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# THE PUBLIC BENEFIT TEST REVISITED

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Abstract

This paper looks at the public benefit test under the Commerce Act 1986. It examines the criteria of the public benefit test and reviews a number of cases where authorisations have been sought under the Commerce Act and the Trade Practices Act 1974 (Aust Cth). The policies and purposes of the public benefit test are then examined. The test is shown to be an expression of both economic and populist policies, consistent with the intention of the legislature, and in keeping with New Zealand's competition law history. The option of providing defined public benefits are examined along with the option of an efficiency test: this part of the paper discusses the recent review of the public benefit test by the Review Team of the Ministry of Commerce. The analysis emphasises the importance of the current debate about the proper direction of New Zealand's competition law: that is, whether wider economic and social objectives should be pursued through retention of the present public benefit test or whether narrower economic efficiency theories should determine the outcome of authorisations by setting efficiency off against competition.

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# THE PUBLIC BENEFIT TEST REVISITED

## Introduction

Part V of the Commerce Act 1986 permits the Commerce Commission to authorise certain restrictive trade practices ("RTPs") and prohibited business acquisitions if the public benefit arising from the practice or acquisition outweighs its anti-competitive effects. At present the only statutory assistance given the parties and the Commission when applying this public benefit test is in section 3A of the Act (inserted by section 4 of the Commerce Amendment Act 1990).[1]

In a recent review of the Commerce Act it was stated that[2]:

> "The nature of the public benefit test is crucial because it defines the extent to which anticompetitive behaviour can be authorised."

One of the issues examined in the review was the ambiguities of the public benefit test ("the PB test") in its present form. The cases in New Zealand, and under the similar test in the Australian Trade Practices Act 1974, show a variety of approaches to the PB test.

This paper first describes the PB test (Part 1), then looks at examples of the PB test in application (Part 2), and then considers the PB test in the context of the policies and purposes of the Commerce Act (Part 3). The

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1 Section 3A provides that the Commission is to "...have regard to any efficiencies..." that may result or be likely to result from the RTP or business acquisition.

2 Review of the Commerce Act 1986: Discussion Document. Competition Policy and Business Law Division, Ministry of Commerce, Wellington. December 1991.

purpose of Parts 1 and 2 is twofold. First, the PB test will be explored in detail, in order to establish its limits. Secondly, the underlying policy and purposes of the PB test may then be identified in Part 3. It will be seen from this analysis that the PB test reflects a recognition in the Commerce Act of the limits of competition. The PB test will be seen to reflect the mix of economic, social and political objectives that underly the Commerce Act. Efficiency will be established as only one of these objectives, and this will be manifest from the examination of the Parliamentary Debates on the Commerce Act, from the cases and from the very nature the PB test, which implicitly recognises that competition and efficiency are not always complementary. Populist views about the limitations of excessive concentration of market power, about the distribution of resources in society, about protecting small enterprises from predatory behaviour and about preserving stable economic and social structures will be seen as relevant, both from the examination of the cases involving the PB test (see Part 2), and from the relevant literature on the policy of competition law in New Zealand.

This analysis will then be drawn upon in a discussion of the merits of the PB test, which investigates the options for redefining the PB test along with an assessment of its usefulness as a integral part of New Zealand's competition law (Part 4). Both populist and economic policies will be established as relevant to the question of redefining the PB test. Part 4 proposes that, while the Commerce Act remains in its present

form, the PB test should not be limited to efficiency criteria alone. The reason for this is that, in its present form, the PB test appropriately reflects all of the economic and populist objectives of the Commerce Act.

At bottom, this paper is about the proper direction of competition law. The debate about the proper direction of competition law is generally expressed in terms of two broad schools of thought (neo-classical economics versus populist economics).[3] The main elements of this debate appear frequently in American antitrust writing.[4] The populist position is that antitrust law should ensure that market behaviour is consistent with the attainment of all of the economic and social benefits that should be available in a democratic and competitive market environment. This includes concepts of fairness, control of illegitimate market power, and the fostering of distributional values, as well as economic efficiency. The neo-classical position, championed most notably by the "Chicago School",[5] is that antitrust law should be restricted to considerations of economic efficiency: this is to be achieved by intervening only

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3 See Michael E DeBow "The Social Costs of Populist Antitrust: A Public Choice Perspective" 14 Harvard Jn of Law & Pub Pol 205 for a useful summary of the opposing positions.

4 See Bork, Bowman, Blake and Jones "The Goals of Anti-Trust: A Dialogue on Policy" 65 Colum L Rev 363 (1965) and more recently E M Fox and L A Sullivan "Antitrust Retrospective and Prospective: Where Are We Coming From? Where Are We Going?" 62 NYU L Rev 93 cf F E Easterbrook "Workable Antitrust Policy" 84 Mich L Rev 1696 (1986).

5 Well known proponents of this School of thought being Judges Posner, Bork and Easterbrook; see R A Posner "The Chicago School of Antitrust Analysis" 127 U Pa L Rev 925 (1979) for a summary of their views.

minimally in the free flow of market forces.[6] This debate is at the heart of the analysis of the PB test in this paper. The cases and literature discussed herein will establish that, while the Commerce Act remains in its present form, populist objectives are both relevant and appropriate considerations when determining public benefit issues.

## PART 1
## THE PUBLIC BENEFIT TEST DESCRIBED

The Commerce Amendment Act 1990 made certain changes to the authorisation provisions of the Commerce Act.[7] A brief summary of the law as of October 30 1992 follows.

### The PB Test in Authorisations for RTPs

Authorisations of RTPs falling within section 27 or section 28 of the Commerce Act are determined under subsection 61(6) of the Commerce Act. Subsection 61(6) provides, in summary, that an authorisation of the relevant RTP is not to be granted unless the Commission is satisfied that the RTP will result or be likely to result in a benefit to the public which would outweigh its actual or likely anti-competitive effects. Authorisations of RTPs falling within section 29 of the Commerce Act are to be determined under subsection 61(7), and those RTPs falling within sections 37 or 38 of the Commerce Act are to be determined under subsection 61(8). Both subsections 61(7) and 61(8)

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6 A view shared by the New Zealand Business Roundtable - see its submission on the Review of the Commerce Act dated 14 January 1992, Ministry of Commerce, Wellington, New Zealand.

7 See Commerce Amendment Act 1990, sections 19-24.

provide that the RTP is not to be granted an authorisation unless it will result or be likely to result in such a benefit to the public that it should be permitted.

It will be noted that the test for authorisation under subsections 61(7) and 61(8) is worded differently to the test in subsection 61(6). Subsections 61(7) and 61(8) do not specifically require a weighing of public benefit against competitive detriment. Nevertheless, the Commission has decided that it is appropriate that any net public benefits be balanced against the net anti-competitive effects arising from the RTP in question.[8]

**The PB Test in Authorisations for Prohibited Business Acquisitions**

An application for authorisation of a prohibited business acquisition[9] may be granted if the Commission "...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... ."[10] Formerly, the Commerce Act required the Commission to determine whether any public benefits from a merger or takeover outweighed the anti-competitive effects arising from the

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8 *Re New Zealand Stock Exchange*, Commission Decision No. 232, 10 May 1989; following *Application by Obadiah Pty Ltd* (1980) ATPR 40-176. The ambiguity created by the different wording may be suggestive of a need for consistency because, notwithstanding the Commission's view that the test to be applied is essentially identical (the merits of this view cannot be discussed in this paper), there remains some doubt whether in fact a broader test of public benefit was intended under subsections 61(7) and 61(8): see also n 11 below.

9 That is, a proposal that has not been granted a clearance under sections 66 or 67.

10 Subsection 67(3)(b) of the Act.

acquisition or strengthening of a dominant position in a market. This amendment again raises the issue of whether a broader public benefit test is envisaged by this different wording. The Commission has recently suggested that consistency in wording between the tests be adopted.[11]

## The Process of Determining an Authorisation

Ahdar[12] has diagrammatically represented the authorisation process for RTPs.[13] The important aspect of this process is the determination of net public benefits when the so-called balancing process is undertaken (note that competitive detriment is also netted against positive competitive effects).[14] In respect of public benefits, the net gains have to be determined in respect of the benefits actually claimed.

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11 See n 8 above, and *Commerce Commission Submissions to Ministry of Commerce: Re Commerce Act Review*. Ministry of Commerce, Welington (1992). Compare the Australian tests, in s 90 of the Trade Practices Act, which, in respect of both RTP's and business acquisitions, permit authorisation if "in all the circumstances" such a benefit to the public is found to warrant authorisation.

12 R J Ahdar "The Authorisation Process and the Public Benefit Test" in R J Ahdar (ed) *Competition Law and Policy in New Zealand* (Law Book Company, Sydney, 1991).

13 Above n 12; see also (1988) 16 ABLR 128, 136.

14 The process is described by the Commission in *Re Weddel Crown Corporation Ltd* (1987) 1 NZBLC (Com) 104,200; the weighing of net competitive detriments is a threshold exercise before moving to the stage of balancing since, for example,if under s 27 there is no substantial lessening of competition, then an authorisation is not required.

A recent example of this netting process is the *Telecom*[15] case, where the efficiencies arising from telephone network designs and reductions in overall costs in running the network were accepted by the High Court and the Court of Appeal as being efficiencies to the public's benefit[16] (the Commission discounted these benefits owing to substantial foreign ownership of Telecom - the Courts disagreed with this conclusion[17]). The High Court netted out these benefits, inter alia, against the loss of allocative and dynamic efficiency that would result and found that the net benefits were outweighed by the competitive detriments.

