IN THE COURT OF APPEAL OF NEW ZEALAND

CA351/2016
[2016] NZCA 560

BETWEEN	GODFREY HIRST NZ LIMITED Appellant
AND	COMMERCE COMMISSION First Respondent
AND	CAVALIER WOOL HOLDINGS LIMITED Second Respondent
AND	NEW ZEALAND WOOL SERVICES INTERNATIONAL LIMITED Third Respondent

Hearing:	15 September 2016
Court:	Kós P, Harrison and Asher JJ
Counsel:	JCL Dixon and SDJ Peart for Appellant M N Dunning QC and N F Flanagan for First Respondent D J Goddard QC and J Q Wilson for Second and Third Respondents
Judgment:	30 November 2016 at 10.15 am

JUDGMENT OF THE COURT

A The appeal is dismissed.

B The appellant is ordered to pay one set of costs to the first respondent and another set of costs to the second and third respondents jointly on a band A basis with usual disbursements.

REASONS OF THE COURT

(Given by Harrison J)

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Introduction

[1] Cavalier Wool Holdings Ltd (Cavalier) and New Zealand Wool Services International Ltd (NZWSI) are the only providers of wool scouring services in New Zealand. In 2014 Cavalier applied to the Commerce Commission for authorisation under s 67(3)(b) of the Commerce Act 1986 (the Act) to acquire control of NZWSI's wool scouring business and assets. The transaction would create a domestic monopoly for wool scouring services. NZWSI's foreign parent, Lempriere (Australia) Pty Ltd, would own 45 per cent of the merged entity with an option to increase its shareholding to 72.5 per cent.

[2] Godfrey Hirst Ltd (Hirst) manufactures woollen carpet in New Zealand for which it purchases scoured wool. Hirst opposed Cavalier's application on a number of grounds. In November 2015 the Commission determined to authorise the

proposed acquisition.[1] In July 2016 the High Court dismissed Hirst's appeal against the Commission's determination.[2] The sole question of law for this Court on Hirst's second appeal is whether the Commission correctly treated productivity gains flowing to Lempriere (as a foreign shareholder) as a benefit to the public likely to result from the transaction.

Background

[3] The Commerce Commission first granted Cavalier authorisation to acquire NZWSI's wool scouring business in June 2011. The High Court dismissed Hirst's appeal against that determination in November 2011.[3] However, the acquisition did not proceed and the authorisation lapsed.

[4] On 23 October 2014 Cavalier applied afresh for authorisation. On 26 March 2015 and 1 October 2015 respectively the Commission released its first and second draft determinations in favour of authorising the acquisition. In reaching its final determination,[4] the Commission was satisfied that the transaction would or is likely to result in such a benefit to the public that it should be permitted.[5] Most of the quantified benefit is expected to arise from productivity gains, essentially cost savings flowing from (a) the release of capital from the sale of excess land and plant; and (b) lower operating costs as the two competing suppliers of wool scouring services consolidate into one monopolistic entity.

[5] The Commission acknowledged that 45 per cent of those benefits would go offshore to Lempriere. To this extent, the transaction would not directly benefit the New Zealand public. However, the Commission concluded that these gains to a foreign shareholder should nevertheless be counted as they provided "other longer-term or wider public benefits".[6] In the Commission's view, "enabling foreign

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1 *Cavalier Wool Holdings Ltd and New Zealand Wool Services International Ltd* [2015] NZCC 31 [Determination].
2 *Godfrey Hirst NZ Ltd v Commerce Commission* [2016] NZHC 1262, [2016] 3 NZLR 645 [HC judgment].
3 *Godfrey Hirst NZ Ltd v Commerce Commission* (2011) 9 NZBLC 103,396 (HC).
4 Determination, above n 1, at [648]–[655].
5 At [625]–[647].
6 At [401].

shareholders to undertake such cost minimisation can provide significant flow-on benefits to New Zealand".[7]

[6] Two such flow-on benefits were identified. One was cost savings which could ultimately enable the new entity to better compete against international rivals, thus producing public benefits to New Zealand through profitable operation over the longer term.[8] The other was preservation of New Zealand's reputation as an attractive destination for foreign direct investment with the likelihood of producing a higher stock of available capital and lower cost of capital for the domestic economy, as well as improved technology and knowledge transfer.[9] While these benefits were unquantifiable, they should be treated as offsetting any productive efficiency benefits flowing offshore to Lempriere.[10]

[7] In identifying these benefits, the Commission applied the High Court's decision in *Telecom Corporation of New Zealand Ltd v Commerce Commission* (*AMPS-A* HC),[11] as well as related comments from this Court when allowing the appeal on a different issue (*AMPS-A* CA).[12] We shall return to these authorities.

