup> Anniversary Workshop included:

- A discussion led by Chris Whelan, Principal with RBB Economics, of the “cutting edge” economic tools (theoretical and empirical) in antitrust analysis. Donal Curtin, in his commentary, queried whether we should be making more use of econometric tools like SSNIP tests and regression analysis – which Donal noted as “an enormously useful technique, even if it doesn’t fit the data perfectly.” Glenn Shewan chaired the session.
- Sam Holmes, Solicitor, and Sarah Keene, Partner, with Russell McVeagh, touched on the modified total welfare standard, which the Court of Appeal in *NZME* confirmed is a permitted consideration for the regulator, but not mandated. Sam and Sarah also discussed the “real chance” test is for the “likelihood” of a substantial lessening of competition. They explored these issues in the context of “Hipster Antitrust”, posing the question: “at what point does self-assessment become more attractive [than the clearance and/or authorisation processes]?” And should the Commerce Commission be adopting a more proportionate approach?

Fionnghuala Cuncannon, Partner with Meredith Connell, commentating the session, noted that quality considerations can be taken into account in an orthodox antitrust framework (where, for example, plurality of media would go to quality of journalism as well as to protecting the freedoms of democracy), characterising this as not “Hipster”. Fionnghuala noted the challenges for all concerned - applicant parties, third parties and the Commerce Commission - from the application of the Official Information Act to the Commission’s work and the potential for OIA requests to be used tactically during the clearance process. This is a feature of the agency’s operating environment that necessitates thoroughness and therefore has an impact on timeframes. Should it be suspended during the consideration process? James Craig chaired the session.

- In a session on “hot regulatory issues – the electricity sector”, Mark Toner, Head of Public Policy & Regulatory Counsel with Vector Limited, and Rob Bernau, the Acting General Manager, Market Design, with the Electricity Authority, touched on a number of the issues impacting on regulation of the electricity sector. Disruption and emerging technologies, electric vehicles and solar generation, decarbonisation, two-way network flows, competition at the network edge (from batteries, solar, diesel and wind, new solutions, and new companies), looming electrification of transport, the need for investment in the “trilemma” of security of supply, sustainability and affordability.

Mark Toner would like to see better alignment of policy goals and regulators – “you won’t solve climate change with cows – it’s EVs”. And is it time for a Ministry of Energy to bring better alignment? Rob Bernau agreed with the idea that regulators should stay out of the way of emergent competition where there is disruption, but also said that regulators need to stay vigilant and have the framework available to sanction bad behaviours when they see it. Simon Peart chaired the session.

- The Board was enormously grateful to Justice Denis Clifford, Judge of the Court of Appeal, and Professor Martin Richardson, Professor of Economics at ANU, for making the trip to Christchurch to discuss, from a judicial and lay member perspective, the role of lay members in court.

Professor Richardson described the lay member's role as the translator and facilitator of the discussion between the court and the parties' experts, testing and assessing the economic issues. He said that a lay member is potentially more able to detect violations of the court's expectations of experts, in terms of the independence and the foundations for their expressed opinions, on the basis of the expert's testimony. Professor Richardson said that the "hot tub" system in New Zealand works very well at present, and leads to better understanding, testing and assessment of the expert evidence. Justice Clifford explained that appellate advocacy becomes a conversation with counsel for the parties about the strengths and weaknesses of their respective cases on the issues, and that the sign of a weak case is the unwillingness to engage with the conversation or even acknowledge weaker points.

The Board recognises the huge value of sessions led by the judiciary and decision-makers – these are always popular with attendees – and the Board extends its gratitude to Justice Clifford and Professor Richardson for supporting the session. The session was chaired by Troy Pilkington.

- Alysha McClintock, Partner with Meredith Connell, discussed the unsubstantiated representations provisions of the Fair Trading Act, why they were needed and how culpability is being assessed. She noted that the new provisions impose a due diligence requirement on traders and that timing is everything; traders must have reasonable grounds to support their claims at the time that the claims are made. Alysha discussed the judicial response to date and considerations for traders, particularly around establishment claims (claims that a product is, for example, backed by scientific evidence) and efficacy claims (assertions that goods do something). Commentary was offered by Joe Edwards, Partner with Russell McVeagh. Joe highlighted some of the practical challenges confronting commercial clients with the substantiation provisions, including the cost of independent testing. Alicia Murray chaired the session.
- In a session focused on the looming criminalisation of cartel conduct for New Zealand, Elizabeth Avery, Partner with Gilbert and Tobin, discussed some of the learnings from the cases brought so far by the ACCC in Australia (with two cases concluded to date and four in the prosecution process). Elizabeth highlighted in particular that the element of a "meeting of the minds" can be very difficult to prove. Commentary was offered by Leo Farmer, Partner with Meredith Connell. Leo noted that harm is often hard to prove and always hard to quantify. The analysis is complex and the overseas experience has seen very few custodial sentences imposed thus far. The element of commitment, at that point before the NZ Supreme Court in *Lodge*, was, Leo noted, the real elephant in the room for the Commerce Commission in obtaining convictions. Proving a consensus leading to expectations will inevitably continue to be the core issue. John Land chaired the session.
- Tom Weston QC gave a thoughtful, and highly entertaining, after dinner speech at the Christchurch Club where the Workshop dinner was held.

