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THE PUBLIC BENEFIT TEST: THE COURSE AND DIRECTION IN A DECADE

LLM RESEARCH PAPER
ADVANCED COMPETITION LAW
(LAWS 545)

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1995

ABSTRACT

This paper examines the development of the Public Benefit Test in New Zealand since enactment of the Commerce Act 1986. It provides a background to the Harvard and Chicago theories of competition policy and some commentary on this debate in New Zealand. The paper examines the trend of the Commerce Commission and Court decisions in the past and comments on a recent Government review on the implementation of the test together with an indepth analysis of the Commerce Commission's guidelines to the assessment of public benefit and detriment issued in October 1994.

Word Length

The text of this paper comprises approximately 13,500 words.

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I INTRODUCTION

> *"The Commerce Act was not designed to generate more competition. Rather its scope was to protect the competitive process from private arrangements aimed at reducing competition. Competition law needs a kind of cost/benefit test in order to distinguish between desirable and undesirable anti-competitive arrangements. Currently this is provided by the competition thresholds, which identify behaviour which is likely to be undesirable and the Public Benefit Test which permits otherwise anti competitive conduct and mergers, if it is demonstrated that they are desirable".*[1]

This statement by the combined working group of the Treasury, Ministry of Commerce and Justice Department aptly summarises the purpose of the Public Benefit Test contained in the Commerce Act 1986 (the Act). This paper examines the Public Benefit Test in the Act provided under sections 61 and 67 against a background of the Harvard and Chicago theories of competition law and proceeds to perform an analysis of the Commerce Commission's Guidelines for the Public Benefit Test[2] recently introduced, as to its consistency with the provisions of the Act.

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1 See Discussion Document by Ministry of Commerce, The Treasury, Department of Justice, Department of the Prime Minister and Cabinet, 1991.

2 Guidelines to the Analysis of Public Benefits and Detriments in the Context of the Commerce Act, Commerce Commission, October 1994.

The Public Benefit Test has been at the centre of the antitrust debate worldwide and has received very close scrutiny in New Zealand recently. The path taken by the Public Benefit Test since the enactment of the Commerce Act 1986 will be the focus of this paper. It will proceed to investigate the advantages and disadvantages of the test in its current form an application.

II THE ANTITRUST OBJECTIVES DEBATE

A A Background

Easterbrook, a much respected economist of recent times describes the antitrust laws as general interest statutes. In his view the proponents have bargained for the opinions of the courts and the judiciary has had broad power to construe the antitrust laws in the public interest. "Public Interest" in his view means efficiency and indeed Easterbrook asserts that the antitrust laws were intended to promote efficiency, and he maintains the courts should formulate antitrust principles and should apply or withhold enforcement of the law in an effort to derive efficient out comes.[3]

This describes the typical Chicago school goals on antitrust law, Easterbrook being a major proponent of the Chicago view point together with Bork, Posner (etc). This view of the goals of antitrust is a more recent development.

The traditional view is known as the Harvard school of thought and favours a wider objective. Robert Lande says that while it is unanimously agreed that the US Congress enacted antitrust laws to encourage competition, disagreement continues over its ultimate goals.[4]

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3 Eleanor M Fox "The Politics of law and Economics in Judicial Decision Making" New York University Law Review Vol 61 554 p562 citing Easterbrook "The Limits of Antitrust 63 Tex Rev 1,24 (1984).

4 Robert H Lande "Wealth Transfers as the Original and Primary Concern of Antitrust : The Efficiency Interpretation Challenged" Hastings Law Journal Vol 34 p 67.

The traditional or Harvard view contends that the U.S Congress was largely motivated by a number of social, moral and political concerns.[5] These goals include promotion of small business and creation of entrepreneurial activity, prevention of industrial concentration and promotion of individual liberty.

Lande's conclusion is that the debate is yet unresolved and he proceeds to argue that congress passed antitrust laws to further economic objectives, but primarily objectives of a distributive nature rather than of an efficiency nature. He says Congress was concerned principally with preventing "unfair" transfers of wealth from consumers to firms with market power. However he contends that although the goal of antitrust may be distributional in preventing unfair acquisition of consumer wealth it was not meant to secure a "fair" overall distribution of wealth in the economy or to help the poor.[6]

Thus it could be said that both views ie. Harvard and Chicago have the common objective of eliminating monopoly power and encourage progressiveness in the use of resources, however they diverge in their thinking on who should share the benefits gained from such efficiencies. In New Zealand the evolvement of competition law is described by Ahdar in an article on competition saying:

> *"competition law and Policy conjures up very little in the minds of New Zealand lawyers. Some, over the years have heard of the*

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5 Above n4, 69.

6 Above n4, 70.

United States antitrust laws. Yet these seemed a peculiarly American situation, tailor made for that great bastion of free enterprise not readily transportable elsewhere....

.... Much has changed of late. The fourth Labour Government's systematic programme of economic liberalisation was the catalyst for widespread changes in virtually every area of life in New Zealand Law, and in particular competition law, was no exception....

We can now point to a modern, robust antitrust regime".[7]

More recently the Harvard v Chicago debate has been a major part of economic discussion in New Zealand. The Traditionalists or the Harvardians in New Zealand say that the Commerce Act 1986 has stated its objective in its preamble:

"An Act to promote Competition in markets within New Zealand... "[8]

Thus they say protection of Competition is the primary objective of the Act. However the New Zealand Chicagoans do not endorse this. They offer the following comment in a paper produced by the New Zealand Business Round Table, an organisation of powerful private enterprise representatives:

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7 Ahdar "Essays in Commercial Law" Borrowdal and Rowe 1991

8 The Commerce Act 1986

> *"Adopting 'competition' as an objective of antitrust law risks compromising the efficiency objective. Instead competition may be pursued as an objective in itself. The result may be to prevent efficiency enhancing arrangements which reduce the number of players in a market or lower transaction costs. Practices which enhance efficiency overall but which result in greater market power may be prevented or deterred. An explicit recognition that the objective of the Act is to promote economic efficiency as a means to enhancing consumer welfare would improve the focus of the Act".*[9]

Although promotion of effective competition is quoted in the preamble and is a visible purpose of the New Zealand Commerce Act 1986 supporting the traditionalist Harvard view, the Chicagoan's thinking has not gone unnoticed. Certain amendments to the Act were introduced in 1990 which included a new section 3A[10] which introduced an obligation to have regard to "any efficiencies" in determining authorisations. This is a notable concession to the Chicago view point. Another provision introduced was section 26[11] of the Act which required the Commission to have regard to the economic policies of the government.

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9 The New Zealand Business Round Table "Antitrust in New Zealand : The Case for Reform 1988, p14.

10 Commerce Act 1986, section 3A : 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 that the Commission considers will result, or will be likely to result, from that conduct.

11 Commerce Act 1986, section 26 : In the exercise of its powers under this Act, the Commission shall have regard to the economic policies of the Government as transmitted in writing from time to time to the Commission by the Minister.

These amendments to the Act do not however convey a definite leaning or bias towards either viewpoint, hence the debate continues in New Zealand as to the application of the Act, to Competition Policy, more particularly the application of the Public Benefit Test.

B Reasons Behind the Conflict

Economists have universally condemned inefficiencies arising from monopoly pricing. Monopoly power most directly affects allocative efficiency and wealth distribution of an economy. Having said that, monopolies do have other effects positive or not, on the productive efficiency of an economy. Firms' desires to earn profits could motivate businesses to compete energetically, to lower costs and prices and improve the quality of the product.[12]

It is submitted however that having gained these efficiencies and reached the position of maximum profit the firms would have reached a comfort zone if no hard competition existed to motivate more efficiencies. Thus the efficiency concept at saturation point results in slackness, lack of innovation and other undesirable economic consequences. It is submitted that efficiencies could bring about short term benefits to an economy, but in the long term would result in consequential inefficiencies.

On the other hand in a competitive market a firm cannot increase prices above marginal costs without losing market share. The origin of the

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[12] Robert H Lande "Wealth Transfers and the Original and Primary Concern of Antitrust - Hastings Law Journal vol 34 p78.

concept of perfect competition is traceable to Adam Smith who introduced the phrase "free competition".

