CHAPMAN TRIPP

20 May 2011

The Chair and Members
Commerce Commission
Wellington

FROM: Grant David / Larissa Wall
DIRECT: +64 4 498 4908
MOBILE: +64 27 4410 322
FAX: +64 4 472 7111
EMAIL: grant.david@chapmantripp.com
REF: 042577817/1300804.1

By email

CAVALIER WOOL HOLDINGS / NEW ZEALAND WOOL SERVICES INTERNATIONAL – VARIATION

1 The Commission has invited submissions on the proposed "variation" of the notice seeking authorisation registered on 9 February 2011 and subsequently dealt with by the Commission in accordance with the procedure for such applications set out in Part 5 of the Commerce Act.

2 As explained in my email of 13 May 2011 to Marette Morrissey (copy **attached**), the Commission has no express power to receive or allow such a variation. That lack of express power must be contrasted with its newly inserted power under section 69AC to vary an undertaking that has been given in relation to an authorisation of a business acquisition. If it were considered necessary to include an express power to vary an undertaking, a fortiori express provision would be required to vary the authorisation itself, which the form of the application (together with any undertaking) effectively defines.

3 Importantly, the Commission, on receiving a notice seeking authorisation must take the positive step of determining whether that application complies with statutory and other prescribed requirements; then it must accept or decline the application. There is nothing in the wording to suggest that the Commission, having exercised that power, is able to re-exercise it one or more times to accommodate subsequent variations to what is being sought.

4 There are good policy reasons for that being the case. First, authorisation can only be granted "on the basis of such benefit to the public that it should be permitted". That requires a testing in public of the application by interested parties and such testing would be negated if the applicant were able to change what it is seeking after consultation has occurred.

5 Second, an ability to vary – especially late in the process – would give rise to the implication that the Commission is involving itself in the reshaping of the application. Such involvement would be inconsistent with the role of the Commission as independent arbiter of public benefit. The Commission must not be seen to be assisting with the applicant's case –especially where authorisation is being sought.

6 Third, an ability to allow variation would require a process that gives all interested parties proper scope for participation. Persons who are given recognition in the statutory procedure have the right to certainty as to what they are dealing with. Involvement in the authorisation procedure is costly and time-consuming.

7 For all those reasons, variation is inconsistent with the Commission's own previous practice. Apart from a few instances of minor changes to wording being allowed, the Commission has consistently required an applicant to start again if they have got the description of what they are seeking wrong. While that approach may occasionally be criticised for inflexibility, it does put appropriate onus on applicants and their advisers to be clear about what they are seeking.

8 Significantly, there was no criticism of that procedural inflexibility in the 2008 review of Part 5 of the Commerce Act when the then Minister of Commerce reported that the Part 5 procedures were working well. It is a function of legislature, not the Commission, to change the procedures prescribed by statute.

9 Assuming that the Commission does have an implied power to accept the variation, there would need to be the full opportunity for interested parties to comment on the new matter for which authorisation is now being sought. In particular: how the transactions as varied are contemplated; what agreements or understandings already exist or are contemplated; what execution risk attaches to those arrangements; and crucially, what effect on competition and public benefit claims by the applicant those arrangements may have?

10 The Commission cannot simply make assumptions in relation to any of those factors. Certainly, it cannot allow any claims by the applicant to pass untested.

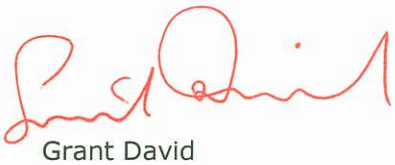
11 The proposed new wording of paragraph 4.5 of the application of 9 February 2011, as set out in Bell Gully's letter of 12 May, indicates that now only WSI's wool scouring assets at Whakatu and Kaputone and its shares in Lanolin Trading are being sought. No explanation is given, or has since been provided, for the change; and no claims have been made as to its effect.

12 It is fair to assume however that concern on the part of the applicant and its advisers as to substantial execution risk underlie the change. That concern of course illustrates the very real uncertainty that the whole acquisition gives rise to.

13 Given WSI's intransigent opposition as expressed at the conference, the Commission must have real doubts that any sale of WSI's scours to CWH is likely to proceed, and thus should exercise its discretion under section 68(2) to decline authorisation. For the Commission to be satisfied otherwise, it would need to be convinced that WSI somehow will completely reverse its position. While a majority shareholder may over time change the composition of the Board of WSI, changes to the fundamental business of the company cannot simply be assumed.

14 The alternative explanation is that some interim "warehousing" arrangement with a friendly party is being contemplated. As indicated previously however such arrangements are fraught with illegality. The Commission risks discrediting the authorisation procedure if it acquiesces in that ruse.

Yours faithfully



Grant David
PARTNER

DIRECT: +64 4 498 4908
EMAIL: grant.david@chapmantripp.com

Larissa Wall

From: Catherine Wheeler on behalf of Grant David
Sent: Friday, 13 May 2011 12:00 p.m.
To: Marette Morrissey; Larissa Wall; David Stock; David Goddard
Cc: Tania Pringle; Anthony Stewart; Matthew Dunning; Hamish Forsyth; David Ainsworth
Subject: RE: Cavalier Wool Holdings Limited: Application for Authorisation - Variation

Thanks for your prompt reply Marette.

