

Some initial notes on Dr John Small's Keynote CLPINZ v2

Introduction

1. Well, that was a tour de force from Dr Small. He covered so much territory it's hard to know where to begin. Harry S Truman¹ has been quoted as saying "Give me a one-handed Economist. All my economists say 'on hand...', then 'but on the other...'"² I've always thought the quote applied more to lawyers – regardless I don't think that John has left us "in doubt", so if his speech was a proposed business acquisition, it would be granted "clearance".
2. John touched on many, many things including:
 - a. **substitutability** of keynote speakers & bait and switch advertising
 - b. the passion that everyone in this room shares for the **mix of economics, law, policy** etc
 - c. the **role of the Commission & what we can expect**
 - d. his thoughts on the **future of antitrust**.
3. This insightful discussion covered 3 substantive areas:

[1] **The future of antitrust** – which in turn dealt with 3 things, namely:

- (1) the **political economy** which I had to look up on Google³
- (2) **upstream price discrimination** (volume discounts for retailers) & concentration
- (3) the **consumer welfare standard**.

[2] **Regulating for competition** – which discussed 3 recent NZ examples:

- (1) The Fuel Industry Act 2020
- (2) The Retail Payment Systems Act 2022
- (3) Grocery Industry Competition Act 2023.

[3] **Regulators needing friends** – discussing:

- (1) engagement
- (2) the role of consumer protection law as the OTT (over-the-top) weapon
- (3) "respect".

¹ Apparently Mr Truman had no middle name but added the "S" to be cool; so it is incorrect to include the "." after "S"

² <https://www.goodreads.com/quotes/7887683-give-me-a-one-handed-economist-all-my-economists-say-on>

³ When I did so, I learnt that this phrase (obviously with Adam Smith having some role) became known as economics, and it is over more recent years that it has developed a broader meaning to cover how politics informs economics and how economics informs politics, and so the circle goes. I understand that it now has more grandiose ambitions covering how societies work covering policy analysis, economics, politics, the role of individuals and the state, and other matters. See for example: https://en.wikipedia.org/wiki/Political_economy; <https://www.britannica.com/money/political-economy>

4. My initial notes (and my presentation if time permits) broadly follows Johns with some reordering. I'm mindful that John Land instructed me not just to agree with the keynote speaker whoever that may be and try to give some fresh perspectives based on me officially being one of the older, but not necessarily wiser practitioners.
5. I see there is a difference of opinion as to who is responsible for the original quote so I will refer to both:

In his Lettres Provinciales, the French philosopher and mathematician Blaise Pascal famously wrote: I would have written a shorter letter, but I did not have the time⁴

I didn't have time to write a short letter, so I wrote a long one instead.- Mark Twain⁵

6. Regardless, my apologies that I had inadequate time to write a shorter commentary.

My topics

7. If you indulge me, I'd like to:

[1] *start with a couple of **background observations***

and then make observations on some of the key themes John touched on namely:

[2] ***International perspectives & how they apply to NZ***

[3] ***Consumer welfare standard & other things***

[4] *The related topic of **regulation and competition**, especially for our small economy*

and I may briefly comment on

[5] ***"Mateship"** as the West (aka big) Island might say.*

[1] Background observations – thanks!

8. Thank you very much for inviting me to comment on the keynote. It's a real honour to be here discussing, as John noted, the area we love, with people I greatly respect and learn from.
9. I wouldn't have anticipated this when I was working 22 years ago with a well-known economics professor on tourism arguments for the ill-fated *Qantas/NZ* authorisation. I certainly couldn't have foreseen this factual when I met Dr Ross Patterson 34 years ago.
10. John talked about our mutual interests. I love the constant exchange of ideas and learning and development which ties in nicely to his keynote as nothing stays the same. He also caused me to rapidly look up a few terms I wasn't familiar with!
11. I want to take the opportunity to note some of the people I have learnt from over the past three decades including Dr Ross Patterson, Phil Taylor, Miriam Dean KC (a great mentor to many of us), Kerrin Vautier, Dr James Farmer KC, Andrew Peterson, Lindsey Jones, John Land, and more

⁴ <https://quoteinvestigator.com/2012/04/28/shorter-letter/>

⁵ <https://www.azquotes.com/quote/349720>

in my age band John Dixon KC & James Every Palmer KC.⁶ But it's not just them it's you, my colleagues and commission staff. And I'm learning every day.

