A TANGIBLE DISTINCTION?

Intangibles and the Public Benefit Test in the Commerce Act 1986

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Table of Contents

Acknowledgments *ii*
Table of Contents *iii*
List of Figures and Tables *v*
Table of Cases *vi*

Introduction **1**

Chapter 1: Defining "Intangible Benefit" **4**
1.1 History of usage 4
1.2 Possible definitions 5
1.2.1 An abstract benefit 5
1.2.2 A benefit that is difficult to quantify 5
1.2.3 A non-market benefit 7
1.2.4 An indirect benefit 7
1.2.5 A non-efficiency benefit 8
1.3 Approach of the Commerce Commission 9
1.3.1 General approach 9
1.3.2 Benefits that have been described as intangible benefits 11
1.3.3 Benefits that have been described as tangible benefits 12
1.3.4 Consistency of the Commission's approach 13
1.4 The common features of intangible benefits 14
1.5 The approach utilised in this paper: a spectrum of tangibility 16
1.5.1 Category 1: Vague claims with far reaching consequences 17
1.5.2 Category 2: Externality arguments 18
1.5.3 Category 3: Quality improvements 19
1.5.4 Category 4: Improving New Zealand's export performance 19
1.5.5 Other benefits 20
1.5.6 The spectrum of tangibility 21

Chapter 2: The Treatment of Intangible Benefits **23**
2.1 Quantified intangibles 24
2.2 Unquantified intangibles 25
2.2.1 Category 1: Vague claims with far reaching consequences 25
2.2.2 Category 2: Externality arguments 28

2.2.3 Category 3: Quality improvements 32
2.2.4 Category 4: Improving New Zealand's export performance 37
2.2.5 Conclusion 40
2.3 Contrasting the treatment of quantified intangibles and unquantified intangibles 41
2.4 The treatment of intangibles over time 42
2.4.1 Category 1A: "Feel good" benefits 42
2.4.2 Category 2A: Environmental benefits 43
2.4.3 Categories 4A and 4B: Enhanced export opportunities and improvements in international competitiveness 44
2.4.4 Conclusion 45

Chapter 3: Legal and Policy Perspectives on the Treatment of Intangible Benefits 46

3.1 The legality of treating intangible benefits differently 46
3.1.1 Disregarding intangible benefits 46
3.1.2 According intangible benefits a lower weighting 47
3.2 Disregarding intangible benefits as a matter of policy 49

Chapter 4: Quantification of Intangible Benefits 51

4.1 The desirability of quantifying intangible benefits 51
4.1.1 The advantages of quantifying intangible benefits 51
4.1.2 The problems associated with quantifying intangible benefits 52
4.1.3 Conclusion 54
4.2 Quantification with an economic model 54
4.2.1 Partial equilibrium analysis 55
4.2.2 General equilibrium analysis 56
4.3 The "willingness to pay" approach 58
4.3.1 Critique of the approach 58
4.3.2 An applied example: valuing public safety benefits 59
4.4 The "ball-park figure" technique 65
4.4.1 The case law 65
4.4.2 Critique of the approach 67
4.5 Conclusion 67

Conclusion 68

Bibliography 70

List of Figures and Tables

Figures

Figure 1: The spectrum of tangibility 6

Figure 2: The categorisation approach to the spectrum of tangibility 22

Figure 3: Increased choice for consumers 34

Tables

Table 1: Categories of benefits 17

Table of Cases

Commerce Commission Decisions

Amcor – NZ Forest Products Ltd, Re (1987) 1 NZBLC (Com) 104,233

Ansett (see *Air New Zealand Ltd/Ansett Holdings Ltd*)

Air New Zealand Ltd/Ansett Holdings Ltd Commerce Commission Decision No 278, 3 April 1996 (*Ansett*)

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NZ Dairy 2 (see *The New Zealand Co-operative Dairy Company Ltd – Waikato Valley Co-operative Dairies Ltd, Re*)

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NZRFU 2 (see *New Zealand Rugby Football Union Inc* Commerce Commission Decision No 580)

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NZSE 2 (see *New Zealand Stock Exchange* Commerce Commission Decision No 232)

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Introduction

The Commerce Act 1986 (the "Act") is the primary piece of legislation governing competition law in New Zealand. Its objective is to "promote competition in markets for the long-term benefit of consumers in New Zealand".[1] To meet this end it seeks to constrain the accumulation of market power and prevent the abuse of monopoly power, and thereby plays an important role in regulating commercial trade practices and business acquisitions in New Zealand.

The scheme of the Commerce Act 1986

Parts II and III of the Act prohibit certain activities on the grounds that they are anti-competitive.[2] If these provisions are breached the person(s) involved are liable to pecuniary penalty.[3] Under Part V of the Act, parties to a business acquisition or trade practice that would potentially breach the Act may apply to the Commission for an authorisation.[4] An authorisation provides them with impunity from attack for being in breach of the Act.[5]

For an authorisation to be granted in respect of anti-competitive arrangements and covenants, the benefit to the public must outweigh the detriment from the lessening

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[1] Commerce Act 1986, s1A. Competition is defined as "workable or effective competition", rather than the traditional economic notion of perfect competition. Perfect competition represents a market structure in which no producer or consumer has the market power to influence prices, leading to a completely efficient outcome. (see, Robert Frank and Ben Bernanke, *Principles of Economics* (3rd ed, McGraw Hill Irwin, Boston, 2007) at 192; Hal Varian, *Intermediate Microeconomics: A Modern Approach* (7th ed, WW Norton, New York, 2006) at 15-16).
[2] SS27 and 28 prohibit the entering of contracts, arrangements, understandings and covenants that substantially lessen competition, s29 prohibits boycotts, s36 prohibits the taking advantage of a substantial degree of market power for certain purposes, s37 prohibits resale price maintenance and s47 prohibits the acquisition of business assets or shares that would have the effect of substantially lessening competition.
[3] Commerce Act 1986, ss80 & 83. S80 deals with restrictive trade practices and s83 covers business acquisitions. There is also the possibility of injunctions and damages (both compensatory and exemplary) being awarded, and in the case of business acquisitions there is the further possibility of divestiture.
[4] Commerce Act 1986, ss58 & 67(1). S58 sets out the provisions allowing persons to apply for an authorisation in respect of a restrictive trade practice. S67(1) enables persons to apply for an authorisation for a business acquisition. Not all conduct can be authorised. In particular, actions prohibited under s36 for taking advantage of a substantial degree of market power for certain purposes cannot be authorised.
[5] Commerce Act 1986, ss58A & 69. S58A pertains to restrictive trade practices and s69 relates to business acquisitions.

in competition.[6] Although the tests for the authorisation of boycotts, resale price maintenance and business acquisitions are worded slightly differently, requiring "such a benefit to the public" that they should be permitted,[7] they have also been interpreted as requiring a balancing of public benefits against any public detriments flowing from the practice.[8]

The benefits and detriments likely to arise from the practice or acquisition are determined by comparing two hypothetical situations; that which would arise with the merger (the factual) and that which would arise without the merger (the counterfactual). Whilst detriments are restricted to those arising in the relevant market,[9] the Commerce Commission[10] (the "Commission") and courts have taken a much broader view as to what constitutes a relevant benefit. A "public benefit" has been described as "any gain to the public of New Zealand",[11] and the Commission and courts have indicated that there is no limitation as to the nature of the public benefit which can be claimed.[12] However, for the public benefit to be accepted the applicant must provide proof of its existence and extent,[13] and establish that there is a causal nexus between the benefit and the relevant conduct or merger.[14] Because the Commission is only concerned with net benefits, any corresponding detriment must be deducted from the public benefit claim.[15]

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[6] Commerce Act 1986, s61(6). More precisely, the application must "in all the circumstances result, or be likely to result, in a benefit to the public which would outweigh the lessening in competition that would result, or would be likely to result or is deemed to result therefrom".

[7] Commerce Act 1986, ss61(7), 61(8) & 67(3)(b). More precisely, in the case of boycotts and resale price maintenance, the application must "in all the circumstances result, or be likely to result, in such a benefit to the public" that it "should be permitted" (ss61(7) & 61(8)). The requirement for business acquisitions is that the acquisition "will result, or will be likely to result, in such a benefit to the public that it should be permitted" (s67(3)(b)).

[8] In respect of s61(7) see, *NZSE 2* at [62]; *Kiwi* at [82]; *Consortium* at [243]. In respect of s67(3)(b) see, *Natural Gas 2* at [363]; *Enerco* at [116]; *Ansett* at [558]; *Ravensdown* at [438]; *Powerco* at [366]; *TeamTalk* at [159] & [240]; *Ruapehu* at [234] & [604]; *Qantas* at [78] & [1387]. Although there is no authority on s66(8), presumably the same principles would apply.

[9] For example see, *Goodman Fielder* at [259]; *Amcor* at [52](ii).

[10] The Commerce Commission is an independent Crown entity, set up to "promote dynamic and responsive markets so that New Zealanders benefit from competitive prices, better quality and greater choice" (Commerce Commission, *Overview*, Commerce Commission <http://www.comcom.govt.nz/TheCommission/Overview.aspx> accessed 23 August 2006).

[11] *Consortium* at [245]; *Midland Health* at [314]; *NZRFU 1* at [305]; *TeamTalk* at [161]; *Ruapehu* at [236]; *Omv* at [399]; *Qantas* at [899]; *NZRFU 2* at [543] & [708].

[12] *Whakatu* at [25](i); *Amcor* at [52](iii); *Telecom (HC)* at 527 & 530.

[13] For example see, *Goodman Fielder* at [263]-[264] & [281]; *Whakatu* at [25](vii); *Amcor* at [52](ix) & {53].

[14] For example see, *Whakatu* at [25](v).

[15] For example see, *Whakatu* at [26]. For example, if positive environmental effects are claimed as a benefit, any environmental detriment needs to be deducted from the environmental benefit, to give a net environmental benefit figure. If environmental benefits are not claimed, environmental detriments do not need to be deducted from the benefits because the environmental detriments would not arise in the relevant market.

The objective of this dissertation

In the last 10 years the Commission has begun to refer to a certain class of benefits as intangible.[16] This dissertation aims to evaluate the treatment of these so-called intangible benefits, with a particular emphasis on considering whether they are ever given significant weight in the public benefit analysis. It canvasses all the authorisation decisions since the introduction of the Commerce Act in 1986, of which there have been 45 Commission decisions, 7 High Court decisions and 1 Court of Appeal decision.[17]

Chapter One attempts to define what an intangible benefit is and sets out the approach to be utilised in Chapter Two to evaluate the treatment of intangible benefits. Chapter Three analyses whether intangibles can be treated differently from tangible benefits under the law as it now stands, and whether they should be considered as a matter of policy. Chapter Four presents three alternative methods of quantifying intangibles and considers the feasibility of using each of these methods. Finally, it is concluded that when assessing the weight to be given to a benefit, the Commission should no longer focus upon whether the benefit is tangible or intangible. It provides little or no assistance, and unnecessarily complicates the analysis.

[16] For a history of the usage of the term "intangible" see Section 1.1.
[17] See the Table of Cases for further details.

CHAPTER ONE
Defining "Intangible Benefit"

1.1 History of usage

The term "intangible benefit" has only come to be used by the Commerce Commission in recent years. Although it has only been used by the Commission in eight of the forty-five authorisation decisions since the enactment of the Act in 1986,[18] it has been used in five of the last six decisions.[19]

The first hint of a distinction between tangible and intangible benefits came in 1987 in *Amcor* where the Commission used the term "tangible public benefits" to describe certain benefits.[20] However, the word "intangible" was not mentioned in a decision until 1991 in *NZ Dairy 2*, and even then it was the applicant, rather than the Commission, who used it.[21] It was not until the Commission's decision in 1995 in *Consortium* that the Commission itself used the term "intangible".[22] Since *Consortium*, nine of the fifteen Commission decisions have drawn some sort of distinction between tangible and intangible benefits.[23] Only one of the three High Court decisions delivered in this period used the term "intangible".[24]

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[18] *Consortium* at [245] & [247]; *Midland Health* at [314]; *NZRFU 1* at [305], [383] & [389]; *TeamTalk* at [161] & [238]-[239]; *Ruapehu* at [239], [417] & [596]-[603]; *Omv* at [399]; *Qantas* at [48], [899], [1188] & [1369]; *NZRFU 2* at [545] & [715].

[19] *TeamTalk* at [161] & [238]-[239]; *Ruapehu* at [239], [417] & [596]-[603]; *Omv* at [399]; *Qantas* at [48], [899], [1188] & [1369]; *NZRFU 2* at [545] & [715].

[20] *Amcor* at [61]. As discussed in Section 1.3.3, the Commission may have been using the term "tangible" in a difference sense to how the Commission now uses it.

[21] *NZ Dairy 2* at [15.12].

[22] *Consortium* at [245] & [247].

[23] *Midland Health* at [314]; *Ansett* at [552]-[553]; *NZRFU 1* at [305], [383] & [389]; *Powerco* at [353]-[356]; *TeamTalk* at [161] & [238]-[239]; *Ruapehu* at [239], [417] & [596]-[603]; *Omv* at [399]; *Qantas* at [48], [899], [1188] & [1369]; *NZRFU 2* at [545] & [715]. *Ansett* at [552]-[553] and *Powerco* at [353]-[356] did not use the term "intangible", instead describing some benefits as "less tangible benefits".

[24] *Rugby Union (HC)* at 321, 323 & 326-327.

1.2 Possible definitions

1.2.1 AN ABSTRACT BENEFIT

The traditional notion of an intangible benefit is something that is "unable to be touched".[25] In the context of the public benefit test that would render all benefits intangibles, and so would not provide any distinction between benefits.[26]

1.2.2 A BENEFIT THAT IS DIFFICULT TO QUANTIFY

An intangible benefit may be "something that cannot be precisely measured or assessed" in a particular unit of measurement.[27] An inability to quantify benefits in a common unit of measurement makes it difficult to weigh benefits and detriments. Whilst the obvious unit of measurement for benefits is money, this is not the only unit of measurement. Benefits could be measured in other units, such as human utility or the percentage increase in productivity.

Because the public benefit test involves looking into the future and judging the level of benefit that would arise if an anti-competitive practice or acquisition was allowed to proceed, no benefit is capable of precise measurement or assessment. However, some benefits are easier to measure than others. It is this ease of measurement concept that provides the foundation for this definition of intangible benefits. The task of classifying benefits as tangibles and intangibles involves constructing a notional line of ease of quantification and placing the various benefits on the line. The final designation of a benefit as tangible or intangible depends upon where it lies in relation to a certain point separating tangibles from intangibles; if it is to the left of that point it is tangible and if it is to the right it is intangible. Figure 1 on the next page illustrates the classification process. Whilst it is easy to classify benefits at either end of the scale as tangible or intangible, the distinction is not so clear for benefits that lie in the middle of the scale.[28]

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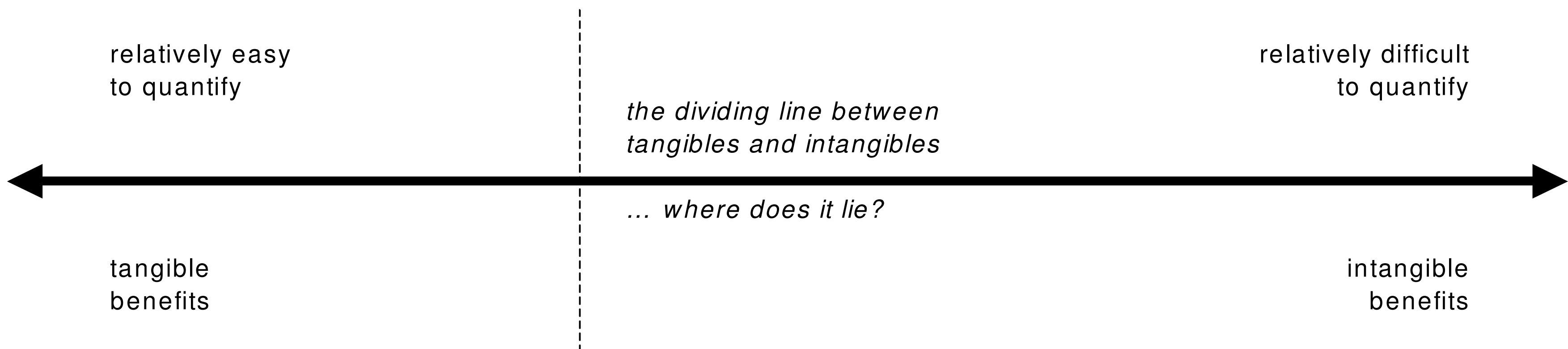
[25] *The Concise Oxford Dictionary* (8th ed, Oxford University Press, New York, 1990) at 615. This is how the accounting profession views intangible assets (see, Craig Deegan and Grant Samkin, *New Zealand Financial Accounting* (3rd ed, McGraw-Hill Book Company, Melbourne, 2006) at 268).

[26] For example, it is impossible to touch a cost saving, an increase in exports or an environmental benefit.

[27] *The Concise Oxford Dictionary* (1990) at 615.

[28] In fact, it is often even difficult to determine where a particular benefit lies on the spectrum of tangibility in relation to another benefit. In other words, it cannot be said definitively that the benefit is more or less intangible than the other benefit.

FIGURE 1: The spectrum of tangibility



An illustration of the implicit classification of public benefits as tangibles or intangibles using an ease of quantification test.

A definition based upon a benefit's ease of quantification can be applied in the individual case or more generally. A case-by-case application involves considering whether that particular benefit is easily quantified in that particular case. A more general application entails examining whether the benefit can usually be easily quantified. For example, a certain health benefit may be easily quantifiable in a particular case. Hence it would be tangible on an individual application, but intangible on a more general application because health benefits are usually difficult to quantify.

1.2.3 A NON-MARKET BENEFIT

The classification of benefits as tangible or intangible could depend upon whether they arise in a market. Intangible benefits would be those benefits that do not accrue in a market setting. For example, there is no market in which improvements in environmental quality and increases in pride and spirit can be bought and sold. By contrast, cost savings, improvements in product quality and tourism benefits all arise in markets[29] and so would be classified as tangible benefits.

1.2.4 AN INDIRECT BENEFIT

The concept of tangibility could be defined by reference to the persons to whom the benefits accrue. A tangible benefit would be one accruing to the parties immediately affected by the proposed acquisition or anti-competitive practice, and an intangible benefit would be a benefit accruing to persons beyond the immediate parties. The immediate parties would normally be the producer(s) applying for authorisation and the consumers of the product or service.

In the context of an airline merger the tangible benefits would be those accruing to the two airlines proposing to merge and the airlines' passengers. The intangible benefits would be those that benefited people outside this group; for example noise reductions and environmental spin-offs from a reduction in the number of flights.

[29] There is a market for the product or service on which the cost savings are made, for the product in respect of which the quality improvement arises and for tourism.

1.2.5 A NON-EFFICIENCY BENEFIT

Finally, intangible benefits could be non-efficiency benefits.[30] Efficiency is traditionally defined in competition law as incorporating allocative, productive and dynamic efficiency.[31] Thus an increase in the cost-effectiveness of production,[32] an increased incentive for efficient investment in research and development[33] and the production of a more socially optimal level of output, would amount to tangible benefits.[34] All other benefits would be intangible.

The inclusion of allocative efficiency within the definition of efficiency means that almost all benefits would be classified as tangible benefits. An environmental benefit would be a tangible benefit if it internalised or alleviated a negative externality,[35] because to the extent that it does this, society's resources are better allocated. The types of benefits that would be intangible in nature include those that increase pride and harmony in a society and those that improve a society's relations with another society.

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[30] The draft Australian authorisation guidelines draw a distinction between efficiency and non-efficiency benefits (Australian Competition and Consumer Commission, *Guide to Authorisation Draft for Comment* (Australian Competition and Consumer Commission, Canberra, 2006) at 28-29). The former are called "economic public benefits" and the latter are called "non-economic public benefits".