I should perhaps clarify the nature of my concerns with the proposed variation of the application.

First, as to process, section 67 of the Commerce Act mandates the procedure which the Commission must apply when it has received a notice seeking authorisation for a business acquisition. That process includes registration, determination of compliance, consultation, and where the Commission determines to hold a conference compliance with section 69B. That process gives rise to rights on the part of all persons who participate in such a conference – including an express right of appeal against the Commission's determination. To vary an application after the conference has taken place would be tantamount to interference with those rights.

Significantly, there is no express power for the Commission to allow variation of an application for authorisation. Unlike, for example, the newly inserted express power under section 69AC which now enables the Commission to vary an undertaking that has been given in relation to an authorisation of a business acquisition. Even in that limited context, however, there are significant constraints on the Commission's ability to allow a variation.

Assuming for argument's sake that the Commission nevertheless does have implied power to accept a variation of an application seeking authorisation, such variation should only be allowed early in the process. Further, there should be full disclosure of the purpose underlying the proposed variation, with interested parties having an opportunity to comment. Certainly, no variation should be allowed if it would likely have a material affect on the Commission's decision, or is sought too late in the process for interested persons to comment.

Second, the Commission must have a real concern that the form of the variation being proposed here may involve a "warehousing" arrangement whereby a friendly party will acquire sufficient shareholding in WSI to procure the sale of the scours to CWH. Such an arrangement would effectively amount to the joint acquisition by CWH and that third party of the scours from the outset. Thus, the existence of any arrangement between that third party and CWH would itself require close scrutiny by the Commission as to its competition consequences and indeed its propriety.

Certainly, the existence of any such arrangement must be disclosed by CWH to the Commission and interested parties. In this regard I note that the effect of undisclosed arrangements in the context of clearance or authorisation applications was criticised by both the Commission and the High Court in *Commerce Commission v Fletcher Challenge Limited* [1989] 2 NZLR 554.

Regards

Grant

GRANT DAVID
PARTNER

CHAPMAN TRIPP | D: +64 4 498 4908 | M: +64 27 4410 322 | PA: Renee McCarthy / Catherine Wheeler +64 4 498 2280
www.chapmantripp.com

From: Marette Morrissey [mailto:Marette.Morrissey@comcom.govt.nz]
Sent: Friday, 13 May 2011 9:46 a.m.
To: Grant David; Larissa Wall; David Stock; David Goddard
Cc: Tania Pringle; Anthony Stewart; Matthew Dunning; Hamish Forsyth; David Ainsworth
Subject: RE: Cavalier Wool Holdings Limited: Application for Authorisation - Variation

Thanks for your email Grant.

The Applicant has not provided the Commission with copies or details of any documents which discuss the transaction proposed in its request to vary the application for authorisation.

The Commission's initial view is that the transaction is likely to be proceeded with, in which case any detriments and benefits will follow. In the event that Cavalier does not acquire the wool scouring assets, there will be no harm or effect on competition.

Regards
Marette

From: Grant David [mailto:Grant.David@chapmantripp.com]
Sent: Thursday, 12 May 2011 3:37 p.m.
To: Marette Morrissey; Larissa Wall; David Stock; David Goddard
Cc: Tania Pringle; Anthony Stewart; Matthew Dunning; Hamish Forsyth; David Ainsworth
Subject: RE: Cavalier Wool Holdings Limited: Application for Authorisation - Variation

Marette
We note that Cavalier now have withdrawn the divestment undertaking given on 3 May.
As regards the proposed variation,we ask whether the applicant in fact has provided the Commission with copies or details of any documents bringing about the transaction in the form that the proposed variation comtemplates.In particular,has Cavalier entered into any arrangement with a third party who agrees to procure the sale of the relevant assets by NZWSI.If so,it will be vital that the identity of that third party and full details of that arrangement be made available for full scrutiny and comment as soon as possible.
Regards Grant

From: Marette Morrissey [mailto:Marette.Morrissey@comcom.govt.nz]
Sent: Thursday, 12 May 2011 1:52 p.m.
To: Grant David; Larissa Wall; David Stock; David Goddard
Cc: Tania Pringle; Anthony Stewart; Matthew Dunning; Hamish Forsyth; David Ainsworth
Subject: Cavalier Wool Holdings Limited: Application for Authorisation - Variation

Dear All

The Commission has today received the attached letter from Belly Gully seeking to vary Cavalier's application for authorisation.

Cavalier has advised the Commission that to avoid any potential breach of the New Zealand Stock Exchange rules, it does not want the variation to be publicly released until after the market closure at 5pm today. However, Cavalier has agreed that the Commission can release the letter to yourselves under the confidentiality undertakings in the interim. Please note that such release is restricted to legal counsel only. The Commission will advise you when it has publicly released the variation, at which time the requirement for confidentiality will no longer apply.

All parties are invited to make submissions on Cavalier's variation request by **Friday 20 May 2011**. Following receipt of such submissions, the Commission will exercise its discretion as to whether it requires a further submission from