

*CPI's Oceania Column Presents:*

# Crisis Talk: Careful Messaging Required as New Zealand Navigates COVID-19 on Eve of Cartel Criminalization

*By Anna Ryan<sup>1</sup>*

*(Lane Neave)*

*Edited by Barbora Jedlickova (University of Queensland)*



Copyright © 2020

Competition Policy International, Inc. For more information visit [CompetitionPolicyInternational.com](http://CompetitionPolicyInternational.com)

August 2020

The residents of my home city of Christchurch, New Zealand, have experienced considerable tragedy in the past decade. Next month, on September 4, 2020, we will mark the 10<sup>th</sup> anniversary of a magnitude 7.1 earthquake which tore through our city just after 4.30am on a Saturday, causing widespread damage. While miraculously no one was killed in that earthquake, in the months that followed we endured numerous serious aftershocks, the most devastating of which hit Christchurch shortly before lunchtime on Tuesday, February 22, 2011. Centered directly under the central city, that aftershock was much more destructive than the original September earthquake. Two substantial office buildings, and many other structures, collapsed, killing 185 people and injuring several thousand. The damage to the building stock in the central city was so severe that approximately 80 percent of Christchurch's central business district subsequently had to be demolished.

Fast forward eight years to Friday, March 15, 2019, and as my colleagues and I settled down to work after lunch – in our new, post-earthquake office – horrific accounts started to circulate of shots being fired at the Al Noor Mosque, located on the western perimeter of Christchurch's iconic Hagley Park. We locked the doors to our building, and watched in disbelief as the media reports began to roll in that a lone gunman had murdered more than 50 people attending Friday prayer at two of our city's mosques. This hate crime – later confirmed as a terrorist attack – was unprecedented in peaceful New Zealand.

Almost exactly a year on from the Christchurch mosque shootings, on March 19, 2020, New Zealand closed its borders to all non-residents for the first time in our nation's history, in response to the COVID-19 pandemic. Six days later, our country went into nationwide lockdown in an effort to contain the virus. Lockdown restrictions began to be eased on April 27, and were lifted entirely on May 13, but border control remains and inbound travelers are required to complete two weeks in managed isolation. At the time of writing, after more than 100 days without any locally acquired cases of COVID-19, Auckland - New Zealand's largest city – is back into lockdown due to a cluster of community transmission cases stemming from an as-yet unidentified source.

Of all the lessons that can be drawn from New Zealand's response to the devastating events described above, one observation is that clear, consistent messaging is a central plank of successful leadership in a time of crisis. The day after the February 22, 2011 earthquake, then Prime Minister John Key sparked the nation's imagination by declaring that "Christchurch will rise again." The phrase "Rise up Christchurch" went on to become synonymous with our earthquake recovery efforts, along with the Maori affirmation "Kai Kaha," meaning "Stay strong." In the immediate aftermath of the Christchurch mosque shootings, our current Prime Minister, Jacinda Ardern, similarly galvanized the nation by vowing to deny the Australian perpetrator notoriety by never speaking his name. This message resonated so strongly with the New Zealand public that the media largely ceased reporting that detail, resulting in the name falling into relative obscurity. And as COVID-19 began to sweep the globe earlier this year, while many nations' leaders struggled to articulate a coherent response, New Zealand's Prime Minister delivered a masterclass in crisis communication. As she unveiled some of the strictest and earliest self-isolation measures in the world, Ms. Ardern reflected that "We're going hard and we're going early...We only have 102 cases, but so did Italy once." Equally succinct were her powerful messages (repeated many times during our initial lockdown and in the weeks that have followed) that New Zealand is a "team of 5 million and "we are all in this together."

Like most competition regulators around the globe, the New Zealand Commerce Commission has not been immune to the severe disruption caused by COVID-19. The day before our nationwide lockdown began, as national supply chains began to buckle under the weight of consumer demand, New Zealand's Minister of Commerce and Consumer Affairs sought to formally assure businesses that they would not face prosecution under New Zealand's Commerce Act 1986 for collaborating for the purpose of maintaining broad and fair access to essential goods and services. The avenue by which the Minister offered this assurance was Section 26 of the Act, which requires the Commission to have regard to the economic policies of the Government in exercising its statutory powers.