[8] Hirst appealed against the Commission's determination. Gilbert J, sitting in the High Court with Professor Martin Richardson as a lay member, dismissed the appeal.[13] The Court addressed a number of issues but the primary question was whether the Commission erred in applying *AMPS-A* HC.[14] After reciting that the statements of principle made in *AMPS-A* HC had stood as good authority for 25 years and had been consistently applied by the Commission,[15] the Court concluded:[16]

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7 Determination, above n 1, at [404].
8 At [406].
9 At [411].
10 At [415].
11 *Telecom Corporation of New Zealand Ltd v Commerce Commission* (1991) 4 TCLR 473 (HC) [*AMPS-A* HC].
12 *Telecom Corporation of New Zealand Ltd v Commerce Commission* [1992] 3 NZLR 429 (CA) [*AMPS-A* CA].
13 HC judgment, above n 2, at [40] and [74].
14 At [20]–[40].
15 At [35].
16 At [36].

> [W]e are unable to accept Mr Goddard's submission that foreign shareholding is to be disregarded in every case, even where the returns represent supra-competitive profits. We are also unable to accept Mr Dixon's submission that returns to foreign capital should be excluded in every case, even where these do not represent supra-competitive profits. We accept Mr Dunning's submission that, as a matter of principle, consistent with *AMPS-A* and subsequent authorities, any supra-competitive return to foreign capital should not be taken into account as a benefit to the public of New Zealand. We would add that it does not matter whether the supra-competitive return results from increased prices or efficiency gains. However, if the return on capital does not constitute a supra-competitive return but simply incentivises competitiveness, efficiency, innovation and investment, *AMPS-A* provides no justification for discounting that part of the return which accrues to foreign capital.

[9] Gilbert J later granted Hirst leave to appeal on this single question of law under s 97 of the Act: whether the High Court erred in law in holding that the Commission was right to treat productivity gains flowing to foreign shareholders as benefits of the transaction.[17] Gilbert J was satisfied that it was "a discrete issue of considerable potential public importance".[18]

Statutory framework and legislative history

The authorisation test

[10] The statutory provisions governing approval of anti-competitive business acquisitions that are nevertheless said to benefit the public set the framework for addressing Hirst's appeal.

[11] In substance, the Commission's powers to authorise or decline proposals to acquire assets of a business or shares have not altered since 1986. Our starting point is the authorisation test applied by the Commission when assessing anti-competitive business acquisitions:

> **67 Commission may grant authorisations for business acquisitions**
>
> …
>
> (3) Within 60 working days after the date of registration of the notice, or such longer period as the Commission and the person who gave the notice agree, the Commission shall—

[17] *Godfrey Hirst NZ Ltd v Commerce Commission* [2016] NZHC 1601 at [5(b)] and [22]–[27].
[18] At [27].

(a) if it is satisfied that the acquisition will not have, or would not be likely to have, the effect of substantially lessening competition in a market, by notice in writing to the person by or on whose behalf the notice was given, give a clearance for the acquisition; or

(b) *if it is satisfied that the acquisition will result, or will be likely to result, in such a benefit to the public that it should be permitted*, by notice in writing to the person by or on whose behalf the notice was given, grant an authorisation for the acquisition; or

(c) if it is not satisfied as to the matters referred to in paragraph (a) or paragraph (b), by notice in writing to the person by or on whose behalf the notice was given, decline to give a clearance or grant an authorisation for the acquisition.

(Our emphasis.)

[12] The Act does not define the operative phrase "benefit to the public". Counsel agree that its meaning 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.

[13] The long title to the unamended assent version stated it was "[a]n Act to promote competition in markets within New Zealand". In interpreting that original purpose, this Court in *Tru Tone Ltd v Festival Records Retail Marketing Ltd* said the statute is "based on the premise that society's resources are best allocated in a competitive market where rivalry between firms ensures maximum efficiency in the use of resources".[19]

Emphasising efficiencies

[14] It is economic orthodoxy that market competition is of general benefit to society through allocative efficiency. However, by s 3 of the Commerce Amendment Act 1990, Parliament introduced an express emphasis on efficiencies in general:

3A Commission to consider efficiency

Where the Commission is required under this Act to determine whether or not, or the extent to which, conduct will result, or will be likely to result, in a benefit to the public, *the Commission shall have regard to any efficiencies*

[19] *Tru Tone Ltd v Festival Records Retail Marketing Ltd* [1988] 2 NZLR 352 (CA) at 358.