[31] Allocative efficiency is achieved where society's resources are allocated to the individuals that value them the most, productive efficiency is achieved where goods and services are produced at the lowest cost, and dynamic efficiency is achieved where the invention, development and diffusion of new products and production processes is encouraged (see, Commerce Clearing House, *New Zealand Business Law Guide*, Volume 1 (Commerce Clearing House, Auckland, 1998-2006) at 85,102; Joseph Brodley, "The Economics Goals of Antitrust: Efficiency, Consumer Welfare, and Technological Progress" (1987) *New York University Law Review* 1020 at 1025-1032). This can be contrasted with the more traditional definitions of efficiency in economics, namely Paerto efficiency and Kaldor-Hicks efficiency. An outcome is Paerto efficient if it makes at least one person better off and nobody else worse off (see, Richard Zerbe, *Economic Efficiency in Law and Economics* (Edward Elgar Publishing, Northampton, 2001) at 3-4). The requirements for Kaldor-Hicks efficiency are not as stringent. An outcome is more Kaldor-Hicks efficient if those that are made better off could in theory compensate those that are made worse off and so lead to a Paerto optimal outcome (see, Zerbe (2001) at 4-5).

[32] This would represent an increase in productive efficiency.

[33] This would represent an increase in dynamic efficiency.

[34] This would represent an increase in allocative efficiency.

[35] A negative externality occurs where the action of a firm or individual confers a cost on a third party and no compensation is paid to the third party by the party conferring the cost (see, Frank and Bernanke (2007) at 347-370; Varian (2006) at 626-647).

1.3 Approach of the Commerce Commission

1.3.1 GENERAL APPROACH

The Commission has adopted the definition in Section 1.2.2, equating the ease of measurement in monetary units with tangibility.[36] This view was endorsed by the High Court in *Rugby Union (HC)*.[37] Hence an intangible benefit is one which is relatively difficult to quantify in monetary terms.[38]

Such a definition is consistent with the history of usage of the term "intangible". The commencement of its use coincided with the publication of the *Guidelines to the Analysis of Public Benefits and Detriments in the Context of the Commerce Act* ("*1994 Guidelines"*) by the Commission, which described a tangible benefit as one that can be quantified in monetary units.[39] This gives an indication of what the Commission meant when it used the term "intangible benefit" in the decisions that followed.

A definition based on quantifiability, is also in harmony with the Commission's more quantitative approach to the evaluation of public benefits since the Court of Appeal's decision in *Telecom (CA)*.[40] The Commission's decision in *Ansett* was the first time it extensively evaluated benefits and detriments in monetary terms and it was also one of the first times that the Commission drew a distinction between benefits based on their degree of tangibility. This implies that there may be a link between the Commission's notion of tangibility and the quantification of benefits.

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[36] *Midland Health* at [314]; *TeamTalk* at [161]; *Ruapehu* at [239]; *Omv* at [399]; *Qantas* at [899]; *NZRFU 2* at [545]. The Chief Economist of the Commerce Commission, Dr Michael Pickford suggests that the distinction is much more pronounced than this, with tangible benefits being those benefits which can be quantified, and intangible benefits being those that cannot be quantified (Email from Dr Michael Pickford to Jill Caughey (22 August 2006) (on file with author)). Because all benefits can be quantified if enough assumptions are made, this raises the question of what is meant by a benefit that can be quantified.

[37] *Rugby Union (HC)* at 327.

[38] Interestingly, on two occasions the Commission has referred to a benefit as being of an intangible nature and then proceeded to quantify it (*NZRFU 1* at [383]; *NZRFU 2* at [715]). This is entirely consistent with the definition because it hinges upon ease of quantification, rather than quantification per se.

[39] Commerce Commission, *Guidelines to the Analysis of Public Benefits and Detriments in the Context of the Commerce Act* (Commerce Commission, Wellington, 1994) at 6. A revised version of these *Guidelines* was issued in 1997.

[40] In *Telecom (CA)*, Richardson J stressed the importance of benefits and detriments being measured in monetary terms (*Telecom (CA)* at 447). Prior to this, quantification of benefits and detriments was done on a sporadic basis. It was probably largely dependent on the efforts of the applicants to provide quantifications in their applications.

Defining intangibility by reference to ease of quantification is also consistent with the current *Guidelines to the Analysis of Public Benefits and Detriments* (the "*Guidelines*"), which state that an intangible benefit "typically" cannot be readily measured in monetary terms.[41] Although the *Guidelines* are not law and do not bind the Commission,[42] the Commission usually refers to the *Guidelines* as setting out the principles used by the Commission in evaluating benefits, when applying the public benefit test.[43] However, because the Commerce Act was amended in 2001 and the *Guidelines* have not been revised, their present status is uncertain.[44] None of the changes directly impact upon the tangible and intangible benefit distinction, suggesting that the term "intangible benefit" still retains the same meaning as it bore in 1997.[45] In any event, the Commission has indicated in its two most recent decisions that the economic principles used in assessing benefits and detriments remain unchanged.[46]

It is not entirely clear whether when the Commission and courts refer to a benefit as being intangible, they are referring to it being difficult to quantify in the individual

[41] Commerce Commission, *Guidelines to the Analysis of Public Benefits and Detriments* (Commerce Commission, Wellington, 1997) at 4. Note that this definition appears to be slightly different than the one adopted in the *1994 Guidelines*. Whilst the *1997 Guidelines* focus upon a benefit's ease of quantification, the *1994 Guidelines* equate tangibility with ability to quantify per se (see, Commerce Commission (1994) at 6). Hence the notion of an intangible benefit may have evolved to recognise that a definition based upon whether a benefit can be quantified over simplifies the matter because all benefits can be quantified if enough assumptions are made.

[42] Commerce Commission (1997) at 7.

[43] *Midland Health* at [293]; *Ansett* at [490]; *Ravensdown* at [365]; *NZRFU 1* at [299]; *Powerco* at [303]; *TeamTalk* at [160]; *Omv* at [398]; *Qantas* at [898]; *NZRFU 2* at [542]. As Stephen Gale notes, whether the *Guidelines* do in fact represent the law remains untested in higher courts (Stephen Gale, *Pieces of String: Quantification and the Commerce Act* (Paper presented at the 8th Annual Workshop of the Competition and Policy Institute of New Zealand, Wellington, 1-3 August 1997 at 1).

[44] It has been suggested that the Commission withdrew the *1997 Guidelines* after the 2001 Amendments (Legal Services Agency, *Law Access Catalogue* (6th ed, Legal Services Agency, 2002) at 10; Commerce Clearing House (1998-2006) at 85,953). However, Dr Michael Pickford states that the Commission's view is that the Guidelines have not been withdrawn (Email from Dr Michael Pickford to Jill Caughey (21 September 2006) (on file with author)). They are still available on the Commission's website (at http://www.comcom.govt.nz/publications/ArchivedPublications/otherpublications.aspx). Given that it has been five years since the 2001 Amendment, it looks unlikely that the Commission will issue a revised version in response to the Amendment, providing further confirmation that the Commission considers the *1997 Guidelines* to represent the law.

[45] There were three main changes. The long title to the Act was repealed and a new purpose section was inserted in s1A. Whilst the objective of the Act is still to promote competition in markets in New Zealand, a distributional bias was introduced in favour of consumers. The s36 monopolisation test now focuses upon the taking advantage of a substantial degree of market power, rather than the use of a dominant position. The acquisition provision in s47 was also amended to reflect the move away from the dominance test. Instead of considering whether an acquisition would give a person a dominant position in a market, the focus is now upon whether the acquisition would substantially lessen competition in a market. For a more detailed outline of the changes see, Lyn Stevens, "The Goals of the Commerce Act" in Mark Berry and Lewis Evans (eds) *Competition Law at the Turn of the Century: A New Zealand Perspective* (Victoria University Press, Wellington, 2003) 61 at 84-85.

[46] *Qantas* at [898]; *NZRFU 2* at [542]. Dr Michael Pickford supports this position (Email from Dr Michael Pickford to Jill Caughey (21 September 2006)).

case or it being generally difficult to quantify. The *Guidelines* seem to support a global approach to the classification of a benefit as an intangible. Guideline Four of the *Guidelines* describes an intangible benefit as a benefit "which *typically* cannot readily be measured in monetary terms".[47] This implies that even if a particular benefit can be readily measured in monetary terms in a given case, it will still be described as an intangible if it is usually difficult to measure in monetary terms. The global classification of intangibles will be adopted in the rest of this dissertation, because otherwise the analysis tends to collapse into a comparison of quantified and unquantified benefits.[48]

1.3.2 BENEFITS THAT HAVE BEEN DESCRIBED AS INTANGIBLE BENEFITS

In their decisions the Commission and High Court have classified 12 benefits as intangible benefits:

- increased tourism[49]
- potentially improved sponsorship[50]
- the development and transfer of expertise between two ski fields[51]
- increasing demand for skiing in another region[52]
- providing an alternative to cellular for New Zealand businesses[53]
- improved service for customers[54]
- greater enjoyment for customers[55]
- spectator and viewer enjoyment[56]
- avoidance of community disharmony[57]

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[47] Commerce Commission (1997) at 4 (emphasis added).
[48] I say tends to, because it is possible that a benefit that is particularly difficult to quantify in the individual case may still be quantified.
[49] *Rugby Union (HC)* at 326. *Ansett* at [553]-[554] may also have referred to tourism as constituting a less tangible benefit.
[50] *Rugby Union (HC)* at 326.
[51] *Ruapehu* at [597].
[52] Ibid at [600].
[53] *TeamTalk* at [238]-[239].
[54] *Powerco* at [74]; *Ansett* at [553].
[55] *Ruapehu* at [602].
[56] *NZRFU 1* at [383]; *Rugby Union (HC)* at 326; *NZRFU 2* at [715].
[57] *NZ Dairy 2* at [15.14]. In that case the avoidance of community disharmony was characterised by the applicant as an intangible benefit. The Commission did not dispute that characterisation. The classification of community harmony as an intangible benefit is supported by the Chief Economist of the Commerce Commission, Dr Michael Pickford (Michael Pickford, "The Evaluation of Public Benefit and Detriment under the Commerce Act 1986" (1993) 27(2) *New Zealand Economic Papers* 209 at 227).

- greater exposure of New Zealand internationally, assisting New Zealand's trade and standing in the world[58]
- preservation of Air New Zealand as the national 'flag carrier'[59]

The *Guidelines* describe two further benefits as intangibles:

- mental and physical health improvements[60]
- environmental improvements, including reducing air, water, noise and visual pollution, and preserving endangered species[61]

1.3.3 BENEFITS THAT HAVE BEEN DESCRIBED AS TANGIBLE BENEFITS

By contrast, it is useful to consider any benefits that the Commission has classified as being of a tangible nature. In *Ansett* it clearly made reference to two benefits as being tangible benefits:

- cost savings[62]
- net revenue gains[63]

Whilst the Commission described certain benefits as being tangible in its decision in *Amcor* in 1987,[64] it is uncertain whether it was using the term in the same sense as it has been used more recently.[65] The context suggests that the Commission may have been using tangible as a synonym for real or significant.[66]

Where the Commission and courts have used the term "intangible benefit" in decisions, they have done so rather loosely. For example, in *NZRFU 2* spectator enjoyment was referred to as being of an intangible nature, but no reference was made to the "feel-good" factor accruing to New Zealanders from improved international performances being an intangible benefit. The latter is almost

[58] *Rugby Union (HC)* at 326.
[59] *Qantas* at [1369].
[60] Commerce Commission (1997) at 4 and 16.
[61] Ibid at 4, 12 and 16.
[62] *Ansett* at [552].
[63] Ibid.
[64] *Amcor* at [61]. These benefits included increased employment, export earnings and spin-off effects to the local Northland economy.
[65] Given that the *1994 Guidelines* were not published until seven years after the decision was delivered, the Commission cannot have been making implicit reference to the *Guidelines'* definition of a tangible benefit as one which can be quantified in monetary terms.
[66] *Amcor* at [61]. The Commission stated that the "...project would provide tangible public benefits in terms of ...".

certainly more intangible than the former.[67] This looseness in expression means that it cannot automatically be inferred that all benefits in these decisions that are not described as intangible benefits are tangible benefits. However, in *TeamTalk* and *Ruapehu* the Commission discussed the various intangible benefits under a heading "intangible benefits".[68] In such circumstances it can sensibly be inferred that the Commission must have considered the other benefits to be tangible benefits. These benefits included:

- cost savings[69]
- net revenue gains[70]
- tourism benefits[71]

The *Guidelines* support the classification of cost savings and net revenue increases as tangibles.[72]

1.3.4 CONSISTENCY OF THE COMMISSION'S APPROACH

The limited number of decisions describing benefits as intangibles, the irregular use of the term by the Commission and the lack of description of other benefits as tangibles, make it difficult to analyse whether the Commission has been consistent in its classification of benefits as intangibles. The best that can be hoped for is a critique of the Commission's categorisation decisions based on what little we can glean from the decisions, the basic principles set out in the *Guidelines* and a dash of common sense.

The classification of tourism as an intangible benefit in *Rugby Union (HC)* is at odds with the implicit classification of it as a tangible benefit in the *Ruapehu* decision.[73]

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[67] *NZRFU 2* at [715]. This looseness in expression can probably be explained by the fact that nothing turns on the classification; all benefits are considered, regardless of whether they are intangible or tangible.

[68] *TeamTalk* at [238]-[239]; *Ruapehu* at [596]-[603]. In *Powerco* at [353]-[356] the Commission discussed certain benefits under a heading "other less tangible benefits". It is uncertain whether this was meant to encompass all intangible benefits. If it was, cost savings, avoided social costs of unemployment and reduced outage costs for consumers would all amount to tangible benefits. The second seems particularly difficult to quantify, which suggests that the Commission may have simply used the heading "other less tangible benefits" as a synonym for unquantified benefits.

[69] *TeamTalk*; *Ruapehu*. This supports the classification in *Ansett* at [552].

[70] *TeamTalk*; *Ruapehu*. This supports the classification in *Ansett* at [552].

[71] *Ruapehu*. This is at odds with the classification of tourism as an intangible benefit in *Rugby Union (HC)* at 326. For further discussion about this inconsistency, see Section 1.3.4 below.

[72] Commerce Commission (1997) at 4, 12 & 13.

[73] *Rugby Union (HC)* at 326; *Ruapehu* at [563]-[592]. As discussed in Section 1.3.3, by discussing the various intangible benefits under a heading "intangible benefits", the Commission in *Ruapehu* implied that all the other benefits were tangible benefits. One of these other benefits was the

Closer examination of *Rugby Union (HC)* suggests that the High Court may have been using the term "intangible" loosely. After describing a number of benefits, including increased tourism as intangible, the Court appeared to partially contradict itself in the following sentence by stating that "some" of the benefits just mentioned could properly be described as intangibles.[74] Therefore it is not certain that the High Court meant to describe tourism as an intangible benefit.[75]

Interestingly, in the *Ruapehu* decision the Commission described the development and transfer of expertise between two ski-fields as an intangible benefit.[76] This is inconsistent with the *Guidelines'* classification of benefits deriving from economies of scale and scope, and cost reductions due to greater specialisation of production, as tangibles.[77] The Commission may have been using the word "intangible" as a synonym for unquantified benefits.[78]

These inconsistencies demonstrate the difficulty of ascertaining the features that make a particular benefit an intangible one.[79] This issue is explored further in the next section.

1.4 The common features of intangible benefits

As discussed in Section 1.2.2, an ease of quantification definition gives rise to difficulties classifying benefits as tangible or intangible. This problem is particularly acute for benefits lying in the middle of the "spectrum of intangibility". The Commission has not developed any test or indicators to assist in this classification process. This section aims to analyse the features of intangible benefits in search of developing a workable framework within which to evaluate their treatment.

increased tourism spending that would accrue to the Rotorua region as a result of the acquisition of Turoa Ski Resort by Ruapehu Alpine Lifts.

[74] *Rugby Union (HC)* at 326-327.

[75] It may have been using the intangibility tag because of the weak nexus between the tourism benefits and the transfer system seeking to be authorised, rather than any inherent inability to quantify benefits from increased tourism. In other words, it may have applied an ease of quantification test in the individual case, rather than in the global sense.

[76] *Ruapehu* at [596].

[77] Commerce Commission (1997) at 4.

[78] All the benefits described as tangible benefits were quantified and all the benefits described as intangible benefits were unquantified.

[79] The classification of other benefits as intangible is questionable. For example see, *Rugby Union (HC)* at 326 in particular. In that case the High Court cited potentially improved sponsorship as an intangible benefit. Although there is nothing in the decisions or the *Guidelines* to suggest that it should not be classified as an intangible benefit, it seems quite different in nature to many of the other benefits that are classified as intangible.

Dr Michael Pickford, the Chief Economist of the Commerce Commission, suggests that intangible benefits usually share two characteristic features which mean that quantification is generally not a realistic possibility.[80] The first is that are difficult to describe precisely.[81] He may be alluding to the fact that these benefits often arise indirectly through a number of channels, making their existence doubtful and their nature difficult to characterise.[82] For this reason, claims of intangible benefits are often quite speculative. Because it is difficult to prove their existence, let alone their extent, quantification is problematic.

The second feature that Pickford suggests intangible benefits usually share is that there is no obvious economic framework through which their value can be assessed.[83] This makes sense. Because intangibles are benefits that are difficult to quantify, it is likely that there will be no obvious economic model in which to assess their value. In considering whether such a framework exists, it is useful to examine the unit of measurement that the benefit is ordinarily measured in. As a rough guideline, if the natural unit to measure the benefit in is in dollar terms it is a tangible benefit, and if it is something else it is an intangible benefit. Applying this rule, cost savings are tangible benefits because their natural unit of measurement is in dollars, and health benefits are intangible benefits because their natural unit of measurement is improvements in mortality and morbidity rates.

Another useful consideration is whether the benefit is a productive efficiency gain. The examples of tangible benefits in the *Guidelines* are all productive efficiency gains that result in cost savings or net revenue gains.[84] It is generally much easier for person(s) to quantify cost savings or net revenue gains,[85] than to quantify the more amorphous and far reaching allocative and dynamic efficiency gains.[86] Hence productive efficiency gains tend to be tangible benefits, and non-productive efficiency gains tend to be intangible benefits.

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[80] Michael Pickford, *The Evaluation of Public Benefit and Detriment under the Commerce Act* (Occasional Paper No 7, Commerce Commission, Wellington, 1998) at 22. The Commission picked up on these two factors in *Ansett* at [548] in relation to improved diplomatic relations.
[81] Pickford (1998) at 22.
[82] This was one of the three reasons why the benefits in *NZRFU 1* were so intrinsically difficult to measure. The other two reasons included the fact that they would be derived in a market in which commercial transactions had not yet occurred, and that they would flow from very mild market regulations (*NZRFU 1* at [408]).
[83] Pickford (1998) at 22.
[84] Guideline 3 of the *Guidelines* (Commerce Commission (1997) at 4). See also, Commerce Commission (1997) at 12-13.
[85] Arising from the better utilisation of resources and economies of scale.
[86] It is even more difficult to quantify non-efficiency gains.

1.5 The approach utilised in this dissertation: a spectrum of tangibility

There will be some benefits for which it is not possible to predict whether the Commission would classify them as tangible or intangible. In the end this does not matter. The treatment of intangible benefits can be evaluated by constructing a "spectrum of tangibility"; with very tangible benefits at one end, very intangible benefits at the other end and intermediate benefits in the middle.[87] Such a spectrum is consistent with how the Commission views the quantification of detriments. In the *Guidelines*, the Commission recognises that quantifiability is a continuum and not all detriments are equally capable of quantification.[88] This same reasoning can be applied to benefits. By considering how the Commission treats benefits of varying levels of tangibility, we can gain an insight into how the Commission treats the so-called intangible benefits and also see whether the treatment of intangibles of varying levels of tangibility differs.