> *"The price of monopoly is upon every occasion the highest which can be got. The natural price or the price of free competition on the contrary is the lowest which can be taken ....*[13]

Competition would force market prices down because multiple producers attracted by higher profits would necessarily increase supply. Thus competition is a process of reactive response through rivalry.

Those who support efficiency theories counteract the inefficiencies occurring at maximum profit levels with contestability arguments.[14] They argue that any decline in productive or allocative efficiency will attract competitors into the market through hit and run entry which would provide a check on any consequential inefficiencies. However it is submitted that this may not always be the case. As sometimes firms that have merged having proven efficiency gains would be in dominant positions in a market where their conduct could prevent market entry.

Thus the traditional view is that competition is the best policy as this will ensure maximum economic efficiency in the long term. The Chicagoans on the other hand appear to focus on immediate and short term efficiency gains. The Chicagoan view in the US was also a reaction to various political and populist theories such as freedom to trade for small

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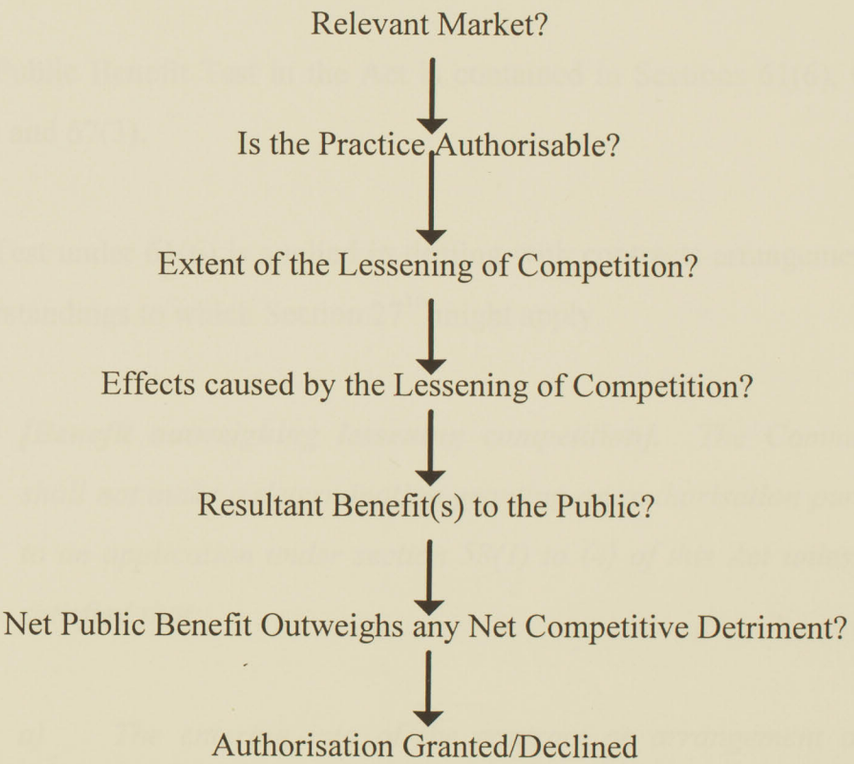
13 J P Nieuwenhuysen "Theory of Competition Policy" p21, citing Adam Smith.

14 Douglas F Greer "Contestability in Competition Policy" p41.

competitors etc which had very little economic justification. The New Zealand economic situation is quite different to the US, hence a direct importation of Chicagoan efficiency policies versus Harvadian competition policy may not be entirely suitable.

III THE AUTHORISATION PROCESS AND THE PUBLIC BENEFIT TEST DEFINED?

The Act sets out in detail the procedure applicants should follow to obtain authorisation of an otherwise prohibited practice ie. a Restrictive Trade Practice or prohibited mergers ie. business acquisitions. The Commerce Commission is responsible for enforcement of the Act and for determining authorisations. The diagram below shows the methodology adopted for authorisation applications.[15]



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[15] Rex Ahdar "Competition Law and Policy in New Zealand 1991 Chap 12 Adopted in Weddel Crown [1987] 1 NZBLC (Com) 104,200.

As can be seen from the above diagram the ultimate test for deciding if an otherwise prohibited practice should be authorised or not is whether the Public Benefit to be gained from such a practice would outweigh any detriment arising from the lessening of competition or from gaining a dominant position. This process is commonly referred to as the "Public Benefit Test". In order to apply the Public Benefit Test the Commission should firstly have determined that the proposed conduct would substantially lessen competition in the market.

A The Public Benefit Test In The Act

The Public Benefit Test in the Act is contained in Sections 61(6), 61(7), 61(8) and 67(3).

The Test under 61(6) is applied in dealing with contracts arrangements or understandings to which Section 27[16] might apply.

61(6) ***[Benefit outweighing lessening competition].*** *The Commission shall not make a determination granting an authorisation pursuant to an application under section 58(1) to (4) of this Act unless it is satisfied that:*

a) The entering into of the contract or arrangement or the arriving at the understanding; or

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[16] Commerce Act 1986 section 27(1) No person shall enter into a contract or arrangement or arrive at an understanding, containing a provision that has the purpose, or has or is likely to have the effect of substantially lessening competition in a market.

b) *The giving effect to the provision of the contract, arrangement or understanding; or*

c) *The giving or the requiring of the giving of the covenant; or*

d) *The carrying out or enforcing of the terms of the covenant: as the case may be, to which the application relates, will in all the circumstances result, or be likely to result, in a benefit to the public which would outweigh the lessening in competition that would result, or would be likely to result or is deemed to result therefore.*

The test under 61(7) has been interpreted by the Commission to be the same as 61(6) although some ambiguity exists in the wording contained in the sections. Of these sections 61(7) is applied when dealing with arrangements which might contain exclusionary provisions under section 29[17] of the Act and 61(8) is applied to practices of Resale Price Maintenance under section 37[18] and 38[19] of the Act. Practices of resale

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17 Section 29(1) for the purpose of this Act, a provision of a contract, arrangement or understanding is an exclusionary provision if:

(a) It is a provision of a contract or arrangement entered into, or understanding arrived at between persons of whom any two or more are in competition with each other.

18 Commerce Act 1986 section 37(1) no person shall engage in the practice of resale price maintenance.

19 Commerce Act 1986 section 38(1) no person (in this section referred to as a "third party" shall engage in conduct, whether alone or in concert with any other person that will hinder or prevent the supply of goods to, or the acquisition of goods from, another

price maintenance are deemed to be in breach of section 27[20] thus presumed to substantially lessen competition in the market. The Public Benefit Test would be applied without a determination under section 27.

61(7) ***[Benefit permitting exclusionary provision, etc].*** *The Commission shall not make a determination granting an authorisation pursuant to an application under section 58(5) or (6) of this Act unless it is satisfied that:*

a) The entering into of the contract or arrangement or the arriving at the understanding; or

b) The giving effect o the exclusionary provision of the contract, or arrangement or understanding:

as the case may be, to which the applications relates, will in all the circumstances result, or be likely to result, in such a benefit to the public that:

c) The contract or arrangement or understanding should be permitted to be entered into or arrived at; or

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person for the purpose of inducing that person not to sell those goods at a price less than a price specified by the third party.

20 Above n16.

d) The exclusionary provision should be permitted to be given effect to.

61(8) *[Benefit permitting resale prices maintenance]. The Commission shall not make a determination granting an authorisation pursuant to an application under section 58(7) or (8) of this Act unless it is satisfied that:*

a) The engaging in the practice of resale price maintenance to which the application relates; or

b) The Act or conduct to which the application relates:

as the case may be, will in all the circumstances result, or be likely to result, in result a benefit to the public that:

c) The engaging in the practice should be permitted; or

d) The Act or conduct should be permitted.

The test under 67(3)(b) is essentially the same as 61(7) and 61(8) and is applied in authorisation applications dealing with Business Acquisitions:

67(3)(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;*

B "Public Benefit"

The words Public Benefit is not defined in the Act. As Ahdar says "not surprisingly the commission has utilised the accumulated wisdom and experience of the Australian Trade Practices environment in developing its own notion of Public Benefit for New Zealand".[21] In doing this the Commission has taken account of a very wide ranging category of possible benefits. Also both in Australia and in New Zealand the question is asked when will a benefit be public?