The Court of Appeal disagreed with the High Court's assessment, viewing the inefficiencies found as too ephemeral, and finding the efficiencies to be sufficient to justify an authorisation.[18] However, the Court of Appeal's judgment has added little to the learning on the PB test. After Richardson J emphasised the importance of the high threshold of the dominance test, the respective judges proceeded to disagree about whether that threshold was reached.[19]

In practice the weight attached to any public benefit or detriment depends upon the opinion of the Commission as to the significance of the projected benefit or detriment, given all of the circumstances surrounding an

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15 *Telecom Corporation of NZ Ltd v Commerce Commission* (1991) 3 NZBLC 102, 340 (HC); [1992] 3 NZLR 429 (CA).
16 Above n 15, 102, 388-102, 389.(HC); 435, 439 (CA).
17 Above n 15, 102, 386 and 102, 389 (HC); 435, 439 (CA).
18 Above n 15, 438-439 (CA).
19 Above n 15, 434, 435 445-446; see further discussion of this case at pp 20-26 below.

application. The Commission, in the *Telecom* case, succinctly summarised this point in the following terms[20] :

> "Neither detriments nor benefits are easy to quantify... In the end, however, uncertain and incomplete dollar values are not the only items to be weighed. There are unquantified but nevertheless real changes in outcomes, and qualitative factors, which must also be taken into account. The Commission must, as a matter of judgement, reach a view on the relative weighting to give to all of the various competitive detriments and public benefits identified as relevant to its decision, and make that judgement accordingly."

**The Meaning of "Public Benefit"**

In *Weddel Crown* the Commission discussed the scope of the word "public"[21]:

> "As to the meaning of the 'public', it seems clear from the preamble of 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 or retailers, as well as users, investors and so on."

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20 *Telecom/Crown*, Commission Decision No. 254, 17 October 1990: cited with approval by the High Court in *N Z Dairy* below n 26.

21 Above n 14, 104,213.

The High Court, in the *Telecom* case, adopted the following statements of the Australian Trade Practices Tribunal[22]:

> "Before a benefit (or detriment) can properly be regarded as a benefit (or detriment) to the public for the purposes of the assessment of public benefit required..., it must be seen as a benefit (or detriment) to the community generally...That assessment will ordinarily involve the consideration of whether the community generally has an interest in the individual or group being so benefited or disadvantaged and whether the benefit or detriment involves detriment or benefit to other individuals or groups."

Following *Re Queensland Co-operative Milling Association Ltd*,[23] the Commission in *Weddel Crown* said that the term "public benefit" is to be given a large and liberal scope[24]:

> "The Act is worded broadly and there appears to be no limitation as to the nature of the public benefit which may be claimed...A benefit is something of value to the public."

In *Fisher & Paykel v Commerce Commission*[25] the scope of "public benefit" was said in the High Court to include flow-on benfits to the public arising from private benefits, including "...second and third tier

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22 Above n 15, 102,383, citing *In re Rural Traders Co-operative (WA) Ltd* (1979) ATPR 40-110, 18,123.
23 (1976) 25 FLR 169.
24 Above n 14, 104,213.
25 [1990] 2 NZLR 731, 767.

effect[s]... .", identified in *The New Zealand Co-operative Dairy Co Ltd v Commerce Commission.*[26]

It has been noted that the fact that public benefit is undefined by the Act "...allows the Commission...to take into account a very wide range of possible benefits."[27] The Ministry of Commerce's recent Discussion Paper[28] notes the following significant factors in applying the public benefit test[29]:

-evidence of causality

-quantification of the benefits claimed

-objective verification of the benefits claimed

-evidence showing the liklihood that the benefit will in fact occur

The Commission has generally given less weight to non-economic benefits, and more weight to improved efficiencies, while the Court has occasionally been willing to take account of issues relating to the distribution of benefits among the public.[30] The distribution factors taken account of by the Courts will be examined in the discussion of the relevant cases below.

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26 [1992] 1 NZLR 601.
27 Above n 2, 6.
28 Above n 2.
29 Above n 2, 13.
30 See *N Z Dairy* case, above n 26, and the *Telecom* case, above n 15, (HC).

## PART 2
## EXAMPLES OF THE PUBLIC BENEFIT TEST IN APPLICATION

This Part looks at examples of the PB test in application, in respect of authorisations for RTPs and for business acquisitions. A number of decisions of the relevant Commissions, Tribunals and Courts, in New Zealand and Australia, will be examined for the purpose of elucidating various aspects of the PB test that will be relevant to the discussion in subsequent parts of this paper.[31] Each case discussed is preceded by a heading, which indicates the points to be illustrated in the discussion of the particular case.

### Examples of RTP Authorisations

#### The Role of Efficiency Arguments in RTP Authorisations.

In *Re New Zealand Kiwifruit Exporters* Association[32] an authorisation was sought for a price fixing arrangement. In its decision the Commission stated[33]:

> "...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 occur if the agreement did not exist."

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31 See van Roy *Guidebook to New Zealand Competition Laws* (2ed CCH Wellington 1991) and J D Heydon *Trade Practices Law* (Law Book Company Sydney 1989) for further examples.

32 *Re New Zealand Kiwifruit Exporters Association (Inc) - New Zealand Kiwifruit Coolstorers Association (Inc)* (1989) 2 NZBLC (Com) 99-523.

33 Ibid, 104,500.

The Commission then discussed a number of earlier cases that considered efficiencies. It relied on its earlier statements in GFL/Wattie,[34] where it said (in GFL/Wattie)[35]:

> "The Act...appears to rest on the premise that the interaction of competitive forces will yield the best allocation of New Zealand's economic resources...unless it is shown...that possession of a dominant position is better able to achieve economic efficiency."

The Commission concluded that RTPs could be authorised on efficiency grounds. However, they also clarified that[36]: "This is not to say that efficiency is the only public benefit which can be taken into account."

The Commission then went on to make some important statements about the place of efficiency arguments under the PB test (with respect to RTP authorisations).[37] Its conclusions are summarised as follows:

1. Parliament's intention was clear in following the Australian legislation (the Trade Practices Act 1974 (Cth)) - accordingly the PB test was to be given a wide meaning, as in Australia;

2. Theory and experience justify a presumption in favour of competition: however, if it can be proven that an RTP will enhance efficiencies and or give rise to other public benefits then this presumption can be rebutted;

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34 Decision No 212, Commerce Commission, Wellington.
35 Above n 32, 104,500.
36 Above n 32, 104,501.
37 Above n 32, 104,501 - 104,504.

3. Efficiency is not a one-sided concept - inefficiencies arising from an RTP must be taken into account;

4. Efficiencies may be counted when they only benefit producers if they represent a genuine resource saving;

5. There are different kinds of efficiencies that may be considered:
   - allocative efficiencies, being better allocation of resources;
   - productive efficiencies, being efficiencies arising from reduced costs and increased economies of scope and scale;
   - innovation efficiencies, allowing better research and development;
   - management efficiencies, resulting from rationalisation and combined expertise.

6. Efficiency must be viewed overall and also over time, so that it is not merely a static evaluation.

Public Benefits other than Efficiency in RTP Authorisations

In *The New Zealand Grape Growers Council Inc*[38] an authorisation was sought for the collective negotiation and fixing of prices and other terms of supply between grape growers and processors (wine makers).

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38 Decision No 263, Commerce Commission, Wellington, 1991.

The Commission looked particulary at the nexus between the public benefits claimed and the RTP. One of the main public benefits claimed was that the RTP would allow price stability in the wine market, overcoming price peaks and troughs caused by the seasonal nature of the grape industry.[39] The Commission said that price stability was not a public benefit in itself, and that it may in fact dull the effective operation of market forces. This could lead to an inefficient allocation of resources owing to the absense of effective price competition.[40] Accordingly, what was argued in the public interest was from another view a further restriction on competitive behaviour, which the Commerce Act says, as a matter of policy, is not in the public good.

Other public benefits considered by the Commission in this case were[41]:

1. Equality of bargaining power between suppliers - this was rejected, but the Commission thought that it could be a public benefit where there was a monopoly buyer;

2. Greater information exchange - not thought significant, but the Commission thought it could be a public benefit where it led to more competitive negotiating;

3. Orderly industry development - not necessarily a public benefit and in many cases would be highly anti-competitive.

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39 Above n 38, 28-29.
40 Above n 38, 27, 29-33.
41 Above n 38, 28-29.

Public Benefits Must Be Substantial and Be Proved to Benefit the Public

In *Re Southern Cross Beverages Pty Ltd*[42] the Australian Trade Practices Tribunal reviewed the relevance of private benefits to the public benefit test in the Trade Practices Act 1974.[43] The Tribunal noted[44]:

1. Before a benefit can properly be regarded as a public benefit it must be seen to benefit, at some level, the community as a whole;

2. The encouragement or enabling of individuals to pursue legitimate ends, if it can be shown to be in the interest of the community as a whole, can be a public benefit but proof of a wider benefit must be shown;

3. Any detriment to the public arising from the benefits conferred on the individual must also be weighed.

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42 (1981) ATPR 40-242.

43 Professor Robert Officer, in a paper delivered on 12 July 1987 to the Trade Practices Workshop (Melbourne), claims that efficiency is the goal of the Trade Practices Act, and the Commerce Act, and that accordingly private benefits that increase overall efficiency in a market should be counted as public benefits. However, the argument that efficiency is the sole objective of the Commerce Act is rejected below, owing to the uncertainties of the economic theories underpinning it and the policy underlying the Commerce Act. Professor Officer's argument that, fundamantally, the Commerce Act is concerned with producing a "bigger pie" is simply not sustainable in light of the analysis that will follow in Part 3 below.

44 Above n 42.

In this case, while the Tribunal found that the installation of glass-doored soft-drink refrigerators benefited the consuming public and the individual merchandisers (through rent subsidies), the tying of the supply of soft-drink to the supply of the refrigerators did not sufficiently benefit the consumer, either by way of price savings or through easier viewing of soft-drinks at the point of sale. It was not certain that any rent saving would be reflected in product pricing, and the point-of-sale convenience to the public was thought minimal.[45] The benfits claimed were ephemeral, and were not sufficiently proved to be of benefit to the relevant sector of the public (i.e. consumers of soft drinks).