There is no easy way to place benefits on the spectrum of tangibility. It essentially involves a value judgment. It is proposed that the benefits, other than the classic tangible benefits, such as cost savings and net revenue increases, can be grouped into four main categories to help reduce the complexity of the value judgments that need to be made.[89] These are set out on the next page in Table 1, and their scope and characteristics are discussed in more detail below.

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[87] See, Figure 1 in Section 1.2.2. Whilst Dr Michael Pickford believes that rather than there being a "spectrum of tangibility" of benefits, there is a "dichotomy" between the tangible and intangible, he acknowledges that for the intangible benefits there may be degrees of intangibility (Email from Dr Michael Pickford to Jill Caughey (22 August 2006)).
[88] Commerce Commission (1997) at 11.
[89] There are other benefits that may well be intangible but do not fall into these categories. It is proposed that this dissertation will not consider their treatment. Instead it will concentrate on fully evaluating the four basic categories outlined in the table on the next page.

TABLE 1: Categories of benefits

Sub-category	**Category 1:** vague claims with far reaching consequences	**Category 2:** externality arguments	**Category 3:** quality improvements	**Category 4:** improving New Zealand's export performance
A	"feel-good" benefits	environmental benefits	increased quality and choice for consumers	tourism benefits
B	promoting New Zealand's general interests at an international level	health benefits	improved information in the marketplace	enhanced export opportunities
C		social benefits	improvements in bargaining relationships	improvements in international competitiveness

1.5.1 CATEGORY 1: VAGUE CLAIMS WITH FAR REACHING CONSEQUENCES

This category represents the benefits that are the least easily quantified. The common feature that underpins them is that they are all benefits that affect a large group of people but only very marginally. Hence, they usually arise very indirectly and it is virtually impossible to devise an economic model that assesses their impact with any accuracy.[90] There are two sub-categories within this category: the "feel-good" benefits, and benefits promoting New Zealand's general interests at an international level. The latter benefits may be slightly more tangible than the former.

Because of the amorphous nature of this category, it is illustrative to provide a list of the benefits that have been raised in decisions that would fall within each of the sub-categories. The "feel-good" benefit sub-category incorporates:[91]

- a "feel-good" factor for New Zealanders[92]
- preservation of Air New Zealand as the national 'flag carrier'[93]
- avoidance of community disharmony[94]

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[90] These are the very two features that Dr Michael Pickford identified as usually being shared by intangible benefits (Pickford (1998) at 22).
[91] Category 1A.
[92] This benefit was discussed in *NZRFU 2* at [803]. The feel-good factor was said to arise from the better performance of international rugby squads.
[93] Described as an intangible benefit in *Qantas* at [1369]. It was also claimed in *Ansett* at [530]-[531].

- avoidance of industry disharmony[95]
- community well-being[96]

The benefits falling within the second sub-category, as promoting New Zealand's general interests at an international level, include:[97]

- improved diplomatic relations between New Zealand and Australia[98]
- benefits under the Closer Economic Relations agreement[99]
- reduced risk to national security[100]

1.5.2 CATEGORY 2: EXTERNALITY ARGUMENTS

These benefits also accrue to the broader community. Benefits within this category tend to partially or fully internalise negative externalities.[101] Although these benefits are generally easier to quantify than the preceding category, quantification is still problematic because they represent improvements in social rather than economic outcomes. There are three basic sub-categories: environmental benefits,[102] health benefits[103] and social benefits.[104] Whilst none of these benefits have been described as intangibles in the decisions, the first two sub-categories are described as intangible benefits in the *Guidelines*.[105]

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[94] Described as an intangible benefit by the applicant in *NZ Dairy 2* at [15.14]. It was also claimed in *Kiwi* at [105], although no specific reference was made to it being of an intangible nature.
[95] This benefit was discussed in *Kiwifruit* at [5.27].
[96] This benefit was discussed in *Midland Health* at [335].
[97] Category 1B.
[98] The Commission may have implied this was an intangible benefit in *Ansett* at [553]-[554]. At [548] it stated that it was difficult to say exactly what the nature of this benefit was and how it could be evaluated. These are the two factors that Dr Michael Pickford identifies as being shared by intangible benefits (Pickford (1998) at 22).
[99] This benefit was discussed in *Amcor* at [69]; *NZ Dairy 1* at [14.5].
[100] This benefit was discussed in *Qantas* at [1365].
[101] In other words, they alleviate the negative spin-off in the pre-acquisition or pre-anticompetitive practice situation. For an explanation of what a negative externality is, see above footnote 35.
[102] Category 2A. This benefit was discussed in *Ravensdown* at [427]-[432]; *Omv* at [512]; *Qantas* at [1365]; *Qantas* (HC) at [411].
[103] Category 2B. A heath benefit was discussed in *Midland Health* at [333]-[334]. Public safety benefits fall within the health category. Such benefits have been raised in four decisions. See, *Fletcher Challenge* at [163]; *Natural Gas Waikato* at [32]; *Speedway* at [118]-[119]; *Qantas* at [1365].
[104] Category 2C. This sub-category focuses upon the broader costs to the community of unemployment and decreased production. It does not incorporate the multiplier effects of an increase in output. Nor does it look at increased employment per se. Benefits falling within Category 2C have been discussed in *Whakatu* at [66]-[67]; *Amcor* at [55]; *Fletcher Challenge* at [160]; *Tasman* at [65.5]; *Grape Growers* at [38.1]-[38.2]; *Consortium* at [255]-[257]; *Powerco* at [338]-[340]. Note that there may well be benefits that fall within Category 2, but fall outside the three sub-categories. For example see, *Ravesdown* at [418]-[419]. In that decision the Commission indicated that a benefit to other transport users from reduced road usage could be a public benefit.
[105] Commerce Commission (1997) at 4 & 16.

1.5.3 CATEGORY 3: QUALITY IMPROVEMENTS

These benefits are more tangible in nature. Unlike the former categories, they arise in a market and generally accrue to the immediate parties in the market(s) concerned, making it easier to demonstrate the benefit's existence. However, because they each concern a quality improvement,[106] their natural unit of measurement is not in dollar terms and so it is difficult to find a framework within which to accurately assess their value. There are three sub-categories: increased quality and choice for consumers,[107] improved information in the marketplace[108] and improvements in bargaining relationships.[109] The Commission and High Court have described benefits falling within the first sub-category as intangibles in six of the eight decisions that label benefits as intangible.[110]

1.5.4 CATEGORY 4: IMPROVING NEW ZEALAND'S EXPORT PERFORMANCE

These benefits are the most tangible of the four categories. They all relate to improvements in New Zealand's export performance. There are three sub-categories: tourism benefits,[111] enhanced export opportunities[112] and improvements in international competitiveness.[113] There is much overlap between

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[106] Whether it be in relation to a product or service, the information in a marketplace or the negotiating environment.

[107] Category 3A. This benefit was discussed in *Vegetable Growers* at [41]; *Amcor* at [58]; *Natural Gas Waikato* at [31]; *Kiwifruit* at [5.31]-[5.33]; *Fisher & Paykel* at [7.7]-[7.11] & [7.14]-[7.15]; *NZSE 1* at [84]; *NZSE 2* at [84]-[88]; *Speedway* at [116]-[117]; *Telecom (CA)* at 440; *SFE 1* at [107], [117], [123], [131] & [133]; *SFE 2* at [123], [131], [139], [143] & [147]; *Ansett* at [506]-[513] & [554]; *Powerco* at [351]-[352] & [356]; *Transpower* at [162]-[164]; *TeamTalk* at [238]; *Ruapehu* at [602]; *NZRFU 1* at [382]-[389] & [393]-[394]; *Qantas* at [69]-[70] & [1329]-[1337]; *Qantas (HC)* at [384]-[410]; *NZRFU 2* at [121]-[127] & [714]-[759].

[108] Category 3B. This benefit was discussed in *Life Underwriters* at [69]; *Grape Growers* at [36.2]; *Electricity Corporation* at [152]; *Electricity Governance* at [419]-[422].

[109] Category 3C. This benefit was discussed in *Brierley* at [61]-[62]; *Kiwifruit* at [5.13]; *Grape Growers* at [35.3]; *Enerco* at [93]; *NZRFU 2* at [798]. In fact, the Commission has acknowledged that by its very nature increased bargaining power is unable to be precisely measured (*Enerco* at [94]).

[110] *NZRFU 1* at [383]; *Rugby Union (HC)* at 326; *Powerco* at [74]; *TeamTalk* at [238]-[239]; *Ruapehu* at [602]; *NZRFU 2* at [715]. The classification of such benefits as intangible may be inconsistent with how the Chief Economist of the Commerce Commission, Dr Michael Pickford views them. In two of his publications, he gave enhanced consumer surplus a separate heading from intangible benefits, which may indicate he considers quality improvements not to be intangible in nature (Pickford (1998) at 21-22; Michael Pickford, "Assessing Public Benefits and Detriments" (1997) *Compliance* 15 at 18).

[111] Category 4A. This benefit was discussed in *Ansett* at [528]; *NZRFU 1* at [407]; *Ruapehu* at [563]-[592]; *Qantas* at [54]-[65]; *Qantas (HC)* at [338]-[378]; *NZRFU 2*, at [801].

[112] Category 4B. This benefit was discussed in *Goodman Fielder* at [267]; *Amcor* at [55], [57] & [71]; *Kiwifruit* at [5.49]; *NZRFU 1* at [403]; *NZRFU 2* at [800].

[113] Category 4C. This benefit was discussed in *Forest Products* at [76]; *Whakatu* at [70]; *Amcor* at [72]; *Fletcher Challenge* at [157]; *Tasman* at [65.2]; *Carter Holt* at [115]; *NZ Dairy 2* at [15.07]-

enhanced export opportunities and improvements in international competitiveness.[114] Nevertheless, because the latter sub-category seems less tangible, the benefit has been divided into two sub-categories in order to evaluate whether the framing of the benefit makes a difference to the Commission's treatment of it.[115]

It is unclear whether the Commission sees these benefits as tangible or intangible benefits. There is authority suggesting that tourism is an intangible benefit and authority suggesting it is a tangible benefit.[116] Unlike the other three categories, the natural unit of measurement of Category 4 benefits is in monetary terms,[117] suggesting that they are more likely to be tangible benefits.[118]

1.5.5 OTHER BENEFITS

There are a number of benefits that could potentially be described as intangibles, but that do not fit neatly into any of the categories above.[119] They include:

- benefits to other transport users from changes in traffic patterns[120]
- improved governance[121]
- an ability to practice for the competitive market[122]

[15.08]; *NZ Dairy 2 (HC)* at 635; *Kiwi* at [102]; *Consortium* at [258]-[262]; *Qantas* at [1364]; *Qantas* (HC) at [429].

114 *NZ Dairy 1* at [14.5] shows the interrelationship between enhanced exports (Category 4B), improvements in international competitiveness (Category 4C) and assisting New Zealand's general interests at an international level (Category 1B). In that case the applicant submitted that there would be increased exports of a wider range of value-added products which would increase international competitiveness, enhancing prospects under the Australia New Zealand Closer Economic Relations (CER) Trade Agreement in particular. In the final decision the Commission did not seem to give any weighting to these benefits, instead focusing upon other benefits (*NZ Dairy* at [14.25] & [15.1]).

115 The links between the sub-categories illustrate the difficulty of developing classes of benefits based on the degree of tangibility of benefits.

116 See the discussion in Section 1.3.4 above. *Rugby Union (HC)* at 326 suggests that tourism is an intangible benefit, but *Ruapehu* implies it is a tangible benefit. Dr Michael Pickford suggests that because the Commission quantified tourism benefits in *Qantas* it is "difficult to classify these as being intangible" (Email from Dr Michael Pickford to Jill Caughey (22 August 2006)). However, as discussed above, the test of intangibility is based upon ease of quantification, rather than quantification per se. In *NZRFU 1* at [383] and *NZRFU 2* at [715], spectator enjoyment was referred to as being intangible, despite being quantified.

117 Their natural unit of measurement is in monetary terms, rather than export volumes because the desired end result is an increase in export receipts, not an increase in export volume. This can be contrasted with environmental spin-offs and quality improvements, which are in themselves the desired end result.

118 Such a view is consistent with Pickford (1997) at 18, in which Dr Michael Pickford gave increased profits from exports a separate heading from intangible benefits, suggesting he does not consider them to be intangible in nature.

119 So there is a fifth residual category of benefits.

120 *Ravensdown* at [419].

121 *Qantas* at [1364]; *Qantas (HC)* at [429].

- reduced lobbying costs[123]
- prevention of free-riding by competitors[124]
- promoting a government policy[125]
- avoided social cost of public funds[126]
- the separation of the trading and regulatory functions of the Ministry of Energy[127]
- advantage of industry self-regulation over government regulation[128]

This dissertation will not consider the treatment of this residual category of benefits. Their infrequent occurrence and the difficulty of placing them on the spectrum of tangibility, mean that further analysis is of little assistance to determining how intangible benefits are treated.

1.5.6 THE SPECTRUM OF TANGIBILITY

Figure 2 on the next page sets out the spectrum of tangibility which was first introduced in Section 1.2.2. The categories of benefits introduced above have been placed upon it. As discussed, there is no definitive test for determining the degree of tangibility of a particular benefit,[129] and so the placement of such categories is essentially a value judgment. This spectrum will be used in Chapter Two to analyse the Commission and courts' treatment of intangible benefits.

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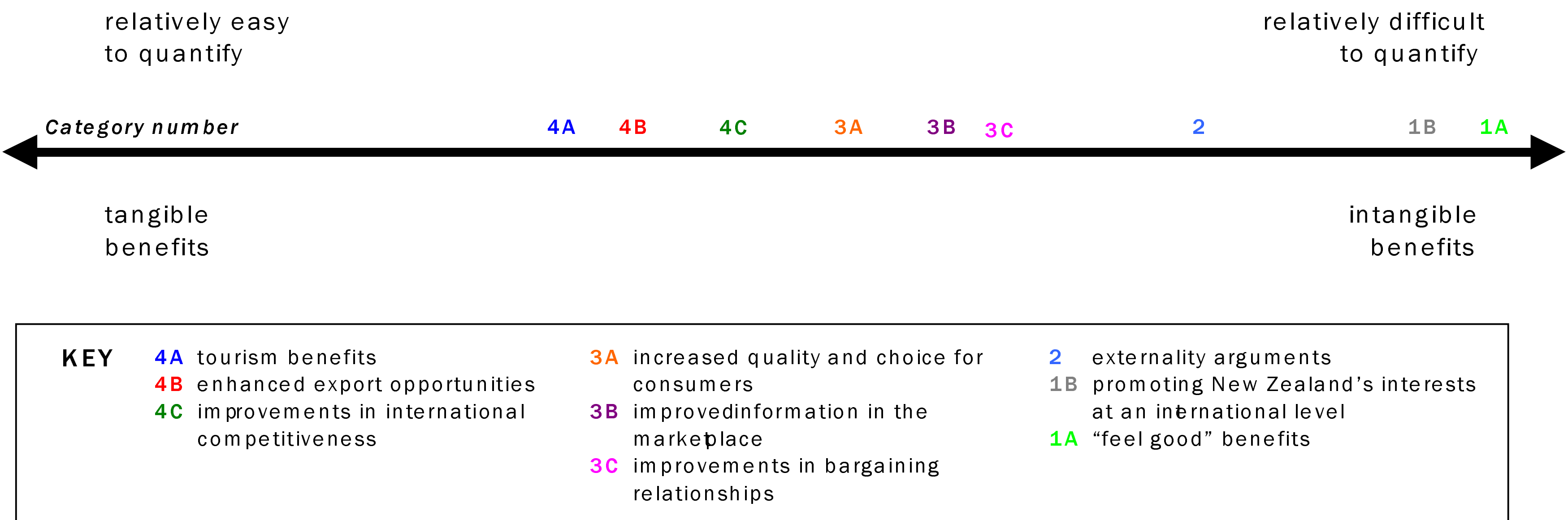
[122] *Electricity Corporation* at [157].
[123] *Electricity Governance* at [437].
[124] *Fisher & Paykel* at [7.16]-[7.21].
[125] *Brierley* at [30]. Note that s26(1) of the Commerce Act states that the Commission shall have regard to the economic policies of the government as communicated by the Minister, when applying the public benefit test.
[126] *Qantas* at [1373].
[127] *Petroleum Corporation* at [175].
[128] *Newcall* at [261].
[129] Or even the relative position of a particular benefit.

FIGURE 2: The categorisation approach to the spectrum of tangibility



The author's view of where the four categories of benefits (utilised in this dissertation to evaluate the treatment of intangible bene
lie on the spectrum of tangibility.

CHAPTER TWO
The Treatment of Intangible Benefits

As discussed in the Introduction, the Commission and courts have taken a very broad approach to what amounts to a "public benefit". Accordingly, all gains to the public of New Zealand, irrespective of their degree of tangibility, are "public benefits" and so must be assessed.[130] The fact that a benefit cannot be readily expressed in monetary terms is no reason to exclude it from the balancing process.[131] The Act provides no guidance as to how tangible and intangible benefits should be weighed; this is left to the Commission and courts.

The Commission and courts have emphasised the need for quantification of benefits and detriments where possible.[132] Shelley Duggan suggests that this means that "intangible and social benefits will be considered irrelevant, or alternatively, will be given little weight in terms of the balancing exercise".[133] Even the Chief Economist of the Commerce Commission, Dr Michael Pickford, seems to agree, at least for the most part, with this view. Although Pickford recognises that intangible benefits must be included in the assessment, he suggests that "it is probably fair to say that, in the absence of quantification, the Commission will need some fairly convincing evidence that they will eventuate before much weight is given to them".[134] Nevertheless, unlike Duggan, Pickford does not entirely exclude the possibility that intangible benefits could be of real weight in a particular instance. He simply suggests that it will be a rare case where the applicant can discharge their burden of proving that the benefit will arise as a result of the practice, will not occur under the counterfactual and is of real magnitude.

This Chapter aims to evaluate the weight that the Commission and courts give to intangible benefits, to contrast the treatment of quantified intangibles and

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[130] *NZRFU 1* at [305]; *Rugby Union (HC)* at 327; *TeamTalk* at [161]; *Ruapehu* at [236]; *Omv* at [399]; *Qantas* at [899]; *Qantas (HC)* at [319] & [415]; *NZRFU 2* at [543] & [708].
[131] *Qantas (HC)* at [415].
[132] *Natural Gas 1* at [111]; *Newcall* at [246]; *Transpower* at [153]; *Ruapehu* at [239]; *Qantas* at [899]; *Qantas (HC)* at [319]. See also, Commerce Commission (1997) at 13, 19 & 20. This more quantitiatve approach is in response to the comments of the Court of Appeal in *Telecom (CA)* at 447.
[133] Shelly Duggan, "Sporting Entities and Trade Practices Law: What is Best and Fairest?" (1999) 7 *Trade Practices Law Journal* 201 at 215.
[134] Pickford (1998) at 4.

unquantified intangibles and to consider whether the treatment of intangibles has changed over time.

2.1 Quantified intangibles

The Commission has quantified a number of benefits of an intangible nature in monetary terms,[135] including: social benefits,[136] increased quality and choice for consumers,[137] better quality decision making[138] and tourism benefits.[139] The decisions indicate that the Commission takes a conservative approach to the quantification of intangible benefits. Because the economic models that are used to quantitatively evaluate intangible public benefit claims usually depend upon a series of simplifying assumptions,[140] the calculations are often discounted to make due allowance for the difficulty of quantification.[141] For example, in *Qantas* the Commission and High Court suggested that the value the Commission arrived at for the potential scheduling benefits was the upper limit.[142] By contrast, the Commission had no such reservations in respect of the most tangible benefit, cost savings.[143] Therefore, rather than using their best estimate of the intangible benefit that will arise, the Commission usually takes a more conservative figure as representing the value of the benefit. This more conservative approach means that, ceteris paribus, less weighting will usually be accorded to quantified intangible benefits than quantified tangible benefits.