John Duns in a recent article[22] quotes the Tribunal in **Queensland Co-Operative Milling Association**[23] in attempting a definition of the words Public Benefit:

> *"Anything of value to the community generally, any contribution to the aims pursued by the Society including as one of its principal elements ... the achievement of the economic goals of efficiency and*

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21 Rex Ahdar "The Authorisation Process and the 'Public Benefit Test' p238.

22 John Duns "Competition Law and Public Benefits" [1994] Adelaid Law Review 16.

23 Above n22 p253 citing [1976] 8 ALR 481 : ATPR para 40-012.

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 corporations involved served some acknowledged end of public policy even though no immediate or direct benefit to others was demonstrable".

Similarly Duns cites the following passage from **Rural Trades Co-Operative (WA) Ltd**[24] and **Southern Cross Beverages**[25] stating:

"Before a benefit can properly be regarded as a benefit to the public for the purposes of section 102 (4) of the Act it must be seen as a benefit to the community generally. This does not mean that private benefit is necessarily irrelevant. The encouragement or enabling of an individual to pursue legitimate ends or to attain legitimate goals or to obtain legitimate rewards may well be beneficial to the community generally. When a benefit to a particular individual or segment of the community is pressed as a relevant benefit to the public .... the tribunal must assess whether the benefit to the individual or group can properly be so categorised".

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24 Above n22 p254 citing [1979] 37 FLR 244.

25 Above n24 citing [1981] 50 FLR 176.

In the ensuing discussion some of the decisions of the New Zealand Commerce Commission and the Courts will be analysed in detail in the application of the Public Benefit Test and further inquiries will be made into what it entails as the development of the test makes progress.

IV APPLICATION OF THE PUBLIC BENEFIT TEST BY THE COMMISSION

This section deals with the application of the Public Benefit provisions of the Act by the Commission in dealing with proposals for authorisation of Restrictive Trade Practices (RTPs) and Business Acquisitions in the past.

Goodman Fielder Limited/Watties Industries Ltd[26] was an application for clearance for a proposal of a takeover by Goodman Fielder Ltd (GFL) of all the issued share capital of Wattie Industries Ltd (Wattie). The commission had to determine whether the takeover proposal would result in GFL acquiring or strengthening a dominant position in any market and if that were the case if any Public Benefit arising out of the implementation of the proposal would outweigh any detriment to the public resulting from such a dominant position. The Commission in assessing any Public Benefit stated:

> *....The effect is to allow detriments resulting from dominance to be offset by all public benefit resulting from the whole of the proposal and not merely those created by the dominance. The Commission could thus take into account not only any efficiency improved as a result of the dominance but also the Public Benefit inherent in the wider base provided by the merger ....*[27]

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26 [1987] 1 NZBLC (Com) 104,109.

27 Above n26, 104,147 para 259.

The commission went on to say that improved markets for New Zealand products overseas, improved prosperity and employment at home could be beneficial and confirmed that a stronger export base is a Public Benefit.

Another aspect to which the Commission gave attention was the distribution of the benefit to the Consumer:

> .... *Much would also depend upon the likelihood of the benefits being passed on to New Zealand consumers or the extent to which they would benefit in terms of the product range....*[28]

It could then be summarised that while giving weight to improved export potential the Commission focused on the distributive effects of the claimed benefits to the consumers at large and was unconvinced that the merger proposal would realise this. The Commission concluded:

> .... *It is competition which protects the consumer and the interests of the consumer must always 'bulk large" in the Commission's deliberations ....*[29]

In **Re Weddel Crown Corporation Ltd**[30] an authorisation was sought for a Restrictive Trade Practice involving a collective agreement by a group of

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28 Above n27, para 268.

29 Above n27, para 278.

30 [1987] 1 NZBLC (Com) 104,200.

meat companies seeking to shut down some meat works and jointly facilitating the costs of such closure.

The Commission had to determine if such an arrangement would substantially lessen competition in a market and if any Public Benefit flowing from the arrangement would outweigh any substantial lessening of competition.

The Commission attempted a definition of the term "Public" during the course of the determination in saying:

> .... *As to the meaning of "Public" it seems clear from the preamble to the Act that 'public' refers to the New Zealand public. Further the term is wider than simply consumers. It could extend to various trade interests, such as manufacturers, wholesalers, retailers as well as to users, investors and so on. Further it includes benefits to the country as a whole as in the fostering of a national interest ....*[31]

It is submitted that this broader view of the term "public" was a fresh approach by the Commission which had previously stated in Goodman Fielder[32] that a Public Benefit should be distributed to the Consumer i.e the wider public and not just a section of the public.

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31 Above n30 104,213 para 25(iii).

32 Above n26.

However the Commission did point out that a benefit to an individual would not itself constitute a benefit to the public[33] thus inferring that a private benefit would not be considered a benefit to the public. The determination by the Commission's majority was that the closure of the meatworks and the rationalisation needed to deal with the overcapacity in the market would have flowing back benefits to the farming industry and the New Zealand economy through a strengthened position in the international markets.

It is submitted that a stronger position of a local industry in the world market through decreased costs was given due weight by the Commission in this decision.

In Re Amcor Ltd/NZ Forest Products Ltd[34] an application for authorisation of a merger proposal was being considered, Amcor Ltd sought to acquire 50% of the shares of New Zealand Forest Products Ltd (NZFP). Some of the Commission's determinations with regard to assessing Public Benefit were:

1) The word "Public" refers to the New Zealand Public. This reiterated the decision in Weddel.[35]

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33 Above n30 104,213 para 25(iv).

34 [1987] 1 NZBLC (Com) 104,233.

35 Above n30.

2) The term "Public" was wider than simply consumers and could extend to various trade interests. This again was a similar pronouncement to the Weddel decision.

3) A benefit to an individual would not constitute a Public Benefit as stated in "Weddel".

4) The Applicants must show that the benefit will actually flow from the proposal i.e that it is likely to happen as a probability rather than a possibility.

5) The benefit must flow to the New Zealand Public.

6) Regional benefits were a Public Benefit.

Some of the other benefits recognised in the decision include Job Security, Access to Foreign Markets, Increased Choice to Consumers, Increased Employment, Increased Economies of Scale, Utilisation of New Zealand Resources.

A very broad spectrum of benefits were given consideration in this decision.

In Re The New Zealand Cooperative Dairy Company Ltd (NZCDC) /Auckland Cooperative Milk Producers Ltd[36] an application was made by NZCDC for clearance to acquire up to 60% of the shares of Auckland Cooperative Milk Producers Ltd. In assessing Public Benefit and comments on the weighing process of setting off any detriment against any benefit the Commission was of the view that the mere fact that dominance was evident is not in itself a detriment but that the commission should as far as practicable assess the degree of detriment:

> *.... There appears also a burden on the Commission to assess as far as practicable the degree of competition detriment likely to flow from the accusation or strengthening of a dominant position.... it is only by attempting to assess the degree of detriment found or inferred from the acquisition or strengthening of dominance that the commission can come to understand the case the applicants have to answer if authorisation is to be granted.*[37]

In Weddel Crown[38] too the Commission took the view that a proper weighting of detriment against benefit should take place outside the lessening of Competition as a per se detriment.

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36 [1988] 1 NZBLC (Com) 104,320.

37 Above n36 104,337 para 8.5.

38 Above n30.

The Commission went on to conclude in this decision that enhanced economic efficiency and enhanced consumer welfare through rationalisation would be recognised as Public Benefits and that the Act did not set a distributive standard, therefore it did not need to deny a public benefit claim simply because participants did not prove that it will flow to particular groups of the public.

