

5 August 2015

The Chairman
Commerce Commission
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by email

Dear Dr Berry

CWH/NZWSI - PROCESS ISSUES

- 1 We write to express our concern at the way in which the Commission's processes have been compromised in this request for authorisation. We consider that the process that the Commission has now indicated it intends to follow – as a consequence of the applicant's latest attempts to salvage its application – is unreasonable and procedurally unfair. We urge you to change it – and suggest a ready means by which you could do so.

The situation that Cavalier has created

- 2 As you will be aware, since the Commission issued its Draft Determination, the applicant and Lempriere have introduced significant new information, which radically changes many of the key aspects of that determination. This includes:

- 2.1 The applicant has advised that it omitted to include in its application foregone capital expenditure [] and there has been competing evidence on the necessity for such [] and the quantification of the amount.

- 2.2 The applicant has further advised that it omitted to include in its application foregone capital expenditure []

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- 2.3 The applicant has suggested that it overstated NZWSI's redundancy costs [] – but there remain questions about how that figure was quantified and what the situation is at other plants such as Clive.

- 2.4 The Commission's independent valuer has confirmed that the Applicant's estimate of value of properties to be sold was overstated [] – but the applicant has disputed those valuations and (we understand) provided

some new information that, to date, has been withheld from not only Godfrey Hirst, but us.

- 3 While these figures do net off to a certain degree, and there are timing considerations, it is the gross sum – at least \$[] in total corrections – that demonstrates the scale of the revising of the application that has occurred. This is more than [] the amount by which the Commission preliminarily indicated it would likely grant authorisation.
- 4 This is not a case of refinement or fine-tuning of an application, or even a situation where one key element of an application has been substantially revised. Rather, multiple revisions and amendments have been made, fundamentally altering the nature and merits of the application.
- 5 The primary problem however is that the Commission intends to proceed to final determination without the parties having the opportunity to make submissions to it knowing what the Commission’s own preliminary views are on the consequences of these substantial changes.

The process the Commission has indicated it intends to follow

- 6 As we understand it, the process that the Commission intends to follow is:
 - 6.1 The parties are to make final submissions on any aspect of the application, other than valuations, before midday on Monday 10 August, which is within three working days of now;
 - 6.2 The Commission has indicated that it will endeavour to provide Godfrey Hirst’s solicitors with the new information about the valuations time by close of business today. That is much too late for Godfrey Hirst’s advisers to take that new information into account in its overall submission, including, in particular, in any submissions it might want to make on the factual and the counterfactual. (Godfrey Hirst stresses that the valuation evidence cannot be isolated in the way the Commission proposes. This evidence has real potential to impact on submissions that Godfrey Hirst intends to make on the appropriate counterfactual.)
 - 6.3 Presumably, the Commission will also provide its own valuer with the opportunity to comment on the new information and to make any revisions to their valuations they consider appropriate. And, at some stage there will be a further conference on the valuations, and an opportunity thereafter to make submissions on the valuations before the Commission’s final determination.

The problems with that process

- 7 The fundamental issue with this process is that the application has changed so radically – and, indeed, continues to be revised – such that the initial draft determination no longer serves its intended statutory purpose. Godfrey Hirst and other interested parties do not know what views the Commission may have formed on the revised application. And it then not being afforded an opportunity to make submissions on whatever those views may be.

- 8 Meanwhile, the applicant has full knowledge on the new information it has introduced and its intended effect on the process, as well as an early opportunity to discuss that information and intended effect with the Commission.
- 9 Contrast that with how the process is supposed to work:
- 9.1 the parties make a full and complete application to the Commission (and represent that they have done so);
 - 9.2 the Commission satisfies itself that the application complies in that regard and records it on its public register;
 - 9.3 the Commission hears from interested parties, seeks clarification on any aspects of the application that it needs to, and then issues a draft determination;
 - 9.4 the parties make submissions on the Commission's analysis in that determination;
 - 9.5 the Commission takes those submissions into account, seeks clarification as appropriate, and then issues a final determination.
- 10 Here, because of the fundamental changes to the merits of the application, Godfrey Hirst is being asked to make submissions in a vacuum, without the benefit of insight into the Commission's views on the key new material.
- 11 That both unreasonable and procedurally unfair to Godfrey Hirst. It is also an unsound approach for the Commission, because it does not allow for the correction of any errors in the Commission's analysis.¹

The way forward

- 12 We think it is not too late for the Commission to correct the situation. What we propose is this:
- 12.1 The Commission should disclose the new valuation information to interested parties, and provide any response from its valuer. It should then hold the valuation conference. The parties should have a (short) period after that conference to make any further submissions on valuations.
 - 12.2 The Commission should then issue a revised draft determination that includes the Commission own preliminary views on at least the newly introduced information on refund to in paragraph 2 above.
 - 12.3 The parties should then have a reasonable period (say, two weeks) in which to make submissions on that updated draft determination.

¹ For example, after the original Draft Determination was issued, Godfrey Hirst was able to point out a mathematical error in the Commission's analysis, which changed the net benefit amount by over 10%.

12.4 The Commission should then consider those submissions, seek any further clarification (which, given this process, is unlikely to be much at all) and issue a final determination.

13 In our view, these changes are required primarily because of the slipshod manner in which the applicant has gone about seeking authorisation. We consider that these changes would not extend the timeframes out by any significant margin – likely, no more than a few weeks. We note that the applicant has agreed to the Commission’s previous requirements for much longer extension. And, to the extent that a further short extension may be prejudicial to the applicant, it is a problem of their own making.

14 We urge you to consider our proposal. We have been instructed by our client to seek all avenues to redress the fairness and process issues that are largely of the applicant’s making. We are available to discuss it further, should you require

Yours sincerely

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