Recognizing the importance of clear communication in times of crisis, the Commission promptly responded with a media statement welcoming the Minister's announcement, and confirming enforcement action would not be taken against New Zealand businesses cooperating to ensure that consumers continued to be supplied with essential goods and services. The Commission then issued guidelines describing some of the factors it will take into account when assessing whether collaboration is legitimately necessary in response to the COVID-19 pandemic. Specifically, the guidelines noted that:

- necessary, legitimate collaboration should center on new measures, taken in good faith in response to extraordinary, pandemic-related, circumstances;
- the measures implemented under the collaboration must not be able to be effectively achieved by businesses acting separately;
- the collaboration should concern essential goods or services (or facilitating their supply);
- the collaboration should be intended to achieve an outcome that benefits consumers, or otherwise serves the public interest;
- the collaboration should be of limited in scope and duration, and include a regular review mechanism for determining whether the collaboration remains necessary;
- information sharing and the type of information shared should not extend beyond what is necessary to respond to the pandemic;
- the collaboration should incorporate any reasonably available measures to minimize potential harm, including any potential substantial lessening of competition; and
- the collaboration should be inclusive - i.e. smaller or independent businesses should be permitted to participate, and competing businesses should be able to access to goods or services.<sup>2</sup>

The guidelines also stipulated that when deciding whether to investigate or take enforcement action, the Commission will consider the extent to which:

- the collaboration is supported by relevant regulatory agencies;
- affected parties support the collaboration; and
- the participants have engaged proactively with the Commission, including making full and transparent disclosure of the measures proposed and addressing any concerns raised.<sup>3</sup>

In mid-May, the Government made temporary but significant amendments to the Commerce Act under the COVID-19 Response (Further Management Measures) Legislation Act 2020. These amendments, which will remain in force until at least the rest of this year, allow the Commission to authorize cartel conduct where it will result in public benefit, waive the NZD\$36,800 application fee, issue provisional authorizations, and to decide not to issue a draft determination before reaching a final decision. In response to this temporary legislation, the Commission swiftly released further guidelines in which it acknowledged that businesses might need to take steps to respond to COVID-19 quickly, and that significant public benefits might be lost, or significant detriments or costs incurred, if these steps were delayed.

The Commerce Commission can be commended for its clear and responsive initial handling of the COVID-19 crisis. Like many organizations in New Zealand, its employees were required to work remotely for several weeks during our national lockdown. During this period, the Commission remained in close contact with New Zealand businesses and consumers via the usual channels such as media releases and website updates, and in addition to carrying out the tasks described above, also undertook a significant body of work in relation to consumer rights and business obligations in relation to disruptions to travel, trading, and events as a result of the pandemic.

Following the lifting of our initial lockdown, however, as the New Zealand public turned its attention to our national election on September 19, 2020 and our country's economic outlook, the question of what is the likely long-term impact of COVID-19 on competition in New Zealand markets began to loom on the horizon. As a relatively isolated island nation (currently more isolated than usual!) with a total population of just under 5 million, unsurprisingly there are high levels of concentration in some of New Zealand's markets for the supply of essential goods and services – for instance, there are only two major players in our supermarket sector. To the extent that our more concentrated markets have traditionally been competitive, consideration must be given as to whether temporary collaboration during the COVID-19 crisis may have weakened competitive tension between major industry actors.

Unfortunately, the temporary measures necessitated by COVID-19 were also particularly ill-timed in terms of the Commerce Commission delivering on its longer-term priorities in the area of cartel enforcement. Specifically, legislation to criminalize cartel conduct – the Commerce (Criminalisation of Cartels) Amendment Act 2019 – is due to come into full force in New Zealand on April 8, 2021. Under the new legislation, criminal penalties may be imposed against individuals and businesses that deliberately engage in cartel conduct. The new criminal penalties are up to seven years' imprisonment for individuals and/or a fine of up to NZD\$500,000. The fines for businesses are the same under the civil and criminal regime. All cartel agreements entered into after April 8, 2021 will be subject to the criminal legislation, together with any cartel agreements entered into before that date if those agreements continue to be given effect to after April 8, 2021.