New Zealand Kiwi Fruit Exporters Association (Inc) / New Zealand Kiwi Fruit Cool Stores Association (Inc)[39] was a decision where the Commission applied the Public Benefit Test to a proposal by NZKEA seeking authorisation to enter into or give effect to certain price fixing arrangements under the provisions of the Commerce Act. In this instance, the Commission did not have to establish that there is a lessening of competition prior to proceeding to apply the Public Benefit Test. Section 30 of the Act presumes that Price Fixing arrangements substantially lessen competition unless Public Benefit is seen to outweigh any detriment arising from the lessening of competition. In this decision the Commission mainly concerned itself with determining if any efficiency gains were prevalent:

> .... *The Commission may assess pursuant to applying the Public Benefit Test, whether an agreement which lessens competition is more efficient than the competition which would or could not occur if the agreement did not exist ....*[40]

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39 [1989] 2 NZBLC (Com) 104,485.

40 Above n39, 104,500.

However the Commission went on to say that efficiency should not be the only consideration in the analysis of Public Benefit:

> *This is not to say that efficiency is the only Public Benefit which can be taken into account .... in fact Public Benefit is a much wider concept encompassing other benefits as well.... Parliament could easily have confined the Commission's deliberations to competition or efficiency considerations had it so intended.*[41]

The Commission proceeded to mention the following as benefits, Innovation efficiencies, Allocative efficiencies and Productive efficiencies and discounted mere pecuniary or money savings.

Re The New Zealand Grape Growers Council Incorporated[42] was again a decision where authorisation was being sought for a Price Fixing arrangement which was already in place. Section 59 of the Commerce Act prohibits the Commission from authorising existing practices, hence undertakings were received by the Commission that the practice would cease in order to enable the Commission to consider the application for authorisation of the practice.

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41 Above n39, 104,501.

42 [1991] 2 NZBLC (Com) 104,573.

In analysing Public Benefit

1) the Commission discounted cost savings as a significant benefit.

2) Price stability was considered to be beneficial only if it provided an accurate reflection of market signals. The Commission considered that whatever the benefits from price stability it could still dull market signals hence leading to inappropriate decisions on quantity and quality of grapes etc and inefficient allocation of resources:

> .... *While stability of price makes decision making easier, it does not necessarily lead to the right decision being made.*[43]

3) Equity of bargaining power was reflected as a benefit.

4) Greater information exchange was not thought to be a significant benefit.

5) Benefit to rural communities was considered of a minor effect only.

The Commission concluded in declining the application stating:

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[43] Above n42, 104,589 para 34.3.

> .... *In any event, the viability of the industry and hence the communities, might ultimately be harmed to a greater extent if the practice leads to inefficiencies detrimental to the industry as a whole.*[44]

It is submitted the Commission was quite focused on efficiency benefits in its determination in this decision.

In New Zealand Cooperative Dairy Co Ltd / Waikato Valley Cooperative Dairies Ltd[45] an application was made for clearance of a proposed merger by New Zealand Cooperative Dairy to acquiring Waikato Valley either by asset purchase or by acquiring shares in the capital of that company. In this proposal the failing company argument was raised in support of the merger application which was rejected by the commission. Hence the commission went on to examine the Public Benefits claimed against any detriment. The benefits claimed were payout enhancement, avoidance of community disharmony, ability to compete internationally and avoidance of dairy farm failures.

In considering payout enhancements as a benefit, although recognising that a section of the public i e. Shareholders of Waikato would benefit, the Commission rejected the benefit as it would not reach the wider public i.e the consumer.

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44 Above n42, 104,590 para 38.2.

45 [1991] 2 NZBLC (Com) 104,592.

As regards ability to compete internationally the Commission rejected this as it was of the opinion that New Zealand Dairy or Waikato Valley would not directly compete in the international market as the Dairy Board would be the principal participant. Although cost savings would occur in the dairy industry it will not alter gross export returns. The commission regarded Community harmony as a benefit but did not foresee the possibility of a serious disharmony occurring.

This decision was appealed to the High Court.

V APPLICATION OF THE PUBLIC BENEFIT TEST BY THE COURTS

In New Zealand Cooperative Dairy Company Ltd (NZCDC) V Commerce Commission[46] NZCDC was appealing to the High court from a decision of the Commission discussed above[47] where an application for clearance of a merger proposal was declined by the Commission on grounds that the claimed Public Benefits did not outweigh any detriment arising from a lessening of competition that would occur if the merger was implemented. The high court appeal was brought after the amendment to the Commerce Act inserting section 3A.[48] The court noted that the Commission when dealing with the application, was doing so prior to the amendment to the Act.

A further development in the course of events following the Commission decision was that the Minister of Commerce handed down to the commission a statement of government policy relating to the dairy industry under section 26[49] of the Act. Although this statement of policy did not directly refer to the declined merger proposal of NZCDC it was quite evident that the Commission's decision was reflected in the Minister's policy statement.

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46 [1991] 3 NZBLC 102,059.

47 Above n45.

48 Above n10.

49 Above n11.

The court said:

> *It would be naive to think that the issue of that statement was not a direct consequence of the Commission's decision in the present case.*[50]

The court proceeded to weigh the benefits claimed against any perceived detriments and said that the statement of policy from the Minister inferring that structural rationalising would lead to greater efficiencies in the industry, did not absolve the court from the weighing exercise. As regards the failing company argument put forward by Waikato which was rejected by the Commission, the High Court on the basis of added evidence before it accepted that Waikato could not survive as an independent dairy company. However the court did not treat the failing company argument as a benefit per se, only giving the argument some credibility.

The court viewed with favour the claimed Public Benefit of increased ability to compete internationally:

> *We consider that the industry's ability to compete internationally will be enhanced by this merger. We regard this as a substantial public benefit which is inextricably linked with industry rationalisation.*[51]

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50 Above n46, 102,066.

51 Above n46, 102,088.

The court also said in overturning the commission's decision:

> .... *These benefits .... will ultimately benefit New Zealand consumers, albeit indirectly....*[52]

Thus the court discounted the identity of the beneficiaries or that a direct benefit to the consumer should occur as long as the benefits ultimately benefited New Zealanders.

The Court at the outset of the appeal stated that it should put itself in the same position as the Commission if the Commission were hearing the case at the date of the appeal. Thus the contributing factor that had gone quite some way in influencing the outcome of the court decision was the amendment to the Commerce Act in section 3A, which required the commission to have regard to "any efficiencies". The court decision clearly established that the proposed merger even if it did not benefit the wider public was being authorised by the Court due to the increased efficiencies it would produce in the process of rationalisation.

This decision was a landmark decision in terms of the development of the Public Benefit Test. In the application of the test so far the Commission had taken note of a variety of benefits and appeared to in some instance focus on benefits to the consumer.

The focus on the consumer was not always prevalent and had been unsystematic as evidenced in the earlier commission decisions discussed

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52 Above n51.

above. It needs to be examined if the Court would apply a consistent focus which in the New Zealand Cooperative Dairy (Waikato) case appears to have been a shift to an efficiency focus.

Following on from Waikato[53] the High Court had before it the case of **Telecom Corporation of New Zealand V Commerce Commission**[54] where Telecom appealed from the Commission's determination declining clearance to Telecom for the purchase of the frequency AMPS-A from the Crown. In assessing the Public Benefits claimed by Telecom the Court adopted a "with" and "without" approach which required a prediction of the future with and without Telecom's acquisition of the frequency. The High Court however recognised the fact that section 3A compels attention to the likely efficiencies that will result form the acquisition but was of the view that those considerations should not exhaust society's interest in business conduct.[55] The High Court went on to state that any efficiencies gained must be passed on to the consumer and that the monopoly "should not fritter away its efficiency gains in slackness and rent seeking activities".[56]

The Court also addressed the issue of benefit to foreign shareholders as opposed to the New Zealand public which the commission had previously rejected as a benefit. The Court did not agree with this, stating:

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53 Above n46.

54 [1991] 3 NZBLC (Com) 102,341(HC).

55 Above n54, 102,383.

56 Above n54, 102,386.

> *New Zealand seeks to be a member of a liberal Multinational trading and investment community. Consistent with this stance, we observe the improvements in international efficiency create gains from trade and investment which from a long term perspective, benefits the New Zealand public.*[57]

Although not in agreement on this aspect of benefit to foreign investors the High Court endorsed the Commission's view that all other benefits claimed were efficiency gains only and that no competitive gains to the benefit of the public had flowed from the proposal to acquire rights to the AMPS-A frequency. The High Court confirmed the Commission's determination to decline clearance to the proposal.

