BUSINESS ACQUISITION AUTHORISATIONS: USE OR MISUSE OF ECONOMIC IDEOLOGY?

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I. INTRODUCTION

Section 47(1) of the Commerce Act 1986 prohibits business acquisitions that are likely to create or strengthen market dominance.[1] Persons proposing to acquire business assets or shares are not required to notify the Commerce Commission. If they wish, they may seek a clearance or an authorisation to remove the risk of proceedings for breach of the Act.

The Commission may grant a clearance if satisfied that a proposed acquisition will not breach s 47(1). The Commission may grant an authorisation under s 67(3)(b) "[i]f it is satisfied that the acquisition will result, or will be likely to result, in such a benefit to the public that it should be permitted". Since 1991 s 3A has required the Commission, in evaluating public benefit, to consider efficiencies that would result or would be likely to result from a proposed acquisition.[2]

This paper analyses the authorisation by the Commission and Courts of mergers and other business acquisitions. In particular, it examines the appropriateness of economic ideology in this context, especially that of the "Chicago School".

The economic theory of "efficiency" and the debate on efficiency in practice are examined in section II. Section III analyses how the Commission and courts assess the efficiency effects of proposed acquisitions. Efficiencies that directly benefit foreigners rather than New Zealanders are examined in section IV. Section V deals with non–efficiency factors and discusses proposed legislative reforms.

II. THE ECONOMIC CONCEPT OF EFFICIENCY

The theory of efficiency

"Efficiency" is a key concept in economics. Economists often judge proposed policies by their effect on efficiency.[3] The types of efficiency relevant to competition law are allocative, productive and innovative efficiencies.

When firms in a market merge, the merged firm may gain or strengthen "market power" enabling it to increase profits by selling a smaller quantity of goods at a higher price. If a firm exercises its market power, there will

1 "No person shall acquire assets of a business or shares if, as a result of the acquisition,–
(a)That person or another person would be, or would be likely to be, in a dominant position in a market; or
(b)That person's or another person's dominant position in a market would be, or would be likely to be, strengthened."

2 "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."

3 When economists go beyond determining the effects of a policy to judge its desirability, they move from "positive economics" (which is purportedly objective) to "normative economics" (based on value judgments). The line between positive and normative economics has become blurred, with many economists treating efficiency effects as determinative of a policy's desirability.

be a misallocation of resources. The value to consumers of the goods no longer produced exceeds the cost of production of those goods, with resources diverted to the production of less valued goods. This is described as a loss in allocative efficiency.

Mergers can increase efficiency (by decreasing transaction costs), so that the same or greater output is produced at a lower cost, or a better quality product is produced at the same or a lower cost. Such gains are gains in productive efficiency.

Mergers can also affect innovative efficiency by changing the future capacity for technological and other innovations.

Efficiency in practice

Economists disagree on the net efficiency effects of mergers generally. Since the 1980s the Chicago School, based on the neoclassical economics of Milton Friedman, has had a significant influence.[4] Its adherents believe that losses in allocative efficiency are small and that gains in productive efficiency are large, resulting in significant net efficiency gains in the short run.

This conclusion is disputed by other economists. For example, Scherer, a prominent industrial organisationalist,[5] doubts whether significant gains in productive efficiency are usually achieved and suggests that productive *in*efficiencies often result.[6] His doubts are supported by many studies.[7]

The effect of mergers on innovative efficiency is also disputed among economists. Schumpeter, who was the first to analyse innovative efficiency, believed that monopolistic conditions produce more rapid progress than does competition.[8] Scherer contends that the evidence points to greater innovation in less concentrated markets.[9]

Although much difference of opinion is due to different estimates of the magnitude of effects, in some cases aspects of economic theory are disputed. For example, the Chicago School argues that a vertical merger of two monopolists can lead to lower prices and increased output,[10] while Scherer and Ross argue that these results are far from clear.[11]

In summary, opinions vary on the general effect of mergers on net efficiency. Thus analyses suggesting large efficiency gains should be treated with caution. This accords with the view of the former Chairperson

4 Its main tenets are that economic efficiency should be the only goal of competition law and that neoclassical price theory should be used to analyse economic efficiency. For a discussion of the Chicago School from a Chicago perspective see Posner, "The Chicago School of Antitrust Analysis" (1979) 127 Uni Pa LR 925 and, from a critical perspective, see Hovenkamp, "Antitrust Policy After Chicago" (1988) 84 Mich L Rev 213. See Easton, "From Reaganomics to Rogernomics" in *The Influence of American Economics on New Zealand Thinking and Policy* (ed Bollard, NZIER, 1988) on the extent of, and the reasons for, the popularity of Chicago School views in New Zealand.