Significantly, in keeping with its usual, proactive approach to fostering a culture of compliance with New Zealand's competition laws, the Commission's original cartel work programme for 2020 placed considerable emphasis on educating traders about conduct constituting cartel conduct and the penalties businesses and individuals could face (both civil and criminal) for engaging in illegal activity. The need for clarity of messaging was heightened by the fact that New Zealand's cartel laws were significantly amended in 2017 under the Commerce (Cartels and Other Matters) Amendment Act. Prior to the passing of the Amendment Act, the two

sections in New Zealand's Commerce Act that most specifically addressed cartel conduct were Section 27 and 30. Section 27 prohibits parties from entering into, or giving effect to, contracts, arrangements or understandings that have the purpose, effect or likely effect of substantially lessening competition in any market in New Zealand. Section 30 contained a *per se* prohibition on price fixing. The Amendment Act repealed Section 30 and replaced it with a prohibition on parties entering into, or giving effect to, a contract, arrangement or understanding that contains a "cartel provision." The term "cartel provision" is defined in Section 30A of the Act as a provision that has the purpose, effect, or likely effect of:

- price fixing – e.g. fixing, controlling or maintaining the price for goods or services that any two or more parties to the arrangement supply in competition with each other, or interferes with how that price is set;
- restricting output – e.g. preventing, restricting or limiting production, capacity, acquisition or supply of goods or services that any two or more parties to the arrangement supply in competition with each other; and/or
- market allocating – e.g. allocating customers to or from which the parties supply or acquire goods or services in competition with each other, or allocating geographic areas in which the parties supply or acquire goods in competition with each other.

The Amendment Act left Section 27 of the Act unchanged.

In the period from the passing of the Amendment Act to immediately prior to the outbreak of the pandemic, the Commerce Commission had been working steadily to educate New Zealand businesses on compliance with the new cartel legislation, including releasing guidelines on competitor collaboration, updating its policy and guidelines to provide greater clarity for those applying for leniency, and launching an anonymous whistleblowing tool to encourage the reporting of cartels. It remains to be seen whether, or to what extent, this work may have been undermined by the Commission's more recent message that competitors will not face prosecution for cooperating to ensure the supply of essential goods and services during COVID-19.

On March 30, 2020, Australian Competition and Consumer Commission Chair Rod Sims delivered a speech to the Australian Financial Reviews Banking and Wealth Summit 2020, titled "Will competition survive the current crises?" In his address, Mr. Sims argued that while governments need to implement sensible and temporary immediate measures to support the economy during the COVID-19 crisis (and competition authorities play a role in this), if we are to recover successfully from the crisis, the long-term competitive structure of our markets must be maintained.<sup>4</sup>

The vigorous enforcement of New Zealand's cartel laws will undoubtedly feature in our eventual post-pandemic recovery. However, it may be a considerable time before we can determine the full extent to which temporary measures allowing greater collaboration may have impacted on our local markets.

Throughout its handling of the COVID-19 crisis, the Commerce Commission has repeatedly stated that it will not tolerate unscrupulous use of the pandemic as an excuse for non-essential collusion or anti-competitive behavior.<sup>5</sup> Given the speed at which traders have had to adapt over recent months in order to survive, however, it is possible that this nuanced messaging may have been lost on some businesses. With New Zealand's cartel

criminalization laws due to come into force in less than 8 months, now is the time for the Commission to begin refocusing the conversation on the serious harm caused to consumers by hard core cartels and the fact that perpetrators will shortly face criminal sanctions. As a resident of a city that has experienced a lot of upheaval over the past decade, I believe that there is considerable value to be gained by reinstating some sense of normality in the midst of life-changing events. In the context of the Commission’s cartel enforcement work, thanks to the hard work of the Government and the Commission over the past few months, those who legitimately need to collaborate over the supply of essential goods or services now know that avenues are available to them to achieve this desirable outcome. As New Zealand begins to turn its attention to economic recovery, conversations need to center on ensuring the future health of our markets. Directing attention back to the upcoming criminalization of cartel conduct seems an obvious place to start.

---

<sup>1</sup> Anna Ryan heads Lane Neave’s competition law practice and is the current Chair of the Competition Law and Policy Institute of New Zealand.

<sup>2</sup> Commerce Commission, “Guideline: Business collaboration under COVID-19,” (May 2020), page 3.

<sup>3</sup> Commerce Commission, “Guideline: Business collaboration under COVID-19,” (May 2020), page 4.

<sup>4</sup> <https://www.accc.gov.au/speech/will-competition-survive-the-current-crises>.

<sup>5</sup> See for example, Commerce Commission, “Guideline: Business collaboration under COVID-19,” (May 2020), page 2; and <https://comcom.govt.nz/news-and-media/media-releases/2020/covid-19-commission-issues-guidance-on-business-collaboration>.