> *that the Commission considers will result, or will be likely to result*, from that conduct.
>
> (Our emphasis.)

[15] Before this amendment the Commission had in some cases placed efficiency in a subordinate position to market competition:[20]

> The preamble to the Act sees it as an Act to promote competition and competition (and the efficiencies it normally brings) must prevail unless the efficiencies or other public benefits of a restrictive trade practice or dominant position are shown to exceed the detriments from the lessening of competition.

[16] But in a minority decision of the Commission endorsed by the High Court in allowing an appeal,[21] a member referred to this Court's interpretation of the long title in *Tru Tone Ltd* to emphasise the underlying concern for efficiency in the legislative regime:[22]

> [The Court of Appeal's] statement clearly does not view the promotion of competition as an end in itself but, rather, as a vehicle for fostering overall economic efficiency.

[17] At the second reading of the bill which introduced s 3A,[23] the Honourable David Butcher, then Minister of Commerce, explained how the amendment would clarify conceptual tensions between competition and efficiency:[24]

> The select committee has … given thorough consideration to the arguments on the relevance of efficiency to the statute, and has inserted a new clause … into the Bill. That provision amends the Act to require the commission to have regard to efficiency when assessing public benefit in relation to applications for the authorisation of restrictive trade practices and business acquisitions.
>
> That change has arisen out of the desire to ensure that *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*

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20 *Re New Zealand Kiwifruit Exporters Association Ltd* (1989) 2 NZBLC (Com) 104,485 at 104,501.

21 *Fisher & Paykel Ltd v Commerce Commission* [1990] 2 NZLR 731 (HC) at 767.

22 *Re Fisher & Paykel Ltd (No 2)* (1989) 2 NZBLC (Com) 104,377 at 104,455.

23 After its second reading what began as the Commerce Law Reform Bill was divided by a Supplementary Order Paper into the Commerce Amendment Bill (containing the efficiency amendment under discussion), the Fair Trading Amendment Bill, and the Dumping and Countervailing Duties Amendment Bill; all three proceeded immediately to their third readings and passed into law.

24 (26 June 1990) 508 NZPD 2397.

> *may arise from what may appear to be a lessening of competition. The change will not reduce the relevance of other public benefit matters.*
>
> (Our emphasis.)

[18] So, while the broad statutory purpose remained the promotion of market competition, the amended regime highlighted that the Commission is not required to preserve multiple market players at the expense of gains in efficiency. Parliament recognised the indirect benefits available to the public from a business acquisition despite a reduction in competition or even its monopolistic elimination. Efficiency gains can count toward public benefit when determining whether or not to authorise business acquisitions. But this does not displace "other public benefit matters".

[19] During debate on the 1990 amendment several members of the House expressed concern about the possible judicial interpretation of the concept of efficiency.[25] Shortly afterwards, in *AMPS-A* HC, the High Court highlighted the several conceptions that may come into play in different ways:[26]

> [Section 3A] compels regard to any efficiencies that will likely result from the acquisition, but what weight will be given to them, either in relation to other potential elements of public benefit or in relation to public detriment, must be a matter of judgment in the particular case. We bear in mind that efficiency has three dimensions commonly referred to as allocative efficiency, production efficiency and dynamic efficiency. Efficiency considerations, positive and negative, are relevant in the assessment of both benefit and detriment but clearly do not exhaust society's interest in the business conduct the subject of the Commerce Act.

The long-term benefit of consumers

[20] Efficiency became an established pillar of New Zealand's competition law and policy. However, about a decade after s 3A was introduced, Parliament decided to emphasise the interests of consumers. By s 1A of the Commerce Amendment Act 2001 the original long title to the Act was repealed and replaced by this new purpose provision:

> **1A Purpose**
>
> The purpose of this Act is to promote competition in markets for the long-term benefit of consumers within New Zealand.

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25 (26 June 1990) 508 NZPD 2399–2400.

26 *AMPS-A* HC, above n 11, at 528.