Public Benefits Must Not Be Attainable by Other Pro-Competitive Means

In *United Permanent Building Society Ltd*[46] authorisation was sought for a RTP of tying insurance to mortgages. The Australian Trade Practices Commission discussed the following public benefits claimed[47]:

1. Mortgage protection was guaranteed, which had the benefit of reducing the overall cost of mortgages owing to the increased security against losses;

2. Cheaper premiums could be offerred, since payments could be incorporated with the mortgage finance repayments;

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45 Above n 42
46 (1975-1976) ATPR (Com) 16-825.
47 Ibid.

3. The mortgagee could pay premiums should any payments be missed, thereby reducing the incidence of non-payment, the risk of loss and consequently the cost of the insurance.

The Commission found that benefits 1 and 3 may amount to substantial public benefits, and that 2 could also if the practice was part of a group insurance scheme. However, it was not thought that there were significant cost savings overall, since the costs of administering the scheme were likely to off-set the benefits. Of most importance, it was found that the benefits could be enjoyed by other means without the countervailing anti-competitive effects.[48] Nevertheless, the decision foreshadows the possibility that, where no viable pro-competitive alternatives to an RTP exists, the RTP may be authorisable on the grounds of the overall savings to consumers arising from the RTP.

Industrial and Community Harmony May be Arguable as a Public Benefit.

In *Re Lamont*[49] the Australian Trade Practices Tribunal reviewed a determination of the Trade Practices Commission which had declined to authorise a proposal for uniform carting charges. The main public benefit claimed was industrial harmony, based on the assertion that uniform charges would remove any possibility of disagreements over charges between independent carriers.[50] The Tribunal accepted that in some cases industrial harmony may be a substantial public benefit. It stated that labour market realities should not be

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48 Above n 46.
49 *Re Lamont on behalf of Owner-drivers in the Pre-mixed Concrete Industry* (1990) ATPR 41-035.
50 Ibid, 51,524.

ignored and that a method of setting rates, if it demonstrably decreased the liklihood of industrial disputes, could be a public benefit. However, the Tribunal thought that this was a "nebulous" public benefit that was difficult if not impossible to quantify.

Historical evidence of industrial relations could only provide a rough guide to the future and there was always the possibility that the benefit would not in fact occur, because of some other disputatious issue that may arise and cause disruption.[51]

The above RTP cases indicate that:

1. Efficiencies are often powerful public benefit arguments, if qualified (*Re N Z Kiwifruit*);

2. There are a wide range of efficiencies that may be arguable, particulary if the public benefits claimed are presented in terms of the ultimate economic effects of the RTP (*Re N Z Kiwifruit, United Permanent*);

3. Benefits to individuals, if they entail flow-on savings to the public or if it is in the public interest that an individual be free to pursue a particular RTP, can be public benefits (*Re Southern Cross*);

4. Benefits directly flowing to the parties to an RTP that may result in better service to the public, or a better labour market environment, may be arguable if sufficiently proved (*Re Lamont*).

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51 Above n 49, 51,525.

These elements gleaned from the above RTP cases may be compared to the public benefits that are considered in the business acquisition cases discussed next. The range of benefits considered and found by the Commission in the above cases clearly show that efficiency is not the only relevant consideration that may arise under the PB test for RTP authorisations, and that wider public benefits can be significant.

## Authorisations of Business Acquisitions

Two recent well publicized New Zealand business acquisition authorisations, *The New Zealand Dairy* and the *Telecom* cases, are carefully examined in this section. Apart from being the leading New Zealand cases, both cases illustrate the limits of efficiency arguments and the importance of wider considerations in the application of the PB test.

The fundamental propositions regarding business acquisition authorisations have been recited above.[52]

### Preservation of Local Industry and the Role of Politics

In *New Zealand Dairy* the Commission was asked to authorise a merger between the New Zealand Dairy Co Ltd, the country's largest dairy company, and a major dairy company in the Waikato and Bay of Plenty. After considering the position of New Zealand Dairy, the acquiring company, in a range of relevant markets, the Commission found New Zealand Dairy to be dominant in the relevant raw milk and town milk supply markets. The

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52 See pp 5-8 above, including an introductory discussion of the *Telecom* case.

Commission also thought that the acquisition would increase New Zealand Dairy's dominance in these markets.[53]

Four public benefits were claimed by New Zealand Dairy[54]:

1. Payout enhancement to farmers;
2. Increased international competitiveness;
3. Avoidance of farm failures;
4. Avoidance of community disharmony.

The Commission found that the enhanced payout would only accrue to a narrow band of the public (Waikato dairy farmers). It rejected the contention that there would be an automatic link between the increased payout and increased spending in the community, and gave this benefit little weight.[55]

Under the second claim, New Zealand Dairy argued that a combined entity would produce efficiencies in the industry as a whole owing to increased competition effects on other dairy companies. The combined entity would enjoy lower costs of processing and distribution through plant rationalisations, which would in turnenhance the industry's international competitiveness. The Commission rejected this claim of increased international competitiveness by finding that the Dairy Board was a price-taker on the international market.[56] It then said[57]:

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53 Decision No 264A., Commerce Commission, Wellington, 23 May 1991.
54 Ibid, para 15.01.
55 Above n 53, para 15.04.
56 Above n 53, para 15.07.
57 Above n 53, para 15.08.

> "...internal dairy company cost savings will serve to increase company profitability, but will have no influence on export prices which are determined in the international marketplace... .For the Commission to accept any public benefits under this category would amount to double counting. The benefits have already been taken into account in the section on Payout Enhancement."

By the time the case came before the High Court the Minister of Commerce had conveyed a policy statement to the Commission under section 26 of the Commerce Act.[58] This statement conveyed the need to protect the industry from fragmentation in order to enhance its ability to compete abroad.[59]

After the Court, on appeal, received further evidence from the Dairy Board, it concluded when overturning the Commission's decision[60]:

> "It is thus our view that improved farm, factory and export efficiency will have a compounding effect with benefits in improved product, increased volume of product and an increase in domestic and export earnings. These benefits will in our view

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58 Section 26(1) provides:

> "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."

59 See [1992] 1 NZLR 601, 610-611.

60 Ibid, 635-636.

> flow through to rural communities and ultimately will benefit New Zealand consumers, albeit indirectly... .We do not think that it matters so much to identify, or that it is possible to identify, where precisely each dollar of savings resulting from increased efficiency will fall. But this does not mean that each of these items of public benefit should not be identified and given weight."

Evidence about the history of increasing concentration, and the technological and scale efficiencies resulting therefrom, influenced the Court's view of the acquisition casting it in the context of a natural trend towards concentration in the industry as a whole.[61]

The Commission, after the Court's decision, released a discussion paper on the milk industry, such was its concern about the competitive situation in the industry.[62]

While the Commission rejected as insubstantial the benefits in avoiding farm failures by allowing the acquisition,[63] the Court disagreed and considered that

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61 Above n 59, 635.

62 Prompted in part by the anti-competitive environment created by the Milk Act 1988: see *Town Milk: Competition, Prices & Regulation. A Discussion Paper*. Commerce Commission, Wellington, 1991.

63 Above n 59, 636.

the benefits to be gained from stability within the farming sector, including the avoidance of insolvencies and unemployment and the consequent waste of resources and disruption, were significant.[64] The "failing company" doctrine argued in support of the merger was rejected as a doctrine, the Court declining to adopt it as proof of public benefit per se.[65] Nevertheless, the underlying elements of that doctrine, that it is against the public interest to allow a company to fail when a merger will save it and its employees' jobs, were given significant weight. In contrast to the Commission's finding that the anti-competitive effects of the merger clearly outweighed the public benefits, the Court authorised the merger, finding that the public benefits "substantially outweiged" the anti-competitive effects.[66]

The Limits of Efficiency Analysis and the Role of "Economic Doctrine"

In *Telecom Corporation of New Zealand Ltd v The Commerce Commission*,[67] a majority of the Court of Appeal, comprising Cooke P, Casey J and McKay J, determined that Telecom would strengthen its dominant position in the mobile phone market if it were granted the right to use the AMPS-A radio frequency.

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64 Above n 59, 636.
65 Above n 59, 616: the "failing company" doctrine is said to be "...a long established, but ambiguous, doctrine under which an anti-competitive merger may be allowed because one of the merging firms is 'failing'.(US Dept of Justice Merger Guidelines (1982).
66 Above n 59, 639.
67 [1992] 3 NZLR 429.

The full Court then decided that Telecom should be authorised to acquire the right to use the AMPS-A frequency. The principal public benefits found were the efficiencies to be enjoyed by Telecom in the provision of cellular phone services.[68]

The leading judgment in respect of Telecom's appeal against the High Court's finding on authorisation was given by Cooke P. Beginnning by noting that "I do not find the [balancing] exercise at all easy", Cooke P signalled that he was to differ with the High Court and the Commission on the application of the public benefit test. The main elements of his findings of fact are listed as follows[69]:

1. The transition to digital technology is necessary to enable Telecom to improve its service and meet competition;
2. The users of Telecom's [cellular] service will benefit if AMPS-A and AMPS-B can be operated in tandem;
3. Significant economies are likely to occur if Telecom acquires the right;
4. Telecom will face "intense competition...before long" and that BellSouth will be a "formidable competitor as soon as it is in business."(writer's emphasis);
5. There is a risk that Telecom and BellSouth could collude [seemingly, contradicting 4 above];
6. In the foreseeable future there are likely to be three participants in the cellular market;

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68 Ibid, 437-439.
69 Above n 67, 437-439

7. The prospect of any competitor commencing operations on the AMPS-A frequency, if available, are remote;
8. Telecom has a "...legitimate need for the band and could be in operation very quickly."