Thus the High Court had indicated contrary to its reasoning in Waikato,[58] that efficiency benefits alone could not satisfy the weighing process in the Public Benefit Test.

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57 Above n56.

58 Above n46.

VI WAS EFFICIENCY A FEATURE?

It can be seen from the foregoing discussion that the Public Benefit Test in application has been unsystematic. The Commission and the Courts have in some instances focussed on consumer benefits or social or distributive elements, particularly so in the earlier decisions and also later in the Telecom decision and the High Court appeal.

In other instances they have tended to focus on efficiencies that may or may not arise as a result of the authorisation and tended to discount distributive effects of the benefits flowing from such efficiencies.

The Business Round Table, the influential proponent of Chicagoan thinking in New Zealand commented:

> *"The Commission's treatment of the balancing exercise... reflects the weaknesses in the Commission's analysis of 'detriments to the public' and 'Public Benefit' which follow from the efficiency effects of particular proposals. Given the manner in which the Commission had applied 'detriment to the public' and 'public benefit' its analysis is biased towards excessive intervention".*[59]

Professor Brock, a research fellow of the New Zealand Institute of Economic Research and a proponent of Chicagoan thinking said:

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[59] Above n9.

> *"Many other issues that writers load on to Antitrust policy can be dealt with by specialised remedies".*[60]

Advocates of efficiency attempt to discredit considerations of income distribution. They claim that equal weight should be given to a dollar lost by consumers and a dollar gained by producers even through producers may be considerably richer than consumers on average.[61]

Douglas Greer made this statement in a published study on the two objectives of efficiency and competition in 1989. Advocacy of Competition on the other hand Greer says, does not necessarily mean the achievement of perfect competition. He is of the view that the preamble of the Commerce Act 1986 uses the words "An Act to **promote** competition in Markets within New Zealand. He says the qualifying word "promoting" suggests a degree of competition in structure and conduct that is more rivalrous than would occur under complete *laissez - fare,* but a degree that would correspond more closely with notions of "workable competition" than with notions of "perfect competition". The Commerce Act 1986 in fact defines competition as workable competition:

> *Section 3(1) [**Competition**] In this Act "Competition means workable or effective competition.*[62]

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60 W.A Brock "Antitrust Debate in New Zealand - A Commentary" New Zealand Business Round Table 1989.

61 Douglas F Greer "Efficiency and Competition - Alternative Complimentary or Conflicting Objectives" New Zealand Institute of Economic Research Monograph 47, 1989.

62 Commerce Act 1986 section 3 (1).

Thus Greer's study recommends a middle road between the New Zealand Harvardians and Chicagoans, recommending a workable competition model. Greer relies on economists such as J M Clark, Edward Mason, Corwin Edwards[63] as proponents of workable competition.

Comments such as these led to the Government introducing amendments to the Commerce Act 1986 including a new section 3A:

> *3A 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 benefit to the public, the Commission shall have regard to any efficiencies that the Commission considers will result or will be likely to result, from that conduct.*

Another amendment to the Act in 1990 was section 26:

> *26(1) [Economic polices] in the exercise of its powers under this Act the Commission shall have regard to the economic policies of the Government as transmitted in writing from time to time to the Commission by the Minister.*

Pickford in a recent article says the conflict between the alternative standards i.e Harvard v Chicago has been a feature of the chequered history of competition policy cases since 1987. He says:

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63 Above n61, 117.

> *The Commission had adopted an unusual economic welfare function with which to evaluate public benefits and detriments, one which seemed inconsistent with standards of conventional cost benefit analysis.*[64]

Having said this in reference to the application of the Public Benefit Test in the earlier decisions Pickford goes on to comment on the decisions after the 1990 amendment saying:

> *Since 1990 there has been a shift in the application of the authorisation test, whereby efficiency gains have been weighted more heavily.*[65]

Pickford in a recent article says the reason for this shift is the section 3A amendment, requiring the Commission to have regard to "any efficiencies". He also cites Ahdar as saying that "efficiency gains, even if redounding solely to the firms concerned, should be given due weight despite not being passed on to the consumer".[66] On the other hand, he cites van Roy[67] as saying that efficiency had been incorporated by the commission in its evaluation of Public Benefit before the 1990

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64 Michael Pickford "The Evaluation of Public Benefit and Detriment under the Commerce Act 1986 - New Zealand Economic Papers 1993 vol 27 pp209-231.

65 Above n64, 221.

66 Above n65 citing Rex Ahdar.

67 Above n65 citing Yvonne van Roy "Guide book to New Zealand Competition Laws" 1991 pp247-248.

amendment. Pickford cites van Roy in saying that the Telecom decision appeared to state that the new section made little practical difference.[68]

It is submitted that this paper agrees with the latter view that the Commission had adopted efficiency measurements at certain times prior to 1990[69] and that the Telecom decision in the High Court hardly seemed to be influenced by section 3A. Thus the application of the Public Benefit Test in practice was still quite unsystematic. Despite the 1990 amendment to the Act the Commission and the Courts had not applied the test with any certainty.

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68 Above n54.

69 For example in New Zealand Cooperative Dairy Company/Auckland Cooperative Milk Producers [1988] 1 NZBLC 104,327.

VII REVIEW OF THE COMMERCE ACT 1986

Following on from the critical views of the New Zealand Chicagoans as discussed above,[70] the Government commissioned a review group to review the Commerce Act in 1991. One of the terms of reference constituting the review group[71] this paper is concerned with, is the review of the economic cost/benefit analysis undertaken and the scope of the "Public Benefit" test applied by the Commerce Commission.[72]

The review group initially published a discussion document.[73] The document sets out the key issues to be dealt with in the review as:

(a) whether the Act uses the best approach to achieve its objectives and

(b) Whether the range of economic activities the Act applies to should be changed.

The objective of the Act is identified as protecting the competitive process from private arrangements and not as a design for generating more competition. An analysis of the two sides of the threshold test is stated as

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70 Above n54.

71 Participants include Ministry of Commerce, The Treasury, Department of Justice and the Department of Prime Minister and Cabinet

72 Other terms include (a) the extent of the Act's application (b) the treatment of mergers and takeovers (c) arrangements for efficient enforcement of the Act.

73 Review of the Commerce Act 1986 - A Discussion Document, 1991.

(a) *Those who consider the Act should focus solely on efficiency argue that the test in the Act should be framed in a way that channels the analysis towards narrowly weighing up any reduction in allocative efficiency against possible gains from greater productive efficiencies...*

(b) *Those who see a wider role for the Act argue that a reduction in allocative efficiency does not include all the detriments from a reduction in competition, while productive efficiencies do not capture all the benefits.*

The review group concluded that a competition threshold would provide a flexible and practical proxy around which a statute can be designed to test claims about economic efficiency. The paper recommends:

> *"The use of the Competitive threshold is sensible regardless of whether the Act focuses on economic efficiency or also takes into account social and distributive concerns".*[74]

The discussion document also recommended that the preservation of the competition threshold would be in line with the OECD experience and the focus of antitrust law in the United States. It is submitted that this view facilitates co-operation between New Zealand and other nations in formulating economic policy.

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74 Above n73, 6.

Having clarified its position on the policy behind the Act the discussion document examines the Public Benefit Test and classifies the issues pertaining to the test as:

1 What constitutes a benefit.

2 The Evaluation of the benefit.

3 The meaning of the word 'Public'.

The document examined the decisions of the Commission and the Courts in the past and concluded that the Commission had taken too broad a view of claims that could be considered as being benefits and that less weighting had been given to economic factors. The discussion document also noted that the Courts had not ruled out the incorporation of distributive values of New Zealand society.

It suggested **two** options for the Public Benefit Test.

(a) Retain the test as it was or retain the test and add a list of matters that are to be treated as benefits in a schedule to the Act or

(b) Limit the analysis of the Test to net national economic benefits by amendment to the Act.

Thus it was clear that the Government review group favoured the approach of preserving the competition threshold in the Act, but had outlined the

options available to clarify the Act in terms of the Public Benefit Test in broad terms.