Authorising anti-competitive acquisitions

[21] The present purpose of the regime — the long-term benefit of consumers — informs the specific provisions governing approval of business acquisitions. Under s 67(3)(a) the Commission must assess whether a proposed acquisition will have the effect of substantially lessening competition in a market. Such transactions are prima facie contrary to the regime's competitive focus. But an anti-competitive acquisition, like a monopolistic merger, can nevertheless qualify for approval under s 67(3)(b) if the Commission is satisfied it will likely result in such a benefit to the public that it should be permitted.[27]

[22] The legislative history shows Parliament's intention to leave this category open for the Commission's expert assessment: while the long-term benefit of consumers within New Zealand must be the primary consideration, the Commission must also have regard to any efficiencies likely to result. The Commission has long been guided by this broad conception of public benefits articulated in an early decision of the Australian Trade Practices Tribunal:[28]

> [W]e would not wish to rule out of consideration any argument coming within the widest possible conception of public benefit. This we see as anything of value to the community generally, any contribution to the aims pursued by the society including as one of its principal elements (in the context of trade practices legislation) the achievement of the economic goals of efficiency and progress. If this conception is adopted, it is clear that it could be possible to argue in some cases that a benefit to the members or employees of the corporation involved served some acknowledged end of public policy even though no immediate or direct benefit to others was demonstrable.

[23] The Commission's latest *Authorisation Guidelines* state that "public" refers to the public of New Zealand at large:[29]

> We regard a public benefit as any gain to the public of New Zealand that would result from the proposed transaction regardless of the market in which that benefit occurs or whom in New Zealand it benefits.

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[27] In the present case the Commission concluded the acquisition was likely to have the effect of substantially lessening competition, which is why it proceeded to the alternative criterion for approval under s 67(3)(b): Determination, above n 1, at [648]–[649].

[28] *Re Queensland Co-operative Milling Association Ltd* (1976) 25 FLR 169, quoted and adopted in *AMPS-A* HC, above n 11, at 530. See also *Air New Zealand v Commerce Commission (No 6)* (2004) 11 TCLR 347 (HC) at [319].

[29] Commerce Commission *Authorisation Guidelines* (July 2013) at [37].

[24] 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,[30] especially when economic activity can have negative consequences for others and many social goods and services are now distributed through market mechanisms.[31] 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.

Decision

Introduction

[25] Mr Dixon for Hirst advances two related grounds of appeal: first, that the Commission and the High Court erred by failing to attempt to quantify the proposed flow-on benefits from the merger from productivity gains to foreign shareholders; and, second, that the Commission and the High Court erred by equating the value of flow-on benefits with the direct benefits to the foreign shareholder. Both grounds derive from the decision of Greig J, W J Shaw and Professor Maureen Blunt in *AMPS-A* HC.[32] That judgment sets the scene for our evaluation of Hirst's appeal.

[26] In *AMPS-A* HC Telecom applied to the Commission for authorisation to acquire management rights in the AMPS-A radio frequency band. Its purpose was to use the band for cellular telephone services in New Zealand. Telecom was about 80 per cent foreign owned. The Commission heavily discounted the efficiency gains or cost savings which would accrue to Telecom from the acquisition for that reason. The High Court upheld the Commission's determination to decline authorisation. However, it articulated a different approach to assessing benefits accruing to foreign

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30 Under the Act the term "market" is "a reference to a market in New Zealand for goods or services as well as other goods or services that, as a matter of fact and commercial common sense, are substitutable for them": Commerce Act 1986, s 3(1A).

31 See the range of non-economic public benefits accepted by the Australian Competition and Consumer Commission in S G Corones *Competition Law in Australia* (6th ed, Thomson Reuters, Sydney, 2014) at [3.190].

32 *AMPS-A* HC, above n 11.

shareholders. As mentioned, this Court later allowed an appeal against the High Court decision but not on this ground.[33]

[27] Both the Commission and the High Court in this case adopted the High Court's statement in *AMPS-A* HC of the correct approach to the issue of returns to foreign shareholders. In view of its direct relevance to Hirst's appeal, we reproduce the full passage from the High Court's judgment as follows:[34]

> *The issue of principle is whether efficiency gains and cost savings accruing solely to foreign shareholders are necessarily to be ignored as public benefits or at least to be largely discounted. It is to be observed that the commission did not disregard, in this connection, any gains and savings accruing potentially to New Zealand consumers, suppliers, and employees.*
>
> The Act has an express New Zealand orientation. Both the long title and the definition of "market" refer to New Zealand and there is, on the other hand, distinct provision about Australia; s 26A(a), (b) and (c).
>
> Decisions as to dominance, its acquisition, and strengthening, are thus limited to the relevant market in New Zealand. Public detriment, which includes the result of the dominance or its strengthening, to that extent is limited to New Zealand results. Moreover, any inquiry and weighing of public detriment or public benefit beyond New Zealand would be difficult, problematic and unlikely to be of any meaningful benefit.
>
> Nevertheless, what redounds to the benefit of New Zealand society is not necessarily immediately obvious. *We reject any view that profits earned by overseas investment in this country are necessarily to be regarded as a drain on New Zealand. New Zealand seeks to be a member of a liberal multilateral trading and investment community. Consistent with this stance, we observe that improvements in international efficiency create gains from trade and investment which, from a long-run perspective, benefit the New Zealand public.*
>
> *On the other hand, if there are circumstances in which the exercise of market power gives rise to functionless monopoly rents, supranormal profits that arise neither from cost savings nor from innovation, and which accrue to overseas shareholders, we think it right to regard these as an exploitation of the New Zealand community and to be counted as a detriment to the New Zealand public.*
>
> While this approach to benefit to foreign investors can, we think, be justified on quite general and fundamental grounds, its appropriateness is reinforced by the insertion of s 3A into the Commerce Act.
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> (Our emphasis.)

