UPDATE ON LEGAL SUBMISSION ARISING FROM COURT OF APPEAL DECISION IN *GODFREY HIRST*

23 December 2016

1. Since the Applicants' legal submission on the Draft Determination was submitted on 25 November 2016 ("**first legal submission**"), the Court of Appeal has issued its decision in *Godfrey Hirst*[1] ("***Godfrey Hirst* (CA)**"), on appeal from the High Court decision relied on in the parties' first legal submission.

2. As outlined below, the *Godfrey Hirst* judgment fully supports the position set out in the Applicants' first legal submission, and is consistent with the prevailing jurisprudence in this regard. In short, *Godfrey Hirst* (CA) confirms that:

   (a) The Commission must exercise its powers in order to give effect to the purpose of the Act, which has as its focus *economic efficiency* and (subject to broader efficiency considerations) the promotion of *competition in markets* in New Zealand. These are economic policy goals.

   (b) The authorisation process requires the Commission to weigh competitive detriments (arising in the specific markets affected by a lessening of competition) against any public benefits. When assessing public benefits, in respect of each benefit claimed, both the overall magnitude of the benefit, and the costs associated with achieving that particular benefit, must be taken into account when considering whether the benefit claimed is indeed a material benefit net of those costs. However, such costs are not detriments in their own right for the purposes of the balancing exercise, they simply operate to discount the "value to the public" of the particular benefit claimed.

   (c) When addressing public benefits, non-economic considerations are only relevant in a narrow set of circumstances (and again, these considerations are only relevant to the quantification or other assessment of the value of any claimed "public benefit").

   (d) The Commission cannot overlay social judgment on this decision-making framework, and must place little or no weight on factors that are based on speculation or intuition.

3. These matters are discussion in further detail below.

The Applicants' position

4. To briefly restate the approach that appears to have been adopted by the Commission in the Draft Determination (in relation to the range of detriments that may be relevant in the context of this application), it is that:

   (a) Media plurality impacts are a public detriment that can be taken into account under the Commerce Act 1986 ("**the Act**") (because they relate to "a well-functioning democracy" and "a healthy democracy");[2] and

   (b) This public dis-benefit in itself may justify refusing the authorisation, irrespective of how large the economic benefits are.[3]

---

1 *Godfrey Hirst NZ Limited v Commerce Commission* [2016] NZCA 560.
2 Commerce Commission's Draft Determination at [1013].
3 At [1017].

5. There is a paragraph in the Court of Appeal's decision in *Godfrey Hirst,* which might, at first blush and taken in isolation, appear to support that position. That is paragraph 24, which reads as follows:

> While the benefits are not confined to the particular market, the Commission and the courts **must take account of the values or public interest at stake in that particular market when determining benefits or detriments** to the wider public, **especially when economic activity can have negative consequences for others and many social goods and services are now distributed through market mechanisms**. But **ordinary commercial markets** are unlikely to warrant the Commission's assessment of non-economic factors when determining public benefits. In the present appeal we need not go beyond the Commission's economic focus to public benefits because the question of law relates solely to the inclusion (or exclusion) of efficiency gains flowing to foreign shareholders.
>
> [Emphasis added.]

6. As an initial observation, there is nothing in paragraph 24 or the balance of the judgment in *Godfrey Hirst* (CA) that suggests that the Commission has an unfettered discretion to consider any factor in its net public benefit assessment, irrespective of its connection to the purpose of the Act. To the contrary:

   (a) The Commission is constrained by the purpose and scope of the Act. This is made clear in para [12] of *Godfrey Hirst* (CA) where the Court states that it is agreed that "benefit to the public" *"must be connected to the broad purposes of the statutory regime for regulating competition in New Zealand, which establishes the Commission and has been subject to several amendments*."

   (b) As set out in the first legal submission, the Act is focused on promoting economic efficiency, an objective that is generally to be pursued through competition in markets. In terms of public benefit, in the context of a competition statute designed to promote economic efficiency, the principal elements of the public benefit assessment are the achievement of the economic goals of efficiency and economic progress.

7. Further, as explained below, to the extent paragraph 24 refers to detriments to the public, it does not detract from the fundamental authorisation framework or the prevailing jurisprudence as summarised set out in the first submission.