Cooke P's findings numbered 4 and 6 above contradict his earlier finding that Telecom was not dominant, since his findings that there was a prospect of "intense competition" and "formidable competition" are inconsistent with his and Richardson J's assessment of the threshold test of dominance.

Cooke P then said, in relation to section 3A of the Commerce Act[70]:

> "Parliament has expressly directed in s.3A that efficiencies are to be taken into account. In my view that direction should not be effectively (albeit unintentionally) circumvented by assuming inefficiencies on grounds of economic doctrine."

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70 Above n 67, 433, 439; s 3A provides:

> "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 that the Commission considers will result, or will be likely to result, from that conduct."

These findings were largely shared by the other Judges of the Court, with Richardson J adding the following two statements[71]:

> "...the Commission and the Court accepted that the relevant benefits and detriments were almost entirely efficiency gains and losses. In these circumstances the balancing process does not give rise to the obvious problems of quantifying and then weighing disparate public interest considerations."
>
> "...both bodies [the Commission and the High Court] considered that there would be significant efficiency gains if Telecom had management rights over both AMPS-A and AMPS-B. In those circumstances there is in my view a responsibility on a regulatory body to attempt so far as possible to quantify detriments and benefits rather than rely on a purely intuitive judgment to justify a conclusion that detriments in fact exceed quantified benefits".

It is to be noted that the efficiency considerations under section 3A are to apply to efficiencies that "...will result, or will be likely to result,... ." Unfortunately, neither the High Court nor the Court of Appeal clarified the exact scope of section 3A, and they gave little guidance on its future application in the context of the PB test as a whole, in terms of balancing or otherwise.

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71 Above n 67, 446-447.

By comparison with the decision of the Court of Appeal, the Commission had considered that the following detriments would arise from an authorisation[72]:

1. reduction in potential competitors;
2. foreclosure of the frequency band under which the most likely entry into the market could be made;
3. loss of allocative efficiency, from the liklihood of higher prices than if the band was available to competitors.

The High Court concurred with these findings and the finding that "...excess profits may well encourage slackness and inefficiency; they may also be used in wasteful "rent-seeking" activities."[73]

The Commission found the following benefits[74]:

1. Increased innovation and production efficiencies (traffic management and network designs);
2. Cost savings by avoiding extra captial for the expansion of Telecom's cellular service.

Both of these benefits were therefore economic efficiencies relating to the cost of Telecom expanding its present market share and supplying potential demand.

The Commission discounted gains to shareholders owing to Telecom's substantial foreign ownership. The Court rejected this approach, seeing efficiencies as

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72 Decision No 254, Commerce Commission, Wellington, 17 October 1991.
73 (1991) 3 NZBLC 102,340, 102,386.
74 Above n 72, 36.

benefiting the wider public because of the overall saving in resources.[75]

The Court of Appeal's reason for overturning the decision of the High Court was that it thought that both the Commission and the High Court had failed to properly quantify and therefore weigh the efficiency detriments against the efficiency gains.

The Court of Appeal also saw the anti-competitive effects of the acquisition in a more robust sense than did the Commission or the High Court. It looked at the "likely" competitors that may emerge in the "foreseeable future", and then, remarkably, decided that, since there would be no other likely contenders at that time (that they knew of), that the anti-competitive detriment should be considered less seriously.[76]

The Court of Appeal bolstered its position regarding potential competitors by reference to the low number of competitors in other overseas markets, albeit noting the differences in market sizes.[77]

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75 Above n 72, 36 (Commission) n 73, 102, 388. Compare the comments of M Pickford in "On the Welfare Function of the Commerce Commission" 22 NZ Economic Paper 15 (1988) who critisizes the Commission for treating efficiency improvements and losses assymetrically, thereby favouring the interest of consumers. Of course this criticism is premised on the assumption that efficiency is the main objective of the Commerce Act, which the writer disputes.

76 Above n 67, 439.

77 Above n 67, 438-439.

Cooke P's statement regarding "economic doctrine" reflected the Court of Appeal's preference for the evidence of anticipated economic efficiencies (having been presented with forecasts by Telecom) as opposed to the evidence of anticipated inefficiencies. In short, the Court was prepared to accept the anticipated gains but not the anticipated losses, notwithstanding that both positions were based on certain economic assumptions and a large measure of extrapolation into the uncertain future. This finding ignores "...the vast asymmetry of information that exists bewteen parties to a merger and the competition authorites", and the great incentive the applicant has to gather and present favourable data.[78] Cooke P concluded that[79]:

> "The suggested public detriment is theoretical and speculative. On the other hand there is solid ground for holding that there will be economies and that the public will benefit from a more efficient Telecom service and a smoother transition to digital technology if Telecom is allowed the band."

Scale Economies and the Distribution of Public Benefits

In *Henderson's Federal Spring Works*[80] an authorisation was sought from the Australian Trade Practices Commission for Henderson's to acquire all of the assets of a rival company. Henderson's and its rival (to be

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78 See J Vickers and D Hay *The Economics of Market Dominance* (Basil Blackwell, Oxford, 1987).
79 Above n 67, 439.
80 (1987) ATPR (Com) 50-054.

acquired) were the two largest suppliers of suspension springs to the Australian automotive industry. After a very thorough analysis of the relevant markets, assisted by the availability of detailed figures and market statistics on production volumes, capital values, sales forecasts and customer details, the Commission considered the following public benefit arguements[81]:

1. The need for industry rationalisation, particulary given existing overcapacity, lack of funds for research and development and excess plant (detailed plans for rationalisation were presented);
2. The substantiated likelihood of increased efficiencies flowing from scale economies;
3. The flow-on benefits of the established efficiencies, being long-term employment stability, further resources for research and development and improved export performance (this involves an element of double counting for if the savings from efficiencies are taken into account, then the counting of resultant benefits seems unecessary).

The failing company doctrine was also argued, but was given little weight by the Commission. The Commission took a similar attitude to that adopted by the Commerce Commission in the *New Zealand Dairy* case.[82] In a very thorough decision, the Commission accepted that there were obvious benefits from the acquisition, but it was concerned about the the market power that the merged

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81 Ibid, 57,148 - 57, 153.

82 See above n 80, 57, 154 for an explanation of this doctrine, but cf the High Court's acceptance of the benefits of avoiding company failure in the *New Zealand Dairy* case - above n 59, 635-636.

entity would thereby acquire, particulary vis-a-vis its customers in the domestic market.[83] The Commission then decided as a "...matter of very fine balance... ." to authorise the merger.[84] It is submitted that it was the importance of the continued viability of the industry, and the possibility of its collapse without the merger, that tipped the scales in favour of an authorisation, rather than the potential efficiencies.

Technological Development and International Trade Development as Public Benefits

In *Fletcher Challenge Ltd*[85] the Commission found that Fletcher Challenge would acquire dominance in the Australian market for the production and supply of newsprint if it acquired 25% of the capital of Australian Newsprint Holdings. Some of the public benefits accepted by the Commission were[86]:

1. Further development of Australia's natural resources;
2. Increased management efficiencies;
3. Development of international competitiveness;
4. Sharing of technological resources between New Zealand and Australian industry;
5. Improved quality of goods;
6. Cost savings through better technological developments achievable by merged entity;
7. Enhancement of closer economic relations, thereby furthering ANZCERTA[87].

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83 Above n 80, 57,159.
84 Above n 80, 57,160 - 57,161.
85 (1988) ATPR (Com) 50-077.
86 Ibid, 57,387 - 57,388.
87 Australia and New Zealand Closer Economic Relations and Trade Agreement.

In respect of the ANZCERTA claim, the Commission said that the claimant would have to "...demonstrate, by way of plans for rationalisation or joint development or other relevant plans, what is proposed."[88]

Maintenance of Employment as a Public Benefit

In *ACI Operations Pty Ltd*[89] the Australian Trade Practices Commission was asked to authorise the acquisition of assets of ACI's competitor, which would give ACI a monopoly position. Apart from proved benefits of increased economies of scale and scope, the Commission seriously considered the effects on employment of its decision. Taking a similar view to that adopted by the Commission in the *N Z Dairy* case, the Commission thought that job losses that might result, if the acquisition was not authorised, would be off-set by increases in employment between the two competitors.[90] The Commission thought that job losses should not, owing to the inevitable responses of the market to unfulfilled demand, be "...sufficient reason to justify the granting of an authorisation."[91] The Commission further said[92]:

> "In relation to employment the Commission cannot focus on one community where the implications of the acquisition will be felt in other communities as well. The Commission must have a broader perspective...and again must also look carefully at the longer term ramifications of its decisions."

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88 Above n 85, 57,396 - the proposal was authorised.
89 (1991) ATPR (Com) 50-108.
90 Since existing market demand would have to be satisfied by the industry, whatever its structure.
91 Above n 89, 56,089.
92 Above n 89, 56,088.

The cases surveyed show that, while efficiencies may be significant in the balancing process under the PB test, wider distributional economic and social factors are also important. The role of government under section 26 of the Commerce Act also introduces a political element into the PB test.

The RTP and business acquisition provisions in the Commerce Act assume that, when prohibited arrangements are entered into, prohibited behaviour is engaged in, or dominance in a market is acquired, there will inevitably be anticompetitive effects. However, the nature of the arrangement, behaviour or industry structure may also allow for assumptions that certain benefits or detriments will occur. For example, a horizontal merger in a capital intensive industry, that permits the retirement and upgrading of plant, may inevitably produce certain scale economies. The difficulty in balancing such factors against wider public detriments lies in qualifying such detriments and balancing them against efficiency projections.