5 Industrial organisationalists emphasise the causal links between market structure, conduct and performance. They consider that income distribution and decentralisation of power are relevant to merger policy. See Scherer and Ross, *Industrial Market Structure and Economic Performance* (Houghton Mifflin, 1990) 1.

6 "Antitrust, Efficiency and Progress" (1987) 62 NYULR 998, at 1004–1009.

7 Reviews of studies appear in Johns, "Mergers and the Trade Practices Act: How Cost–Effective is the Current Approach?" (1990) 3 Competition Review 40, at 46, Ahdar, "Authorisation and Public Benefit Under the Commerce Act 1986: Some Emerging Principles" (1988) 16 ABLR 128, at 145 and Corones, *Competition Law and Policy in Australia* (Law Book Company, 1990) 132–134.

8 *Capitalism, Socialism and Democracy* (Harper, 1942) 88 and 103.

9 Above n 6, at 1014.

10 Bork, *The Antitrust Paradox* (Basic Books, 1978) 230. Vertical mergers are mergers with an actual or potential customer or supplier eg a car manufacturer merging with a car dealer.

11 *Industrial Market Structure and Economic Performance*, above n 5, at 522–527.

of the Commerce Commission who contended "as a broad generalisation, that acquisition of dominance does not necessarily lead to increased efficiency on a sustained basis".[12]

III. The Assessment of Efficiency by the Commission and Courts

The function of the Commission and Courts is not to analyse the effects of mergers in general, but to determine the likely effects of particular proposals. The Commission has held that it must weigh likely benefits against likely detriments to determine the net public benefit that would result from a proposed acquisition.[13]

Allocative efficiency

The Commission and Courts recognise losses in allocative efficiency as a detriment. To quantify these losses they would have to predict the extent to which a firm will exercise market power by raising its price and decreasing output. Such changes are difficult to predict.

Therefore the Commission and Courts do not attempt to quantify losses from allocative inefficiency.[14] For example, in *Elders Resources NZFP Ltd v Crown* the Commission stated that the price increases on which calculations were based were used "for indicative purposes only" rather than as a prediction.[15]

Productive efficiency

The Commission and Courts recognise gains in productive efficiency as a benefit. For example, in *Natural Gas Corporation of New Zealand Ltd v Enerco New Zealand Ltd* public benefits recognised by the Commission included savings from combining head offices, reducing senior staff and reducing operating costs.[16] In *New Zealand Co–operative Dairy Company Ltd v Auckland Co–operative Milk Producers Ltd* the Commission treated the earlier implementation of productive efficiencies as a benefit in itself.[17]

The Commission and Courts require more than mere assertions of future productive efficiencies. In *Goodman Fielder Ltd v Wattie Industries Ltd* the Commission stated:[18]

> When public benefits are being claimed, the mere making of assertions and vague claims will not assist the Commission. What is required, if any weight is to be given by the Commission to such a claim, is evidence in relation thereto.

The Commission and Courts have denied or discounted many claims of productive efficiency gains because of insufficient evidence.[19]

In recent cases they have required applicants to quantify claimed efficiencies. Even when quantified, the Commission and Courts generally

12 "Competition Law in New Zealand: A Look Ahead" in *Competition Law and Policy in New Zealand* (ed Ahdar, Law Book Company, 1991) 106.

13 *Kiwi Co–operative Dairies Ltd/Moa–Nui Co–operative Dairies Ltd*, Decision No. 267, 9 April 1992, at para 82.

14 Eg *Goodman Fielder Ltd v Wattie Industries Ltd* (1987) 1 NZBLC (Com) 104,108, 104,151, *Amcor Ltd v New Zealand Forest Products Ltd* (1987) 1 NZBLC (Com) 104,233, 104,251, *Enerco New Zealand Ltd v Progas Systems Ltd*, Decision No. 272, 22 December 1993, at para 114.

15 Decision No. 227, 21 March 1989, at para 54.4.

16 Decision No. 270, 22 November 1993, at para 345.

17 (1988) 1 NZBLC (Com) 104,320, 104,356.