Context for decision

8. The issue the Court of Appeal was considering in *Godfrey Hirst* (CA) arose from the fact that the benefits (in the form of cost savings) arising from the merger in issue would go to a company that was 45% foreign owned. It was thus arguable that a substantial portion of the benefits would accrue to a person who was not a member of the New Zealand public.

9. The question before the Court was therefore whether that 45% of the benefits counted as a benefit to New Zealand under the authorisation test, or whether only 55% of the benefits could count, to weigh against the competitive detriments in the benefits/detriments balancing exercise mandated in the authorisation process. The High Court had held that, assuming the company was only earning a normal (as opposed to supra-competitive) return on foreign capital, all the cost savings would count as a benefit to New Zealand: it was not necessary to apportion the benefit to reflect the foreign shareholding[4] for a number of reasons, including because there is a general benefit to New Zealand in being an attractive destination for foreign capital.[5]

---

4 *Godfrey Hirst NZ Limited v Commerce Commission [2016] NZHC 1262* at [36].
5 Ibid.

10. The question on appeal was whether the full amount of the cost savings counted as a "benefit to the public". The Commission's position was that it did.

11. Many of the features of the regime highlighted in the first legal submission were also highlighted by the Court of Appeal in its decision, for example:

    (a) In the section headed "Emphasising efficiencies", the Court referred to s3A and its emphasis on the obligation of the Commission to focus on efficiencies when considering benefits to the public.[6] It noted that before this amendment "the Commission had in some cases placed efficiency in a subordinate position to market competition", indicating that the amendment had been required to re-orientate the Commission to its correct focus.[7]

    (b) The Court of Appeal also cited the same passage that the Applicants cited in the first legal submission, from the Minister of Commerce's speech on introduction of the s3A amendment. As did the Applicants in the first legal submission, the Court of Appeal in its citation emphasised the following passage:[8]

> ...the presumption of the principal Act in favour of competition as the prime regulator of business activities may be displaced when the efficiency gains to the whole economy may arise from what may appear to be a lessening of competition.

    (c) The Court summarised the position that the Commission is not required to preserve multiple market players at the expense of gains in efficiency. Efficiency gains count towards public benefit when determining whether to authorise business acquisitions, although that does not displace other public benefits matters.[9]

    (d) The Court considered the introduction of s1A, emphasising the purpose of the regime is to promote competition for the long-term benefit of consumers,[10] and that a "benefit" is "anything of value to the community",[11] and "any gain to the public".[12] All of the passages cited by the Court of Appeal indicate that, in accordance with the ordinary use of the term, a "benefit" can only be a positive value on the benefits / detriments ledger.

Paragraph 24

12. Against that framework, at paragraph 24 the Court stated that:

> While the benefits are not confined to the particular market, the Commission and the courts must take account of the values or public interest at stake in that particular market when determining benefits or detriments to the wider public, especially when economic activity can have negative consequences for others and many social goods and services are now distributed through market mechanisms.

13. This statement must be read in the context of the question before the Court as set out above.

---

6 *Godfrey Hirst* (CA) at [14].
7 At [15].
8 At [17].
9 At [18].
10 At [21].
11 At [22].
12 At [23].

14. There is nothing in paragraph 24 that suggests the Court of Appeal intended to depart from the extensive jurisprudence relied on by the High Court, or that it itself cited in the preceding section of its decision, regarding the purpose and scheme of the Act and the way in which the scheme of the Act requires benefits and detriments to be assessed in the context of the authorisation regime. Rather:

    (a) In the broader context of the case, paragraph 24 is concerned with when non-quantifiable *benefits* can be taken into account.

    (b) The discussion in paragraph 24 makes it clear that the focus of the public *benefit* test is on *economic activity*, noting that in very limited circumstances, non-economic factors may be relevant to the assessment of a particular benefit. Specifically, the Court speculates that this might arise where the particular market is involved in delivering social services and goods; for example, health and social care services once provided by the state, but "*now* distributed through market mechanisms".[13] The consideration of non-economic factors (positive or negative) is not warranted in ordinary commercial markets – by which the Court appears to have meant, outside the context of use of market mechanisms (typically, by public bodies or perhaps charities) to deliver social goods and services.