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33 *AMPS-A* CA, above n 12.

34 *AMPS-A* HC, above n 11, at 531; quoted in HC judgment, above n 2, at [21].

First ground of appeal

(a) Failure to quantify

[28] Mr Dixon developed Hirst's primary line of argument by reference to this passage from *AMPS-A* HC. His approach to *AMPS-A* HC was ambivalent. We understood him to accept the High Court's reasoning except to the extent that it did not require quantification of the expected benefits. He conceded, however, that the Commission correctly applied *AMPS-A* HC in considering whether in the long term there might be indirect flow-on or public benefits from the proposed acquisition.

[29] The Commission's error was, Mr Dixon submitted, in failing to attempt to quantify these benefits. He emphasised the Commission's factual finding that the expected cost savings from Cavalier's proposed acquisition of NZWSI will flow to the shareholders, with 45 per cent going offshore to Lempriere. To that extent, he submitted, the gains from efficiencies are not direct public benefits to New Zealand. The High Court should have construed *AMPS-A* HC as requiring the Commission to consider whether the transaction would lead to quantified "gains from trade and investment which, from a long run perspective, [would] benefit the New Zealand public".[35]

[30] Mr Dixon's point was repeated in numerous ways. But his argument can be distilled to this one essential proposition: while the Commission may properly find that a transaction will be of indirect benefit to the public where cost savings flow to a foreign shareholder, it is bound to go further and quantify that benefit and any corresponding detriments before it can be satisfied that the acquisition should be authorised.

(b) The Commission's approach

[31] Hirst's argument must be viewed within the wider perspective of the Commission's statutory obligations as we have outlined them and its analytical approach to Cavalier's application. As noted, the Commission was empowered to grant an authorisation if it was satisfied the acquisition would result or be likely to

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[35] *AMPS-A* HC, above n 11, at 531.

result in such a benefit to the public that it should be permitted. In determining whether the subject conduct will meet that threshold, the Commission's inquiry was qualified by only one statutory requirement: it was to have regard to any efficiencies it considers will result or are likely to result from the acquisition, as well as broader benefits and detriments in the light of the overriding purpose to promote competition in markets for the long-term benefit of consumers in New Zealand.

[32] In discharging its functions, the Commission defined the relevant markets as including the supply of wool scouring services in both the North and South Islands of New Zealand for wool destined for domestic use and export; the national market for the refinement and supply of wool grease to small and large customers; and the national market for the manufacture, import and wholesale supply of wool and synthetic carpets.[36] It summarised its task as:[37]

> … assessing whether public benefits, which stem largely from rationalisation within a sector that is facing a declining demand, are sufficient to outweigh the competitive detriments arising from having only one domestic scourer.

[33] The Commission was affirmatively satisfied that the acquisition will result in a substantial public benefit.[38] It found that the wool scouring industry is declining in New Zealand and has for some time been characterised by rationalisation in the face of a declining wool clip and increasing greasy wool exports to China.[39] The industry's development in Asia poses a significant long-term competitive constraint on the domestic industry. Evidence was accepted that the merger is necessary to ensure a viable wool scouring industry in New Zealand; without it, a "fight to the death" would ensue between the two remaining domestic scourers.[40] NZWSI's ability to compete internationally would be improved by rationalisation. By reducing its scouring operations from five sites to two, the company would improve its economies of scale and generate cost savings.[41] While the new entity would be

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36 Determination, above n 1, at [125]–[127].
37 At [369].
38 At [637]–[647].
39 At [642].
40 At [407].
41 At [388].

able to raise domestic prices,[42] increasing international competition is likely to ensure that productivity gains do not constitute functionless economic rents.[43]