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[135] Perhaps unsurprisingly, all of these decisions came after the Court of Appeal's decision in *Telecom (CA)* in 1992, in which Richardson J stressed the desirability of quantifying benefits in monetary terms (*Telecom (CA)* at 447).

[136] Category 2C. See, *Powerco* at [338]-[340]. Although that case dealt with social detriments arising from redundancy, presumably the same methodology can be applied to social benefits arising from redundancy. Whilst the Commission stated that it was not possible to quantify the size of the one-off social costs from staff reductions, they came up with a ball-park figure to demonstrate "the impact they may have on the public benefit assessment" (*Powerco* at [339]). See Sections 2.3 and 4.4 below for further discussion of this technique.

[137] Category 3A. See, *NZRFU 1* at [382]-[389] & [393]-[394]; *Powerco* at [351]-[352]; *Qantas* at [69]-[70] & [1329]-[1337]; *NZRFU 2* at [121]-[127] & [714]-[759]. Interestingly, the Commission in *Powerco* simply accepted the amount claimed by the applicant because it was "not large" and was "considered reasonable" (*Powerco* at [352]).

[138] Category 3B. See, *Electricity Governance* at [419]-[422].

[139] Category 4A. See, *Ruapehu* at [563]-[592]; *Qantas* at [54]-[65] & [1222]-[1314]; *Qantas (HC)* at [338]-[378].

[140] *Qantas* at [1238]. These simplifying assumptions are often unrealistic.

[141] For example see, *Ruapehu* at [611]; *Qantas (HC)* at [416]. *Qantas* at [1298] and *NZRFU 2* at [734] & [758] note that such benefits must be cautiously evaluated.

[142] *Qantas* at [1337]; *Qantas (HC)* at [389]. Nevertheless, it was adopted for the purposes of calculating the public benefits arising out of the proposed arrangements.

[143] Note that the discounting of the applicant's claim, is a separate matter from the Commission's discounting of their own calculations.

Once quantified, quantified intangibles and quantified tangibles are weighed and balanced in the same manner.[144] This makes sense; logically a dollar's worth of quantified intangibles should have the same weighting as a dollar's worth of quantified tangibles. If that were not the case the quantification exercise would be futile.

2.2 Unquantified intangibles

If intangible benefits are not quantified, the Commission is required to weigh quantified (and possibly some unquantified) detriments against quantified and unquantified benefits. It must compare dollars and non-dollars. As such, it must undertake a qualitative assessment of the benefits and detriments.[145] This section analyses whether, and the extent to which, unquantified intangibles have been given weight.

2.2.1 CATEGORY 1: VAGUE CLAIMS WITH FAR REACHING CONSEQUENCES

As discussed in Section 1.5.1, these are the least tangible of all the benefits. This means that any bias the Commission might have against intangible benefits is more likely to be evident in its discussion of this category of benefits.

Category 1A: "Feel-good" factors

In its decisions, the Commission has shown a reluctance to place any weight upon "feel-good" factors. In *NZRFU 2*, the Commission indicated that it was disinclined to place any weight upon a claimed benefit of increased "feel-good" for New Zealanders as a result of better international performances by New Zealand squads, because of the tenuous nature of the benefit and the weak and indirect link between the proposal and the benefit.[146] In *NZ Dairy 2*, *Kiwi*, *Kiwifruit* and *Midland Health*, evidential problems meant that the Commission placed little or no weight

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[144] The quantified benefits, whether intangible or tangible, are usually set out in a table and added together to give the total sum of the quantified benefits. See, *Powerco* at [357]; *Ruapehu* at [593]; *Electricity Governance* at [463]; *Qantas* at [77], [1385] & [1394]; *Qantas (HC)* at [424]; *NZRFU 2* at [805].

[145] A qualitative assessment relies on "experience and judgment" (*Ansett* at [551]), and can be contrasted with a quantitative approach which measures benefits and detriments in a common unit. Even in a qualitative assessment, the Commission needs to demonstrate the weight applicable to benefits, if the weighing and balancing process is to be meaningful (*Fletcher Challenge* at [147]).

[146] *NZRFU 2* at [803].

upon the avoidance of community and industry disharmony and the promotion of community well-being.[147]

The preservation of Air New Zealand as New Zealand's national flag carrier has been claimed as a benefit on two occasions. In *Ansett* the Commission seemed to place no weight upon it,[148] but in *Qantas* the Commission and High Court indicated that a value should be attached to it.[149] However, no explicit indication was given in *Qantas* of the weighting that should be ascribed to it. The Commission appeared to only have regard to the quantified benefits in its final analysis.[150] Whilst the High Court indicated that the benefit was being considered,[151] the magnitude of the quantified detriments makes it difficult to gauge what weight was placed upon it.[152] The fact that the benefit was grouped with other benefits of a speculative nature under a general heading at the end of the benefit section, may suggest that the High Court did not consider that it was of particular importance.[153]

Category 1B: Assisting New Zealand's general interests at an international level

Category 1B benefits have never been accorded any real weight. In *Ansett*, whilst the Commission acknowledged that an improvement in diplomatic relations between New Zealand and Australia was a benefit of some significance, there was insufficient evidence of its extent to determine what weight should be accorded to it.[154] Thus the Commission seemed to assign little or no weight to it.[155] Benefits

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[147] *NZ Dairy 2* at [15.13]-[15.14]; *NZ Dairy 2 (HC)* at 636; *Kiwi* at [105]; *Kiwifruit* at [5.27]; *Midland Health* at [335]. In *NZ Dairy 2* and *Kiwi*, the Commission doubted whether there was a nexus between the avoidance of community disharmony and the proposed mergers (*NZ Dairy 2* at [15.13]; *Kiwi* at [105]). In *Kiwifruit*, there was nothing to suggest that the agreement seeking to be authorised would eliminate problems with industry disharmony (*Kiwifruit* at [5.27]). In *Midland Health* it was thought that the benefit to the community's well-being would accrue, whether or not the activity was authorised (*Midland Health* at [335]).
[148] *Ansett* at [530]-[531] & [550]. At [531] the Commission indicated that it was best considered under the other benefit headings.
[149] *Qantas* at [1376]; *Qantas (HC)* at [429]. The Commission stated that it had a "non-quantifiable symbolic value". See Section 2.4.1 for an evaluation of how the treatment of this benefit has changed over time.
[150] *Qantas* at [1394]. The benefit was assigned a value of 0 in the table and the benefits were said to amount to $40.5m, with no reference being made to unquantified benefits. The Commission was criticised by the High Court for this (*Qantas (HC)* at [415]).
[151] *Qantas (HC)* at [411] & [415].
[152] The value of the quantified detriments was more than double the value of the quantified benefits. This meant that the unquantified benefits were never going to be sufficient to tip the balance.
[153] *Qantas (HC)* at [411]. The heading was "other benefits".
[154] *Ansett* at [548]. This evidential problem arose from the intangibility of the benefit. The Commission stated that it was difficult to see exactly what the value of the benefit was and how it could be evaluated.

under the Australia New Zealand Closer Economic Relations (CER) Trade Agreement have also been given little or no weight, on the basis that they have already been assessed under some of the other heads, such as efficiency improvements.[156]

In *Qantas*, the Commission identified reduced risk to national security as a public benefit.[157] However, there was no further discussion regarding its significance and extent. The Commission has made it clear that for a benefit to be given weight, the applicant must provide evidence of its existence and extent.[158] The lack of discussion in *Qantas* regarding the extent of any national security benefit, suggests that it was accorded very minimal or no weight. Nevertheless, the fact that the Commission raised the benefit, suggests that the Commission may consider that national security benefits could be of real significance in some instances. On appeal, the High Court made no reference to the national security benefit, suggesting that it did not consider it to be of any importance.

Conclusion on the weight attached to Category 1 benefits

Whilst the Commission and courts appear willing to accord some weight to the benefits within this category,[159] in no case have they been given more than a minimal weighting. However, it is not the lack of tangibility but the lack of causal nexus[160] or the minimal extent[161] of the claimed benefit that is cited as the reason for this low weighting. The onus is on the applicant to provide evidence of the causal nexus between the practice and the benefit, and the extent of the benefit.[162] If insufficient evidence is provided to discharge this onus, no weight can be given to the benefit. This means that it is not possible to positively conclude that the lack of weight accorded to this category of benefits is solely because of their intangibility.

Interestingly, it is probably the very features that make these benefits so intangible that makes it so difficult to provide evidence of the causal nexus and the extent of the benefit. Category 1 benefits often arise quite indirectly, flowing through a

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[155] Two of the four Commissioners, Commissioners Bollard and Stapleton, later suggested that the nexus between the benefit and the acquisition had not been adequately shown (*Ansett* at [550]). This is a further reason to give minimal or no weighting to the benefit.
[156] *Amcor* at [69]; *NZ Dairy 1* at [14.5] & [14.25].
[157] *Qantas* at [1365].
[158] For example see, *Goodman Fielder* at [263].
[159] See, *Ansett* at [548] in particular.
[160] *NZRFU 2* at [803]; *Ansett* at [550]; *Kiwifruit* at [5.27].
[161] *NZ Dairy 2* at [15.14]; *NZ Dairy 2 (HC)* at 475; *Kiwi* at [105]; *Ansett* at [548].
[162] For example see, *Whakatu* at [25].

number of channels, meaning that their existence and nature is controversial. This makes the demonstration of a casual nexus problematic. Because they arise outside of markets and affect a large group of people but only marginally, there is no obvious economic framework in which to assess their value. This makes it difficult to provide evidence of their extent.

There is an alternative explanation for the low weighting attached to Category 1 benefits. Unlike the benefits in the other categories, Category 1 benefits are not efficiency gains.[163] The Commission has stated on a number of occasions that greater weight is to be given to efficiency claims than other claims.[164] This is presumably a reflection of section 3A of the Act, which compels the Commission to have regard to any efficiencies that may result from the conduct which is sought to be authorised.[165] The Commission appears to have read this as requiring greater weight to be placed upon efficiency than non-efficiency benefits.[166] Such an interpretation would justify a lower weighting for Category 1 benefits.

2.2.2 CATEGORY 2: EXTERNALITY ARGUMENTS

As discussed in Section 1.5.2, these benefits usually accrue to the broader community. The 1991 and 1992 Reviews of the Commerce Act remark that wider social benefit claims are generally accorded a low weighting,[167] and are never a significant element in the decisions.[168] Dr Michael Pickford's writings support this view. Writing in 1989, he opined that the decisions tend to emphasise the

[163] Efficiency, being used in the traditional competition law sense and so incorporating allocative, productive and dynamic efficiency.

[164] *Brierley* at [70]; *Ansett* at [490]; *Ravensdown* at [365]; *Powerco* at [303]. In other decisions it has stressed that the emphasis or focus is on economic efficiency (*Midland Health* at [313]-[314]; *NZRFU 1* at [300] & [345]; *TeamTalk* at [160]; *Ruapehu* at [235]; *Qantas* at [48], [898] & [1188]; *NZRFU 2* at [542], [549] & [708]). See also, Commerce Commission (1997) at 12. Whilst the 1991 Review of the Commerce Act recognises this basic position, it notes that where the judgment on the basis of efficiency is a fine one, it is possible that other factors may tilt the balance (Minsistry of Commerce, The Treasury, Department of Justice and Department of the Prime Minister and Cabinet, *Review of the Commerce Act 1986: Discussion Document* (Ministry of Commerce, Wellington, 1991) at 12).

[165] More precisely, s3A of the Commerce Act 1986 stipulates that "[w]here 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"

[166] See Section 3.1.2 below for an examination of whether the Commission's interpretation of the effect of s3A of the Commerce Act is correct.

[167] Ministry of Commerce et al (1991) at 11; Ministry of Commerce, The Treasury and Department of Justice and Department of the Prime Minister and Cabinet, *Review of the Commerce Act 1986* (Ministry of Commerce, Wellington, 1992) at 13. However, the 1992 Review noted that it is possible that they could occasionally be significant.

[168] Ministry of Commerce et al (1992) at 13.

economic, rather than the broader social effects.[169] Later in 1993, he noted that benefits of a social nature had not been decisive in any case.[170] To the extent that Category 1 benefits are wider social benefits, these comments are also applicable to those benefits.

Category 2A: Environmental benefits

A reduction in adverse environmental effects has been claimed on three occasions. In *Ravensdown* the Commission held that there were possibly some environmental public benefits, but felt that there was insufficient information available to allow a firm conclusion to be drawn.[171] In the final analysis, it stated that the value of the public benefits was equivalent to the quantified benefits, plus some items which were difficult to identify or quantify.[172] Commissioner Taylor indicated that quantified detriments and benefits were fairly similar, with quantified detriments being slightly higher in magnitude.[173] Yet, even after taking into account the environmental benefits, he was not satisfied that the detriments were outweighed by the public benefits.[174] The fact that there were also significant unquantified detriments[175] complicates the analysis, and so the actual significance attached to the environmental benefits cannot be accurately gauged. However, the Commission's indication that it had insufficient information to evaluate their extent, tends to suggest that little weight was attached to them.

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[169] Michael Pickford, "Competition Policy, Mergers and the Net Social Benefit Test" in Bollard, Alan (ed) *The Economics of the Commerce Act* (Research Monograph 52, New Zealand Institute of Economic Research, Wellington, 1989) 89 at 91.
[170] Pickford (1993) at 217. Instead, authorisation decisions are based mainly on the gains and losses of efficiency. Arguably, Category 2 benefits are efficiency benefits to the extent that they result in a better allocation of resources.
[171] *Ravensdown* at [431] & [435].
[172] Ibid at [436]. Thus the Commission at least created the appearance that they had considered the unquantified benefits.
[173] The Commission quantified detriments as lying between $0.87m and $6.1m per annum and benefits as lying between $2.99m and $3.47m per annum (Ibid at [436]). Commissioner Taylor considered the true value of the detriments to be in the middle of the range (Ibid at [362]). Commissioners Stapleton and Brown indicated that they thought that the detriments lay at the upper end of the range (Ibid at [361]).
[174] Ibid at [444].
[175] Ibid. Namely a loss of product quality (Ibid at [344]). A loss of investment efficiency was also said to be possible (Ibid at [354]).

In *Omv* the Commission did not consider that a case had been made for significant weight to be attached to environmental benefits.[176] This essentially seemed to be a problem of proving that the benefit would actually eventuate.[177]

It was the Commission, rather than the applicant that raised the possibility of environmental benefits in *Qantas*.[178] The Commission considered that these effects were likely to be relatively minor.[179] However, the fact that the Commission raised them may suggest that it considers that they could be of real significance in some instances.

Category 2B: Health benefits

In *Midland Health*, the Commission accepted that there might be some benefits in the short term to the mental health of patients from the anti-competitive arrangement that the applicants sought to be authorised.[180] However, in its final analysis the Commission indicated that it did not consider that the nexus between the benefits and the arrangement had been sufficiently demonstrated.[181] This suggests that very little or no weight was accorded to the benefit to patients' mental health.

Improved safety has been claimed as a benefit in four decisions. Whilst the Commission accepted that there was a public benefit arising from improved safety in both *Fletcher* and *Qantas*,[182] it did not discuss the weight to be accorded to it.[183] This may suggest that the Commission did not consider the benefit to be significant in either of these cases. However, the fact that it was the Commission that raised

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[176] *Omv* at [513].
[177] Ibid. The Commission did not accept that there would be better environmental outcomes in the factual compared to the counterfactual.
[178] These benefits included a reduction in pollution, visual disamenity and noise.
[179] *Qantas* at [1378].
[180] *Midland Health* at [334]. These arose from patients having ready access to their families, to community support and to vocational and recreational services. It was also in line with the government's policy on access to mental health facilities (*Midland* at [333]).
[181] Ibid at [343]. In the absence of the agreement the proposed mental health facility was likely to be built in the same place (Waikato Hospital) and so similar benefits would ensue under the factual and counterfactual.
[182] In *Qantas* it was the Commission rather than the applicant that identified the safety benefit (*Qantas* at [1365]).
[183] *Fletcher Challenge* at [163] & [169]; *Qantas* at [1365]. In *Fletcher Challenge* the benefit was claimed in conjunction with a reduction in road maintenance costs. Although the benefit pertaining to reduced road usage was quantified in that decision, it may have only related to the part of the benefit attributable to reduced road maintenance costs.

the possibility of public safety benefits in *Qantas* may indicate that it considers that they could be of real significance in some cases.

A claim of improved safety was not accepted in *Natural Gas Waikato* on the grounds that no problems with existing safety procedures had been suggested, and hence no benefit would arise under the factual.[184] Nor was it accepted in *Speedway*, on the basis that the benefit would arise with or without the presence of the anti-competitive agreement.[185]

Category 2C: Social benefits

These benefits have not been given any real weight in the decisions. Whilst the Commission in *Consortium* remarked that it fully appreciated that closures of freezing works would cause substantial distress, it was not convinced that the social benefits accruing to some as a result of the agreement to close one freezing works, would outweigh the social costs to others from the agreement.[186] Accordingly, the Commission saw no social benefits accruing from the proposal.[187] Nor did the Commission in *Tasman* accept that a reduction in the volume logged would have adverse consequences for the township of Murupara.[188] The increased stability of rural communities was said to have no more than a minor beneficial impact in *Grape Growers*.[189]

Although the stabilisation of employment was accepted as a public benefit in *Fletcher,*[190] the Commission did not discuss the weight to be accorded to it, suggesting minimal or no weight was given to it. The enhancement of job security was considered in *Whakatu* and *Amcor*.[191] It was not accepted on the facts in *Whakatu*,[192] and although it was accepted in *Amcor*,[193] there was no discussion regarding the weight to be attached to it.

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[184] *Natural Gas Waikato* at [32].
[185] *Speedway* at [118].
[186] *Consortium* at [256]-[257].
[187] Ibid at [257].
[188] *Tasman* at [65.5].
[189] *Grape Growers* at [38.1]-[38.2].
[190] *Fletcher Challenge* at [160].
[191] *Whakatu* at [66]-[67]; *Amcor* at [55].
[192] *Whakatu* at [67]. In fact, the Commission considered that on balance there was a net detriment to employees from the agreement to close a meat works.
[193] *Amcor* at [55].

Conclusion on the weight attached to Category 2 benefits

Very little weight has been attached to benefits falling within this category. As for Category 1, this low weighting may be explained by the difficulty facing the applicant of proving a causal nexus between the benefit and the practice, and proving the extent of the benefit. Just as with the Category 1 benefits, arguably it is the very features that make these benefits intangible, that make it so difficult to provide affirmative evidence of the causal link and the extent of the benefit.

2.2.3 CATEGORY 3: QUALITY IMPROVEMENTS

Category 3A: Increased quality and choice for consumers

This benefit has been claimed in a large number of cases and it has been given significant weighting in at least one case.[194] In a number of other cases this benefit has been accepted but the weight to be prescribed to it has not been discussed, perhaps suggesting that minimal weight was attached to it.[195] Nevertheless, the Commission seems more inclined to give benefits in this category weight than those in the first two categories.

In *Qantas*, the High Court accepted that the appellants had demonstrated that substantial online benefits would accrue from the proposed alliance and stated that although they could not be safely expressed in monetary terms, they should be given considerable weight in the final analysis.[196] The fact that the High Court dealt with these benefits in a separate section to the other unquantified benefits, confirmed how important it considered them to be.[197]

In *Transpower*, the Commission indicated that it considered improved security of supply to be a real benefit, despite the fact that it was described rather than quantified.[198] It referred to the extremely large cost of a total system collapse and

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[194] *Qantas (HC)* at [410].
[195] *Amcor* at [58]; *Natural Gas Waikato* at [31]; *Telecom (CA)* at 440; *Ansett* at [554]; *Powerco* at [353]-[356]; *Qantas* at [76] & [1362].
[196] *Qantas (HC)* at [410]. The High Court criticised the Commission for subscribing a value of zero to them in their final analysis (*Qantas (HC)* at [415]).
[197] Online benefits had their own section, whereas all other unquantified benefits were dealt with under one broad heading.
[198] *Transpower* at [165].

stated that any reduction in the likelihood of this occurring was a public benefit.[199] However, in that case the absence of detriments[200] meant that any magnitude of benefit would be sufficient to make out a case for authorisation.