He tangata, he tangata, he tangata. It is the people, it is the people, it is the people.

12. Anyway back to John:

- a. It seems that he's right that he and Josh Wright are sufficiently fungible to be seen as good substitutes in response to a SSNIP.
- b. I have not observed any change in consumer behaviour, output, prices or quality
- c. Regardless there seems no *bait advertising*⁷ as the conference organisers have clearly met the statutory defence of offering to "... supply immediately... equivalent goods or services to the customer in a reasonable quantity and at the price at which the first-mentioned goods or services were advertised".

[2] International perspectives & how they apply to NZ (Back to the future)

13. When I started 30 odd years ago we looked to the US and took a Chicago-School approach. I was then lucky to practice EU competition law in the late 90s and saw a very different approach. That set me up well for what I've seen as the "**Big Bang**" of 2001.⁸ From memory this saw:

- a. a **new merger control test** moving from dominance to the SLC test⁹
- b. the not so revolutionary change to the ***misuse of market power*** provisions¹⁰
- c. a new purpose test, moving from competition as an end *to the consumer welfare test*¹¹
- d. a new part 4 of the Commerce Act for generic regulation
- e. the *Telecommunications Act 2001*

⁶ I also love my exchange of ideas and learnings from Sarah Keene, Troy Pilkington and others. Also team members – who have gone on to greater things – including Jennifer Hambleton, Oliver Meech, Anna Rawlings, Gus Stewart, Rose Wang, Danny Xie, Nicko Waymouth, Paul Mathewson, and well-known gentleman-golfer Andrew Peterson.

⁷ As we all know, **Bait advertising** is prohibited by section 19 [Fair Trading Act](#)

⁸ See the [Commerce Act Amendment Act 2001](#)

⁹ In the grocery inquiry it was [submitted by the NZFGC](#) "*This duopsony was the result of a series of supermarket acquisitions in the late 90's and early 2000's, culminating in the acquisition of Woolworths (New Zealand) Limited by Progressive Enterprises Limited, which reduced the number of supermarkets in New Zealand from three to two. This merger occurred in 2001, while the current "substantial lessening of competition" merger test (found in section 47 of the Commerce Act 1986) was in the process of being introduced. The merger was actually declined by the Commission under the new "substantial lessening of competition" test⁹⁸ but ultimately allowed to proceed under the old "dominance" test⁹⁹ pursuant to a ruling by the Privy Council.¹⁰⁰ In other words, the Commission was not satisfied that the merger would not substantially lessen competition in the relevant markets in New Zealand.*" Footnote [100] cited ***Progressive Enterprises Ltd v Foodstuffs (Auckland) Ltd [2002] UKPC 25.***

¹⁰ It was a considerable disappointment to many that the courts appreciated that "substantial market power" was a lower threshold than "dominance" but regarded the phrase "take advantage of" meant "use". For other discussion and disappointments by Dr Ross Patterson see (his doctoral thesis) ***The Rise and Fall of a Dominant Position in New Zealand Competition Law New Zealand*** Universities Law Review · Jan 1, 1993 and (relevant to the regulatory discussion) ***Light Handed Regulation in New Zealand Ten years On*** Competition and Consumer Law Journal · Jan 1, 1998

¹¹ I am grateful to John for pointing out the OECD discussions on consumer welfare standard. In particular ***Advantages and Disadvantages of Competition Welfare Standards – Note by New Zealand*** OECD: DAF/COMP/WD(2023)23 ; 15 June 2023 [https://one.oecd.org/document/DAF/COMP/WD\(2023\)23/en/pdf](https://one.oecd.org/document/DAF/COMP/WD(2023)23/en/pdf) which discusses the topic superbly, including highlighting this change in the purpose test, as well as the roles of the total welfare standard and potential for the modified total welfare approach.