However when the final review document was released in 1993[75] following submissions from various interested parties and the industry etc the Government review group had changed direction somewhat in stating:

> *There is consensus in the review team and among those consulted, that the efficiency gains and losses associated with a merger or practice are the principal consideration in the application of the Public Benefit Test.*

The review group cites the Telecom High Court case as its authority for this view to a limited extent. In Telecom it was stated:

> *The more efficient use of society's resources in itself is a benefit to the public to which some weight should invariably be given. That is not to say it is the only consideration or indeed ... the most important consideration.*[76]

The comment offered by the review group in response to the above statement from Telecom:

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75 Review of the Commerce Act 1986 by Ministry of Commerce, The Treasury, The Department of Justice and The Department of Prime Minister and Cabinet, 1993.

76 Above n75, para 2.11.

> *This statement is consistent with section 3A of the Act, which requires the commission to "have regard to any efficiencies". However given the policy objectives of the Act the majority of the review team considers that the analysis of efficiency related benefits and detriments arising from a proposed merger or practice should be the principal consideration in every decision....*[77]

It is submitted that the review group, while relying on the Telecom High Court decision, had made a recommendation well beyond what the court had said in Telecom. Telecom was categorically clear in stating that society's interest in business conduct was of value. The Courts said:

> *"Efficiency consideration 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".*[78]

The High Court's view in the **Telecom case** was consistent with section 3A of the Act which says "regard should be had to any efficiencies". The review team, however was of the opinion that the decision in **Telecom (HC)** and section 3A would not provide any certainty to the Public Benefit Test. It said:

> *.... in order to remove doubt and to avoid possible future deviation by the Courts or the Commission, the Act should be amended to*

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77 Above n75, para 2.12.

78 Above n54, 102,383.

ensure that the principal role of efficiency analysis in the authorisation process is explicit.[79]

Thus the group recommended a total shift which was not supported by the facts in Telecom, neither in the words of the Act.

The proposals of the review group were:

(a) The principal role of efficiency analysis must be made explicit in the Act.

(b) That no account should be taken of the identity of those who gain benefit as long as the benefit accrues to New Zealand.

(c) Resources to consumers and producers should be of equal value.

It is submitted that any amendment of the Act to explicitly state the principal role of the efficiency analysis could well make efficiency the principal focus of the Act thereby defeating the object of the Act which is to protect competition within New Zealand. In fact the preamble to the Act would well denigrate in status. Also there is no support in the common law for this shift of focus.

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79 Above n75 para 2.14.

VIII CABINET DECISIONS

The government review group's recommendations were reported to cabinet, following which cabinet recorded the following decisions in relation to assessing benefits and detriments in the application of the Public Benefit Test. The following decisions were announced in a cabinet paper.[80]

Cabinet has:

a *agreed that the Commerce Act be amended to clarify the basis on which the Commerce Commission and the Courts assess the benefits and detriments arising from anticompetitive mergers and practices;*

b *agreed that the amendments be effected by:*

1 *replacing the words "benefit to the public" with "benefit to New Zealand" in the sections of the Act relating to the authorisation of anticompetitive mergers and practices or other words which capture the intent of:*

A *making clear in the statute that even where little or none of the benefit accrues to other than the owners of a business it will be treated as a benefit; and*

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80 Cabinet Paper 1993.

B *ensuring that the Commission and the Courts can take into account whether or not benefits which accrue outside of New Zealand create gains from trade and investment which will benefit New Zealand or are monopoly rents which arise neither from cost savings nor innovation;*

2 *amending section 3A of the Act to reflect that in assessing applications for the authorisation of anticompetitive mergers and practices:*

A *the consideration of productive, allocative and dynamic efficiency will be the principal element of the analysis;*

B *no account shall be taken of the identity of those who gain the "benefit to New Zealand"; and*

3 *the preparation of a draft section 26 statement of the Government's economic policy in relation to transfers of wealth between consumers and producers to the effect that the Governments policy is to value resources equally regardless of whether it is in the hands of consumers or producers;*

ii *noted that the Commerce Commission intends to publish guidelines on the way it applies the public benefit test; and*

iii *noted that officials will continue to monitor the effect of the above amendments including the effects of the guidelines;*

It appeared Cabinet was clearly setting out to implement the recommendations made by the review group in identifying productive, allocative and dynamic efficiencies as the principal elements of the Public Benefit v Detriment analysis. However to date no further progress has been reported with regard to implementing the Cabinet decisions.

Thus there was still much uncertainty about the application of the Public Benefit Test with the Act in its current form.

In October 1994 the Commerce Commission issued a set of guidelines for dealing with the Public Benefit Test. This set of guidelines was intended to clarify the Commission's approach to assessing Public Benefit and detriment as noted in the Cabinet decisions referred to above.[81]

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81 Above p37.

IX THE COMMERCE COMMISSION GUIDELINES TO THE ANALYSIS OF PUBLIC BENEFITS AND DETRIMENTS 1994

In the introduction to the set of guidelines for the analysis of Public Benefit and Detriment the Commission recognises the need for consistency in the application of the Public Benefit Test.

> *The general acceptance of the guidelines coupled with proposed changes to the Act would enable a consistent approach to Public Benefit evaluation ....*[82]

The Commission however notes that the guidelines will not be taking precedence over the intent and spirit of the Act, in other words it infers that the guidelines will not be applied at all cost despite the provision of the Act.

> *The guidelines are not a mechanistic procedure for making determinations. The words of the statute will be paramount and each case will be examined in their own light. The guidelines are to enable consistency for present and future commissions and the business community.*[83]

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82 Commerce Commission "Guidelines to the Analysis of Public Benefit and Detriment in the Context of the Commerce Act October 1994, p1.

83 Above n82.

A A Summary Of The Guidelines

(a) Efficiency gains to include tangible as well as intangible benefits.

(b) Tangibles to include:

(i) Economies of scale.
(ii) Economies of scope.
(iii) Improved utilisation of capacity.
(iv) Cost reductions.
(v) Reduced transaction costs.

(c) Intangibles to include:

(i) Environmental improvements.
(ii) Improvements to health

(d) Net gains as opposed to transfer of wealth between groups; both economic and social aspects will be relevant.

(e) Efficiency gains should be net gains, not mere changes in inputs and outputs.

(f) Double counting prohibited.

(g) Consideration should be with and without the proposal and the claimed benefits.

(i) Distribution of benefit is irrelevant.

(j) The public should be the New Zealand public only; benefit to foreigners can only be to the extent that it benefits the New Zealand public.

(k) Increased employment should be at a national level.

(l) Domestic earnings to take precedence over export earnings.

B Comparison Of The Guidelines And The Commission's Past Application Of The Public Benefit Test

There are clearly major differences between the guidelines noted above and the approach of the Commission and the Courts, dealt with earlier in the paper. Some examples would be:

Goodman Fielder/Wattie[84] which gave weight to export potential and the distributional effects of the benefits. The guidelines do not give weight to export earnings as against domestic earnings and the distribution of benefits is considered per se irrelevant.

Weddel Crown[85] attempted a definition of the word 'Public' and concluded that the benefit should arise to the New Zealand public. The Commission also stated that the benefit could extend to various interest

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84 Above n26.

85 Above n30.

groups such as manufacturers, wholesalers retailers etc. This coincides with the guidelines which defines 'Public' as the New Zealand public and also states that the distribution of the benefit is irrelevant per se. However in this decision the Commission determined that a benefit to an individual would not constitute a benefit to the public. This is now contradicted by the guidelines which states "if one New Zealander is better off over time and all other New Zealanders are no worse off, a public benefit has been achieved".[86]

Amcor[87] recognised regional benefits, job security, consumer choice, and increased employment among other benefits. The guidelines now specifically reject regional benefit. It states a benefit should be to all of New Zealand. The guidelines also provide that job security and increased employment will not be benefits unless national employment increases. Also consumer choice in itself is now not a benefit as the guidelines specifically reject a distributional objective from any claimed benefits.

New Zealand Co-operative Dairy/Auckland Milk Producers[88] recognised enhanced economic efficiency and enhanced consumer welfare through rationalisation as Public Benefits. This is in line with the Commission's guidelines.

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86 Above n82,9.