It has been shown that the PB test is not simply about efficiencies. Wider public welfare issues, such as unemployment, industrial disruption, consumer welfare and the loss of export industries are important. Efficiency analysis does not yield an answer to the question of the desirability of considering such wider detriments. Nor is it possible to determine this issue based on the outcomes of the cases, since the merits of each case are, in hindsight, almost impossible to objectively assess.

Accordingly, in order to fully assess the merits of the PB test and its alternatives it is necessary to examine the above issues in the light of the policies underlying the Commerce Act.

# PART 3
# THE PUBLIC BENEFIT TEST AND THE POLICY AND PURPOSES OF THE COMMERCE ACT

## Competition as a Policy Objective

The preamble to the Commerce Act states that it is:

> "An Act to promote competition in markets within New Zealand and to repeal the Commerce Act 1975."[93]

The Report of the Commerce and Marketing Committeee on the Commerce Bill stated[94]:

> "The Bill will help to ensure that competition and freedom in the market-place become a reality."

In his statement during the introduction of the Commerce Bill the then Minister of Trade and Industry said[95]:

> "The Bill represents a key part of the Government's policy to improve the performance of the economy and to restore and maintain long-term growth."

Later, he spoke about the purpose of the Bill[96]:

> "...the Bill is designed to reduce prices by increasing competition in the market-place and by prohibiting price rigging arrangements, price fixing arrangements and other trade practices

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93 The Commerce Amendment Act 1991 amended the Act to include trans-tasman markets in some cases - see sections 3(1B), 3(1C), 4(2) and 36A of the Commerce Act.
94 See NZ Parliamentary Debates Vol 468, 1985: 8594.
95 NZ Parliamentary Debates Vol 463, 1985: 4681.
96 Ibid, 4685-4686.

> that restrict competition. That is the basic purpose of the Bill,... the purpose of the Bill is to give the consumer a fair go so that the market-place operates effectively and prices are reduced."

Other comments about the Bill, made during the second reading, were:

> "In tandem with other changes, the Bill increases efficiency in the New Zealand economy. In particular, it will help to ensure that the benefits of a freer economy will not be frustrated by private restrictions in the market-place."[97]

> "The legislation introduces safeguards for groups that are affected by the deregulation that the Government is carrying out, such as in the wheat industry. People operating in that industry wanted an assurance that there would not be moves towards monopolization within the industry."[98]

In their article on the Commerce Act, Stevens and Round selected the following statements made by the then Minister of Trade and Industry during the introduction of the Bill[99]:

> "The Act, which is aimed at ensuring that `the conditions for workable and effective competition exist and that the benefits of increased economic efficiency and growth are enjoyed by all members of the community including consumers,'... ."

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97 NZ Parliamentary Debates Vol 469: 506.
98 Ibid, 512.
99 L L Stevens and D K Round "The Commerce Act 1986 - A Legal and Economic Commentary Upon Some Fundamental Concepts" [1987] 12 NZULR 231, citing NZ Parliamentary Debates Vol 463: 4681.

Later, the authors stated[100]:

> "The policy reflected in both the Australian Trade Practices Act and the New Zealand Commerce Act is that competition is a social and economic good to be encouraged while at the same time proscribing non-acceptable business practices."

They then conclude[101]:

> "There is really no single purpose behind such legislation. Rather, it reflects conflicting social and political interests which interact with economic issues in society. It comprises a mixture of ideological motives and distributive (welfare) goals, as well as the desire for competitive markets."

This view was echoed in the recent Review of the Commerce Act[102]:

> "A competition threshold provides a yardstick for behaviour which is accessible to the business community, and encourages business to behave in a way which creates wide-ranging benefits for the community."

The Limits of Competition Policy

Friedmann has noted that[103]:

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100 Ibid, 233; in a note (n 14) the authors comment "... that it will generally be economically inefficient to pursue competition at all costs."
101 Above n 99, 233.
102 Above n 2, 6.
103 W Friedmann *Law in a Changing Society* (2 ed Penguin 1972), 308.

> "The basic problem of anti-trust is the definition of the public policy criteria which balance the value of cooperation against the benefits of competition. This is as perenial a problem as it is elusive. Nor can it be answered in absolute terms."

In particular, the promotion of competition will not necessarily yield the most economically efficient outcome.[104] Moreover, as we have seen, efficiency is but one policy goal of the Commerce Act. Those who claim that economic efficiency is the ultimate objective of the Commerce Act base their claim more on ideological desire than on legislative intention. Further, economic efficiencies are not easy to define or measure. The certainty that is sought in theories of economic efficiency ignore the possibility that concepts of economic efficiency may not be limited to the traditional categories of productive, allocative, and technical efficiencies.[105]

Melsheimer has said, in relation to the role of economic theory in antitrust[106]:

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104 See D F Greer *Efficiency and Competition: Alternative, Complementary or Conflicting Objectives* (NZIER Research Monograph 47 1989).

105 For example, the context in which economic efficiencies may be considered will vary from that of a company, to an industry, to a nation or to a world-wide context. Efficiencies at one level may produce inefficiencies on another; for example, efficiencies of mass production in a industry may produce environmental costs that, in the long run, are inefficient. On a more mundane level, production efficiencies gained from increased economies of scale after a merger may be accompanied by managerial inefficiencies: see Corones below n 154, 296-299.

> "Stripped of ideology, economics is a tool - one tool - for understanding antitrust issues, not a method of explaining away every practice, simple or complex, that arguably impairs the competitive process. Economics assists decisionmakers in understanding the real world competitive process. It a science, not a slogan. It is a vehicle, not a destination."

Indeed, these sentiments have been supported somewhat by one of the main proponents of the Chicago School; Posner says that[107]:

> "Since economics yields no answer to the question of whether the existing distribution of income and wealth is good or bad, just or unjust (although it may be able to tell us a great deal about the costs of altering the existing distribution, as well as the distributive consequences of various policies), neither does it answer the ultimate question of whether an efficient allocation of resources [according to the model of efficiency adopted] would be socially or ethically desirable."

Accordingly, notwithstanding the opinion that efficiency is at the core of the Commerce Act,[108] the fact remains that it is the promotion of competition that is the expressed objective of the Commerce Act. This objective is understood to yield a variety of results, apart from

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106 T M Melsheimer "Economics and Ideology: Antitrust in the 1980s" 42 Stanford L Rev 1319, 1335 (1990).

107 R A Posner *Economic Analysis of Law* (3 ed Little Brown & Co Boston 1986) 13.

108 See J G Collinge "Determining Public Interest Under the Commerce Act: A Review To Date" (unpublished paper, Commerce Commission, Wellington 1987) 5.

efficiency, including[109]: "freedom in the market-place", reduced prices, giving the consumer a "fair go", safeguards for smaller producers as well as the elimination of unfair business practices (for example, price fixing and resale price maintenance).

Clearly, the range of outcomes that may occur by virtue of the competition policy pursued by the Commerce Act will not always be consistent with increased economic efficiency in a given market.

The Public Benefit Test and the Limits of Competition

The adoption of the PB test arguably reflects a recognition that a competitive market structure and competitive market practices are not always desirable. The inclusion of section 3A in the Commerce Act implicitly recognises the divergence of competition and efficiency objectives. This is further support, in the context of the PB test, that the Commerce Act is not solely aimed at efficiency since, if this was the sole underlying objective, there would be no need for section 3A.

A review of the history of American antitrust law shows that, through the maintenance of competition under the Sherman Act and the Clayton Act, competition would provide the primary safeguard against the rise and increase of monopoly power and unfair trade practices.[110] Populist goals were thought to be as important under the American legislation as were any underlying efficiency objectives. This may be compared to prevailing monopolies and merger policy in the United

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109 See above pp 31-32.
110 See D Millon "The Sherman Act and the Balance of Power" 61 So Cal L Rev [1988] 1219.

Kingdom, which was reviewed in 1978, and expressly recognised the disadvantages to consumers of monopoly pricing and anti-competitive market behaviour, despite efficiences.[111] The content of the debates over the Commerce Bill show that objectives relating to the control of market power and the prevention of unfair practices were significant aspects of the policy underlying the Commerce Act.[112] Revisionist thinking that says the ultimate intention of the legislature was to promote efficiency alone simply does not coincide with the facts.

We have seen that the PB test is wide, allowing a variety of factors to be weighed by the Commission when considering an authorisation. The undesirable outcomes that may result from the pursuit of competition at all costs are recognised by the very existence of the PB test. This is not to say, however, that the PB test exists solely to rectify inefficient outcomes flowing from the anticompetitive provisions of the Commerce Act. Sosnich's comments on competition policy objectives apply equally to the objectives of the PB test[113]:

> "If the sole function of competition law was the maximisation of consumer welfare by advancing the most efficient allocation of resources and by reducing costs as far as possible, the formulation of legal rules and their application would be

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111 *A Review of Monopolies and Merger Policy*. Her Majesty's Stationery Office. Cmnd 7198 (1978), 12-15.

112 See pp 34-35 above.

113 Sosnich "A Critique of Concepts of Workable Competition" 72 Qu J Ec (1958) 380.

> relatively simple... .In reality however different policy objectives have been pursued in the name of competition law, many of which are not rooted in notions of consumer welfare in the technical sense at all, and some of which are plainly inimical to the pursuit of allocative and productive efficiency."

Accordingly, since efficiency is not the sole goal of the Commerce Act, similary it cannot be the sole goal of the PB test. Economic efficiency is but one of a number of important objectives of the Commerce Act, and is therefore but one of the objectives to be considered when applying the PB test.

The policy of the PB test can perhaps best be stated as one of flexibility of approach. The PB test allows those who seek authorisations for RTPs or business acquisitions a wide range of possible arguments to support their case. Public benefits are not restricted to theoretical gains arising from projected economic efficiencies. Of course, this is a two-sided equation, and the public detriments that may be weighed are equally unrestricted.