[https://one.oecd.org/document/DAF/COMP\(2023\)4/en/pdf](https://one.oecd.org/document/DAF/COMP(2023)4/en/pdf)

- f. the *Dairy Industry Restructuring Act 2001*
14. These things linked to John's second topic about regulation which I'd like to come back to. But it's clear that the trend to regulatory changes to enhance competition began 20 years ago.
15. There was further considerable tinkering with those regulatory regimes to improve them about a decade or so after that. More recently we have moved away from TSLRIC to the RAB for telecommunications.
16. On international perspectives I've many thoughts but some of them are as follows:
- a. **Commission staff** – in more recent developments many Commission staff have worked for offshore regulators - including Antonia Horrocks, Michael Tilley and Andrew Risely - their calibre and experience, which also includes private practice is noticeable from the other side of the fence
 - b. **Commission approach** – NZ has either led or been quick to follow in many areas – the Commission always excelled with written reasons for its merger decisions well before many its peers & now it is a fast follower on many other developments. More recently its produced a multitude of plain-English user-friendly guidelines.
 - c. **The ICN¹² – at the institutional level** – we have seen, despite quite different rules in different jurisdictions, a formidable cross-fertilisation and a level of convergence on both economic perhaps beyond what was anticipated by the ICN's predecessor ICPAC.¹³
17. Some side notes:
- a. **ICPAC** was obviously US led and as with these things the move was not entirely altruistic - a stated goal was to open markets for US exporters & other companies.
 - b. **Protectionism** – John mentioned our *authorisation process*. I understand this is unique to Australia & New Zealand. But it works well for a small economy and enables consideration of broader factors in a transparent way as John has noted. Our system has also been criticised as *protectionist* but it is more transparent than those many other jurisdictions. I've spoken on the interface of trade law in competition law a few times at international conferences and each time I'm astounded by the protectionism we see by our contemporaries.
 - c. **I was involved in an early ICN project on unilateral market power and I met with one of my co-authors at the OFT.** This was the early naughties and he told me that the OFT were looking to use consumer *protection law to enhance competition law*. Domestically in 2007 we saw the influence this could have with the penalties imposed on the banks for inadequate disclosure of foreign currency conversion fees (*ANZ National was fined a total of \$1.325 million and agreed to pay reparation of \$10,000,000 and costs of \$160,000*).¹⁴

¹² <https://www.internationalcompetitionnetwork.org/>

¹³ [Wikipedia notes](#): *The International Competition Network (ICN) is an informal, virtual network that seeks to facilitate cooperation between competition law authorities globally. It was established in 2001 after the publication of a Final Report of the International Competition Policy Advisory Committee to the US Attorney General and Assistant Attorney General for Antitrust (or the ICPAC report, for short). I have not found the source for the comment on opening up markets but recall it from readings at the time*

¹⁴ See for example: [https://comcom.govt.nz/news-and-media/media-releases/archive/seventh-bank-to-plead-guilty-tsb-to-pay-\\$471,000-over-credit-card-fees](https://comcom.govt.nz/news-and-media/media-releases/archive/seventh-bank-to-plead-guilty-tsb-to-pay-$471,000-over-credit-card-fees)

On 14 August 2023 we saw the announcement: *Commerce Commission action delivers \$3.675 million 'sting' to One NZ for Kiwi consumers*¹⁵

[3] The consumer welfare standard (CWS) & other things

18. We've seen the move from Chicago versus Harvard school to hipster economics to neo-Brandeisism & other names. There is the US political & legal debate that John noted.
19. There is tremendous debate on the *2023 draft merger guidelines* issued by the FTC and DOJ:¹⁶
 - a. critics say it ignores recent case law and is excessively focused on market structure.
 - b. the agencies say that:
 - i. transparent: the guide is intended to be objective and transparent to demonstrate to parties how they approach issues (noting they are open to feedback);
 - ii. it's the law: they cite statutes and Supreme Court jurisprudence, plus relevant appeals courts decisions (which are still binding);
 - iii. market / economics: the guides apply current economic thinking, reflecting market developments (predominantly platforms) as well as the law.
20. We are lucky that we have well-established statute and case law. As summarised in the OECD submission John referred to, *Advantages and Disadvantages of Competition Welfare Standards – Note by New Zealand*¹⁷, which discusses the topic superbly, the 2001 amendments clarified that the "SLC test" we know and love is a consumer welfare test, but we have roles for the total welfare standard (for authorisations) with potential for the modified total welfare approach.
21. Despite this we, and other members of the ICN, cannot help but be influenced by the *2023 Draft Merger Guidelines* - or at least the thinking behind them - and for those wanting to know more I recommend the ABA's podcast.¹⁸ In addition to highlighting concerns about increasing market concentration, concerns about market power in labour markets (largely exempt here under section 44 of the Commerce Act), it has been stressed by agency representatives that stepping away from looking at things as purely vertical or horizontal (and recombining the guides) is not just to assess areas of harm, **it is also to identify broader explanations and/or benefits of proposals which a narrower analysis may miss**. This is certainly something important for us, as