There are four decisions dealing with stock exchange regulations in which benefits including better quality clearing services, ensuring integrity in the market and increasing confidence in the market have been accepted.[201] In each of these decisions, these benefits were found to outweigh the detriments arising from the lessening of competition. However, the detriments in each of these cases were not large,[202] and so it is difficult to gauge whether the benefits were really accorded significant weight.

Once again, in some cases this sub-category of benefits has been given little or no weighting because of the difficulties of proving a causal nexus between the proposed activity and the benefit.[203] However, this seems to be much less of a problem than with the previous two categories of benefits. This probably stems from the fact that this benefit usually accrues to individuals in the immediate market,[204] and so the benefit does not tend to flow through as many channels, making the proof of a causal nexus much easier.

In *TeamTalk* and *Ruapehu* benefits within this sub-category were given little weight because the Commission felt that they had already been accounted for in the consideration of other benefits.[205] In *Ruapehu*, greater enjoyment as a consequence of an improved skiing experience was held to manifest itself in increased skier days.[206] The valuation of skier days incorporated both the benefit

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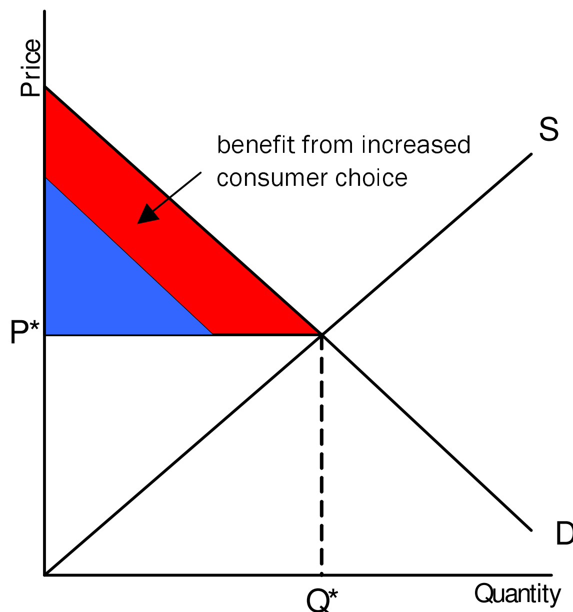
[199] Ibid at [163].
[200] Ibid at [152].
[201] *NZSE 1* at [84]-[88]; *NZSE 2* at [48]-[56]; *SFE 1* at [100]-[133]; *SFE 2* at [122]-[147].
[202] *NZSE 1* and *SFE 1* explicitly note this point (*NZSE 1* at [76]; *SFE 1* at [134]-[135]). The very purpose of the agreements were to achieve these benefits for participants in the stock exchange.
[203] *Kiwifruit* at [5.31]-[5.33]; *Speedway* at [116]. In those decisions the Commission indicated that the respective benefits did not depend upon the existence of an agreement. See also, *Ansett*. In relation to improved international passenger air services, the Commission indicated if Air New Zealand were to become less competitive other airlines would fill the gap (*Ansett* at [511]). In relation to improved international freight services for exporters and importers, Commissioners Bollard and Stapleton held that Air New Zealand had not adequately shown the nexus between the acquisition and the claimed benefit (*Ansett* at [550]). See also, *Vegetable Growers* at [41]. In that case the Commission could find no link between the benefit and the arrangement.
[204] And so can be classified as a market and direct benefit. See Sections 1.2.3 and 1.2.4.
[205] *TeamTalk* at [238]; *Ruapehu* at [602].
[206] *Ruapehu* at [602].

accruing to producers in terms of increased profits,[207] and that accruing to consumers in the form of greater enjoyment.[208] In *TeamTalk*, the Commission seemed to suggest that increased choice for consumers was reflected in the additional profit TeamTalk would receive.[209] Whilst this is true to some extent, the Commission may have erred in part. Only some of the increased satisfaction accruing to consumers from greater choice will be reflected in the price they pay for the services they purchase. The market price for a good or service is often less than the maximum amount which some consumers would be willing to pay. This difference represents what is known in conventional economic terms as a "consumer surplus". Consumer surplus is the utility that accrues to consumers beyond what they have paid for. The diagram above illustrates the area of consumer surplus. Contrary to the view taken in *TeamTalk*, this represents a benefit to the public that should be considered when the public benefit test is applied.[210]

FIGURE 3: Increased choice for consumers



The blue and red areas represent the consumer surplus that accrues to customers from purchasing the service. Note that part of this consumer surplus would be achieved by the purchase of an alternative, albeit less preferred service (blue area), and so the increase in consumer surplus from increased customer choice represents a smaller area (red area).

By contrast, it is useful to consider the loss of product quality or consumer choice on the detriment side. The same difficulties of quantification logically must arise. The very nature of anti-competitive practices and acquisitions mean that in virtually all decisions the loss of consumer choice will be a relevant detriment. A reduction in consumer choice reflects a loss of allocative efficiency. A loss of allocative

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[207] This is known as the producer surplus and represents the value that producers receive over and above what they would be prepared to sell it for (see, Frank and Bernanke (2007) at 184-185).
[208] This is known as the consumer surplus and represents the value that the good has to consumers over and above what they pay for it (see, Ibid at 142-145).
[209] *TeamTalk* at [238].
[210] In the end this error probably did not make any difference because the Commission seemed to be of the view that the magnitude of the benefit was small (Ibid at [239]).

efficiency has two effects: a loss of consumer choice and an increase in price.[211] This makes it difficult to determine the extent of detriment attributable to the loss of consumer choice. Hence it is more informative to look at losses of product quality. This detriment is often raised in decisions.[212] A loss of quality was held to be a detriment of significant magnitude in *Hoyts*, *Ansett* and *Ravensdown*.[213] By parity of reasoning, an increase in product or service quality should be able to be accorded significant weighting if the facts warrant it.

Category 3B: Improved information in the marketplace

This benefit arose in *Life Underwriters* and *Electricity Corporation*. It was also raised in *Grape Growers* but rejected on the facts.[214] The focus of the applicant's submissions in *Life Underwriters* centred around an improvement in the ability of consumers to make informed decisions based on accurate information.[215] Whilst a revised code was authorised subject to conditions, the detriments in that case were not particularly significant.[216] In *Electricity Corporation* the Commission made it clear that it had given some weight to having better informed market participants,[217] but did not indicate how significant the benefit was, except to say that the sum of all the benefits were significant, even though they had not been quantified.[218]

Category 3C: Improvements in bargaining relationships

Greater equality of negotiating power has been raised as a benefit in four cases. The basic philosophy seems to be that if there is already a reasonable parity of bargaining power, there will be no public benefit from increasing the weaker party's

[211] A loss of allocative efficiency occurs when a firm raises the price above the competitive level and so restricts the quantity sold in the market (Commerce Clearing House (1998-2006) at 85,953).
[212] *NZ Dairy 2* at [14.02]; *Hoyts* at [7.2]-[7.3]; *Ansett* at [469]-[473]; *Ravensdown* at [336]-[344]; *NZRFU 1* at [336]-[339]; *Powerco* at [286]-[288]; *TeamTalk*; *Ruapehu* at [390]-[411], *NZRFU 2* at [93]-[95] & [619]-[627]. Interestingly, loss of quality has only been raised in the past fifteen years.
[213] *Hoyts* at [7.3] & [9.2]; *Ansett* at [473], [481] & [489]; *Ravensdown* at [344].
[214] *Grape Growers* at [36.2]. The sharing of knowledge between growers to enable price negotiations to take place in a more informed environment was rejected because the present extent of disadvantage was not substantial and the collectivity (sharing of knowledge) would not provide more than a marginal amount of public benefit.
[215] *Life Underwriters* at [69].
[216] Ibid at [75]-[76].
[217] *Electricity Corporation* at [152].
[218] Ibid at [150] & [158].

negotiating position.[219] It was for this reason that the benefit was rejected in *Kiwifruit*[220] and *Grape Growers*.[221]

Two types of benefits were claimed under this head in *Enerco*. The applicant, Enerco, suggested that stronger negotiating power would enable it to negotiate a lower price for gas. The Commission held that this was only a benefit to the extent that lower wholesale prices would be passed on to customers.[222] Enerco also suggested that it would be able to use its strengthened negotiating power to secure access to other retail gas markets and to compete in them and act as an industry watchdog. The Commission felt that at most, only a small public benefit could be attributed to this.[223]

In *NZRFU 2*, the Commission accepted that greater leverage for the NZRFU in its negotiations over international television rights, sponsorship and revenue sharing arrangements was a public benefit, but only to the extent that those revenue flows were derived from foreign sources.[224] Because the nexus between improved international performances and the introduction of the arrangements was weak, the resulting benefits were classified as relatively minor.[225]

In *Brierley*, the applicant claimed bargaining difficulties would arise under the counterfactual.[226] Whilst the Commission acknowledged the possibility could not be precluded, they felt that the likelihood was very low and so consequently gave little weight to it.[227]

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[219] *Kiwifruit* at [5.13]; *Grape Growers* at [35.2].
[220] *Kiwifruit* at [5.13].
[221] *Grape Growers* at [35.2].
[222] *Enerco* at [92]. Whether this represents the current law is unclear. Prior to the amendment of the Act in 2001, the High Court held that public benefits, even if not shown to have been passed directly on to consumers had an element of public benefit (*Fisher & Paykel (HC)* at 767; *NZ Dairy 2 (HC)* at 633-634). However, s1A of the Commerce Act 1986 (added by s4 of the Commerce Amendment Act 2001) arguably introduces a distributional bias in favour of consumers and so may change the position. For further discussion see, Commerce Clearing House (1998-2006) at 86,052-86,053; Rex Ahdar, "Consumers, Redistribution of Income and the Purpose of Competition Law" [2002] *European Competition Law Review* 341; Geoff Bertram, "What's Wrong with New Zealand's Public Benefit Test?" (2004) 38(2) *New Zealand Economic Papers* 265.
[223] *Enerco* at [93].
[224] *NZRFU 2* at [798]. Otherwise it would simply amount to a redistribution of income between different groups.
[225] Ibid.
[226] *Brierley* at [62].
[227] Ibid.

Conclusion on the weight attached to Category 3 benefits

The Commission and courts have shown a greater willingness to place weight on benefits within this category, than the previous two categories.[228] Difficulties of proving a causal nexus are much less prevalent. It seems that Category 3 benefits are of a different order than Category 1 and 2 benefits.

2.2.4 CATEGORY 4: IMPROVING NEW ZEALAND'S EXPORT PERFORMANCE

Category 4A: Tourism benefits

Tourism benefits have been raised, but not quantified in three decisions.[229] In each of these decisions, little weight was accorded to them, because of difficulty proving a causal nexus between the proposed activity and increased tourism.[230]

Category 4B: Enhanced export opportunities

These benefits have had a real influence in a number of decisions. In *Amcor* the main benefit arising from the proposal was to allow access to the Australian market.[231] The development and maintenance of a unified marketing effort, so as to facilitate the flow of fruit overseas was given significant weight in *Kiwifruit*, and appeared to be the key factor for the Commission in authorising the agreement.[232]

As for the other categories, in some decisions little or no weight has been given to these benefits because of difficulties proving a causal nexus between the proposed activity and the enhanced export opportunity.[233]

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[228] See, *Qantas (HC)* at [410] in particular, where the High Court gave considerable weight to online benefits. For examples of decisions where the Commission gave significant weight to detriments that would fall within this category, see *Hoyts* at [7.3] & [9.2]; *Ansett* at [473], [481] & [489]; *Ravensdown* at [344]. There are also a number of decisions where Category 3 benefits determined the outcome of the case, but because of the lack of detriment it cannot be ascertained whether they were actually of significant weight (*Transpower*; *SFE 1* at; *SFE 2*; *NZSE 1*; *NZSE 2*; *Life Underwriters*).
[229] *Ansett*; *NZRFU 1*; *NZRFU 2*.
[230] *Ansett* at [550]; *NZRFU 1* at [407]; *NZRFU 2* at [802].
[231] *Amcor* at [71]. The enhancement in export potential was given weight not so much because of the increase in export opportunities itself, but because of the likelihood that it would impact favourably on the New Zealand economy via improved employment, regional development and further prosperity (*Amcor* at [55] & [76]).
[232] *Kiwifruit* at [5.47], [5.49] & [5.52]. Most of the other claimed benefits were not accepted (*Kiwifruit* at [5.52]).
[233] *Goodman Fielder* [267]; *NZRFU 1* [403]; *NZRFU 2* [800]. Another reason for giving the benefit little weight in *Goodman Fielder* was that there was no realistic prospect that the benefit would be passed on to the New Zealand consumer (*Goodman Fielder* at [278]). The High Court later held that

Category 4C: Improvements in international competitiveness

This benefit may tend to be claimed when it is difficult to prove that there is an enhancement in export opportunities, making it more speculative in nature. If this is the case, it is likely that this sub-category of benefits will be given less weight than the former sub-category.

In *NZ Dairy 2* the Commission declined to take the claimed improvement in international competitiveness into account, on the grounds that it had already been accounted for under the payout enhancement benefit.[234] To consider it would therefore amount to double counting.[235] The High Court disagreed, holding that an improvement in international competitiveness was a substantial public benefit.[236] Although it could not be measured in monetary terms because that would risk double counting, it indicated that it should still be identified and given weight.[237] The High Court overturned the Commission's decision to decline authorisation, holding that the benefits substantially outweighed the detriments.[238] The increased weighting given to international competitiveness benefits was one reason for this change.[239] In the later case of *Kiwi*, the Commission accepted the view of the High Court that such benefits should be given weight.[240] Nevertheless, difficulty proving the causal nexus between the benefit and the acquisition suggests that the weight accorded to it was only limited.[241]

Whakatu and *Consortium* concerned agreements to close meatworks. Without such agreements to significantly reduce capacity, it was said that meat producers and processors would not be in a state to strengthen their position in international markets. This argument was particularly convincing to the Commission in both

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there is no requirement that benefits be passed on to consumers (*Fisher & Paykel (HC)* at 767; *NZ Dairy 2 (HC)* at 633-634). For a discussion of whether this remains the law, see above footnote 222.

[234] *NZ Dairy 2* at [15.07]. The Commission indicated that whilst the agreement would result in cost savings, it would not alter the gross export returns to the New Zealand economy. The net revenue payout to shareholders would increase, but that was separate from international competitiveness.

[235] Ibid at [15.08].

[236] *NZ Dairy 2 (HC)* at 635.

[237] Ibid at 636.

[238] Ibid.

[239] The other was an increased weighting given to payout enhancement (*NZ Dairy 2 (HC)* at 634). Note also, that ten days after the Commission's reasons were delivered, the Minister of Commerce conveyed a statement of economic policy under s26 of the Commerce Act, supporting rationalisation in the dairy processing industry (*NZ Dairy 2 (HC)* at 610-613). This is also likely to have impacted on the High Court's final decision.

[240] This appears to be the effect of *Kiwi* at [101]-[102].

[241] Ibid at [103]. There were several steps to achieving an increase in export revenues.

cases.[242] In *Consortium*, the public benefit attributed to the improvement in international competitiveness was of greater magnitude than that attributed to the productive efficiency gain.[243] However, in both cases the competitive detriments were limited, making it difficult to gauge the significance of the international competitiveness benefit.[244]

An improvement in international competitiveness was raised by the applicant in *Carter Holt*, but not discussed by the Commission.[245] Whilst improvements in international competitiveness were accepted in *Fletcher Challenge* and *Qantas (HC)*, there was no discussion of the weight to be attached to them.[246] This lack of discussion suggests that no, or very little, weight was accorded to the international competitiveness benefit in these decisions.

Lack of evidence of the extent of the international competitiveness benefit was the reason it was not accepted in *Forest Products*, *Amcor* and *Tasman*.[247] As discussed above, proving an enhancement in international competitiveness is probably more difficult than proving an enhancement in exports, because the former is more amorphous than the latter.

Conclusion on the weight attached to Category 4 benefits

The Commission has certainly shown itself willing to place real weight on benefits within this category. They have been identified as constituting the main benefit in four decisions,[248] and being substantial in another decision.[249] On occasions where little weight has been placed on them, reasons other than their degree of tangibility are to blame. In particular, the claims are often quite indirectly related to the proposed activities.[250] Where there is a large number of channels through which the activity's consequences must flow before the benefit arises, it is difficult to

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[242] *Whakatu* at [70]; *Consortium* at [260]-[263].
[243] *Consortium* at [262]. Note that the Commission may have been looking beyond just the international competitiveness improvements (see, *Consortium* at [258]-[262]).
[244] *Whakatu* at [69]; *Consortium* at [240].
[245] *Carter Holt* at [115].
[246] *Fletcher Challenge* at [157]; *Qantas (HC)* at [429].
[247] *Forest Products* at [76]; *Amcor* at [72]; *Tasman* at [65.2].
[248] *Amcor* at [71]; *Kiwifruit* at [5.47], [5.49] & [5.52]; *Whakatu* at [70]; *Consortium* at [260]-[263].
[249] *NZ Dairy 2 (HC)* at 635.
[250] The link was very far fetched in *NZRFU 1* and *NZRFU 2*, in particular. In those cases it was claimed that New Zealand's success on the rugby field would translate into more tourists coming to New Zealand (*NZRFU 1* at [404]-[407]; *NZRFU 2* at [134] & [800]-[802]).

demonstrate the causal nexus. Unlike the first two categories of benefits, this indirect nature is not characteristic of all benefits within this category. It is possible that the link between the benefit and the activity can be reasonably direct.[251] Hence it is not the degree of tangibility of these benefits that causes the problem of proving the causal nexus.

Interestingly, the Commission appears to place more weight on enhanced export opportunities than improvements in international competitiveness.[252] This is largely because of evidential issues. International competitiveness is a much more amorphous concept than export enhancement, and will often be claimed if it is not possible to prove the latter benefit.

2.2.5 CONCLUSION

An examination of the decisions reveals that the Commission and courts are reluctant to attach more than a negligible weighting to benefits within Categories 1 and 2. They show much greater willingness to place real weight on benefits in Categories 3 and 4. Because the former categories are less tangible than the latter, this prima facie suggests that intangible benefits have less influence on the authorisation decision.

However, as discussed above, there may be alternative explanations for this lower weighting given to intangibles; namely difficulties of proving a causal nexus between the activity seeking to be authorised and the benefit, and difficulties in proving the extent of the benefit. Interestingly, it is these very features that characterise benefits as intangibles. As discussed in Section 1.4, the Chief Economist of the Commerce Commission, Dr Michael Pickford, notes that intangibles usually share two common features; they are difficult to describe precisely and there is no obvious framework in which to assess their value.[253] The former makes it problematic to prove a causal nexus between the benefit and the activity seeking to

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[251] For example see, *Ruapehu* at [563]-[592] in relation to tourism benefits.
[252] This may make the framing of the benefit important; exactly the same benefit may be made to appear more tangible simply by the way the applicant expresses it in their submissions. However, at least theoretically, the Commission should be able to see through this. If there is no evidence of export enhancement there seems little use of an applicant claiming it.
[253] See, Pickford (1998) at 22.

be authorised,[254] and the latter makes it difficult to prove the extent of their value.[255] Because it is the intangibility that lies at the heart of the problem of proof, it is the intangibility that causes intangible benefits to be given less weight. Hence, it can be concluded that the reason the Commission accords a lower weighting to intangible benefits is because of their inherent difficulty of quantification.[256]

2.3 Contrasting the treatment of quantified intangibles and unquantified intangibles

The Commission and courts have stressed the desirability of quantifying benefits where possible.[257] This could mean that benefits that are not quantified are not given as much weight in the public benefit analysis. Dr Michael Pickford acknowledges this possibility, stating that "it is probably fair to say that, in the absence of quantification, the Commission will need some fairly convincing evidence that they will eventuate before much weight is given to them".[258] The High Court decision in *Qantas (HC)* refutes the idea that a benefit could be given less weight simply because it has not been quantified.[259] However, the High Court's position is not necessarily at odds with Pickford's; Pickford leaves open the possibility that unquantified intangible benefits may be accorded real weight, and the High Court says nothing to cast doubt upon the heavy burden of proof that the applicant bears in relation to intangible benefits.