18 Above n 14, at 104,148.

19 Eg *New Zealand Forest Products Ltd v UEB Industries Ltd* (1987) 1 NZBLC (Com) 104,159, 104,177, *Enerco v Progas*, above n 14, at para 100, *NCG v Enerco*, above n 16, at para 325.

adopt a healthy scepticism in evaluating the extent of claimed benefits. In *Telecom Corporation of New Zealand Ltd v Commerce Commission* Cooke P doubted "even the approximate accuracy" of Telecom's estimated savings.[20] The Commission has also been cautious in accepting overseas empirical research as evidence of likely future efficiencies. In *NCG v Enerco* it did not accept that American econometric results would hold in New Zealand, due to differences in scale and the regulatory environments.[21]

The approach of the Commission and courts in requiring applicants to provide evidence of prospective productive efficiencies is appropriate, given that productive efficiencies are difficult to estimate and are likely to be presented in the most favourable light by the applicant.[22]

The Commission and High Court have also recognised likely productive *in*efficiencies that may arise in the absence of competition. For example, in *Telecom* the High Court, following the approach of the Commission, thought that excess profits "may well encourage slackness and inefficiency".[23] However, this was rejected by the Court of Appeal. In allowing Telecom's appeal against the High Court's refusal to authorise the acquisition of rights to cellular phone frequencies, Cooke P stated:[24]

> 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. This Court was referred to no substantial evidence that in New Zealand Telecom is other than an efficient business and a determined competitor.

Casey J described the claimed inefficiencies as "nebulous and speculative".[25]

The Court of Appeal based its decision on, inter alia, developments since the High Court judgment showing that competitors were likely to enter the cellular phone market sooner than predicted by the High Court.[26] Although, in these circumstances, the Court of Appeal's dismissal of possible productive inefficiencies may have been justified, there is a risk that likely productive inefficiencies may be ignored if the comments of Cooke P are applied in cases where applicants do not face such constraints.

Although it might seem reasonable to require claimed inefficiencies to be proved as rigorously as claimed efficiencies, future productive inefficiencies are difficult to prove with hard data. Although Cooke P seemed to suggest that the onus is on those opposing or investigating a proposal to adduce evidence of productive inefficiencies, it is submitted that the Commission and courts should not be reluctant to recognise productive inefficiencies merely because they cannot be proved as rigorously as efficiencies.[27] Among other things, the Commission and courts should look

20 [1992] 3 NZLR 429, 437.
21 Above n 16, at para 307.
22 *Exposure Draft: Analysis of Public Benefits and Balancing Them Against Detriments Arising From Substantial Lessening of Competition/Acquisition or Strengthening of a Dominant Position* (Commerce Commission, February 1993) 4.
23 (1991) 3 NZBLC 102,340 (HC), at 102,388, following the Commission's approach in *Telecom Corporation of New Zealand Ltd v Crown*, Decision No. 254, 17 October 1990, para 142.
24 Above n 20, at 439.
25 Ibid, 449.
26 Ibid, 438–439.
27 Millard, the lawyer engaged to scrutinise the inter–departmental review team's findings, noted that those researching detriments are at an informational disadvantage to the applicant and do not have the resources or the same incentive to develop an analysis to counteract the applicant's contentions (Report to the Secretary of Commerce in *Review of the Commerce Act* (Ministry of Commerce, Treasury, Department of Justice and Department of the Prime Minister and Cabinet, 1992)

at whether the applicant has evidence of constraints making it likely that productive inefficiencies will *not* occur. Presumably such evidence could be found when an applicant is, in the words of Cooke P, "an efficient business and a determined competitor".

The Court of Appeal's statements in *Telecom* have not deterred the Commission from recognising productive inefficiencies. In *Enerco New Zealand Ltd v Progas Systems Ltd* the Commission discounted anticipated savings "for the fact that there is little pressure on dominant suppliers to maintain them".[28] This is consistent with statements by the Commission that dominance can lead to slackness.[29]

Innovative efficiency

As well as analysing the likely effects on allocative and productive efficiencies, the Commission and Courts examine implications for innovative efficiency. They tend to adopt Scherer's view that mergers *decrease* innovative efficiency. For example, in *Carter Holt Harvey Ltd v Crown* the Commission predicted that the loss of competitive pressures would decrease innovative efficiency.[30] In *Telecom* the High Court believed that greater competition would result in larger innovative efficiency.[31] No effort has been made to quantify the detriment from loss of innovative efficiency.