¹⁵ [Commerce Commission - Commerce Commission action delivers \\$3.675 million 'sting' to One NZ for Kiwi consumers \(comcom.govt.nz\)](https://comcom.govt.nz)

¹⁶ [Antitrust Division | 2023 Draft Merger Guidelines | United States Department of Justice](https://www.justice.gov/antitrust/2023-draft-merger-guidelines)

¹⁷ As noted in footnote 13 above. *OECD: DAF/COMP/WD(2023)23* ; 15 June 2023

[https://one.oecd.org/document/DAF/COMP/WD\(2023\)23/en/pdf](https://one.oecd.org/document/DAF/COMP/WD(2023)23/en/pdf)

¹⁸ **What Are the Thoughts Behind the Changes? Draft DOJ-FTC Merger Guidelines Explained by DOJ DAAGs**

Our Curious Amalgam On July 19, 2023, the U.S. Department of Justice's Antitrust Division and the Federal Trade Commission issued the long-awaited draft Merger Guidelines. How should you approach the draft guidelines? The DOJ Antitrust Division's Deputy Assistant Attorney Generals Andy Forman and Michael Kades speak with Melissa Maxman and Anora Wang about the background, guiding principles, and some specific languages. Listen and engage in the constructive process of commenting on the guidelines. With special guests: Andrew Forman, Deputy Assistant Attorney General for the Antitrust Division, U.S. Department of Justice and Michael Kades, Deputy Assistant Attorney General for the Antitrust Division, U.S. Department of Justice Related Links: DOJ-FTC 2023 Draft Merger Guidelines (July 19, 2023) "Look Mickey" by Roy Lichtenstein (National Gallery of Art) Hosted by: Melissa Maxman, Cohen & Gresser LLP and Anora Wang, Arnold & Porter Kaye Scholer LLP

Listen on Apple Podcasts: <https://podcasts.apple.com/nz/podcast/our-curious-amalgam/id1475699244?i=1000623634550>

we increasingly see narrowly defined markets, or focussing on customer or supplier groups. This broader assessment is described as a “prism” and “3D chess” in the ABA podcast.

22. But picking up on themes from John's talk, there is indeed a suspicion about size and market concentration (which can be seen in the (rebuttable) presumptions in the *2023 Draft Merger Guidelines*).
23. This is exemplified by the “blurb” for Tim Wu's *Antitrust in the new Gilded Age* which reads:¹⁹

We live in an age of extreme corporate concentration, in which global industries are controlled by just a few giants firms—big banks, big pharma, and big tech, just to name a few. But concern over what Louis Brandeis called the “curse of bigness” can no longer remain the province of specialist lawyers and economists, for it has spilled over into policy and politics, even threatening democracy itself. History suggests that tolerance of inequality and failing to control excessive corporate power may prompt the rise of populism, nationalism, extremist politicians, and fascist regimes. In short, as Wu warns, we are in grave danger of repeating the signature errors of the twentieth century.

24. We have also seen greater scrutiny of platforms, most notably with the introduction of the EU *Digital Markets Act*.²⁰
25. I don't think I need to say much on this other than I think that we are lucky that we do not have the politics of the US - but I am interested to follow from afar accusations that prior articles by some FTC commissioners suggest process issues.²¹
26. For those wanting a more abridged version, I was interested to see the tweet by Former FTC Acting Chair & Commissioner, Maureen Ohlhausen, commenting to US parties concerned about the *2023 Draft Merger Guidelines*:²²

This doesn't change the law. You have the same chance of winning in court tomorrow that you had yesterday before these guidelines [were released]

27. This does of course highlight the more litigious nature of the US, US antitrust, and the fact that litigation there is often worthwhile, unlike in our small economy. This highlights the significance of the Commission's soft (and not so soft) law. It's fair to say that the debate will continue in the US.²³
28. John referred to the Robinson-Patman Act. A leading US attorney blogs “*When I first started practicing antitrust law in the ‘80's, the Robinson-Patman Act was already an object of derision*”.²⁴ Sadly I have run out of time to add commentary on this but I commend the blog to you if you're interested in more background. (I wonder whether the criticisms are about a focus

¹⁹ [Columbia Global Reports | The Curse of Bigness · Columbia Global Reports](#)