[34] Mr Dixon did not and could not challenge the lawfulness of this assessment. Nor did he challenge the Commission's recognition of two indirect macro benefits, following *AMPS-A* HC. The first correlated to the decisive factor to which we have just referred — the acquisition would enable NZWSI to remain competitive internationally, providing "significant flow-on benefits to New Zealand".[44] The second was that the New Zealand economy benefited from "inbound foreign investment".[45]

(c) Our assessment

[35] The Commission correctly referred to judicial guidance.[46] It highlighted in particular the view of Richardson J in *AMPS-A* CA that a regulatory body such as the Commission must "attempt so far as possible to quantify benefits and detriments [of the acquisition to the public] rather than rely on a purely intuitive judgment".[47] This guidance may imply a dichotomy between strict objectivity and undisciplined subjectivity. It must not be allowed, however, to obscure the Commission's primary function of exercising a qualitative judgment in reaching its final determination. The Commission is a specialist body whose members are appointed for their particular expertise across a range of disciplines and who are expected to exercise their collective knowledge, skill and experience in making what is an essentially evaluative judgment on any application.

[36] Mr Dixon's submissions assume that the mathematical quantification of efficiencies will determine the Commission's assessment under s 67(3)(b). However, the statutory framework and legislative history shows that the

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42 The Commission considered that the merged entity would be able to increase prices up to 20 per cent before the threat of entry would be likely to provide a competitive constraint: Determination, above n 1, at [648.2].

43 At [413]–[414].

44 At [404].

45 At [411].

46 At [370]–[378], citing *AMPS-A* CA, above n 12, at 447; *Godfrey Hirst NZ Ltd v Commerce Commission*, above n 3, at [105] and [115]; and *Ravensdown Corporation Ltd v Commerce Commission* HC Wellington AP168/96, 16 December 1996 at 47–48.

47 *AMPS-A* CA, above n 12, at 447.

Commission's determination must have regard to efficiencies when weighed together with long-term benefits to consumers, the promotion of competition, and any economic and non-economic public benefits at stake in the relevant market. Where possible these elements should be quantified; but the Commission and the courts cannot be compelled to perform a quantitative analysis of qualitative variables. This Court's observation in *New Zealand Bus Ltd v Commerce Commission* is apposite.[48] When applying the prohibition under s 47(1) against business acquisitions that would have the effect of substantially lessening competition, the Court stated:[49]

> It is true that some data will be weighed or considered in deciding whether the law is violated and some will not. Yet all the suggestions about more systematic ways to inform that judgment are merely techniques, or hand tools. In short, this Court should not allow a kind of false scientism to overtake what is in the end a fundamental judgment which is required by the Act itself.

[37] Axiomatically, the Commission is better equipped than the courts to apply "more systematic ways" to inform its evaluative judgment. But the dangers of "false scientism" survive. The Commission cannot be expected to render all relevant factors in quantitative terms. Nor should its qualitative judgment be reserved as a mere backstop.[50] In this respect, we disagree with the framework outlined and applied in the High Court in Hirst's 2011 appeal.[51] We endorse the Court's summary of the Commission's "standard practice" relating to quantifiable factors:

> [53] … Consistent with economic theory, detriments (welfare losses) are quantified (as far as practicable) under three categories of efficiency losses: allocative, productive and dynamic. Efficiency benefits (welfare gains), recognised pursuant to s 3A, are also quantified. Other benefits claimed by a party seeking an authorisation are quantified if possible. The Commission then forms its view on the range, magnitude and likelihood of all the claimed benefits (those quantified and any that are not quantifiable).

[38] However, in the light of the statutory scheme, we are satisfied that a quantitative analysis of this nature cannot dominate the Commission's approach. In cases where the Commission is able to undertake parallel assessments of a qualitative and quantitative nature, each must be informed by and ultimately integrated within the Commission's determination by exercising its institutional

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48 *New Zealand Bus Ltd v Commerce Commission* [2007] NZCA 502, [2008] 3 NZLR 433.
49 At [104] per Hammond J.
50 Contrast *Godfrey Hirst NZ Ltd v Commerce Commission*, above n 3, at [117].
51 At [91]–[117].

expertise. Qualitative factors can be given independent and, where appropriate, decisive weight; it follows that non-quantifiable factors need not assume a merely supplementary function in a largely arithmetical exercise, as supposed in contemporary practice.[52] Richardson J's concern to avoid "[p]ure speculation … and simple intuition" remains valid.[53] This appeal demonstrates, however, the dangers arising from a narrow focus on quantified efficiencies — it invites technical dissection of discrete components of determinations which are beyond reproach when viewed as a whole.