15. The Board thanks all the speakers, panellists, commentators and sessions chairs, for their effort to making the 30<sup>th</sup> Anniversary Workshop so engaging, and a great success.

#### *Other features of the year*

16. The Board notes, and greatly appreciates, the ongoing support from Conference Innovators (CI). The hugely capable and efficient secretariat, administrative and logistical support that we get from Charlotte (currently on parental leave with Grace and Olivia through CI is hugely appreciated.
17. Charlotte underpinned the success of the 2019 Workshop, including navigating serenely the technical side of ensuring the remotely-delivered keynote talk was a success.
18. Olivia, who took over from Charlotte during the year, has been instrumental in orchestrating the online format for the 2020 Workshop, and we are hugely excited to see how this will go. An entirely virtual/online format for the 2020 Workshop will be a first for the Institute.

19. Financially, CLPINZ continues in good health, achieving a slightly better than break-even result for the 2019 Workshop and ending the financial year ending March 2020 with total accumulated funds of \$85,807.

*A note of thanks to Laura*

20. This Chair's Report would not be complete without a note of thanks to the outgoing Chair, Dr Laura Meriluoto.
21. Laura's two-year term as CLPINZ's Chair concluded with the 2019 AGM. Laura's drive and modernising influence can perhaps most visibly be seen in the refreshed brand and the new website that were put in place in time for the 2019 Workshop, and in the occasion of bringing the 30<sup>th</sup> Anniversary Workshop back to its Christchurch origins.
22. Behind the scenes, Laura has put a great deal of effort in to improving the Institute's organisation and administration and the Board notes its appreciation of Laura's very significant contribution over her term as Chair.
23. Laura was succeeded by Anna Ryan, Partner with Lane Neave. Anna was, at the time of the AGM, on parental leave but agreed to step into the challenge of the Chair's role and has actively led our meetings and Workshop planning since June 2020. The Deputy Chair, Oliver Meech, was Acting Chair in the period from the 2019 AGM until June 2020.
24. At the time of writing this Chair's Report, the CLPINZ Board is very much looking forward to the 2020 Workshop. The change to an entirely virtual/online format has allowed some real freedoms around workshop planning, with less of the administration cost and cost of international travel.
25. We have a hugely exciting programme this year. Keynote speaker Maureen K. Ohlhausen, Chair of Global Antitrust Practice and Partner at Baker Botts in Washington D.C., USA, will be presenting on the role of antitrust in times of economic crisis and recovery. Her observations will draw on the extensive advice she has been providing clients during the current COVID-19 pandemic on issues such as pricing, joint ventures, mergers involving distressed assets, and platform competition topics, including her perspective of these issues as former Acting Chairman, and Commissioner, of the Federal Trade Commission. Another highlight of this year's programme is a presentation on acquisitions of nascent competitors (aka "killer acquisitions") by Renata B. Hesse, Co-Head of the Antitrust Group at Sullivan & Cromwell in Washington D.C., USA. The 2020 Workshop programme also boasts a line-up of other distinguished speakers, including Dr Katharine Kemp, Senior Lecturer at the University of New South Wales, Sarah Court, ACCC Commissioner, and Marcus Bezzi, ACCC Executive General Manager.
26. Due to the virtual format of this year's Workshop, there will not be a Workshop dinner this year. The Board had hoped to provide Workshop attendees with an opportunity to connect in person over the course of the Workshop, with drinks functions originally scheduled for Thursday evening in Auckland, Wellington and Christchurch. However, recent changes to New Zealand's COVID-19 alert levels and the possibility of further changes in the coming days has prompted a decision to cancel these events. The Board would like to thank Russell McVeagh, Chapman Tripp and Lane Neave respectively for very kindly having offered to host these functions.
27. The 31<sup>st</sup> Annual Workshop promises to be something different, but at the same time the Board very much hopes that it will continue to be informative, thought- and debate-provoking, and a genuine opportunity to reconnect with fellow enthusiasts in the competition, consumer and regulatory space in New Zealand.
28. With final thanks also to the current Board for their efforts over the year to plan and deliver the CLPINZ Workshops: Laura Meriluoto, John Land, Alan Lear, Donal Curtin, Glenn Shewan, James Craig, Troy Pilkington, Neil Anderson, Simon Peart, Alicia Murray, William Taylor and Chris Noonan.

*Anna Ryan, Chair / Oliver Meech, Deputy Chair*