

Memorandum

Date: 31 August 2015
To: The Chairman and Members
Commerce Commission

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By email

CAVALIER WOOL HOLDINGS AND NEW ZEALAND WOOL SERVICES INTERNATIONAL - GODFREY HIRST SUBMISSION FOR CONFERENCE ON PROPERTY VALUATIONS

Introduction and summary

- 1 On behalf of Godfrey Hirst (NZ) Limited (Godfrey Hirst), we present this submission for the Commission Conference on Property Valuations rescheduled for 1 September 2015.

- 2 In advance of that conference, we consider it important that the Commission take into account the following procedural issues and concerns:
 - 2.1 Godfrey Hirst goes into the conference under a substantial disability because of the significant information asymmetry between Godfrey Hirst and CWH.
[REDACTED]

 - 2.2 Godfrey Hirst also go into the conference under an additional disability because [REDACTED]

 - 2.3 More generally, as previously expressed to the Commission, it is poor process to go into the conference without the parties being aware of the Commission's initial views on the valuations. The submissions that the Commission has called for are necessarily to be provided in a vacuum, rather than in response to a position taken by the Commission. The better approach would be for the Commission to have issued a revised draft determination to take into account this new information (as well as all the other new information, [REDACTED])

3 We submit below that the only proper way ahead now is for the Commission to issue a revised draft determination which does take account of all that new information and indicate the Commission's thinking on all matters, including property valuations.

4 Those procedural issues aside, in this submission we say the Commission should:

4.1 Adopt the property valuations provided by its own properly qualified and properly instructed valuers, Knight Frank and Turley & Co, who have provided "best practice" valuations;

4.2 [REDACTED]

4.3 [REDACTED]

4.4 Have regard to the alternative counterfactuals (being the sale of the Kaputone and Clive sites without the CWH/NZWSI merger proceeding), [REDACTED]

Procedural concerns

5 The information asymmetry that afflicts us is mostly of the Commission's making. We repeat our protests at the extensive confidentiality which the Commission has imposed on us in terms of its interpretation of our confidentiality undertakings, in relation to much of the information to be considered at the conference. Indeed, not only is the conference itself closed to the public, but we are unable even to inform our client of the contents of the confidential topic list which has been circulated to participants.

6 Of particular concern, is the [REDACTED]

[REDACTED]

...

[REDACTED]

7 [REDACTED]
[REDACTED]
[REDACTED] CWH's current application to the Commission seeking authorisation to acquire NZWSI and Lempriere's previous application to the OIO. The non-public nature of any information held by any organisation that is subject to the Official Information Act does not of itself override the primary principle of availability.

8 Second, the Commission's acceptance [REDACTED]
[REDACTED]
[REDACTED]

9 There are a number of further responses that we could make to the Commission's reasons, but for present purposes, our paramount concern is the procedural unfairness it results to Godfrey Hirst from the Commission having adopted such a "closed material procedure". The obvious shortcomings of a closed material procedure are discussed in the decision of the UK Competition Appeal Tribunal in *BMI Healthcare (and others) v Competition Commission*. The Tribunal noted (at para 42):

The point about a closed material procedure is not that material is withheld, but that the persons able to look at such material are circumscribed. At its most extreme, a closed material procedure involves an advocate acting for an affected party in court proceedings, but in circumstances where, once that advocate has seen the "closed" material, he or she is precluded from taking instructions from the affected party.

10 Such procedure is described by the Tribunal as "a derogation from the principle of natural justice".

11 The Commission's suggestion that it will "test the information", and that this should be "sufficient for your purposes", does not properly reflect the procedural rights of affected third parties under the Commerce Act and the common law. First, affected third parties are *entitled* to participate and – critically – to test the arguments and information advanced by the applicant. Our role is not limited to scrutinising the Commission's analysis.

12 Second, the principle of availability in the Official Information Act reflects a policy recognition that agency decision-making is improved by public involvement. Our client, as a leader in the sector, is uniquely qualified to assess the arguments and information that the applicant relies upon. But we are denied the ability to discuss these matters with our client, let alone represent its views to the Commission. In short, the Commission's approach derogates significantly from accepted principles of natural justice.

13 That derogation is exacerbated here by the fact that exclusion from confidential material has been one sided. To elaborate, counsel who have been representing the applicant CWH throughout the authorisation process, Bell Gully, are now also

representing Lempriere/NZWSI. This was confirmed to us in the Commission's email (Mya Nguyen) of 25 August 2015.

14 In her email, Ms Nguyen also advised that:

[REDACTED]

15 We appreciate of course [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

16 On that basis, there are no grounds for [REDACTED]
[REDACTED]
[REDACTED]

17 But, in any event, [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED] The practical effect is that the Commission has imposed a closed material procedure on Godfrey Hirst, [REDACTED]
[REDACTED]

18 All this raises significant procedural issues, including but not limited to:

- [REDACTED]
[REDACTED]
- [REDACTED]
- [REDACTED]
[REDACTED]
[REDACTED]
- [REDACTED]
[REDACTED]
- [REDACTED]
[REDACTED]

19 At the very least, procedural fairness requires that the Commission [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

20 In addition, to the above procedural issue, there is important information [REDACTED]

[REDACTED]

• [REDACTED]

• [REDACTED]

• [REDACTED]

• [REDACTED]

• [REDACTED]

• [REDACTED]

• [REDACTED]

• [REDACTED]

• [REDACTED]

[REDACTED]

22 Bell Gully's submission of 10 August 2015 on behalf of both CWH and Lempriere/NZWSI states [REDACTED]:

[REDACTED]

23 The submission goes on to acknowledge [REDACTED]

[REDACTED]

24 The starting point is that Justice Mallon's words have been taken out of context. Specifically, [REDACTED]

[REDACTED] Rather, Godfrey Hirst had argued before Her Honour (at

279) that any public benefit can only arise if there were improved productivity from making surplus land available. Justice Mallon disagreed; and ruled that the public benefit is that fewer land and building resources are needed for scouring operations in the factual compared to the counterfactual, thereby releasing land for other productive uses. Her Honour stated (at 281):

It is not necessary to inquire into the relative level of productivity of the alternative use. The benefit lies in the release of surplus resources for other economic uses; and the best evidence of the value of those alternative uses is to the price that is likely to be paid for the surplus resources.

25 [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED] Her Honour notes (at 276) that the Commission concluded:

All valuations are to some degree subjective, it is not until the sale is made that the true value is revealed.

26 Similarly, at 286, Her Honour states:

As the Commission recognise, the true value is what someone paid in a sale.

27 [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

28 [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
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34

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

38

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

42 [REDACTED]

43 [REDACTED] the Commission's email (Mya Nguyen) to us of 16 June advising that the Commission had released its valuations to the respective property owners (being to Lempriere/NZWSI in the case of Kaputone) and authorising us to advise our own client as to the result of the valuations in the following terms:

1. *The Commission's valuations for each of the properties is lower than the valuations provided by Cavalier in the Application;*
2. *The issue of the valuations is potentially material in the Commission's final determination.*

44 [REDACTED]

45 [REDACTED]

[REDACTED]