Having considered the provisions of the Commerce Act, the policies underlying those provisions, and examples of the policies and provisions in application, it is now appropriate to revisit the PB test with a view to answering the question of whether a redefinition of the PB test is appropriate.

## PART 4
## IS A REDEFINITION OF THE PUBLIC BENEFIT TEST REQUIRED?

The foregoing discussion of the PB test shows it has been given a large and liberal interpretation, in accordance with the broad objectives of the Commerce Act. However, this has not meant that spurious or ill-defined benefits, such as greater community harmony,[114] have been allowed to figure significantly (at least, not directly).

The PB test has now been refined considerably in the decisions of the Commission and the courts. Applicants for authorisations now have sufficient indication of the sorts of public benefits that are arguable, but at the same time are aware that the category of acceptable benefits is not closed. The heart of the PB test in practical terms is whether sufficient proof of a public benefit can be shown: this necessarily weeds out speculative or dubious claims.

At first sight therefore, and if the policy objectives recited in this paper are accepted, it would not appear that there is any pressing need for modification of the PB test. In fact, the majority of submissions made to the Ministry of Commerce in its recent review of the Act supported the status quo.[115] However, some strongly argued that the test should be limited to benefits flowing from efficiencies. [116]

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114 Such as were argued in the *N Z Dairy* case, above n 53.
115 Above n 2, 9.
116 Above n 2, 9.

The answer to the question of the desirability of a new or redefined PB test depends upon the matters that are considered to be the proper focus for the authorisation process, and the appropriate weight to be given to the sorts of public benefits considered desirable.

## The Options for Redefining the PB Test

In its Discussion Paper, the Commerce Act Review Team identified two main approaches to the PB test[117]:

1. to consider a mix of economic efficiency and other factors relating to public benefit ("the wider test");

2. to consider economic efficiency alone ("the narrower test").

The wider test could also include a list of defined benefits - this is discussed further below. The Review Team thought that the wider test would allow for the consideration of anything of value to the community generally, including economic benefits.[118] In contrast, the narrower test would only promote economic efficiency, other public interest issues raised by the RTP or acquisition being left to the government to remedy by other means.[119]

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117 Above n 2, 14.
118 Above n 2, 14.
119 Above n 2, 15.

Flexibility in approach, adaptability to differing circumstances and cases, responsiveness to community demands and consideration of distribution values were identified as characteristic of the wider test. However, it was noted that the need for value judgements to be made by the Commission and the Court may lead to uncertainty and some inconsistency.[120]

Furthering the achievement of industrial objectives and an established methodology were seen as the positive aspects of the narrower test, but it was noted that there is no established jurisprudence on such a test and that adoption of the test would assume that savings to producers were more important than savings to consumers.[121]

The central issue underlying all of the proposals in the Discussion Paper is whether it is desirable for the Commerce Act to continue to pursue competition as its prime objective, rather than to pursue efficiency and/or other objectives.

The option of creating a list of defined benefits will be considered next, and then the option of limiting the PB test to efficiency will be investigated.

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120 Above n 2, 15: compare the decision of the Commission in the *N Z Dairy* case with that of the Court, for example: See above notes 53 and 59.

121 Above n 2, 15.

## A List of Defined Benefits

The Discussion Paper suggests that "...the Government could provide the Commission with guidance on matters to be treated as benefits."[122] The Discussion Paper then suggests that ranking of benefits could be made and that categories of individuals and groups who qualify as the "public" could be defined. However, as the Discussion Paper notes,[123] "...a list can not anticipate the full range of business situations that might arise in relation to individual applications."

Under section 80 of the Commerce Act 1975 the Commission was allowed to consider, in addition to defined public benefit criteria, "Any other effects aiding the well-being of the people of New Zealand;... ." While such a "wrap-up" clause initially seems an attractive proposition, it would make the provision of defined criteria less useful, since the PB test would in effect be opened up to its present scope. The provision of a definition of the "public" could lead to a great deal of uncertainty in interpretation while jurisprudence on the question developed.[124] The advocates for a list of benefits wished the Commission to give more weight to non-economic factors. If such matters are accepted as

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122 Above n 2, 16.

123 Above n 2, 16.

124 Examples of the problems vague definitions can cause may be found in *Lindsay v Cundy* (1876) 1 QBD 348 and in *Wakefield Board of Health v West Riding Rly Co* (1863) 6 B & S 794. In the later case Cockburn CJ observed: "I hope the time will come when we shall see no more of interpretation clauses, for they generally lead to confusion." Such confusion could arise for the reasons given by the Court of Appeal in *Telecom*, above n 67, 434, where Cooke P highlighted the cicularity of merely paraphrasing the meaning of terms in relation to dominance.

being ones which should be given greater weight, then the provision of a list, even with a "wrap-up" clause, may serve a useful purpose. However, it is possible now for the government to use section 26 of the Act to transmit its desire for certain economic policies to be considered by the Commission.[125] While section 26 does not expressly expressly include social policies, it does give some scope for wider economic policies relating to the distribution of wealth to be transmitted to the Commission. On the other hand, a list would be contrary to the apparent policy shift represented by the adoption of section 3A. The Commission would be bound to give more weight to listed criteria, thereby possibly weakening the impact of efficiency arguments (although these too could be listed. and perhaps guidance on weighting could be given). The actual application of such criteria in the balancing process would not be any easier, and any weighting could only be in the form of general directions as to importance.

Those who object to the present wider test, and who would object to an extended definition of public benefit, do so, inter alia, because of the wider public detriments that would also be potentially examinable. Such detriments could off-set beneficial efficiencies,[126] and may make attaining an authorisation less likely than under the present test.

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125 Section 26 was utilised in the *N Z Dairy* case in somewhat controversial circumstances, the communication of the policy being made by the Minister of Commerce while an appeal was pending; presumably distributional economic policies could also be communicated.

126 As occurred when the Commission and the High Court turned down Telecom's application - see above pp 23-25.

A PB Test Based on Efficiencies Only

This was considered as option (c) in the Discussion Paper.[127] This approach envisages what the Discussion Paper described as "...a partial equilibrium analysis."[128] That is, the analysis would only take account of direct efficiency gains or losses flowing from the RTP or business acquisition. Factors such as higher output, better quality output, reduced marginal costs arising from higher productivity and improved innovation would be central benefits to consider.[129] The converse of these factors would be weighed to obtain a net efficiency quota to weigh against the net anti-competitive effects of the proposal.[130]

The Act presently recognises that competition and efficiency will not always be complementary (by allowing the Commission to have regard to efficiencies flowing from an anti-competitive activity). The frequent divergence of efficiency and competition has long been recognised by economists.[131] Owing to this divergence,

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127 Above n 2, 17; a "general equilibrium" test was also considered, which is a test allowing consideration of wider economic factors, but it was thought that such a test differed little from the present PB test and would not necessarily achieve efficiency goals.

128 Above n 2, 17.

129 See cases discussed in Part 2 above for examples.

130 Above n 2, 15.

131 See for example Feldman "Efficiency, Distribution, and the Role of Government in a Market Economy" 9 J Econ Lit 785 (1971) and Bork, Bowman, Blake and Jones above n 4 and more recently, and in the New Zealand context, see Bollard *The Economics of the Commerce Act* (NZIER 1989) and Greer above n 104.

an assessment of which objective should prevail in any given case can be very difficult, as is shown by the cases, in both New Zealand and Australia, in which the respective Commissions have had to grapple with the balancing of the two criteria.[132]

While it may be possible to estimate what costs may be incurred or savings enjoyed from an RTP or business acquisition (although quantifying these is usually very difficult), it is beyond the scope of economics to decide the question of whether, in principle, competition should prevail over efficiency (since this is essentially a policy question involving judgements about the social and distributive effects of competition and efficiency). The present PB test permits the Commission to make certain policy choices between competition, efficiency and other public benefits, in individual cases. However, the complexity of multidimensional competition,[133] and the difficulty in accurately predicting whether projected efficiencies will in fact occur, can make this decision a very difficult one to make. Demsetz suggests that "...these techniques [efficiency and competition analyses] often are rationalized as methods for improving on the market's ability to serve consumers."[134] However, he

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132 See for example *Re New Zealand Kiwifruit Exporters Association (Inc) - New Zealand Kiwifruit Coolstorers Association (Inc)* (1989) 2 NZBLC (Com) 99-523 and in Australia *Pasminco Limited Australian Mining & Smelting Limited* (1988) ATPR (Com) 50-082.

133 This phrase is defined as competing through product quality, contractual arrangements, and institutional innovation, in addition to price competition: see H Demsetz "Economic, Legal, and Political Dimensions of Competition" in Dr F DeVries (ed) *Lectures in Economics - Theory, Institutions, Policy* (Elsevier Science Publishers B V, Amsterdam, 1982), 18.

134 Above n 133, 58.

concludes that "In practice, this may produce solutions not tailored well to consumer interest."[135] Thus it is by no means certain that the public will be any better served by substituting an efficiency based PB test.

Further, Areeda & Turner observe that the United States courts[136]:

> "[When] faced with a square choice between a competitive market structure and efficiency, individually pursued and obtained, ...have chosen efficiency...Contrary judicial utterances are few, and either casual, gratuitous or unsupported."

There are already strong indications that efficiency as a public benefit will loom large in the future under the existing PB test.[137] By adopting efficiency as the sole criteria in the PB test one might speculate whether the main objective of the Commerce Act will, by default, shift to efficiency, notwithstanding the Act's proclaimed purpose of promoting competition.

Given the potentially significant impact Commission decisions can have on the community one wonders whether a refinement of the public benefit test is merely tinkering with what should be the real questions of:

1. the appropriateness of competition or efficiency tests alone for enhancing public economic welfare; and

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135 Above n 133, 58
136 P Areeda & D F Turner *Antitrust Law* (Little Brown & Co, Boston, 1978), 9.
137 See the *Fisher & Paykel* case, above n 25, the *Telecom* case, above n 67 and the High Court in *N Z Dairy*, above n 26.