A good illustration of the possibility that unquantified intangibles may not be treated as favourably as quantified intangibles, is provided by the *Powerco* decision. No more than a minimal weighting has ever been accorded to unquantified Category 2 intangible benefits.[260] However, in *Powerco*, the Commission took a more quantitative approach to the social detriments arising from redundancies. Although

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[254] If a benefit is difficult even to describe with any precision, proving a causal nexus will be problematic.
[255] If there is no obvious economic framework in which to assess the value of a benefit, it is difficult to provide convincing evidence of its extent.
[256] This is not to say that the Commission is acting incorrectly in according less weight to intangible benefits. The legality of the Commission's treatment of intangible benefits is discussed in Section 3.1.
[257] *Natural Gas 1* at [111]; *Newcall* at [246]; *Transpower* at [153]; *Ruapehu* at [239]; *Qantas* at [899]; *Qantas (HC)* at [319]. See also, Commerce Commission (1997) at 13, 19 & 20. This more quantitative approach is in response to the comments of the Court of Appeal in *Telecom (CA)* at 447.
[258] Pickford (1998) at 4.
[259] *Qantas (HC)* at [415].
[260] See Section 2.2.2 above.

the Commission was concerned with a detriment, rather than a benefit, the same methodology could be applied to social benefits. Whilst the Commission recognised that it was not possible to quantify these detriments with any accuracy, "merely for the purpose of demonstrating the impact they may have on the public benefit assessment", it came up with a ball-park figure of $500,000 for the detriments.[261] This figure was then weighed against the other quantified benefits and detriments.[262] It represented ten times the value of the other detriments and about 11 to 18 percent of the value of the benefits.[263] Hence, it was a factor that could potentially influence the final outcome. This more favourable treatment of quantified intangibles provides a strong incentive to applicants to attempt to quantify intangible benefits. The possibility of quantification is discussed in more detail in Chapter Four.

2.4 The treatment of intangibles over time

In the 1991 Review of the Commerce Act, the review team noted that because the authorisation test enables an analysis of all benefits and detriments which are of value to the community, it can accommodate changes in community values.[264] The objective of this section is to consider whether the treatment of intangibles has changed over time.

2.4.1 CATEGORY 1A: "FEEL-GOOD" BENEFITS

In both *Ansett* and *Qantas*, the preservation of Air New Zealand as New Zealand's national flag carrier was claimed as a public benefit. When *Ansett* was decided in 1996, the Commission seemed to place no weight upon it,[265] but in 2003 when the *Qantas* decision was delivered, the Commission stated that it had a "non-quantifiable symbolic value".[266] On appeal, the High Court in *Qantas* agreed that a

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[261] *Powerco* at [339]. To do this it assumed that on average the social cost was $10,000 per person made redundant. If, for example, forty people were made redundant, the total cost would be $400,000. This appeared to be rounded off to $500,000 (*Powerco* at [340]). See Section 4.4 for an evaluation of this "ball-park figure" approach to the quantification of benefits.
[262] Ibid at [340]. It was deducted from the benefits accruing from rationalisation.
[263] Depending which figure was accepted as representing the public benefits.
[264] Ministry of Commerce et al (1991) at 14.
[265] *Ansett* at [530]-[531] & [550].
[266] *Qantas* at [1376].

value should be attached to this benefit.[267] As discussed in Section 2.2.1, it is difficult to gauge with certainty what weight the Commission and High Court attached to it. It may well be that it was given very little weight. Nevertheless, in very similar circumstances, the Commission and High Court were prepared to give a benefit which had not accorded any value seven years earlier, at least some weight.

The precise cause of the Commission's change in approach is not clear. It may be the result of an increased emphasis on fostering New Zealanders' sense of identity. In fact, promoting New Zealanders' identity is one of the current Labour-Progressive Coalition Government's three goals.[268] Arguably, government policy often reflects what is of value to society, and to the extent that it does this, it should be incorporated into the public benefit test.[269]

2.4.2 CATEGORY 2A: ENVIRONMENTAL BENEFITS

As discussed in Section 2.2.2, in the three decisions that have discussed environmental benefits,[270] it does not seem that they have ever been assigned any real weight. However, as stated in Section 2.2.2, there may be alternative explanations for this low weighting.[271] Interestingly, in *Qantas* in 2003, it was the Commission, rather than the applicant, who raised the possibility of environmental benefits.[272] The Commission did not raise the benefit in similar circumstances in *Ansett*, which was decided in 1996. Nor has it raised them in any other case. Arguably the reduction in road usage and the more efficient use of synfuels which were accepted in *Fletcher Challenge* and *Petroleum Corporation*, would have

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[267] *Qantas (HC)* at [429].
[268] Dame Silvia Cartwright, *Speech from the Throne* (Speech delivered at the State Opening of Parliament, Wellington, 8 November 2005); Hon Dr Michael Cullen (2006) 631 NZPD 3207-3208 (Budget Statement).
[269] The Commission in *Kiwifruit* at 104,494 appeared to recognise this when it said that "[p]ublic benefit could and is likely to involve some other valid and proper government policy". Although s26 of the Commerce Act requires the Commission to have regard to the economic policies of the Government as communicated in writing to the Commission by the Minister when applying the public benefit test, this is not, nor should it be, the exclusive channel of communication on policy matters. Other ministerial statements or enactments are also sources of guidance (*Kiwifruit* at 104,495). However, the Commission will not speculate on policy; it will only rely upon authoritative government statements as to the future (*Kiwifruit* at 104,495). The High Court approved of these comments in *NZ Dairy 2* at 612.
[270] *Ravensdown* at [427]-[432]; *Omv* at [512]; *Qantas* at [1365]; *Qantas (HC)* at [411].
[271] In particular, difficulty proving a causal link between the proposed activity and the benefit, and difficulty proving the extent of the benefit. These difficulties may be reflective of the intangible nature of environmental benefits.
[272] *Qantas* at [1365].

positive effects on the environment.[273] As such, they are similar in character to the reduction in flight numbers in *Qantas*. However, it was only in their more recent decision in *Qantas* that the Commission raised the benefit.

The fact that the Commission was prepared to raise the possibility of environmental benefits in *Qantas* in circumstances where it had not done so before, may be an indication to future applicants that it is now willing to place real weight on environmental outcomes. This could be reflective of society's increased emphasis on environmental quality. Alternatively, it may simply be a signal that the Commission wants all public benefits brought to their attention. Dr Alan Bollard, a former Commission Chairman[274] seems to support the prior view. Writing in 1993 he predicted that there would be a growing emphasis on social impact analysis.[275]

2.4.3 CATEGORIES 4A AND 4B: ENHANCED EXPORT OPPORTUNITIES AND IMPROVEMENTS IN INTERNATIONAL COMPETITIVENESS

Although there does not appear to be any discernible trend in the treatment of this category of benefits, the current Labour-Progressive Coalition Government's objective of "economic transformation" may assist to predict a future trend.[276] To realise this policy the Government has an objective of growing globally competitive firms.[277] Hence, an enhancement of export opportunities or an improvement in international competitiveness would help achieve the Government's current economic policy. This implies that we should see an increase in the weight accorded to these benefits.[278] However, this assumes that the Government's economic policy has never previously focused upon growing globally competitive firms. This is dubious. In 1995 for example, the National Government had an objective of developing a more "open, internationally competitive enterprise economy".[279]

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[273] *Fletcher Challenge* at [163]; *Petroleum Corporation* at [180]-[181].
[274] From 1994 to 1998.
[275] Bollard (1993) at 7.
[276] Cartwright (2005); Cullen (2006) 631 NZPD 3197-3203 & 3207-3208.
[277] Cullen (2006) 631 NZPD at 3201-3202.
[278] For a discussion of how government policy can be relevant in an authorisation decision, see above footnote 269. The promotion of exports was one of the benefits that the Commission in *Kiwifruit*, gave as an example of a valid and proper government policy that could be taken into account in the application of the public benefit test (*Kiwifruit* at 104,494).
[279] Rt Hon Bill Birch, *Budget Policy Statement 1995* (1995) The Treasury <http://www.treasury.govt/pubs/bmb/policy.htm> accessed 22 September 2006.

2.4.4 CONCLUSION

Given the limited discussion of intangibles in the decisions, especially those of the most intangible nature,[280] it is difficult to positively state that intangibles have been accorded more weight in more recent decisions. However, the Commission and High Court decisions in *Qantas*, suggest that this could be the case. If it is, there is now an increased incentive for applicants to claim that intangible benefits will eventuate.

[280] Categories 1 and 2.

CHAPTER THREE

Legal and Policy Perspectives on the Treatment of Intangible Benefits

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This Chapter seeks to evaluate whether intangible benefits can be treated differently from tangible benefits under the law as it now stands, and whether they should be considered as a matter of policy.

3.1 The legality of treating intangible benefits differently

3.1.1 DISREGARDING INTANGIBLE BENEFITS

Although there is no specific direction in the Act that intangible benefits must be taken into account, three factors suggest that they should be. First, in not providing a definition of "public benefit", Parliament showed its preference for a broad public benefit test, incorporating all benefits, irrespective of their degree of tangibility. Had it wished to do so, it could easily have restricted public benefits to tangible benefits.[281]

Second, the words "public benefit" were taken from the Australian Trade Practices Act 1974, where they had long been given a wide meaning.[282] This shows an intention on the part of the New Zealand Parliament that public benefit be given a wide conception, so as to incorporate intangible considerations, as well as more tangible benefits.[283]

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[281] In *Kiwifruit*, the Commission noted that Parliament could easily have confined the Commission's deliberation to competition or efficiency considerations had it so intended (*Kiwifruit* at [5.2]).

[282] This point was noted in *Kiwifruit* at [5.2]. The High Court of Australia's decision in *Queensland Co-operative Milling Association* is authority for the proposition that the public benefit concept has a wide ambit (*Queensland Co-operative Milling Association* at 182).

[283] This intention is supported by the comments of Clive Matthewson, a Labour Member of Parliament who sat on the Commerce and Marketing Select Committee who considered the Commerce Bill. In the Commerce Bill's third reading in Parliament, he alluded to the fact that terms in the Act could be clarified by reference to Australian precedent (Clive Matthewson (1986) 470 NZPD 1266).

Finally, the legislature chose the broader goal of effective competition, rather than efficiency, as the objective of the Act.[284] If intangible benefits were to be disregarded, only efficiency factors would be considered as part of the public benefit analysis.[285] Parliament deliberately chose a broad objective for the Act, going beyond simply considering efficiency claims, and so there is a strong argument that "public benefit" should be given a commensurately wide interpretation. Excluding intangible benefits means that non-efficiency benefits would be given no consideration, which seems to be at odds with the chosen objective of the Act.

3.1.2 ACCORDING INTANGIBLE BENEFITS A LOWER WEIGHTING

As discussed in Chapter Two, intangible benefits seem to be accorded less weight than tangible benefits. Whilst there is no indication in the Act that intangible benefits must be given the same weighting as tangible benefits,[286] there is also no suggestion that less weight may be given to intangible benefits. There is no obvious explanation why benefits such as cost savings should be worth inherently more than environmental or health benefits. In the absence of either of the justifications set out below applying, there does not appear to be a legitimate reason for according intangible benefits less weight.

Issues of proof

As discussed in Section 2.2, the lower weighting attached to intangible benefits is often due to problems of proof, especially in relation to the causal nexus and the extent of the benefit.[287] Where this is the case, the Commission and courts are

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[284] Commerce Act 1986, ss1A & 3(1). For a discussion about the appropriate goal of competition law see, Douglas Greer, *Efficiency and Competition: Alternative, Complementary or Conflicting Objectives* (Research Monograph 47, New Zealand Institute of Economic Research, Wellington, 1989); Stephen Jennings and Susan Begg, *An Economic Review of Commerce Commission Decisions under the Commerce Act 1986* (Report prepared for the Treasury, Jarden & Co, Wellington, 1988) at 23-27.

[285] Category 1 benefits are non-efficiency gains and the other three categories are efficiency gains. Any non-efficiency gains falling outside Category 1 are likely to be intangible in nature. Hence, by excluding intangibles from the public benefit analysis, non-efficiency gains will not be considered. Obviously, some efficiency gains will also not be considered.

[286] Ceteris paribus of course.

[287] Note that it may be that the very intangibility of the benefit gives rise to the problem of proof.

entirely justified in placing less weight on intangible benefits because the applicant bears the burden of proving these matters.[288]

The scheme of the Act

The lesser weighting given to intangibles, may be partially justified by the scheme of the Act. Section 3A of the Act was inserted in 1990 and requires the Commission to have regard to any efficiencies that will, or will be likely to result, from the conduct seeking to be authorised. It is the only direct assistance that the Act gives in relation to the application of the public benefit test.[289] Although the Commission and courts appear to have assumed that section 3A places the focus on efficiency benefits,[290] it is not entirely clear that this is the effect or intention of the provision.[291]

Taken literally, section 3A is simply a reminder to the Commission and courts that they must consider efficiency benefits.[292] At the very most, it places a positive obligation upon the Commission to consider efficiencies.[293] The High Court in *Telecom (HC)* seemed to recognise this, noting that efficiencies were neither the only, nor the most important consideration.[294] In the 1992 Review of the Commerce Act the review team acknowledged that section 3A did not clearly establish efficiencies as the principal benefit.[295] It was for that reason that the majority of the review team recommended the amendment of section 3A to state that efficiencies were the principal consideration in the authorisation process.[296] However, this recommendation was never implemented. Arguably this means that,

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[288] For example see, *Whakatu* at [25].
[289] *Telecom (HC)* at 527.
[290] *Brierley* at [70]; *Midland Health* at [313]-[314]; *Ansett* at [490]; *Ravensdown* at [365]; *NZRFU 1* at [300] & [345]; *Powerco* at [303]; *TeamTalk* at [160]; *Ruapehu* at [235]; *Qantas* at [48], [898] & [1188]; *NZRFU 2* at [542], [549] & [708]. This position is also supported by the Chief Economist of the Commerce Commission, Dr Michael Pickford (Pickford (1998) at 3).
[291] Unfortunately, Hansard is of little assistance.
[292] In other words, it simply makes explicit what had always been implicit.
[293] Rex Ahdar, "The Authorisation Process and the "Public Benefit" Test" in Rex Ahdar (ed), *Competition Law and Policy in New Zealand* (The Law Book Company, Sydney, 1991) 217 at 242. Mr Philip Burdon, the National Member of Parliament for Fendalton, recognised this positive obligation in the Bill's first reading, noting that it, "specifically requires efficiencies to be used as one of the criteria to be taken into consideration when testing the merits of a proposed merger and/or takeover" (Philip Burdon (1990) 508 NZPD 2222 (Report of the Commerce and Marketing Committee)). Aside from this comment, Hansard is of no assistance.
[294] *Telecom (HC)* at 530. Although in the case of a merger, the Court noted that efficiency considerations, positive and negative, would be the prime consideration.
[295] Ministry of Commerce et al (1992) at [2.13].
[296] Ibid at [2.12], [2.14], [2.24] & [2.52].

ceteris paribus, efficiency benefits should be given no greater weight than non-efficiency benefits.[297]

Even if section 3A could be said to justify greater weight being placed on efficiency benefits, this only provides a justification for lesser weight being placed upon intangible benefits within Category 1. The other categories all represent efficiency gains.[298] Hence this justification can only provide a partial explanation, if any explanation, for the lower weighting accorded to intangible benefits.

3.2 Disregarding intangible benefits as a matter of policy

A potential advantage of restricting the notion of "public benefit" to tangible benefits is that it limits the ambit of the investigation, reducing the time and cost involved in making a decision.[299] Because intangible benefits do not appear to have affected the outcome of cases to date, disregarding them will only make a difference in extremely rare cases (if ever). However, this argument ignores the definitional issue that such a change will create.[300] Currently it is not necessary for applicants to characterise benefits as tangible or intangible; they can simply list all the benefits that they claim will arise as a result of the activity that is sought to be authorised.[301] If public benefits were to be restricted to tangible benefits, the definitional issue discussed in Chapter One would arise. Arguments would be made about whether a particular benefit was a tangible or intangible benefit. This would increase the cost and time involved in the decision making process, and at least partially, if not wholly, offset the time and cost savings that would arise from not

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[297] However, it should be noted that the efficiency benefits arising from a proposed activity will usually be accorded the greatest weight because they tend to be of the greatest magnitude.

[298] In respect of Category 2 benefits see, Commerce Commission (1997) at 12 & 16. It is stated that "other factors, such as environmental and social factors ("intangible" factors), can at least conceptually be included within an efficiency perspective" (Commerce Commission (1997) at 16).

[299] The 1988 Review of the Commerce Act recommended a restriction upon the concept of public benefit to economic benefits (Department of Trade and Industry, *A Discussion Paper: Review of the Commerce Act 1986* (Department of Trade and Industry, Wellington, 1988) at 59 & 64). It was hoped that such a restriction would reduce the ambit of the investigation and speed up the whole authorisation process.

[300] This definitional problem was noted by Dr Alan Bollard, in considering whether the public benefit test should be restricted to economic benefits and detriments. He noted that such a restriction would make it difficult to judge whether certain issues like unemployment would qualify as "economic" or not (Alan Bollard, *An Economic Comment on the Commerce Act Review* (New Zealand Institute of Economic Research, Wellington, 1989) at 20).

[301] Obviously, the applicant must also provide evidence to support the claimed benefits.

having to evaluate the weighting to be given to intangible benefits.[302] Furthermore, inconsistencies could arise between cases. A particular benefit may be treated as a tangible benefit in one case and so be considered as part of the public benefit test, but be treated as an intangible benefit in another case and so not be considered. This would increase uncertainty in the authorisation area.

Moreover, there does not appear to be any sensible policy reason for excluding intangible benefits from the public benefit test. Environmental and health benefits are valuable, particularly in today's society. The current Government's objective of promoting New Zealand's identity suggests that even the most intangible benefits, those falling within Category 1, have at least some value in today's society.[303]

[302] The increased costs may even more than offset these time and cost savings.
[303] Cartwright (2005); Cullen (2006) 631 NZPD at 3206-3208.

CHAPTER FOUR
Quantification of Intangible Benefits

As concluded in Section 2.3, because quantified intangibles may be given more weight than their unquantified counterparts, there is an incentive for applicants to attempt to quantify intangible benefits. This Chapter seeks to examine the desirability and feasibility of quantifying intangible benefits.

4.1 The desirability of quantifying intangible benefits

In the only authorisation decision ever to reach the Court of Appeal, Richardson J stressed the desirability of quantifying benefits and detriments, where and to the extent that it is feasible.[304] He noted the "responsibility on a regulatory body to attempt so far as possible to quantify detriments and benefits rather than rely on a purely intuitive judgment".[305] In its last eight decisions, the Commission has remarked that it is mindful of this responsibility.[306] This section seeks to evaluate the desirability of such a "responsibility", with reference to intangible benefits.