²⁰ [Evaluating the Case for Regulation of Digital Platforms – Report on the Digital Economy \(gaidigitalreport.com\)](#)

²¹ [FTC chair Khan accused of 'abuse of power' in new US House probe | Reuters](#)

²² <https://twitter.com/bakerbotts/status/1682484371045883904/photo/1>

²³ [The case against the FTC | The Hill](#)

²⁴ [Forgotten But Not Gone—Antitrust, Price Discrimination, and The Robinson-Patman Act in the 21st Century — The Antitrust Attorney Blog — February 26, 2020](#)

on competitors, rather than consumers, and excessive formalism.²⁵ I suspect that there are (quite strong) views contrary to those expressed to John. *Small dealers and worthy men?*²⁶)

29. I wonder if there is a desire for antitrust / competition law to do too much. We are already seeing that competition law most broadly can be seen to cover:
- a. Antitrust / competition²⁷
 - b. Consumer protection
 - c. Data protection
 - d. Privacy.
30. Indeed the ABA podcast series *Our curious amalgam* describes the mix as being as above.
31. In short, I (largely, I think) agree with John's comments on the *political economy* whatever it is.

[4] Regulation to enhance competition (especially for our small economy)

32. Again I agree with John. We have seen an increase in regulation to enhance competition, where competition is seen as having failed, or market structures otherwise dictate against it.
33. But as noted before, I think the arc has been long, having started 20 years ago.
34. When we acted for 2degrees on mobile termination, many indicated that there would be little if any benefit. No one seems to seriously question that now.
35. I also believe that with small concentrated markets, and a relatively permissive merger clearance regime that generally permits much higher concentration than other, bigger markets, it is even more important that we have both as much market competition as possible but are prepared to regulate when necessary.
36. My own view is that while platform regulation may be seen as necessary or desirable by some:
- a. Generally this will be a matter for other regulators – to reinforce John's comments, technology and globalisation may drive the platforms.
 - b. Care must be taken as technology moves so quickly – the Microsoft case²⁸ now seems a distant memory, and the companies can come and go (MySpace anyone?) – we may need a long enough time frame, as certainly the broader perspectives noted above.

²⁵ The problem may be that it was an amendment of the antitrust laws. I understand that in 1936, it was clearly aimed at protecting competitors – the little retailers, especially small grocery stores. But when all the antitrust laws were focused on consumer welfare, Robinson-Patman had to change its focus as well. Therefore, interpretations of it were narrowed considerably.

²⁶ *Trans-Missouri Freight Ass'n*, 166 U.S. at 323. Referred to in [Consumer Welfare & the Rule of Law: The Case Against the New Populist Antitrust Movement](#) April 15, 2019, Elyse Dorsey, Geoffrey A. Manne, Jan M. Rybnicek, Kristian Stout, and Joshua D. Wright

²⁷ My Bing / chat GPT search suggested that: this is really just semantics that antitrust is the US word and competition law for the EU and elsewhere, confusingly they are often treated as complementary terms rather than substitutes; regardless they have **the same goals, promoting fair competition, protecting consumer welfare & fostering competition**

²⁸ *United States v. Microsoft Corporation*, 253 F.3d 34 (D.C. Cir. 2001)

[5] “Mateship” as the West (aka big) Island might say.

37. Earlier I noted the Commission’s stupendous successes in the consumer protection law space. The OTT strategy works! It was no accident that John’s predecessor, Anna Rawlings, was a leading consumer protection lawyer.
38. The Commission’s broader advocacy through media releases (which has always been a forte, hats off to Vince Cholewa, and others in that role past & present) and its excellent guidelines is also strong.
39. I like John’s reference to “playing nice” which I see as a constructive way where the Commission can be more proactive, like a referee perhaps with quicker and more efficient (and less damaging / costly) outcomes.
40. I also would reinforce his views and the desire to have mutual respect which is something for us all to remember. External advisers can be the Commission’s greatest advocates. This is a two-way street.
41. Finally, the Commission will, as I understand it from former chair Anna Rawlings’ recent post-mortem,²⁹ soon have doubled in size in the space of five years. It is now an even stronger monopolist with few, if any, constraints. I urge the Commission to use that power wisely.

²⁹ LEANZ AGM, and Reflections from Former Commerce Commission Chair, **Anna Rawlings**. Speakers: **Anna Rawlings**. Date: Wednesday 21 June 2023