Competing economic theory

The Commission is sceptical of aspects of Chicago School theory. In *NCG v Enerco* the applicants adopted a Chicago School analysis by arguing that the vertical merger of two monopolists would lead to lower prices and increased output. The Commission refused to accept that the theory was clear cut and noted that the empirical evidence was inconclusive. It also pointed to features of New Zealand energy markets casting doubt on the degree to which the theory applied to the proposal.[32]

The Commission is right to be cautious in accepting Chicago School theories. Such theories are based on restrictive assumptions about the behaviour of producers and consumers and other features of the market.[33] By recognising this, the Commission has adopted a thoughtful approach in using theory to evaluate proposals.

Conclusion on assessment of efficiency

Although in *Telecom* Richardson J stated that, where possible, benefits and detriments should be quantified,[34] the cases show that it is often difficult to estimate, let alone accurately quantify, efficiencies and inefficiencies. Despite such limitations, the Commission and courts have generally adopted a rigorous approach in evaluating the extent of these effects. By requiring applicants to produce evidence of claimed efficiencies, they

Appendix IV). The Commission has noted that quantification of benefits is usually easier, so that relying on quantification could result in a bias towards authorisation (*Exposure Draft*, above n 22, at 4).

28 Above n 14, at para 109.

29 *Exposure Draft*, above n 22, at 3.

30 Decision No. 228, 5 April 1989, at para 111. Similarly *Tasman Forestry Ltd v Crown*, Decision No. 224, 24 February 1989, at para 64.2, *Enerco v Progas*, above n 14, at para 114, *Exposure Draft*, above n 22, at 3.

31 Above n 23, at 102,387. Due to the changed circumstances by the time of the Court of Appeal hearing, the Court of Appeal did not explicitly deal with the effects on innovative efficiency.

32 Above n 16, at paras 265–290.

33 Hovenkamp, above n 4, at 234–235, notes that Chicago School theory "rests on premises whose soundness and application to the real world are not self-evident" and that "if these premises are given up, the Chicago School model falls apart".

34 Above n 20, at 447.

have rejected the questionable assumptions of some economists who believe that mergers will almost invariably produce significant gains.

IV. Efficiency Gains Which Benefit Foreigners

When applicants have foreign shareholders, the direct benefits of efficiency gains may accrue to foreigners rather than to New Zealanders. This raises the issue of whether competition law should only be concerned with efficiency gains per se, as advocated by the Chicago School, or whether the distribution of such gains between New Zealanders and foreigners is relevant.

In *Telecom* the High Court accepted that "a benefit to the public" in section 67(3)(b) of the Act referred to a benefit to the *New Zealand* public.[35] The main benefits from Telecom's proposed acquisition were likely productive efficiency gains. The fruits of these gains would accrue mainly to foreign shareholders through increased profits, as Telecom was 80% foreign owned. Although the Commission had discounted the benefit to relect the large foreign shareholding,[36] the High Court stated that "[i]t is important in assessing the magnitude of these benefits ... to focus not so much on their immediate distribution as on their durability".[37] It justified its approach in economic and legal terms.

The Court's first economic rationale was taken from a Department of Trade and Industry report:[38]

> [E]conomic efficiencies are real and of benefit to the public in terms of overall resource allocation and economic welfare even if little or none of the benefit directly accrues to others than the owners of the business.

However, if it is only the economic welfare of the foreign owners that increases, there is hardly a benefit to New Zealand. Similarly, an improvement in overall resource allocation is not a benefit to New Zealand if the benefits of the new allocation accrue solely to foreign owners. It is sometimes argued that there is a benefit to New Zealand because using resources more efficiently frees some resources for alternative uses. Although this might occur in theoretical economic models, surplus resources cannot always be put to an alternative use in real markets, especially surplus labour. Hence the assertion that a merger will benefit New Zealand by improving overall resource allocation cannot be accepted without further justification.[39]

The High Court's second economic rationale for giving efficiency gains full weight was that:[40]

> New Zealand seeks to be a member of a liberal multilateral trading and investment community. Consistent with this stance, we observe that improvements in international

35 Above n 23, at 102,386.

36 Above n 23, at para 34.

37 Above n 23, at 102,386. Although the High Court thought that the efficiencies would increase profits to shareholders, with no benefits to consumers through lower prices (at 102,386–102,388), the Court of Appeal accepted that the efficiencies would lead to lower prices and hence would not be completely realised as shareholder profits (above n 20, at 437).