    (c) In the context of a paragraph in a decision that deals with the manner in which *benefits* are assessed, the reference to "detriments" must be a reference to the Commission's consideration of whether or not there is a *net* public gain from the benefit claimed, after off-setting the costs (or detriments) that also arise in achieving that claimed benefit.

    (d) That is, even where non-economic factors are relevant, paragraph 24 does not signal a departure from the position that negative consequences or costs associated with achieving a particular benefit or gain are relevant only to the quantification or other assessment of the magnitude and robustness of *that* claimed benefit or gain.

15. Further, in relation to non-economic factors, media markets plainly do not come within the specific category of market provision of social services referred to in paragraph 24. Newspapers, radio, and digital platforms survive (or fail), and have always survived (or failed), based on their ability to attract circulation and/or advertising revenues. The government is not purchasing services from the parties for the public good, except in the limited instances where they receive New Zealand on Air funding for particular programmes (and TVNZ receives the largest proportion of New Zealand on Air funding by a significant margin). The parties to this transaction must provide commercially viable services that are profitable on a stand-alone basis, or those businesses will fail. That is the standard of an ordinary commercial market.

16. As can be seen from the analysis of these same markets in two recent ACCC cases,[14] the news / information and advertising markets are readily analysed in the anti-trust context as "ordinary commercial markets".

---

13 *Godfrey Hirst* (CA) at [24].

14 The Australian Competition and Consumer Commission has considered and cleared two media mergers in recent months:

- Seven West Media Limited - proposed acquisition of The Sunday Times Publication and website from News Limited (public review completed 15 September 2016). Public register accessible at: http://registers.accc.gov.au/content/index.phtml/itemId/1198464/fromItemId/751046; and
- News Corporation - proposed acquisition of APN News & Media Limited's Australian Regional Media division - ARM (public review completed 8 December 2016). Public register accessible at: http://registers.accc.gov.au/content/index.phtml/itemId/1200083/fromItemId/751046.

17. It is accordingly inconsistent with the purpose and scheme of the Act, and with the approach taken by all other antitrust regulators with developed and sophisticated competition law regimes, for the Commission to take broad media plurality considerations into account in any context other than as a factor of product quality that drives consumer choice and advertiser demand.

18. The European Commission reached this same conclusion in its consideration of the *Microsoft / LinkedIn* merger when considering the point at which a "public good" falls within, and when it falls outside, even a very wide public interest economic analysis. In relation to the social policy considerations surrounding privacy related issues, the EU Commission stated (as explained in its press release):[15]

> Privacy related concerns as such do not fall within the scope of EU competition law but can be taken into account in the competition assessment to the extent that consumers see it as a significant factor of quality, and the merging parties compete with each other on this factor.

19. The Commission, like the European Commission, is an economic regulator and must focus on economic considerations. This has been made clear in the reform of its authorisation test under the Act; the addition of the updated purpose statement under s1A in 1990; and in all of the cases that have ruled on the scope of its jurisdiction since then, including the most recent decision of the Court of Appeal in *Godfrey Hirst*.

Comments are obiter dicta

20. Moreover, the comments made by the Court at paragraph 24 were *obiter dicta*. They do not form part of the Court's reasoning in relation to the result reached by the Court on the question of law before it. As the Court recognised at [24], it was not concerned with the provision of social services and goods and did not need to look beyond the Commission's (normal) economic focus.

21. While *obiter dicta* comments in the Court of Appeal may be influential, they are not binding and are at most of persuasive effect. This is for good reason. Obiter comments are often made as an aside. The reasoning has not been tested through submission or argument on the subject, nor can the comment necessarily be treated as having benefited from the full consideration of the bench (given analysis and debate on the observation would ultimately be irrelevant to the final decision). To the extent that it might be argued that paragraph 24 suggests a departure from prevailing jurisprudence (which is not correct, for the reasons set out above), that proposition should be approached with a high degree of caution.

22. In particular, given the issue before the Court was the manner in which public *benefits* are to be assessed and quantified, another court would be slow to assume that the Court of Appeal was opining on, or departing from established case law on the type of *detriments* that can be taken into account. The Commission's own guidelines are clear that the relevant detriments are those arising from the substantial lessening in competition in the markets affected by the transaction in the form in of modelled price increases or quality reduction. No other detriments form part of the Commission's assessment as confirmed by case law.

