

By email

Mya Nguyen

Commerce Commission
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MATTER NO. 400-4888
PARTNER Haydn Wong
DATE 22 May 2015

Dear Mya

Response to Godfrey Hirst memorandum of 21 May 2015

Thank you for providing us with a copy of the letter filed by Chapman Tripp on behalf of Godfrey Hirst, dated 21 May 2015. We respond on behalf of our client as follows.

1. Our client intends to proceed with the transaction if its authorisation application succeeds. The contrary inference that Godfrey Hirst seeks to draw is factually incorrect and does not satisfy the legal test under section 68(2) of the Commerce Act.
2. As a starting point, the letter is based on a press release from Cavalier Corporation and in so far as it follows exactly the press release it is partially accurate. We say "partially" because it quotes only those parts of the Press Release which are vaguely supportive of its arguments. By way of examples, the letter (other than by attaching copies of the Press Release) ignores that the Press Release indicates an operating profit in the order of \$1 million (only the asset write down takes the expected profit forecast below the bottom line). The letter also ignores that the Press Release describes a Business Plan produced by the Cavalier Corporation Board – and reviewed by Deloitte – taking the company back into profitability, and that the Cavalier Corporation Bankers have been apprised of that plan. Accordingly, the letter is selective of the facts.
3. As to the opinion expressed in the remainder of the letter, it is highly speculative and its conclusions are short on facts and fail the test under section 68(2) for the Commission to form the opinion that a proposed transaction is "unlikely to be proceeded with". The established test under section 68(2) requires the Commission to form the opinion that there is "a real or strong probability (i.e., something toward the upper end of the scale, and certainly much higher than a 50/50 prospect) that the acquisition is unlikely to be proceeded with, before the Commission can decline under s 68(2) to consider clearing or authorising it."¹ This is rather stronger than the "balance of probabilities" test, which is settled law as the test for clearances and authorisations.² That reflects the role of section 68(2) in the scheme

¹ *New Zealand Bus Ltd v Commerce Commission* (2002) 10 TCLR 377 (HC) at [34]. See also [35], which holds that it is an error to confuse uncertainty with unlikelihood.

² *Commerce Commission v Southern Cross Medical Care Society* (2001) 10 TCLR 269 (CA) at [7] and [65]-[66]. Those cases indicate that the Commission should only take into account evidence of "probable outcomes" rather than "possible" or "speculative" effects: see *Air New Zealand Limited v Commerce Commission* [1985] 2 NZLR 338 (HC) at 342, lines 36-45.

of the Commerce Act; i.e., the provision serves the purpose of relieving the Commission of the burden of considering the merits of transactions that will not proceed.³

4. The suggestion by Godfrey Hirst that a financially beneficial commercial transaction which is the subject of a binding contract and which requires no financial input from Cavalier Corporation will not go ahead comes nowhere near to the standard of a probable outcome. It is simply speculation based on a selective reading of a press release.
5. The transaction for which authorisation is sought from the Commission is by Cavalier Wool Holdings which is purely a wool scouring company and which is owned as to the other 50% by Direct Capital and the ACC. The transaction, once authorisation is granted, will be unconditional, binding on all the parties to it, and the parties stand ready to proceed. The benefits that flow from the transaction make it more likely that the merger will proceed.
6. The proposition advanced in the letter that Cavalier Corporation has “put the Commission and other interested parties to too much distraction and expense already” tends to overlook the fact that the “distraction and expense” in question has arisen largely as a consequence of Godfrey Hirst’s unsuccessful opposition and unsuccessful appeal. Godfrey Hirst is the sole significant opposition in respect of the current application and it has failed again at the Draft Determination level. It is that opposition that has added material cost and delay to the process.
7. The Commission can, in our view, safely dismiss the latest submission by Godfrey Hirst. Cavalier Wool Holdings would not be pursuing the application if it did not genuinely intend to complete the transaction. If Godfrey Hirst genuinely believes that the transaction will not proceed then it will no doubt reconsider the resources it continues to apply to opposing the application.

[Sgd: Phil Taylor]

Phil Taylor
Consultant

³ See *New Zealand Bus* (above) at [34]: “To lapse into the vernacular, the provision entitles the Commission to say “this one is dead in the water, we won't waste our time with it”. That may slightly overstate the appropriate test, but I think not greatly. Mr Millard instanced – I think correctly – a situation where the target company had already been taken over, and was no longer available for acquisition”.