87 Above n34.

88 Above n36

Kiwi Fruit Exporters/Kiwi Fruit Coolstorers[89] recognised innovative, allocative and productive efficiencies, despite going on to state that efficiency will not be the only consideration. The guidelines appear to focus heavily on efficiencies as the principal benefit in line with the proposals of the Government review team which also support this view.

New Zealand Co-Operative Dairy/Waikato Valley[90] recognised community harmony but rejected the ability to compete internationally as not being a benefit. On appeal however the High Court was of the opinion that the ability to complete internationally would be a benefit and discounted the identity of the consumer. The High Court's reasoning is reflected in the Commission's guidelines, which is a shift from the Commission's earlier determination.

Telecom (HC)[91] all would not be in conformity with the Commission's guidelines with regard to recognising benefits such as overseas shareholder profits. The guidelines state that overseas shareholder gains would only be considered if benefits accrue to New Zealanders. The distribution to consumers aspect, that Telecom (HC) stressed as a benefit that must be considered in any analysis, has also been rejected by the Commission's guidelines as irrelevant.

From the foregoing examples it is evident that the Commission's approach to the Public Benefit Test has changed radically from a social distributive

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89 Above n39.

90 Above n45.

91 Above n54.

perspective, with a few exceptions such as the Weddel Crown decision, to an entirely efficiency based approach.

C What Is Efficiency?

The Government's review of the Commerce Act and the Commerce Commission's guidelines give much recognition to the consideration of efficiencies in the application of the Public Benefit Test. There appears to be a presumption that "efficiency" is per se economic efficiency. Yet Douglas Greer, a non efficiency advocate disagrees with this view.

He offers this pronouncement by Pitofsky:

> *"It is bad history, bad policy and bad law to exclude certain political values in interpreting the antitrust laws. By "political values" I mean, first a fear that excessive concentration of economic power will breed anti democratic political pressures, and second, a desire to enhance individual and business freedom by reducing the range within which private discretion by a few in the economic sphere controls the welfare of all. A third and overriding political concern is that if the free-market sector of the economy is allowed to develop under antitrust rules that are blind to all but economic concerns, the likely result will be an economy so dominated by a few corporate giants that it will be impossible for the state not to play a more intrusive role in economic affairs.*[92]

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92 Above n61, 21 citing Pitofsky [1979].

Greer quotes Pitofsky in warning that Government intrusion would entail government ownership and intensive price regulation. This paper submits that Pitofsky's statement which talks of the prevalent United States arena would be even more relevant here in New Zealand despite the absence of such populist values, as commercial giants are so few in number in this country that economic power would be concentrated in the hands of those few and government intervention would be inevitable.

Efficiency has traditionally been defined as:

1 Allocative efficiency

2 Productive efficiency

3 Dynamic efficiency

Allocative efficiency - this refers to the optimum method of allocating available resources.

Productive efficiency - is in reference to production costs in terms of total outputs i.e producing the most at the least cost.

Dynamic efficiency this refers to progress in technology and innovation thus bringing about a reduction in overall costs in the long term.

Greer questions which of the above efficiencies fit in to the New Zealand Public Benefit Test. He says efficiency gains are easier to allege than to prove and measurement of efficiency gains is difficult. He notes:

Achievements in one area of efficiency may have no positive impact elsewhere. Given limited resources for antitrust enforcement, priorities would then be needed to achieve the greatest net benefit from the enforcement costs. Achievements in one area of efficiency may produce costly inefficiencies elsewhere".[93]

The guidelines list the following as efficiency gains:

- economies of scale
- economies of scope
- better utilisation of existing capacity
- reduced labour costs
- lower working capital
- reduced transaction costs

In **Telecom (HC)** what the applicants claimed as efficiencies were largely discounted by the Courts due to the hypothetical nature of the quantification.

The Commission says in the recent guidelines that benefits in terms of efficiency improvements provides a discipline upon the items included and the weight given to them. The guidelines recommend that efficiency improvements must be measured with respect to change in all outputs and all inputs, and not just the change in selected outputs or inputs such as import/export savings, energy savings, expenditure savings etc which are considered partial measures and would not in themselves qualify as

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93 Above n61, 23.

efficiency improvements. The Commission considers increased net profits due to cost savings while outputs remain unchanged to be an efficiency gain which should be given due consideration. Thus the Commission's guidelines appear to be driven by profit margin measures of efficiency.

The Commerce Act in section 3A states that regard should be had to "any efficiencies". The Commission's guidelines appear to narrow this down paying close attention to the bottom line as it were, rather than efficiency gains in selected areas. The words "regard should be had to any efficiencies" is a broad definition implying any gain should be considered in the benefit v detriment analysis.

It is submitted that this interpretation by the Commission modifies the Act.

D Distributional Issues

In the earlier Commission decisions discussed above it was evident that the Commission was fairly persistent in focusing on the distributional effects of the benefits claimed. **Telecom (HC)** pronounced clear principles on this topic.

It stated in Telecom citing re **Rural Traders Co-Operative (WA) Ltd.**[94]

> *Before a benefit (or detriment) can properly be regarded as a benefit (or detriment) to the public for the purposes of the*

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94 [1979] ATPR 10-110 p123.

assessment of public benefit required by section 90(9) it must be seen as a benefit (or detriment) to the community generally ....

.... It is relevant that the Australian Tribunal has always proceeded on the basis that the term "benefit to the Public" draws attention to the possibility that business conduct, that would otherwise infringe the Act may have social value. Hence it would not be in the public interest to rely exclusively upon the functioning of competitive markets to deliver everything "of value to the community generally"....

.... We have concluded that this approach is applicable to authorisation under the New Zealand Act. This does not rule out the incorporation of distributive values of New Zealand society in the assessment of Public Benefit.[95]

Thus the common law as it has evolved in Telecom which is the most recent pronouncement on this topic appears to emphasise that the distributional aspect of a claimed benefit is also of importance and should not be ignored.

However the Commission's guidelines takes a radical approach by providing that the relevance of distributional aspects per se should not play a part in the analysis of Public Benefit.

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95 Above n54, 102,383.

The Commission's guidelines form the view that the Act may have indirect distributional objectives through the promotion of competition, but does not contemplate direct distributional benefits. While this paper accepts such a view to a limited extent it is submitted that the definition of "market" plays a crucial role in arriving at a conclusion on the Act's objectives. "Public Benefit" is not defined in the Act, hence it must be construed in the context of the Act's entirety.

The market definition is provided in section 3(1)(A):

3(1)(A) ***[Market].*** *Every reference in this Act, except the reference in section 36A(1)(b) and (c) of this Act, to the term "Market" is a reference to a market in New Zealand for goods or services as well as other goods and services that , as a matter of fact and commercial common sense, are substitutable for them.*

Seeing that the Public Benefit Test is only applied when authorising a restrictive trade practice or a merger or acquisition that substantially lessens competition or strengthens a dominant position in a "market" it is contended that Public benefit should surely flow through to that very market by the very authorisation of such a practice or merger, once it is concluded that the benefit outweighs any detriment. As the market definition in the Act is in terms of the supply or acquisition of goods or services it must apply to the consumption of such goods or services and therefore the "consumer". Thus it is contended that the distribution of the benefit to the consumer is intended to a large extent in the Act and that the definition of the word "market" goes quite some way in establishing that.

The Public Benefit Test should prove that a benefit is realisable to the market hence to the consumer of the goods or services the subject of the authorisation or clearance of a practice or merger. Although this interpretation would not mean that the benefit should extend to the public at large as long as it is contended that benefit to the "consumer" in a small market or large, despite the significance in size in proportion to the population of New Zealand was intended in the Act.

Thus the Commission's view expressed in the guidelines that no attempt will be made to define who is "public" or "private" in assessing public benefit, and if a benefit has been gained by one and all other New Zealanders are no worse off a public benefit has been achieved, is a modification of the Act. It is submitted that the Act establishes through its definition of the word "market" that a benefit must flow through to the market in which the goods or services, the subject of the authorisation, are supplied or acquired. Thus this paper puts forward the view that distribution to the consumer must surely be intended in the Act.