2. the appropriateness of the Commission making policy choices ostensibly in the public interest.

Allied to these questions is the fundamental policy choice between the pursuit of purely economic objectives versus populist goals. As presently framed, the Commerce Act clearly aims to pursue both economic and populist goals. DeBow[138] has identified this dichotomy in American antitrust thinking, but concludes with a sceptical view of the benefits of continuing to pursue populist goals through antitrust. In particular, he sees potential for the use of bodies such as the Commerce Commission to advance strategic and political interests, rather then to pursue legitimate concerns over abuse of market power and anti-competitive practices. He claims a cost-benefit analysis of the use of antitrust for populist purposes may reveal that populist goals are best left to legislation designed specifically to address the distributional and welfare concerns that underly the populist concerns.[139] These issues are further examined in the text that follows.

**Efficiency or Populist Goals - the Narrower or the Wider Test?**

The narrower and wider tests broadly mirror the dichotomy between economic and populist goals identified by DeBow.

Melsheimer has observed that: "Something is going on in antitrust policy", after which he opines that[140]:

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138 Above n 3.
139 Above n 3, 212-222.
140 Above n 106, 1335.

> "...in the hands of Chicago School proponents, economics has become an engine for ideology hostile to the operation of antitrust law. Moreover, the use of economics is ideologically selective. If economic learning can assist in labeling a practice procompetitive or, at worst, neutral, then such learning is an appropriate component of the judicial process. If the economic learning, however, causes antitrust concern, it is too cumbersome for judges to handle. This sort of disingenuosness has no place in a rational and honest antitrust policy."

The examination of the cases in Part 2 of this paper illustrates how populist, or welfare, concerns often overlap with economic analysis. For example, in the *N Z Dairy* case the public benefits argued in favour of the acquisition could have been framed in either populist or economic terms. The core benefit argued was the maintenance of viable farms, which supplied the Waikato Dairy Cooperative. In populist terms, it could be argued that it was a benefit to the public that these farms remain viable, thereby maintaining employment levels and avoiding social and industrial disruption. In political terms, another populist perspective, it was communicated by the Government that it was part of its economic policy that the farming sector should be protected from disruption owing to its strategic significance to the New Zealand economy.

In efficiency terms, the High Court thought that the acquistion would realise significant economies of scale and scope, which would be vital to the international competitiveness of the industry. It will be recalled that the Commission and the High Court disagreed about the significance of these efficiencies, the Commission

in particular finding that the efficiencies would not significantly affect the international competitiveness of a price-taking industry, but would lead to significant public detriments from dominance in the relevant markets. Quite clearly, it was the populist factors that determined the outcome of the *NZ Dairy* case.

Commentary on the Narrower Test

Advocating efficiency as the appropriate goal of antitrust law is the view of those who propose the narrower test. Efficiency proponents share the hostility of the Chicago School to any antitrust controls: what is needed, says the Chicago School, is minimalist controls, since all will be well if the market is left to sort itself out through the "natural" flow of free forces.[141] Of course, no mention is made of the fact that human beings are usually not rational maximisers, and in fact the so-called free forces are in reality economic power wielded by powerful business concerns and people. The history of antitrust, and indeed its very rationale, was a response to the failure of market forces to yield efficient, rational and fair outcomes - why we should have faith in such forces in the modern era is not made clear in the theory.[142]

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141 See, in the New Zealand context, these views recounted in S Cave "More more market" N Z Listener October 10 1987 and "The Roundtable Tilts at the Commerce Act" Public Eyes November 1988.

142 See J Peeters "The Rule of Reason Revisited: Prohibition on Restraints of Competition in the Sherman Act and the EEC Treaty" 37 the Am Jn of Comp Law 521 [1989] for a history of antitrust law responses to market failures; see also H Henderson *The Politics of the Solar Age - Alternatives to Economics* (rev ed Knowledge Systems Inc Indianapolis 1988) Part Two for a critical historical analysis of market based economics.

In the United States the so-called new era in antitrust policy, which is based on the theory that only efficiency losses justify a per-se prohibition, began with *Continental T V Inc v GTE Sylvania*.[143] This case narrowed the per-se prohibition on vertical practices by holding that the prohibition was not to apply in the absense of demonstrable inefficiencies. The Court effectively presumed procompetitive outcomes owing to the presence of efficiencies (we have already seen how the two are not correlative).

The *Continental T V Inc v GTE Sylvania* case reflects the Chicago School thinking that places efficiency as the yardstick for determining antitrust cases (as, indeed, all economic issues) - anticompetitive behaviour that does not lead to inefficiencies is not, according to this School, relevant.[144]

However, as has been shown above, the Commerce Act does not, in its present form, have efficiency as its sole objective. It is not correct therefore to assert that an efficiency PB test would complement the Commerce Act's objectives. Further, as the *Continental T V* case illustrates, an efficiency PB test would inevitably narrow the restrictions on anticompetitive conduct. Given the high threshold for business acquisitions under the Commerce Act, it is likely that most business acquistions would easily meet the authorisation criteria should efficiency benefits and detriments only be relevant.

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143 433 US 36 (1977).

144 That is: "competition is equalized to allocative efficiency and non-economic goals are explicitly rejected... ." - see Peeters above n 142, 530.

The likely consequences of an efficiency PB test would be twofold. First, significant aggregation of market power would be more likely to occur, particulary in capital intensive industries. Secondly, if the Commission's views of the efficiency arguments advanced in *NZ Dairy* are accepted, the role of wider factors can be important, but under the narrower test they would be irrelevant. Opinions over the extent and significance of efficiencies vary widely from case to case and between finders of fact.[145] In consequence, under the narrower test, economic opinion would drive New Zealand's competition law, notwithstanding the broader policies of the Commerce Act.

It is submitted that the adoption of the narrower test would lead to a fundamental shift in policy emphasis under the Commerce Act.

Commentary on the Wider Test

Peeters has stated, in relation to competition policy[146]:

> "It is generally recognised that some restraints on competition can be useful and therefore should be excused. This policy decision will be based on the goals of competition policy."

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145 See the differring opinions of the Commission and the Courts in the *Telecom* case and the *N Z Dairy* case, above notes 67 and 26 respectively.

146 Above n 142, 522.

Citing Fikentscher, Peeters has identified the following grounds on which anticompetitive conduct has been accepted[147]:

1. economic policy - i.e. uphold anticompetitive conduct for economic reasons (efficiencies, the "narrower test");

2. legal policy - i.e. uphold anticompetitive conduct on legal grounds, such as the so-called de minimus concept[148];

3. socio-political - i.e. protection of small producers, consumers, and other societal interests;

4. political - i.e. the impact of Government policy in other areas[149].

Peeters goes on to note[150]:

> "These last two types of policy rules of reason clearly indicate that the goals of competition policy can be very broad and do not have to be confined to the preservation of competition as defined. Dissipation of market power, protection of small enterprises, the entrepeneurial freedom of retailers and other non-economic goals can give a special character to a system of competition laws."

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147 Above n 142, 522-523, citing W Fikentsher Wirtshaftsrecht 22 III 5(b).

148 That is, that while there may be a legal breach of competition law, the anticompetitive consequences are minimal - this sort of thinking appeared to significantly influence the Court of Appeal in the *Telecom* case, see in particular Cooke P's judgment above n 67, 439.

149 Compare s 26 of the Commerce Act.

150 Above n 142, 522-523.

Retention of the wider test would mean that the Commerce Act would continue to have a "special character" in the sense described by Peeters.[151] The need to retain this "special character" depends upon the policy objectives of the legislature, and on the presence of other constraints on industry should the populist policies be withdrawn from the legislation. If the laissez-faire philosophy of the Chicago School is accepted, then the wider test is clearly, as a matter of policy, unacceptable.[152] If some of the tenents of the Chicago School are accepted, particulary in relation to the need to maximise efficiencies, but some sympathy is retained for populist goals, then perhaps the present emphasis in the Commerce Act, incorporating section 3A, is an acceptable balance.[153]

The wider test, as already noted, allows the wider objectives of the Commerce Act to be realised where appropriate.[154] It reflects traditional concerns over the societal effects of excess aggregation of market power. Given the policies that underly the Commerce Act, it is appropriate, in the absence of a full reform of the Commerce Act, to retain the PB test in its present form. Efficiency has been given an emphasis by the inclusion of section 3A and it is up to the Commission and the courts to wisely balance any competing objectives on a case by case basis.

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151 See also R Ahdar "Regulating Mergers upon Socio-Political Grounds in New Zealand" [1986] 12 NZULR 49 for a summary of socio-political reasons for controlling concentration in industry.

152 Although, if this philosophy prevailed there probably would be no Commerce Act at all.

153 Particulary given the predisposition of the Commission and the Courts to efficiency arguments.

154 See above pp 54ff.

Those who call for the narrower test to be adopted on the grounds of certainty and "rational" economic theory forget that the wider test reflects the history and policy of competition law both in New Zealand and abroad.[155] From a New Zealand historical perspective, one can begin with section 26 of the Board of Trade Act 1919, which authorised the Governor-General to make such regulations as he deemed necessary in the public interest to prevent "unfair" methods of competition and methods prejudicial to the public welfare. Later, section 19 of the Trade Practices Act 1958 allowed the Commission to make orders against RTP's that were "contrary to the public interest". The general objectives of the Commerce Act 1975 included the promotion of the interests of consumers, and the transmited economic policies of government.[156]

Such broad policies are surely best facilitated by a PB test that allows all factors to be taken account of, particular where future effects must be predicted. Narrow economic analysis can serve as a model to assist the process, but, as Melsheimer notes, it fails to serve a useful purpose when it substitutes theory, or to use Cookes P's words in *Telecom*, economic doctrine, for proper analysis of all relevant policy criteria.[157]

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155 See notes 4, 142 and 153 above; and see generally Y van Roy *Guidebook to New Zealand Competition Laws* (2 ed CCH NZ Ltd Auckland 1991) chpt 1, S G Corones *Competition Law and Policy in Australia* (Law Book Company Sydney 1990), chpts 1 & 2, R Whish *Competition Law* (2 ed Butterworths London 1989) chpt 1 and L A Sullivan *Handbook of the Law of Antitrust* (West Pub Co St Paul 1977) chpt 1.