[39] Mr Dixon's challenge was at the margins of the Commission's determination, focusing on an asserted failure to conduct an accurate quantification of benefits. We repeat, first, his reliance on the Commission's finding that because at least 45 per cent of the productive efficiency gains would flow to Lempriere they would not in that sense directly benefit the New Zealand public;[54] and, second, his essential premise that the Commission was not entitled to treat the indirect benefits as enhancing its overall affirmative finding unless and until it quantified these benefits. As Mr Dunning QC for the Commission emphasised, Hirst does not suggest how this exercise would be carried out and knows that it cannot be accurately undertaken. We agree with him that, even if the exercise was feasible, it leaves open the decisive question of how the Commission might incorporate the results into its ultimate finding.

[40] As Mr Dunning also submitted, flow-on effects are not a benefit arising from the merger in isolation. They arise from a policy decision to encourage foreign investment in New Zealand companies. The Commission's inquiry is into whether the acquisition will result in an affirmative benefit to the public; it is not whether a consequence might have a quantifiable economic effect.

[41] The logical corollary of Mr Dixon's argument is that, if the Commission could not accurately undertake this quantification exercise, it would be bound to treat the flow-on effects as detriments which quantitatively offset the other many and

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52 See, for example, *Air New Zealand v Commerce Commission (No 6)*, above n 28, at [416].

53 *AMPS-A* CA, above n 12, at 446, quoted in *Godfrey Hirst NZ Ltd v Commerce Commission*, above n 3, at [92].

54 Determination, above n 1, at [400].

incontestable public benefits, ultimately justifying dismissal of the proposed acquisition. Seen in this light, Hirst's argument is an attempt to set up an economic impossibility for the ultimate objective of defeating Cavalier's application. The statute does not allow for imposition of an artificial construct or gloss on what is a deliberately broad and evaluative test. The Commission is to have particular regard to any efficiencies which will result from the transaction within a wider quantitative and qualitative assessment. There is no warrant for imposing a rigid condition on its powers to determine whether an acquisition is in the public benefit by requiring the Commission to undertake an economically impossible and ultimately meaningless analysis.

[42] Nor is there an apparent economic rationale for importing this requirement. Repatriation of returns on an investment by a foreign shareholder cannot be inherently detrimental if that is the price of the investor's provision of ongoing capital support, as the Commission found.[55] Mr Goddard QC for Cavalier is right that it makes no more sense to apply an offsetting discount against a foreign shareholding than for a benefit obtained by a domestic shareholder being used to meet debt obligations to a foreign creditor. Within the scheme of the Act productivity gains accruing to capital are gains accruing to a New Zealand company and thus to the public benefit. Mr Dixon's preferred approach (assuming it is possible) would require the Commission in each case — and the courts on appeal — to strip back layers of global ownership in order to calculate the expected flow-on benefits based on the ultimate profit destinations.

[43] We add what is perhaps obvious: the Commission is not here dealing with a corporate raider exploiting a productive enterprise for short-term gain. Importantly, the relevant foreign shareholder is a global wool supplier that has operated since 1857:[56]

> Lempriere, the owner of NZWSI, is an Australian based global business which is involved in the wool industry. In Australia it is a merchant supplier of mainly fine wools. It also has businesses in the United States of America, Argentina and South Africa, and is one of the world's major suppliers of fine wool to European, Japanese and American fashion houses.

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55 Determination, above n 1, at [503]–[504].

56 At [52].

And the Commission, in its expert assessment, was satisfied that a merged entity within the Lempriere group will result or be likely to result in such a benefit to the New Zealand public that the acquisition should be permitted.

[44] We conclude by endorsing the High Court's answer to the same argument advanced by Mr Dixon in that forum:[57]

> [30] If Mr Dixon is correct that returns to foreign shareholders must be quantified and excluded from the assessment of public benefit and any offsetting [flow-on] benefits factored in at the end of the process as part of the qualitative assessment, that exercise would have been undertaken by the Court of Appeal in *AMPS-A*. The Court would then have faced the problem of quantifying and weighing disparate public interest considerations. The fact that this was not done, coupled with Richardson J's observation that no quantification problems arose in that case, further supports the conclusion that the Court did not consider it appropriate to discount returns to foreign capital derived from efficiency gains and losses.