E Domestic V Foreign Shareholders

The Commission provides in the guidelines that the word public is to be inferred as the New Zealand public, hence benefits to foreigners are to be counted only to the extent that they also involve benefits to New Zealanders. The guideline states "inflows of overseas capital of themselves are not benefits to New Zealand since they are made in return for the subsequent outflow of dividends, interest and capital repayments". However the guidelines recognise inflows of technology transfer of access

to overseas markets as public benefits that are linked to foreign investment in New Zealand.

Telecom (HC) proffered some principles on the issue of overseas investment in New Zealand stating that international efficiencies create gains from trade and investment which, from a long run perspective benefit the New Zealand public. However this was qualified by the Court in saying that recognising such a benefit does not mean a monopolist exercise its market power to gain subnormal profits, which accrue to overseas shareholders as this would be an exploitation of the New Zealand public. In its prior determination the Commission in Telecom did not totally disregard benefits to foreign owners but only gave it minimal weight. The High Court in Telecom said:

> *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.*[96]

Thus it is submitted that the Commission's guidelines take a narrow view of overseas investments/shareholders benefits as only being a benefit if it benefits New Zealanders, on the basis that the Act refers to in its preamble,

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96 Above n54, 102,386.

the promotion of competition in markets within New Zealand. The Government Review Group said:

> *The review team notes however, that many medium and large sized firms 'that are generally thought of as being New Zealand firms (Air New Zealand, Brierley Investments and Fletcher Challenge) have significant overseas shareholdings. Accordingly that domestic/foreign distinction is often not easily made and is therefore, not usually a useful basis for analysis under the Commerce Act. Nevertheless, the review team agreed with the general thrust of the High Court's approach that competition law should not discourage foreign investment that is likely to provide benefits to New Zealand economy but should discourage the transfer overseas of functionless monopoly rents.*[97]

It is contended that the Government review group and Telecom's view is a more appropriate and accurate interpretation of the preamble of the Act than that espoused by the Commission's guidelines. "Markets within New Zealand" does not directly mean "benefits to New Zealanders" as the guidelines indicate. Foreign investment could promote competition within New Zealand which should be a benefit in itself rather than if it only extends to benefits to New Zealand***ers.***

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97 Above n75, 12 para 2.46.

If the merger or restrictive trade practice that is the subject of the authorisation could be proved to be a benefit to the New Zealand market, it should satisfy the Act's requirement of promoting competition within New Zealand. In fact it is suggested that the Commission's guideline in insisting on benefits to New Zealanders as opposed to benefits to New Zealand is bringing in a distributional objective which is contradictory to its view on the topic of distribution of benefits. Thus there appear to be inconsistencies within the guidelines.

F Creation And Retention Of Employment

The Commission's guidelines provide that creation or retention of jobs would not in themselves be an efficiency gain, hence they fall outside the definition of Public Benefits. The guideline also provides that unless national employment levels increase no additional weighting will be given to increased employment. It is submitted that establishing increases in national employment would be an uphill task in a prospective merger or restrictive trade practice proposal. Surely increases in localised employment should have some effect on national employment figures. While on the one hand the guidelines are at pains to explain that a benefit to one is a benefit to all, it appears to take on a distributive role in stating that national employment as opposed to increased regional or local employment would only qualify as a benefit.

The object of the Act in promoting competition within New Zealand and the definition of the word "market" in the Act does not impose an extended geographic dimension to the Public Benefit Test that all of New Zealand should benefit from the authorisation or clearance process, as long

as the benefit is "within" New Zealand . It is submitted that in discounting increased employment or retention of employment as a benefit in itself the Commission is promoting an efficient but shrinking industry concept which again is not supported by the provisions of the Act.

X RECENT DEVELOPMENTS IN AUSTRALIA

Around the same time as the New Zealand Government Review Group had produced a discussion document and undertook the Review of the Commerce Act, the federal governments of Australia jointly commissioned the Hilmer committee[98] to review the competition policy and its basic principles in all of Australia.

Australia had a similar authorisation procedure under the Trade Practices Act as New Zealand's Commerce Act and the Australian Trade Practices Commission was responsible for authorising otherwise anti competitive arrangements and mergers on a case by case basis just as in New Zealand. There was however one major difference between Australia and New Zealand, in that price fixing arrangements were not deemed per se illegal as it was under the Act in New Zealand. Thus price fixing arrangements in Australia had to first satisfy the lessening of competition test and only following such a finding that the Public Benefit Test provisions of the Trade Practices Act would be applied. The Hilmer committee recommended in its findings that Australia should follow the New Zealand legislation in deeming price fixing arrangements to be per se illegal and have the continued availability of the authorisation process for such illegal practices to continue. The Committee recognised two main rationales for the universal and uniform application of competitive conduct rules i.e efficiency and equity. The report said:

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98 F G Hilmer, Independent Committee of Inquiry into a National Competition Policy (Canberra 1993) - The Hilmer Report.

> *The efficiency rationale has never been more important. Australia is under increasing pressure to improve its international competitiveness so as to maintain and improve living standards. In this environment pleas for special treatment warrant the closest scrutiny. This is particularly so in respect of many of the current exemptions from the TPA including some government provided services such as electricity and port services and private professional services which are largely sheltered from international competition yet provide key inputs to businesses that must contend with domestic and international competition.*[99]

It should be noted that the Committee stressed the importance of living standards in Australia in applying the efficiency rationale quoted above. Thus there was an indication that consumer benefit was an important consideration of the Australian governments in commissioning the review of competition policy. The governments were unanimous that all market participants had to be treated equally with universal rules whether they be government corporations or private firms and that no exemptions should apply.

The committee stressed that Public Benefit was not defined in the Act but made reference to the case of re **ACI Operations Pty Ltd**[100] which recognised economic development, fostering business efficiency, supply of better information to consumers, growth in export markets, expansion of employment and environmental protection as Public Benefits.

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99 Above n98 Cap 5, 86.

100 [1991] ATPR (Com) 50,108.

Unlike the Government review in New Zealand, it noted that economic efficiency was considered paramount but additional benefits must be given consideration in assessing if benefit outweighed detriment.

The Committee in its final consideration of the application of the Public Benefit Test said that although the committee had sympathy with the submissions received which urged that Public Benefit considerations should be limited to matters of economic efficiency it did not feel that parties should be denied the opportunity to demonstrate "other dimensions of community welfare". This approach is quite different to the New Zealand government review group's recommendation, which recommended a prime facie "efficiency" approach to the analysis of Public Benefit.

Thus it is submitted that the Hilmer Committee was recommending a "Yes competition but efficiency" approach which is the workable competition model discussed earlier.[101] This paper supports this view.

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101 Above pp35 and 36.

XI CONCLUSION

From the foregoing discussion it is submitted that the recent Government review and the Commission's guidelines are not consistent with the provisions of the Act. The paper has analysed the competition versus efficiency arguments and concludes that a compromised approach would be ideal, i.e a workable competition model.

The common law as it had evolved in the Telecom (HC) decision does not support the view that efficiency considerations should be the only consideration in the analysis of Public Benefit and Detriment. This paper has argued that the government review group had over extended its interpretation of the Telecom (HC) decision in stating that efficiency analysis should assume a principal role in the authorisation process. As it turned out in the Telecom (HC) decision the court was of the view that section 3A of the Act did not make much difference to the implementation of the Public Benefit Test.

It is also apparent from the above analysis of the Commission's recent guidelines that an extended geographic dimension has crept into the Public Benefit Test despite also conveying that the distribution of benefit is irrelevant per se. Thus this paper submits that conflicting signals are being given in the guidelines and concludes that the authorisation process within the Act clearly contemplates benefits flowing through to the market and therefore the consumer. Hence an efficiency only analysis will be contradictory to the provisions of the Act.

A total efficiency approach could leave the New Zealand competition policy isolated from the rest of the world and efficiencies that do not reflect or accrue benefits to consumers resulting in firms' slackness at maximum profit levels. The Australian approach is sensible, that society's standard of living should improve as a result of an effective competition policy. This has not been given consideration in New Zealand. Thus this paper recommends the Government of New Zealand re-think its stance in the development of competition policy and achieve a compromise based on the workable competition model. Consumer living standards would be the best corroborative evidence of a well thought out competition process.

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