38 *Review of the Commerce Act 1986: Reports and Decisions* (Department of Trade and Industry, 1989), cited by the High Court, above n 23, at 102,386.

39 The efficiency analysis could be broadened to take into account alternative uses (*Exposure Draft*, above n 22, at 14). Decisions to date have not undertaken rigorous analyses of alternative uses of resources made redundant by an acquisition.

40 Above n 23, at 102,386.

efficiency create gains from trade and investment which, from a long–run perspective, benefit the New Zealand public.

This is a vague assertion which is contrary to calls to demonstrate benefits as precisely as possible. Although long–term gains from trade and investment should not be ignored merely because they are difficult to quantify, such indirect effects need to be shown more precisely before they are used to justify giving full weight to efficiency gains that benefit foreign owners.

The High Court cited s 3A to give legal justification to fully weighting efficiency gains. Section 3A requires the Commission to "have regard to any efficiencies that the Commission considers will result, or will be likely to result, from that conduct".

However, as noted by the Court, s 3A does not rule out distributive factors.[41] This also follows from the phrase "have regard to". This phrase was discussed by the High Court in *New Zealand Co–operative Dairy Company Ltd v Commerce Commission* in the context of s 26:[42]

> As with any other evidence it is for the tribunal to assess the weight to be given to each item of evidence .... We do not think there is any magic in the words "have regard to". They mean no more than they say. The tribunal may not ignore [the evidence]. It must be given genuine attention and thought, and such weight *as the tribunal considers appropriate.* (emphasis added)

Thus s 3A does not require efficiency gains to be given full weight when they benefit foreign owners.

In the Court of Appeal the judges unanimously held that an authorisation should be granted. Despite reaching the opposite conclusion on the facts, the Court of Appeal adopted the same analytical approach as the High Court. It referred to the efficiency gains but did not discuss, let alone determine the magnitude of, the extent of the benefits to New Zealand.

The Courts' reasoning is not convincing. Acquisitions causing detriment should only be authorised if applicants show benefit to New Zealand, rather than relying on vague assertions and economic theories that may not reflect market realities. Efficiency gains were public benefits in earlier cases because they benefited New Zealand investors, who are part of the New Zealand public. Hence the public benefit was in benefit to New Zealand, not in the efficiency gains per se.[43] Therefore, when the benefits of efficiency gains flow directly to foreign owners, the public benefit should be discounted to a large extent, unless other benefits to New Zealand can be shown.

The Commission has not adopted the approach of the High Court and Court of Appeal. In *NCG v Enerco* it discounted benefits to relect the substantial foreign shareholdings in the applicants "[i]n accordance with the Commission's policy regarding public benefit claims".[44]

41 Ibid, at 102,383 and 102,385.

42 (1991) 3 NZBLC 102,059, 102,067–102,068.

43 For example, in *Goodman Fielder v Wattie*, above n 14, at 104,149, the Commission accepted that the merger would lead to greater rationalisation. However, because the applicant did not explain the division of processing between Australia and New Zealand, the Commission could not assess "the likely benefit of rationalisation to the New Zealand public". Hence, despite the greater efficiency in the use of New Zealand resources, the efficiency gain could not be taken into account because it was not shown that it would benefit the New Zealand public.

44 Above n 16, at para 346.

V. NON–EFFICIENCY FACTORS

Non–efficiency factors recognised by the Commission and courts

The Commission has stated that there is no limitation on the categories of public benefit which may be claimed.[45] Benefits recognised besides efficiency include:[46]

- international competitiveness;[47]
- returns to New Zealand investors;[48]
- increased consumer choice[49] and product diversification;[50]
- regional development;[51]
- improved access to Australian markets;[52]
- job security;[53]
- preventing the collapse of businesses;[54] and
- savings in road maintenance costs.[55]

The Commission has also recognised non–economic benefits such as increased public safety[56] and the avoidance of community disharmony.[57] The Commission counted as a detriment the lessening of supplier control that would follow a proposed merger of two dairy co–operatives.[58]