4.1.1 THE ADVANTAGES OF QUANTIFYING INTANGIBLE BENEFITS

The quantification of benefits and detriments is a process designed to inform the Commission of the possible magnitudes of the various elements, and thereby assist it in the application of its judgment.[307] Because all the benefits and detriments are in a common unit of measurement, it is much easier to apply the public benefit test; the quantified benefits simply need to be weighed against the quantified detriments to give an estimate of the net benefit or detriment arising from the activity that is sought to be authorised. Quantification provides a more objective framework within

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[304] *Telecom (CA)* at 447.
[305] Ibid. The High Court in their recent decision in *Qantas* also noted this responsibility (*Qantas (HC)* at [235]).
[306] *Newcall* at [246]; *Transpower* at [153]; *TeamTalk* at [161]; *Ruapehu* at [237]; *Electricity Governance* at [464]; *Qantas* at [899]; *NZRFU 2* at [544] & [807]. For other statements about the desirability of quantification see, *Natural Gas 1* at [111]; *NZRFU 1* at [305]; *Powerco* at [250]; *Ruapehu* at [239]; *NZRFU 2* at [72]. See also, Commerce Commission (1997) at 13 & 19-20.
[307] *Electricity Governance* at [396]; *Qantas* at [79] & [1389]; *NZRFU 2* at [807] & [812]. See also, Commerce Commission (1997) at 19.

which to establish the weights to be given to the various benefits and detriments claimed,[308] and so results in a more transparent decision making process.[309]

The Commission in *NZRFU 2* suggested that the problem with relying solely on qualitative arguments is that reasonable arguments can be put forward by different parties that come to different conclusions about the desirability of a course of action.[310] However, the same can be said of quantitative arguments; different groups will arrive at different valuations for intangible benefits, owing to the different assumptions that they make. For example, in *Qantas* the applicants submitted that travellers would receive a 100 percent convenience gain from improved aircraft schedules, resulting in a benefit of $2 million annually from year three onwards.[311] The Commission was sceptical of the 100 percent gain, questioning whether people completely waste their time and suggesting that they find other less optimal ways to use it.[312] In the end, the Commission held that travellers would only achieve a 20 percent convenience gain, and so the benefit would amount to $476,000.[313] This only represents 23.8 percent of the value claimed by Qantas and Air New Zealand.

4.1.2 THE PROBLEMS ASSOCIATED WITH QUANTIFYING INTANGIBLE BENEFITS

There are two basic issues associated with the quantification of intangible benefits which may make their quantification impractical: reliability and cost.

Reliability issues

The very nature of intangible benefits means that they are inherently difficult to quantify. Hence, when they are quantified a number of simplifying and often unrealistic assumptions must be made, making the reliability of the calculations

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[308] *Electricity Governance* at [395].
[309] Provided the assumptions relied upon and the process of quantification are set out in detail. It has been suggested that authorisation decisions gain a greater legitimacy through the discipline and transparency of quantitative assessment (Allan Fels and Tim Grimwade, "Authorisation: Is it Still Relevant to Australian Competition Law?" (2003) 11 *Competition and Consumer Law Journal* 187 at 210).
[310] *NZRFU 2* at [685].
[311] *Qantas* at [70], [1330] & [1333]. Note that the benefit was said to be higher in the first and second years; $13 million in the first year and $4 million in the second year.
[312] Ibid at [1333].
[313] Ibid at [70] & [1337]. For other examples see, *NZRFU 1* at [384]-[387]; *Electricity Governance* at [419]-[422]; *Qantas* at [59]-[60] & [1281]-[1282]; *NZRFU 2* [121]-[124] & [714]-[759].

doubtful. If it is not possible to quantify benefits with any degree of accuracy, their inclusion in the quantitative analysis may be more misleading than helpful.[314] It may detract from the quality of the decision, and result in some practices being authorised when they should not be and some not being authorised when they should be.

The number of assumptions that need to be made in quantifying intangible benefits gives Commissioners greater scope to endorse or reject techniques depending on their economic inclination. Where this occurs a biased outcome is produced, which may not accurately reflect the value of the benefit. It also reduces the degree of consistency between cases. It is important to note that this same bias could exist in the weight given to unquantified intangible benefits. However, the bias will be more evident in the case of quantified intangibles because the decision making process is more transparent. This transparency may actually serve to reduce the bias, and so quantification may actually reduce the scope for Commissioners to impose their own biases upon decisions.

There are a number of ways to minimise this reliability concern. Wider ranges of values for benefits can be used to reduce the potential margin for error.[315] The weight given to the benefit can be reduced to ensure that it does not improperly cause the activity to be authorised.[316] Finally, the inclusion of a qualitative evaluation of the benefit can either confirm or refute the quantitative assessment.

Cost issues

The legal and economic fees incurred by parties seeking authorisation are considerable.[317] If intangible benefits were to be quantified on a regular basis, the

[314] The Treasury, *Cost Benefit Analysis Primer* (The Treasury, Wellington, 2005) at 24.
[315] *Ruapehu* at [611]. Sensitivity analysis of the benefit to key variables can be particularly helpful. Sensitivity analysis is a method of assessing the robustness of results to changes in the parameters (see, David Anderson, Dennis Sweeney and Thomas Williams, *Quantitative Methods for Business* (10th ed, Thomson South-Western, Belmont, 2006) at 291). Giving a benefit a wider range of values may just postpone the inevitable, because at some stage it will need to be weighed alongside the other benefits against the detriments, and so a more definitive value will need to be placed upon it.
[316] *Qantas (HC)* at [416]. Note that this may actually reduce the accuracy of the authorisation decision and create a bias against authorisation.
[317] For example, Jennings and Begg have estimated that the legal and economic costs incurred by the applicants in *Goodman Fielder* were $1 million (Jennings and Begg (1988) at 68). Given that this case was decided 19 years ago, the costs are likely to be significantly higher today. Professor Tim Hazledine of the Economics Department at the University of Auckland, suggests that the airlines in *Qantas* probably spent around $50 million in legal and consultancy fees (Tim Hazledine,

expense would increase even further, because the methodologies used to quantify intangible benefits tend to be resource intensive.

The Commission relies heavily upon applicants to provide evidence of the extent of the public benefits. Applicants have no incentive to quantify benefits if the cost of quantification is greater than the benefit arising from the increased likelihood that the activity will be authorised.

Furthermore, there is no point in the Commission insisting upon quantification if the cost of quantification would outweigh the benefit to society from the improvement in decision making. That this might occur was recognised by the Commission in *Newcall*. In relation to the quantification of benefits, Professor Ergas on behalf of Telecom wondered whether the cost of their quantification would be such that they would "greatly swamp any benefits that it might provide you with in terms of improved decision-making".[318] The Commission acknowledged that in that instance it would have been very difficult and costly to undertake quantification with any precision.[319]

4.1.3 CONCLUSION

Whilst the quantification of intangible benefits is of significant assistance to the Commission if it is accurate, the nature of intangible benefits may mean that quantification is too unreliable and costly to render it feasible. Where this is the case, qualitative assessment has an important role to play. The next three sections present three alternative methods of quantifying intangible benefits.

4.2 Quantification with an economic model

It may be possible to utilise an existing economic model or to develop a new one, to quantify the magnitude of a benefit.[320] Such models can be partial equilibrium or general equilibrium. Partial equilibrium models analyse the changes in welfare by

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"Application of the Pubic Benefit Test to the Air New Zealand/Qantas Case" (2004) 38(2) *New Zealand Economics Paper* 279 at 280).

[318] *Newcall* at [248].

[319] Ibid at [250].

[320] For example see, *NZRFU 1* at [382]-[389]; *NZRFU 2* at [121]-[127] & [714]-[759]; *Electricity Governance* at [419]-[422]; *Ruapehu* at [563]-[592]; *Qantas* at [54]-[65] & [1222]-[1314]; *Qantas (HC)* at [338]-[378].

focusing upon a particular market, whereas general equilibrium models take a much broader approach, looking at the effects on the entire economy.[321]

4.2.1 PARTIAL EQUILIBRIUM ANALYSIS

Partial equilibrium analysis can be used where the intangible benefit arises in a market context.[322] Theoretically, where a market exists, the elasticities[323] of the demand and supply curves can be estimated. The elasticity of the relevant curve can be used in conjunction with the change in price or quantity to give an estimate of the value of the benefit to society, as measured by the change in consumer or producer surplus.[324]

Critique of the approach

Partial equilibrium analysis requires an estimate of the elasticity of demand or supply to be made.[325] This is often not an easy task.[326] However, the elasticity of demand for the particular good or service is almost always estimated to quantify the allocative efficiency detriment.[327] Hence, in the case of quality improvements[328] the elasticity will have already been estimated. For other benefits, such as increased tourism and exports, existing studies may be available to minimise the cost and time involved in calculating the elasticity value.[329]

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[321] Caroline Dinwiddy and Francis Teal, *The Two-Sector General Equilibrium Model: A New Approach* (Philip Alan Publishers, New York, 1988) at 3 & 7-9; Paul Krugman and Maurice Obstfeld, *International Economics: Theory and Policy* (7th ed, Pearson Addison Wesley, Boston, 2006) at 29. Partial equilibrium analysis utilises a conventional supply and demand model, whereas general equilibrium analysis uses a much more complex model, consisting of a system of equations capturing the behaviour of firms, households and the government and how these sectors interact. For further information see, Dinwiddy and Teal (1988).

[322] Benefits within Categories 3 and 4 arise in markets. To the extent that Category 2 benefits are externalities they can also be analysed in a market context (Frank and Bernanke (2007) at 347-370; Varian (2006) at 626-647).

[323] Elasticity is a measure of the responsiveness of quantity demanded or supplied to changes in price. It is equal to the percentage change in quantity demanded or supplied from a one percentage change in price (Ibid at 98-99 & 111-112).

[324] For example see, *NZRFU 1* at [382]-[387]; *NZRFU 2* at [121]-[127] & [714]-[759]. For an explanation of what consumer and producer surplus are, see above footnotes 207 and 208.

[325] The elasticity of demand is required if the change in consumer surplus is being calculated. The elasticity of supply is required if the change in producer surplus is being calculated.

[326] Which is complicated further by the fact that elasticities usually vary along the curve (Frank and Bernanke (2007) at 104-106 & 112-114).

[327] At least since the decision of the Court of Appeal in *Telecom (CA)*.

[328] Category 3A.

[329] See, Murray-North, *The Economic Determinants of Domestic Travel in New Zealand* (New Zealand Tourism and Publicity Department, Wellington, 1989). Appendix Six calculates the elasticity of demand for tourism. Note that in the case of case of tourism and export benefits, the relevant market will be different to the market that is the focus of the case.

The usefulness of partial equilibrium analysis may be reduced by the use of inaccurate elasticity values. Elasticity values are calculated by observing the values of price and quantity in a marketplace on more than one occasion.[330] If the relevant curve, or the other intersecting curve, has shifted during the period of observation or since the elasticity value was calculated, then the elasticity value may be inaccurate. Using the wrong elasticity value will give an incorrect valuation of the public benefit.

4.2.2 GENERAL EQUILIBRIUM ANALYSIS

General equilibrium analysis can be utilised where the relationship between the activity that is sought to be authorised and the benefit is known. In *Qantas*, the applicants used a computable general equilibrium (CGE) model[331] to estimate the benefits to New Zealand from an increase in tourism.[332] Having arrived at an estimate for the increase in tourist numbers, the applicants estimated how much these additional tourists would spend in New Zealand and used CGE modelling to estimate the effect of that spending on the rest of the economy.[333]

Critique of the approach

In *Qantas*, the Commission indicated that it preferred partial equilibrium analysis to general equilibrium analysis.[334] Because the assessment of competitive detriments is restricted to the immediate market,[335] partial equilibrium analysis must be used to evaluate their magnitude.[336] If general equilibrium analysis is then used to evaluate some or all of the benefits, the estimation methods do not produce comparable values.[337]

To date, no individual or organisation has developed a general equilibrium model of the New Zealand economy.[338] Given the very high fixed costs associated with

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[330] Frank and Bernanke (2007) at 98-99.
[331] A CGE model is a general equilibrium model which is solved via computer simulation. Such models are also known as applied general equilibrium (AGE) models.
[332] *Qantas* at [61] & [1222].
[333] Ibid at [1235].
[334] Ibid at [1384]. The High Court agreed (*Qantas (HC)* at [367]).
[335] For example see, *Goodman Fielder* at [259]; *Amcor* at [52](ii).
[336] *Qantas* at [1384].
[337] Ibid. This point was endorsed by the High Court in *Qantas (HC)* at [367].
[338] However, the New Zealand Institute of Economic Research ("NZIER") is trying to get funding to develop one (Interview with Dr Niven Winchester (21 September 2006)).

setting up such a model,[339] developing a general equilibrium model of the New Zealand economy for a competition law case will almost certainly never be viable. Even if such a model was developed by an organisation such as the New Zealand Institute of Economic Research (NZIER), reliability is a concern. General equilibrium modelling relies upon a vast number of assumptions, most of which cannot be determined with any accuracy. In *Qantas*, Ralph Lattimore[340] suggested that a

> problem that's particularly acute for general equilibrium models of the New Zealand economy is that, of the hundreds and thousands of parameters in the model, 99% of them are guesstimates. They have never been estimated in a New Zealand market environment.[341]

Hence, even a model specifically designed to replicate the features of the New Zealand economy could be "inapt in many subtle ways, with unknowable consequences for the validity of the results".[342]

There are some global equilibrium models which are designed to be utilised across a number of countries.[343] Even utilising such an existing model[344] is a major undertaking, entailing significant costs. Less than 10 economists in New Zealand would be able to apply a CGE model to estimate the value of a particular benefit.[345] Furthermore, reliability concerns are even more pronounced for this class of models, because they are not specifically designed to replicate the features of the New Zealand economy. For example, in *Qantas* the three different models considered all produced vastly different results, with one of the models producing a value double that of another model.[346]

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[339] Data is needed on all markets in the economy simultaneously.
[340] A senior fellow at NZIER who were employed in support of Gulliver Pacific Group's submission.
[341] *Qantas* at [1298].
[342] Ibid at [1299]. This makes sensitivity analysis of particular importance. For an explanation of what sensitivity analysis is, see above footnote 315.
[343] For example, the MONASH model (which was used in *Qantas*) and the GTAP model. For further details about the MONASH model see, Peter Dixon and Maureen Rimmer, *Dynamic, General Equilibrium Modelling for Forecasting and Policy: A Practical Guide and Documentation of MONASH* (North-Holland, Amsterdam, 2002). For further details about the GTAP model, see Thomas Hertel (ed), *Global Trade Analysis: Modeling and Applications* (Cambridge University Press, New York, 1997).
[344] As was the case in *Qantas*.
[345] Interview with Dr Niven Winchester (21 September 2006).
[346] *Qantas* at [1236]. The models produced values of $66 million, $73 million and $133 million. This complexity led the Commission to adopt a cautious approach when considering their results (*Qantas* at [1298]).

4.3 The “willingness to pay” approach

Because all public benefits must accrue to someone, in principle a valuation can be obtained by ascertaining how much the beneficiaries would be willing to pay for the benefit.[347] There are two ways to arrive at willingness to pay values. A contingent valuation asks beneficiaries the maximum amount that they would be prepared to pay to receive the benefit.[348] An observational valuation observes the behaviour of individuals in markets where the benefit has an influence.[349]

4.3.1 CRITIQUE OF THE APPROACH

In theory, willingness to pay provides an economic framework in which to value intangible benefits. However, in practice it is very difficult to calculate willingness to pay values. It is often difficult to obtain accurate answers from respondents of the maximum amount that they would be prepared to pay for the benefit, because they have difficulty conceptualising and isolating the benefit,[350] or they figure that they can free ride on the payments of others.[351] It is also difficult to arrive at willingness to pay values via market based studies, because there are usually a number of influences on the price of the product or service, aside from the benefit being examined. These influences must be isolated before a value for the benefit can be calculated.[352] The willingness to pay technique and the problems associated with it are discussed further below, in the context of valuing public safety benefits.

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[347] A willingness to accept approach could also be utilised to evaluate public benefits. This approach focuses upon how much individuals would need to be paid to compensate them for giving up a certain benefit (Jagadish Guria et al, *The New Zealand Values of Statistical Life and of the Prevention of Injuries* (Draft Report, 2003) at 5). The two methods often derive different results. For an explanation of why, see Guria et al (2003) at 7.

[348] Gisela Kobelt, *Health Economics: An Introduction to Economic Evaluation* (Office of Health Economics, London, 1996) at 27; The Treasury (2005) at 22. This method uses “stated preferences”.

[349] “The Price of Life” (4 December 1993) *The Economist* 76 at 76; The Treasury (2005) at 22. This uses method “revealed preferences”. For example, in the context of mortality and morbidity valuation, wages could be studied. In theory, workers in dangerous jobs should be paid a premium to compensate them for the greater chance of death and injury.

[350] Mark Goodchild, Kel Sanderson and Ganesh Nana, *Measuring the Total Cost of Injury in New Zealand: A Review of Alternative Cost Methodologies* (Report prepared for the Department of Labour, Business and Economic Research, Wellington, 2002) at 24. This is particularly so for the most intangible benefits, Category 1 benefits.

[351] And thereby get the benefit for free. This is especially so for Category 1 and 2 benefits.

[352] “The Price of Life” (4 December 1993) at 76.

4.3.2 AN APPLIED EXAMPLE: VALUING PUBLIC SAFETY BENEFITS

Public safety is a benefit which has been claimed in four decisions,[353] but as yet, no attempt has been made to quantify it. Whilst it is uncontroversial that an increase in public safety is a benefit, it is not so easy to quantify it.[354] The purpose of this subsection is to use public safety as a case study of whether some of the more intangible benefits can be quantified.[355]

From a purely theoretical perspective, the valuation of public safety seems quite straightforward. The increase in safety, measured in terms of the numbers of deaths and injuries[356] prevented, simply needs to be multiplied by the monetary value of preventing these fatalities and casualties, to give the benefit attributable to public safety. However, in practice the calculation of the values of these two inputs is problematic. Techniques for calculating these values are discussed below.

Techniques for the calculation of the impact of improved safety on the number of casualties and fatalities

A number of studies consider an initiative to improve public safety and convert it into the number of fatalities or injuries avoided.[357] Where a relevant study is available, it can be used to calculate the health outcomes from the activity that is sought to be authorised, in terms of fatalities and injuries avoided.

Where individuals are not injured or killed, but their quality of life is adversely affected, this can be converted into a measure of life years lost using cost utility

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[353] *Fletcher Challenge* at [163] & [169]; *Natural Gas Waikato* [32]; *Speedway* at [118]-[119]; *Qantas* in [1365]. Note that it was the Commission, rather than the applicant that identified the benefit in *Qantas*.

[354] Land Transport New Zealand, *Putting a Price on Life* (1999) Land Transport New Zealand <http://www.landtransport.govt.nz/publications/rsnz/1999/mar-04.html> accessed 30 August 2006. Just like any other good or service, public safety competes for peoples' resources.

[355] To date, no attempt has been made to quantify Category 1 and 2 benefits. A Category 2 intangible detriment was valued in *Powerco* using the "ball-park figure" technique. However, as discussed in Section 4.4 below, this technique has its limitations.

[356] Injuries could be broken into categories, based on their degree of seriousness.

[357] For example see, Ministry for the Environment, *Proposed National Environmental Standards for Air Quality Resource Management Act Section 32: Analysis of Costs and Benefits* (2004) Ministry for the Environment <http://www.mfe.govt.nz/publications/air/nes-air-standards-analysis/html> (the effect of environmental standards on premature mortality, hospitalisations and restricted activity days); Des O'Dea, *An Economic Evaluation of the Quitline Nicotine Replacement Therapy (NRT) Service* (Ministry of Health, Wellington, 2004) at 33-45 (the effect of a stop smoking initiative on health outcomes); Vince Dravitzki, Tiffany Lester and Sam Wilkie, *The Safety Benefits of Brighter Road Markings* (Land Transport New Zealand, Wellington, 2005) (analysing the effectiveness of making road markings brighter).

analysis.[358] This technique uses surveys to attempt to capture individuals' utility in different health states.[359] These utilities give a measure of the quality of life enjoyed in each of these states, relative to some benchmark health status, such as perfect health.[360] The increase in individuals' quality of life in the factual can be multiplied by the average life expectancy to give a valuation in terms of life years gained.[361] The measure of life years gained can then be converted into dollars, using the same techniques used to value the benefit of preventing fatalities and casualties.