156 See s 2A Commerce Act 1975.

157 Above n 106, 1335; and see *Telecom* above n 67, 439 (per Cooke P).

One factor that has concerned some about the wider test is the uncertainties that arise from the variety of factors that must, as a matter of policy, be considered.[158] One economist has noted this concern and offers the following suggestions[159]:

> "...in many of the cases seen under the Commerce Act [that] I have been involved in or studied, I would have liked to have seen a greater discipline by expert witnesses in the application of the public benefit test. This would include identifying why and where the serious conflict between competition and other policies occurred, carefully linking the conflict with the (alleged) gains from the alternative proposal, and arguing in detail a significant balance in favour of the less competitive alternative...Quantitative estimates may be helpful, but they can not be conclusive. Anyone with practical experience will know how unreliable the estimates typically are - even after allowing that in any case they are prospective."

This call for better quantification of benefits and detriments is also made in the Court of Appeal's judgment in the *Telecom* case.[160]

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158 Above n 2, 9.
159 B Easton *Submission #31 to the Commerce Act Review Team*, Ministry of Commerce, Wellington 1991.
160 Above n 67, 446-47 (per Richardson J).

Competition policy analysis is complex. The desire for simplicity or doctrinal consistency should not lead us to abandon the historical policies underlying our competition law in favour of a conveniently less demanding economic analysis that ignores established policy objectives. The legislature has chosen to allow a broad range of factors to be considered under the present PB test as a means of arriving at a sensible balance between the interests of producers and consumers.

Reasons for the Call for the Narrower Test

The calls for a change from the PB test to the narrower test are mainly coming from big industry.[161] The call for the narrower test stems, in theory, from the conflict between the principal policy of the Commerce Act, to promote competition per se, and the size-efficiency dichotomy.[162]

The size-efficiency dichotomy arises where it becomes necessary, for reasons of capital costs or production levels required, for participants in an industry to increase firm size until a monopoly or oligopoly exists. Accordingly, usually owing to the capital intensive nature of an enterprise, competition in terms of the number of participants may suffer as a result. The

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161 Of the submissions made to the Review Team, of the Ministry of Commerce, all of those who favoured an efficiency test were, without exception, submissions from large industrial or multinational enterprises, or their interest groups.

162 See discussion of this dichotomy in E W Kintner *Federal Antitrust Law* (Anderson Pub Co Cincinnati 1980) 34-38.

difficult question for competition policy is when and how to evaluate whether aggregations of market power are justified on this basis. As Kintner notes[163]:

> "The significant point here is that monopoly power is a relative concept that must be evaluated in the particular context of an industry and/or market."

The challenge for competition law, and in particular for those who must determine authorisations under the Commerce Act, is to decide in any given case whether sufficient justifying factors exist for an anticompetitive business acquisition or RTP.

Friedmann has observed that, when considering[164]:

> "...the difficulties and contradictions inherent in the Benthamite idea of of free trade...any legislature which seeks to establish legal rules preventing the consequences of uninhibited competition [or control thereof], by which the strong may destroy the weak, must establish a legal apparatus, often of great complexity. This is the dilemma of antitrust."

While it is clear that the size-efficiency dichotomy is one of the reasons behind the calls for the narrower test, and that in certain cases the needs of efficiency are justified, the control of the abuse of market power through the regulation of RTPs and business acquisitions

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163 Above n 162, 293.
164 Above n 103, 308.

is of at least equal importance. Ultimately, efficiency as a justification for aggregation of market power must, while the present Commerce Act remains, be balanced against the factors that may arise, either as public detriments or benefits. The difficulties inherent in this process would not necessarily be avoided by the narrower test.[165]

## Balancing Doctrine and Practice

In the report of the Standing Committee of the Australian House of Representatives on Legal and Constitutional Affairs,[166] the benefits and costs of mergers and takeovers were assessed. The Committee's conclusions, after considering all of the economic factors in favour of increased concentration, and all of the potential costs (including detrimental social consequences), were that the evidence about the effects of mergers and takeovers was inconclusive,[167] and said:

> "On the basis of these considerations the Committee is of the view the competiton policy should neither actively encourage nor discourage mergers or takeovers, but should, as a primary function, ensure that unacceptable levels of dominance and misuse of market power are prevented."

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165 Vickers and Hay, above n 78, 23 who note that there are "formidable Difficulties" associated with assessing efficiency gains against anticompetitive consequences.

166 Known as the "Griffiths Report", 1989. House of Representatives. Canberra, Australia.

167 Ibid, 15.

Ahdar observes that[168]:

> "Merger control premised upon having to promote competition will often satisfy many of the populist objections to big business, since the level of mergers prohibited (large scale mergers) are the very kind of mergers which also infringe socio-political values. In this sense the competition based approach is compatible with the socio-political approach."

The maintenance of minimum levels of competition proscribed by the Commerce Act is not always consistent with the most efficient outcomes. However, where significant efficiencies are created by an RTP or business acquisition, an authorisation is likely in the absence of excessive anticompetitive effects. Nevertheless, detriments to the public such as monopolistic pricing, predatory practices, shedding of employment and industry instability may offset efficiencies. In circumstances where there are a mixture of efficiencies, inefficiencies and other public benefits or detriments, the weight attributed to each benefit or detriment becomes crucial.

In both Australia and New Zealand there is a trend for efficiencies to loom large in public benefit analyses. However, cases such as *N Z Dairy* and *United Permanent Building Society* illustrate that other factors can and

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168 Above n 151, 49 citing Areeda and Turner above n 136, 18-21.

may prove significant. It is hoped that a balance will be maintained between the economic and wider objectives of the Commerce Act. P H Clarke observes that[169]:

> "It is important to appreciate that objectives may exist at two distinct levels. This is most likely to occur in relation to legislation like the TPA, which engages in social or economic engineering where it is not possible to put into legislative form the precise end result Parliament wishes to achieve."

Clear recognition and pursuit of all of the policies of the Commerce Act will ensure that the social and economic "engineering" of the Commission and the Courts fairly balances the competing interests in the community.

## CONCLUSIONS

It has been observed that[170]:

> "The essential first step to any proposal for new competition legislation is a consideration of the objectives which the legislation is designed to achieve. This is especially so in relation to legislation expressed in very wide and general terms."

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169 P H Clarke "Trade Practices Policy and the Role of the Trade Practices Commission" (1989) ABLR 291, 292.

170 T Frazer "Defects and Effects - Competition Policy for the 1990s" [1988] 51 Mod L Rev 493, 496.

The author then identifies three possible objectives for competition law[171]:

1. Promotion of economic efficiency[172];

2. Achieving a balance between effective competition and other, unrelated, public interest objectives[173];

3. Promotion of economic unity, such as in the EEC or in trans-tasman relations.[174]

Despite attempts by the Chicago School and others to reduce competition policy and analysis to their own narrow ideological framework, the Commerce Act and similar antitrust legislation in Australia, Europe and the United States, continues to allow for the fulfilment of populist objectives. Competition law is not simply about economic analysis, but also involves "...a desire to achieve 'fairness' in commercial dealings... ."[175]

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171 Ibid, 496-497.
172 He adds, at 497: "As interpreted by the Chicago School of economists, this approach will usually result in a substantial withdrawal of government from the market,... ."
173 He adds, at 497: "An anticompetitive agreement, merger or monopoly practice will be permitted if its removal would have adverse effects on such interests as employment or the distribution of industry."
174 Compare s 36A of the Commerce Act.
175 Above n 165, 497; compare extract from Parliamentary Debates above n 96.

The laissez-faire vision of a society of rational maximisers who partake in transactions where no externalities exist is so far removed from reality as to be almost useless as a model.[176]

Insofar as the PB test is concerned, the adoption of the narrower test depends upon acceptance of the economic doctrine of the Chicago School. The promotion of efficiency as the sole objective of the PB test would undermine all other objectives that are clearly part of the policy behind the Commerce Act. If there were some certain reward for this sacrifice then perhaps such a reform would be justified - however, the only certainty about it will be the further aggregation of market power in New Zealand industry. Moreover, as Ahdar notes, much of the evidence about the effects of concentration in industry are equivocal.[177]

The wider test, which essentially is the present PB test, allows for the continued pursuit of all of the competition policies enunciated during the Parliamentary Debates. To limit the benefits and detriments to efficiencies would undermine the wider policy objectives of the Commerce Act. An efficiency test would open the door for New Zealand's competition policy to be overrun by economic doctrine, often advanced by those who seek to strengthen or abuse their market power.

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176 Myrdal has noted that economists have disregarded modern psychological research on people's behaviour as income earners, consumers, producers and investors because the results of this research are impossible to integrate into their conceptual framework - see Henderson above n 142, 166.

177 Ahdar, above n 151, 65; and see Vickers and Hay above n 165, 13.

The present PB test allows the Commission and the courts to make fair decisions based on the best interests of the public at large, while taking account of the efficiencies of any proposal. A body of jurisprudence that is flexible enough to cope with an array of circumstances has now developed through the application of the PB test.

In these circumstances, and given all of the policies behind the Commerce Act, it is difficult to see how the narrower test is either justified or warranted. For these reasons the writer advocates retention of the PB test in its present form.

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