There has been much debate on whether the distribution of benefits and detriments within New Zealand affects overall public benefit.[59] The Commission has sometimes weighted benefits depending on who will receive them or has recognised a detriment when a merger would result in income being transferred from consumers to producers. For example, in *Goodman Fielder v Wattie* the Commission held that, as the proposed merger would lead to increased prices for staple foods, the weight to be given to the public benefit from efficiency gains depended upon "the likelihood of the benefits being passed on to New Zealand consumers or the extent to which they would benefit in terms of product range, etc".[60] In contrast, in *Auckland Co–operative Milk Producers* the Commission adopted a Chicago School analysis by stating that to discount a public benefit claim merely on the basis that the benefit will not be passed on to a particular group of consumers would unduly prejudice a proposal.[61]

45 *Weddel Crown Corporation Ltd* (1987) 1 NZBLC (Com) 104,200, 104,213 (a trade practices case).
46 Many of these benefits are a direct result of efficiency gains and therefore should only be counted to the extent that they are not already taken into account as efficiency gains. In recent cases the Commission has been vigilant against double counting (eg *Natural Gas Corporation of New Zealand Ltd v Wanganui District Council*, Decision No. 269, 29 October 1992, at para 108).
47 Eg *New Zealand Co–operative Dairy Company Ltd v Commerce Commission*, above n 42, at 102,087–102,089.
48 *Amcor v NZFP*, above n 14, at 104,247.
49 Ibid, at 104,248.
50 *NZFP v UEB*, above n 19, at 104,172.
51 *Amcor v NZFP*, above n 14, at 104,248.
52 Ibid.
53 Ibid, 104,247.
54 Eg *New Zealand Co–operative Dairy Company Ltd v Commerce Commission*, above n 42, at 102,089.
55 Eg *Fletcher Challenge Ltd v New Zealand Forest Products Ltd* (1988) 1 NZBLC (Com) 104,283, 104,308.
56 Ibid.
57 *New Zealand Co–operative Dairy Company Ltd v Commerce Commission*, above n 42, at 102,089.
58 *Kiwi v Moa–Nui*, above n 13, at para 113.
59 In *Weddel Crown Corporation*, above n 45, at 104,213, the Commission distinguished "public" benefits from "private" benefits so that benefits accruing to a small group were not counted. Although this arbitrary distinction is no longer followed, the issue of whether benefits may be weighted to reflect their distribution still remains.
60 Above n 14, at 104,149.

Recent developments

Recent cases suggest that distributional and other non–efficiency factors are of minor importance in assessing public benefit. For example, in *Telecom* the High Court stated that it may well be that efficiency considerations will be the prime consideration.[62] While efficiency effects are often the largest benefits and detriments it is to be hoped that such statements do not signal an intention to treat efficiency gains as, by their very nature, more important than other benefits and detriments.

However, non–efficiency factors are likely to be even less important in future, as the government intends to amend the Act so that economic efficiency will be the principal element in considering authorisations.[63] If the amendments follow the recommendation of the inter–departmental review team, efficiency will become the principal factor in assessing *every* proposal.[64]

The High Court in *Telecom* put little emphasis on the transfer of income from consumers to producers.[65] This accords with the current view of the Commission. It has indicated that it will ignore distribution of income because, inter alia, it should be slow to read distributional objectives into the Act.[66] Although there are no explicit distributional objectives in the Act, it is difficult to see why a transfer of income that is a benefit or detriment should not fall within the wide criterion of (net) ''benefit to the public''. However, the approach of the Commission and courts is to be confirmed by a proposed amendment replacing ''benefit to the public'' with ''benefit to New Zealand''. The majority of the review team recommended this change so that the identity of beneficiaries of efficiency gains would be irrelevant.[67]

The scope of the future test for authorising acquisitions will depend on how the Act or the Commission and courts define ''efficiency''. In dissenting from the majority's recommendation, the Department of Justice noted that there was considerable dispute on the meaning of ''efficiency'' and warned that a narrow interpretation could be adopted.[68] Thus distributional factors will be given no weight and other non–efficiency factors only minimal weight in future, even if they are significant in a particular case.

Should non–efficiency factors be important?

Some proposed mergers may lead to significant non–efficiency benefits and detriments. If so, what is the case in favour of giving such factors little or no weight in deciding whether to authorise a merger?