Techniques for the valuation of the benefit of preventing fatalities and casualties

There are a number of techniques, including the willingness to pay approach, that can be used to calculate the value to society of preventing fatalities and casualties.

The human capital approach

The human capital approach values the benefit from avoiding a death or injury as the production that would be lost if that death or injury was to occur.[362] Because this approach does not capture an individual's aversion to injury, or the pain, grief and suffering of those close to the casualties, it only partially captures the social cost of death or injury.[363] Another problem with the approach is that it means that the lives of children, the elderly, women and minorities are worth less.[364] This seems callous and inappropriate.

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[358] This is particularly useful in the case of health effects arising from pollution.
[359] A number of different survey techniques are available. For further information, see Kobelt (1996) at 22-23. Both physical and mental health conditions can be included in the analysis.
[360] For example, breaking an arm might give an individual 90 percent of the utility that they enjoy in "perfect health".
[361] Obviously, if quality of life is only increased for a portion of individuals' lives, then this portion is the appropriate value to multiply the increase in life quality by.
[362] Ted Millar and Jagadish Guria, *The Value of Statistical Life in New Zealand: Market Research on Road Safety* (Land Transport, Wellington, 1991) at 1; "The Price of Life" (4 December 1993) at 76. For those whose output is not produced in a market, for example housewives, an estimate has to be made of its value ("The Price of Life" (4 December 1993) at 76). Note that some commentators restrict the human capital conception to income earned in markets (for example see, Jane Barnett, Peter Clough and Vhari McWha, *The Full Social Cost of Road Accidents* (Paper presented to the Road Safety Research, Policing and Education Conference, Canberra, New Zealand Institute of Economic Research, November, 1999) at 5). This would mean that production such as unpaid housework would not be included.
[363] Barnett, Clough and McWha (1999) at 5. As such, it has been described as "embarrassingly conservative" (Millar and Guria (1991) at 1).
[364] Millar and Guria (1991) at 2; Goodchild, Sanderson and Nana (2002) at 13. The lives of children are worth less because their production begins further into the future and so is substantially discounted. The lives of the elderly are worth less because their labour market production has

The insurance approach

The benefit of avoiding a death or injury could be measured as the value of the insurance that would be payable if the death or injury was to occur.[365] However, just like the human capital approach, there is nothing to suggest that insurance payments reflect the true costs of the death or injury. Moreover, individuals who have no insurance would unrealistically be assumed to have a zero value of life or avoidance of injury.

The implicit valuation approach

The value of public safety can be inferred from past decisions which impact upon health and safety.[366] For example, the costs and effects of past political decisions, such as fencing swimming pools and placing health warnings on cigarette packets could be examined.[367] The cost can be taken as a benchmark for the value of the deaths and injuries prevented. The problem with this approach is that valuations vary widely,[368] and there is nothing to suggest that those past decisions were correct.[369]

The willingness to pay approach

The basic tenets of this approach are set out above. In terms of public safety, a willingness to pay approach entails determining individuals' willingness to pay for incremental changes in the risk of accidental death and injury, and aggregating them to find society's willingness to pay for improvements in safety.[370] A contingent valuation asks a representative sample of individuals what they would be prepared

ended. The lives of women and minorities are worth less because on average their wages tend to be lower. Note that in reality, an average value may be taken as representing the value of all lives, irrespective of age, gender or ethnicity. Nevertheless, the lives of these demographic groups would be implicitly worth less.

[365] In New Zealand this insurance would include private insurance and accident compensation payments.

[366] Barnett, Clough and McWha (1999) at 5.

[367] Ibid.

[368] Ibid.

[369] By following these decisions, any mistakes made in the past will be perpetuated.

[370] Barnett, Clough and McWha (1999) at 5. Asking an individual what they would pay to avoid certain death would be unworkable because usually they would be prepared to pay far in excess of their total wealth (people would be prepared to borrow, ask for charity from others and possibly even steal to stay alive).

to pay for certain increases in public safety.[371] An observational valuation looks at things that are expected to reveal preferences for safety; for example the rate at which individuals change their tyres, or wage differentials for those in risky jobs.[372] However, for much of this behaviour there are no reliable data, or the data that are available do not reflect individual preferences because government regulations distort individuals' choices.[373] Therefore, in practice willingness to pay for public safety is most easily measured through surveys of stated preferences.

An example of a willingness to pay approach to the evaluation of public safety: valuing the prevention of fatalities and casualties on New Zealand roads

Land Transport New Zealand ("LTNZ") appears to be the only New Zealand agency which has attempted to put a value on saving a life.[374] A fatality is currently valued at $3,046,700,[375] a serious injury at $304,700, and a minor injury at $12,200.[376] This is based on a survey of New Zealand residents undertaken in 1989 and 1990 by Ted Millar and Jagadish Guria on behalf of what was then the Land Transport Safety Authority ("LTSA").[377]

Millar and Guria used a contingent valuation methodology to calculate monetary estimates for individuals' willingness to pay to avoid fatalities and casualties.[378] People were asked to state how much they would pay for different goods and services which would reduce their risk of death and injury on the roads.[379] The value of statistical life was then calculated by dividing the average willingness to pay by the reduction in risk.[380] The loss of quality of life due to serious and minor injuries is set at 10 percent and 0.4 percent respectively, of the value of statistical

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[371] Ibid at 5-6.
[372] Ibid at 6; Goodchild, Sanderson and Nana (2002) at 25.
[373] Barnett, Clough and McWha (1999) at 6.
[374] It uses the valuation to assist in analysing whether particular transport projects should be undertaken.
[375] This is commonly referred to in the literature as the value of statistical life (VoSL).
[376] Ministry of Transport, *The Social Costs of Road Crashes and Injuries: June 2006 Update* (Ministry of Transport, Wellington, 2006) at 7. These values do not include the medical and legal costs of the fatality or casualty.
[377] Millar and Guria (1991). In 1998-1999 another survey was conducted (Guria et al (2003)). It was more comprehensive than its predecessor (Guria et al (2003) at 3 & 10). The statistical value of life based on willingness to pay figures was found to be $3-$5 million (Guria et al (2003) at 8 & 34). This has not yet been adopted by the Ministry of Transport in their evaluation of road safety projects.
[378] Millar and Guria (1991) at 4-5.
[379] Ibid at 9. For example, one of the questions asked people how much toll they would pay to take a one way trip of 20km on a road that reduced their risk of dying in an accident from 6 in 10,000 to 3 in 10,000 (Appendix Two at 4).
[380] Goodchild, Sanderson and Nana (2002) at 24. For example, if an individual is willing to spend $20 to reduce their risk of dying by 1/100,000, their statistical value of life is $2 million.

life.[381] These valuations of death and injury are updated regularly to reflect changes in individual earnings, on the assumption that willingness to pay will vary with ability to pay.[382]

The richer an economy is, the more its citizens can be expected to be prepared to pay for life and injury saving measures.[383] Values of statistical life for a number of countries, as published in a 1993 *Economist* article,[384] suggest that the New Zealand value is very much in line with estimates for countries of similar income per capita.[385]

Putting it all together: evaluating public safety benefits

In the road safety context

Fletcher Challenge dealt with a claim of increased road safety from a reduction in road usage.[386] Although the applicant quantified the benefits from reduced road usage, this figure may have pertained to the reduced road maintenance costs. If such a case was to come before the Commission now, the LTSA's estimates for the value of statistical life and avoidance of injury could be multiplied by the number of fatalities and casualties avoided, to determine the safety benefit. There are studies available that would assist in estimating the number of casualties and fatalities avoided as a consequence of a reduction in road usage.[387]

In other contexts

The LTSA's figures could also be used as an approximation of the benefit arising from the prevention of fatalities and casualties in other public safety contexts.[388]

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381 Ministry of Transport (2006) at 21.
382 Barnett, Clough and McWha (1999) at 6; Land Transport New Zealand (1999).
383 Gavin Fisher et al, *Health and Air Pollution in New Zealand: Christchurch Pilot Study* (2005) Ministry of Transport <http://www.transport.govt.nz/page-151> accessed 1 September 2006.
384 "The Price of Life" (4 December 1993) at 76.
385 Fisher et al (2005).
386 *Fletcher Challenge* at [163] & [169].
387 For example see, Department of Transportation, "Road Usage and Safety" in *Washington State Data Book* (2005) Office of Financial Management, State of Washington <http://www/ofm.wa.gov/databook/transportation/tt02.asp> accessed 16 September 2006.
388 Millar and Guria (1991) at 8. Millar and Guria state that overseas research suggests that the values could be applicable to other contexts.

They have already been used in a number of studies for this purpose.[389] The real difficulty lies in determining the number of fatalities and casualties avoided as a result of the safety improvement. Studies could potentially be of assistance.[390] Where benefits result in improved life quality, rather than avoided fatalities or injuries, cost utility analysis can be utilised to calculate a valuation in terms of life years saved.[391] It is important to note that other economic costs, avoided as a result of the benefit occurring would also need to be included in the analysis.[392]

Critique of the approach

The cost, time and complexity of the Commission or an applicant undertaking a study to value life and the avoidance of injuries would be prohibitive. However, these burdens need not be incurred, because the estimates of the LTSA can be utilised.

Whilst theoretically very sound, the willingness to pay approach has difficulties in application. It is very hard for people to put values on tiny changes in probabilities that are already very small.[393] However, the fact that the value of statistical life revealed by reported speed choice was consistent with that revealed by the willingness to pay questions, suggests that the respondents did understand the risk levels in the willingness to pay questions.[394] A further problem lies in the fact that it is difficult for those who have never been seriously injured to know how much they would like to avoid it.[395]

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[389] For example see, Ministry for the Environment (2004) (calculating the health benefits from proposed environmental standards); Fisher et al (2005) (calculating the health costs of pollution in Christchurch); Brian Easton, *The Social Costs of Tobacco Use and Alcohol Misuse* (Public Health Monograph Series No 2, Wellington School of Medicine, Wellington, 1997) at 18 & 43-44 (calculating the social costs of tobacco and misuse); O'Dea and Tucker (2005) at 23 (calculating the social costs of suicide). Their potential usefulness has also been noted in the context of evaluating the health benefits from campaigns to reduce the incidence of skin cancer (Cancer Society, *Cancer Update in Practice* (Issue 2, Cancer Society, Wellington, 2000)). In some instances a value of statistical life year has been calculated (for example see, Ministry for the Environment (2004); O'Dea (2004) at 57). This allows benefits arising from an increase in life expectancy or an improved quality of life to be calculated.

[390] For example, the effects of environmental standards and health policies have been quantified (Ministry for the Environment (2004); O'Dea (2004) at 33-45).

[391] The life years saved will be multiplied by the value of a statistical life year, rather than the value of a statistical life.

[392] For example, costs to the public health system of treating the injuries or conditions.

[393] "The Price of Life" (4 December 1993) at 76; Kobelt (1996) at 22.

[394] Millar and Guria (1991) at 30. This is because respondents did not need to understand small risk levels to answer the speed choice questions.

[395] "The Price of Life" (4 December 1993) at 76; Kobelt (1996) at 22.

The values calculated by the LTSA related to risks where people felt in control.[396] In their report, the LTSA suggested that higher values may be appropriate for risks people feel are outside their control, such as environmental exposures, occupational incidents, and airline and public transport crashes.[397]

A common objection to valuing public safety is that it is morally offensive to reduce human life to dollars and cents.[398] However, it is not as callous as it sounds. Individuals do it implicitly all the time. For example, a driver takes a chance of being killed in a car, but judges the speed and convenience to be worth the risk.[399] Furthermore, whenever the government issues regulations or allocates resources that affect health and safety, it too values our lives.[400]

4.4 The "ball-park figure" technique

The "ball-park figure" approach to valuation involves coming up with a value for the benefit accruing to an individual, and then scaling it up to arrive at an estimate of the total benefit. The distinguishing feature of this technique is that there is no basis for the number adopted as representing the value of the benefit accruing to an individual. No reference is made to surveys or studies; rather the number is seemingly plucked out of the air.

4.4.1 THE CASE LAW

The Commission has taken a ball-park figure approach to the quantification of intangible benefits on two occasions.[401] In *Qantas*, it was used to value the scheduling benefits to travellers under the proposed alliance between Qantas and Air New Zealand. The Commission assumed that on average, business and leisure travellers would receive a 20 percent gain[402] from scheduling benefits.[403] This was applied to an assumed opportunity cost of $100 per hour for business travellers,

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[396] Millar and Guria (1991) at 8.
[397] Ibid. See also, Fisher et al (2005). In other words, the value of life might not be independent of the cause of death.
[398] Millar and Guria (1991) at 1.
[399] "The Price of Life" (4 December 1993) at 76.
[400] Millar and Guria (1991) at 1.
[401] Assuming that Category 3 benefits constitute intangibles.
[402] This was significantly lower than the 100 percent gain assumed by Air New Zealand and Qantas.
[403] *Qantas* at [70] & [1337].

and $20 per hour for leisure travellers,[404] to arrive at a total benefit of $476,000,[405] which was rounded off to $500,000.[406] On appeal, the High Court did not criticise the Commission's approach.[407]

In *NZRFU 1* and *NZRFU 2*, the NZRFU suggested that the benefit accruing to television viewers from a more attractive National Provincial Competition (NPC), could be evaluated using the ball-park figure technique.[408] For example, in *NZRFU 1* it was suggested that the increased attractiveness of a more even game might be valued at between 50 cents and $10 per person viewing.[409] Even at a figure of only 50 cents, the public benefit would still total $2.5 million per year.[410] The Chairman and Commissioners Auton and Stapleton accepted this general approach.[411] Commissioner Harrison on the other hand, thought that the intangible and subjective nature of the benefit meant that it should not be quantified.[412] The Commission in *NZRFU 2* rejected the technique in favour of a more elaborate economic model[413] suggesting that, "[t]he difficulty with this approach is that it is fairly ad hoc; no sound reasoning was provided by the Applicant as to why this was a sensible range for the net benefits that may accrue".[414]

The ball-park figure technique has also been used to evaluate a Category 2C detriment. As discussed in Section 2.3, in *Powerco* the Commission, whilst recognising that the social detriment associated with redundancy could not be quantified with any accuracy, came up with a rough figure to demonstrate the impact that it would have on the public benefit assessment.[415] It assumed that on average, the social cost was $10,000 per person made redundant. If forty people were made redundant, the total cost would be $400,000. This figure was then

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[404] Ibid. Arguably, average wage rates could provide at least a partial basis for these figures.
[405] Ibid at [1337] & [1385].
[406] Ibid at [70] & [1394].
[407] *Qantas (HC)* at [388]-[389].
[408] *NZRFU 1* at [388]-[389] & [393]-[394]; *NZRFU 2* at [125]-[126] & [738]-[739].
[409] *NZRFU 1* at [388].
[410] Ibid. In *NZRFU 2*, it was suggested that the benefit to the average individual viewer was between $0.60 and $1.20, equating to a total benefit of between $6 million and $12 million (*NZRFU 2* at [738].
[411] *NZRFU 1* at [389]. However, because of the relatively weak nexus between the Regulations and the increased attractiveness of the NPC, they felt that the estimate was more likely to be at the lower end of the range.
[412] Ibid. The Commissioners took the same positions to the benefit arising from greater audience enjoyment of New Zealand international matches (Ibid at [393]-[394]).
[413] *NZRFU 2* at [739]. The Commission adapted the spectator demand model that they had used to quantify the increased enjoyment accruing to spectators.
[414] Ibid.
[415] *Powerco* at [339].

rounded off to $500,000 and weighed against the other quantified benefits and detriments.[416] Presumably this same technique could be used to value a social benefit.

4.4.2 CRITIQUE OF THE APPROACH

As the comments of the Commission in *NZRFU 2* highlight,[417] the ball-park figure technique has no sound evidential basis and so the values it produces for the benefits may well be inaccurate. *NZRFU 2* illustrates that where there is a preferable alternative that has an economic basis for its assumptions, the ball-park figure technique will not be used. Where there is no such alternative, arguably the ball-park technique could be useful to the extent that it focuses the Commission's attention on the magnitude that the benefit could have.[418] However, it is questionable how such an arbitrary valuation can be of much assistance. Whilst the Commission in *Ansett* recognised the usefulness of quantification, it cautioned against the temptation to accept "spurious quantification[s]".[419] If numbers are simply plucked out of the air, quantification loses its advantages of objectivity and transparency. Qualitative analysis is preferable to a ball-park figure analysis.

4.5 Conclusion

The quantification of intangible benefits is no easy task. Economic models may be of assistance in a limited number of cases. The costs and the lack of data will be prohibitive in many instances. The willingness to pay approach may provide a relatively accurate and cheap method of quantification where there have been sufficient studies to base the analysis on. Where all else fails, the ball-park figure technique is available. Given the complete lack of basis for its assumptions, its use in place of qualitative analysis is questionable at best.

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[416] Ibid at [340]. More specifically, it was deducted from the benefit accruing from rationalisation.
[417] *NZRFU 2* at [739].
[418] And so results in greater transparency.
[419] *Ansett* at [551].

Conclusion

Evaluating the treatment of the class of benefits termed "intangible" by the Commission, necessitates classifying benefits as tangible or intangible. This is a difficult task that has been exacerbated by the apparent lack of agreement, even amongst Commissioners, as to the precise meaning of the term "intangible benefit". Whilst the current *Guidelines*[420] and the preponderance of decisions[421] suggest that intangibility hinges upon a benefit's ease of quantification, some decisions seem to implicitly equate intangibility with quantification per se.[422] This difference in definition, combined with the difficulty of applying the definitions, leads to inconsistencies in classification. Consequently, it is impossible to say with precision which benefits are tangible and which are intangible. This dissertation overcomes this classification problem by utilising a spectrum of tangibility within which to evaluate the treatment of less tangible and more tangible benefits.

To date, negligible weight has been attached to the most intangible benefits.[423] This treatment is usually justified by evidential problems, which largely stem from the intangibility of the benefit itself. Whilst it is difficult to discern a change in the treatment of intangibles over time, the Commission appears more willing to discuss intangibles than in the past, even raising them itself in one recent decision.[424] There is some indication that more weight is accorded to quantified intangibles,[425] providing an incentive to applicants to quantify intangible claims. However, quantification is a difficult task – issues of cost and reliability rendering it impracticable in many instances.[426]

Under the current law, intangible benefits must be considered in the application of the public benefit test, unless the intangibility means that the applicant cannot satisfy its evidentiary burden of proving the benefit. As a matter of policy, it would

[420] Commerce Commission (1997).
[421] *TeamTalk* at [161]; *Ruapehu* at [239]; *Omv* at [399]; *Qantas* at [899]; *NZRFU 2* at [545].
[422] For example see, *Ruapehu*. Interestingly, the Chief Economist of the Commerce Commission, Dr Michael Pickford seems to support a test based on quantification per se. (Email from Dr Michael Pickford (22 August 2006)).
[423] Category 1 and 2 benefits.
[424] *Qantas* at [1365].
[425] See, *Powerco* in particular.
[426] This is particularly so for the more intangible benefits (Categories 1 and 2).

be inappropriate to exclude intangibles from the balancing process. It would raise a complex definitional problem and exclude some issues that are of real concern to society.

The distinction drawn by the Commission between tangible and intangible benefits does not seem to be a particularly useful one, particularly given the Commission's sporadic and inconsistent use of the term. Because nothing hinges on the distinction, it is of little or no assistance to applicants or the Commission. The key focus for the Commission in determining the weight to be given to intangible benefits seems to be the evidential problems flowing from intangibility, rather than the intangibility per se. Focusing upon whether a given benefit is tangible or intangible unnecessarily complicates the public benefit analysis. It may be best if the Commission recognises this by doing away with the distinction, and instead focusing upon the core requirements for proving a benefit.[427] Because the Commission often draws on the principles set out in the *Guidelines* in its decisions, an important first step towards abolishing the distinction would be to remove it from the *Guidelines*.[428]

[427] The requirements of proving a causal nexus and providing evidence of the extent of the benefit.
[428] Commerce Commission (1997).

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