Second ground of appeal — false equation

[45] Mr Dixon submitted also that the Commission erred in law in simply equating, without proper evidence or inquiry, the value of the indirect or flow-on benefits with the value of direct benefits to shareholders; that is, the dollar value of those flow-on benefits with Lempriere's share of the dollar value of the cost savings forecast from the transaction. He submitted that the two figures bear no relationship one to the other. He referred to the Commission's finding that the figures were unlikely to equate; and that there was only "a real possibility that the benefits from [these flow-on] impacts may be substantial".[58] In this case the Commission estimated the total of quantified benefits, including flow-on benefits, to range from $24.71 million to $28.23 million.[59]

[46] In Mr Dixon's submission the Commission was not entitled to disclaim an attempt to quantify the actual value of the indirect benefits and, because that was not possible, the Commission has erred in law by simply assigning an arbitrary value or using the value of another variable as a proxy without a proper evidential basis. To

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57 HC judgment, above n 2.
58 Determination, above n 1, at [415].
59 At [626].

the extent that *AMPS-A* HC stands as authority for that approach, it was incorrectly decided and does not satisfy the requirements of s 67(3).

[47] We agree with Mr Dunning that Mr Dixon's secondary argument mischaracterises the Commission's approach. The Commission did not assign or attempt to assign the variables of cost and benefit an arbitrary value; it simply acknowledged that, although the public benefits from these flow-on effects and the productive efficiency gains obtained by Lampriere are unlikely to equate, there remains a real possibility that the former will be substantial. It was therefore inappropriate to exclude them from its analysis.[60]

New ground of appeal

[48] Before us Mr Dixon argued that the productivity gains identified by the Commission are to an extent functionless monopoly rents of the type discussed in *AMPS-A* HC:[61]

> [I]f there are circumstances in which the exercise of market power gives rise to functionless monopoly rents, supranormal profits that arise neither from cost savings nor from innovation, and which accrue to overseas shareholders, we think it right to regard these as an exploitation of the New Zealand community and to be counted as a detriment to the New Zealand public.

[49] The High Court recited that Hirst did not challenge the Commission's finding that the acquisition would not give rise to functionless monopoly rents and thus did not discount them to reflect the foreign shareholding.[62] The Commission was well equipped to assess this question.[63] And its answer could have been challenged in the High Court. We agree with Messrs Dunning and Goddard that this is in effect a new ground of appeal. Hirst cannot now reopen a ground which was not within the scope of the question for which leave to appeal was granted. We decline to consider it further.

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60 Determination, above n 1, at [415]–[416].
61 *AMPS-A* HC, above n 11, at 531.
62 HC judgment, above n 2, at [37]–[38].
63 Determination, above n 1, at [412]–[414].

Conclusion

[50] In conclusion, we are satisfied that the Commission did not err in treating productivity gains flowing to Lempriere as benefits of the transaction. Cost savings to foreign shareholders are not excluded in the context of flow-on benefits which together satisfy the Commission that the merger is likely to benefit the public. These benefits were properly accounted for within the Commission's broad evaluation by assuming all efficiencies benefit the public. Without evidence that the New Zealand public will be exploited, gains to foreign shareholders are properly treated as positive elements of the transaction to reflect the correlative benefits of preserving a domestic participant in a competitive global market and encouraging foreign investment.

[51] The Commission is not required to adhere rigidly to a quantitative analysis of a transaction which defies its accurate application. An attempt to do so creates a degree of artificiality. Its only effect in a case like this is to invite a challenge to the Commission's determination on the assumption that the result will always turn on the numbers, albeit with ancillary attention to the quality of the data. While mathematical precision is helpful where it might be available in assessing public benefits, the legislative regime does not require the Commission to quantify all factors. So long as the Commission marshals robust reasons, applying its expertise to quantitative and qualitative factors within its statutory mandate, the courts will not lightly resort to a tangential ground to interfere with its approval or dismissal of a proposed business acquisition. Moreover, when its reasons for this determination are viewed in totality, there is nothing to suggest that the Commission erroneously treated efficiency gains to a foreign shareholder as an arbitrary proxy for anticipated flow-on benefits.

[52] It is perhaps trite that "there can be no suggestion of [an appellate court] rubber-stamping a decision simply because it represents the views of experts".[64] But Hirst has not identified an error that would warrant our impeachment of the Commission's satisfaction that a monopolistic merger in an ailing industry is likely to benefit the New Zealand public, albeit with some profits being disseminated throughout the global economy.

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[64] *AMPS-A* CA, above n 12, at 434 per Cooke P.

Result

[53] The appeal is dismissed.

[54] The appellant is ordered to pay one set of costs to the first respondent and another set of costs to the second and third respondents jointly on a band A basis with usual disbursements.

Solicitors:
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