Conclusion

23. In conclusion, the decision in *Godfrey Hirst* (CA) supports the analysis provided in the first legal submission. Specifically, paragraph 24 does not support any ability of the

---

[15] European Commission "Mergers: Commission approves acquisition of LinkedIn by Microsoft, subject to conditions" (press release, 6 December 2016). Accessible at: http://europa.eu/rapid/press-release_IP-16-4284_en.htm.

Commission to decline an authorisation where quantified benefits exceed quantified detriments, based on plurality "detriments". Nor does it otherwise detract from, or counter, the key arguments set out in the first legal submission: arguments which are well supported by case law including *Godfrey Hirst* (in the High Court and the Court of Appeal, noting that the High Court decision was upheld by the Court of Appeal and also remains authoritative, and helpful).

24. In particular, as set out in the first legal submission:

(a) In an authorisation, the first stage is consideration of (economic) detriments arising from the lessening of competition. The relevant detriments are limited to the economic detriments from harm to the competitive process, in the markets in which any lessening of competition is likely. The second stage is to consider whether there are public benefit gains that outweigh the competition detriments. Anything "of value" can be a benefit, provided it arises as a result of the transaction. In respect of each benefit claimed, the costs of achieving that benefit can be netted off against its claimed "value" to New Zealand, to arrive at a net benefit. The benefits do not need to accrue in the markets affected by the transaction.

(b) Media plurality concerns more broadly, are outside the scope of the Act, as has been recognised by the Commission in the past. Increased product quality and variety, as it affects consumers' and advertisers' product choices, is a relevant antitrust consideration in the context of the Commission's assessment of whether a substantial lessening of competition will arise through reduced product quality in the factual as compared with the counterfactual. However, broader considerations of the impact of the transaction on the "Fourth Estate" are social policy, not economic, factors. As the information outlined by the editorial attendees at the Commission's conference made clear, these issues involve not economics, but instead a mix of the disciplines of sociology and political science.

(c) If the Applicants had claimed that the transaction benefited the Fourth Estate, and the Commission was concerned such benefits would also come at a material cost to the Fourth Estate, then the Commission could plainly net out the costs directly arising from the achievement of the benefit claimed, and discount any "Fourth Estate benefit" to zero; and treat it as insufficiently substantiated and so unproven. But in this case, although the parties are firmly of the view that the Fourth Estate will benefit from the maintenance of a sustainable entity invested in journalism and print, with incentives to keep journalists in the regions, the parties had no need to rely on those benefits to make their case for authorisation, because the efficiencies arising from the transaction are compelling. The Commission confirmed that view when it found in the Draft Determination that the benefits arising from cost savings significantly outweigh any detriments arising from a lessening of competition in the markets affected by the transaction.

(d) Even if plurality concerns could be considered, the case law is clear that the Commission is not permitted to stand back and overlay social judgement on the authorisation framework, or rely on speculation and intuition (as affirmed in *Godfrey Hirst*). The Commission must place limited weight on any unquantifiable benefits (and detriments, if unquantifiable detriments other than costs of achieving claimed benefits are permitted to be taken into account at all, which for the reasons explained above is not the case). It is apparent from a review of the Draft Determination that the Commission's description and assessment of potential effects on media plurality is (of necessity) abstract and imprecise. Reflecting the imprecise nature of that endeavour, the Commission makes significant judgements based on limited evidence with reference to

assumed broad "flow-on" effects such as government accountability, influence on politicians and "an effective functioning democratic process".

25. The Commission should take an approach that is consistent with *Godfrey Hirst (CA)* and other relevant New Zealand authorities. It should focus on economic efficiency considerations and disregard broader social policy goals that are not within the scope and purpose of the Commerce Act. Nothing in *Godfrey Hirst (CA)* supports the Commission's view that it has a statutory mandate to subordinate economic efficiency to other social goals. If the Commission is satisfied that the proposed transaction will deliver net efficiency gains for New Zealand, as it was in the draft determination, then the Commission can and must authorise the transaction.