The review team accepted the same arguments used to persuade the Commission and courts to adopt a Chicago School analysis giving little weight to non–efficiency factors. The first such argument is that giving

61 Above n 17, at 104,358.
62 Above n 23, at 102,386.
63 Press statement by the Hon. Philip Burdon, Minister of Commerce, 16 February 1993. At the time of writing the proposed legislative reforms are unlikely to be introduced before 1995.
64 *Review of the Commerce Act*, above n 27, at paras 2.13–2.14.
65 The Court stated, above n 23, at 102,389, that the benefits and detriments in this case were almost entirely efficiency gains and losses, despite stating at 102,388 that the public would pay higher prices and that transfers between New Zealand consumers and producers arising solely from dominance are not necessarily to be viewed with equanimity.
66 *Exposure Draft*, above n 22, at 10–11.
67 *Review of the Commerce Act*, above n 27, at paras 2.32–2.36, 2.52 and 2.76.
68 Ibid, at paras 2.56–2.57. The Commission has suggested that factors such as environmental and social factors ''can at least conceptually be included within an efficiency perspective'' (*Exposure Draft*, above n 22, at 6–7 and 12–13).

weight to non–efficiency factors makes the balancing process difficult and its results unpredictable.[69] However, as seen in section III, even efficiency gains and losses are extremely difficult to estimate. Thus, even under an efficiency test, results would be a matter of impression. If other factors are significant, it is difficult to see why they should not be given due weight.

The review team also believed that the current test should be replaced because weighing different factors requires value judgments which cannot be supported by economic analysis.[70]

Although the proposed test will remove some discretion from the Commission and Courts, it will still require value judgments (such as on what constitutes an "efficiency"). Furthermore, the decision to give little weight to non–efficiency factors is itself an extremely value laden choice.[71] It is typical of the Chicago School approach which devalues factors that cannot be demonstrated by "objective" economic analysis.[72] It is submitted that the Commission and Courts should instead be able to give appropriate weight to *all* effects of a proposed merger, even if this involves value judgments on the significance of factors other than those considered relevant by some economists. Courts and tribunals regularly weigh disparate factors in reaching decisions.

The review team also believed that non–efficiency concerns are better addressed by other policies. While this may be so in some cases, other policies have a cost which may not be taken into account under the efficiency test. In other cases it may be difficult to find an alternative policy (when there is a danger to the freedom of the press from a merger concentrating media interests[73]).

The recent trend in the Commission and courts to give little weight to non–efficiency factors will be endorsed and taken further by the proposed legislative reforms. It is submitted that the arguments in favour of the reforms are not sufficient to overcome the desirability of giving all benefits and detriments full consideration. It is likely that recent judicial developments and the proposed reforms will result in authorisation decisions that are contrary to the public interest.

VI. Conclusion

The economic concepts underlying the Act make economic theory and debate relevant in determining the benefit to the public from proposed acquisitions. In assessing the magnitude of likely efficiency effects the Commission and courts have avoided the excesses of particular economic ideologies. However, in determining which efficiency and non–efficiency effects are relevant, they have tended towards a Chicago School approach. By concentrating on economic efficiency to the detriment of other factors, the Chicago School approach is narrow and ignores factors that determine whether a merger will truly benefit New Zealand. Furthermore, Chicago

69 *Discussion Document* (Ministry of Commerce, Treasury, Department of Justice and Department of the Prime Minister and Cabinet, 1991) para 2.36.

70 *Review of the Commerce Act*, above n 27, at paras 2.40, 2.41, 2.50 and 2.63.

71 Easton, "The Public Interest in Competition Policy" in *The Economics of the Commerce Act* (ed Bollard, NZIER, 1989) 69–71, Hovenkamp, above n 4, at 235–237.

72 As already noted, the Chicago School believes that efficiency should be the only concern of competition law. Some New Zealand groups have argued for explicitly adopting an efficiency goal, eg Begg, *Antitrust in New Zealand: A Case for Reform* (New Zealand Business Roundtable, 1988) 136.

73 Pitofsky, "The Political Content of Antitrust" (1979) 127 Uni Pa LR 1051 and Ahdar, "Regulating Mergers Upon Socio–Political Grounds in New Zealand" (1986) 12 NZULR 49, 55–57.

School theory is based on very restrictive assumptions that do not always reflect market realities. As legislative reforms will support the trend towards Chicago School analyses, it is likely that the authorisation process will move further away from a comprehensive analysis of the desirability of proposed acquisitions and towards the application of inappropriate economic ideology.