Further reflections on the interpretations of private and public benefits in merger authorisation decisions

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Further reflections on the interpretations of private and public benefits in merger authorisation decisions

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The Australian Competition Tribunal’s decision in Qantas provides an in-depth analysis on private and public benefits. The Canadian Competition Tribunal’s decision in Superior Propane also provides useful learning on the topic. This article examines the distinction between public benefits and private benefits, as well as the pros and cons of the balancing weights standard applied in some merger authorisation decisions. It attempts to reconcile the role of efficiencies with the future trend in authorisation decisions, and finally concludes by proposing a way forward for the Australian Competition Tribunal and the Australian Competition and Consumer Commission.

I Introduction

In Qantas Airways Ltd, the Australian Competition Tribunal (Australian Tribunal) granted authorisation in respect of a proposed airline alliance between Qantas Airways Ltd (Qantas) and Air New Zealand Ltd (Air NZ) and embarked on an extensive reasoning of the interpretation of public benefit in its decision. The Australian Tribunal applied a total welfare standard, albeit modified such that differential weights are given to public benefits depending on whether these benefits are shared amongst members of the community in general and are sustainable. Despite authorisation by the Australian Tribunal, the alliance failed ultimately because the rejection of the proposed alliance by the New Zealand Commerce Commission (New Zealand Commission) was supported on appeal by the High Court of New Zealand (New Zealand High Court) in Air NZ and Qantas v Commerce Commission.2

Mergers and acquisitions are vital to the success of a country’s economy, as they are frequently employed as tools by dominant parties to strengthen failing corporations.3 While, on one hand, the merger of firms within a country should be permitted so as to provide the expanded firms with a level playing field against larger foreign corporations, on the other hand, there is a need to protect consumer interests and those of smaller businesses against the anti-competitive practices of larger corporations. Despite the dearth of

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1 Qantas Airways Ltd (2001) AC 540.'9

6 Please note that the Trade Practices Act 1992 (Cth) was renamed the Australian Competition and Consumer Act 2010 (Cth) on 1 January 2011.
7 TPA s 2.

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authorisation decisions from the Australian Tribunal post the Qantas decision, it is worth revisiting the interpretations of the public benefits test in merger authorisation decisions for future guidance. Empirical evidence indicates that mergers and acquisitions are pro-cyclical.4 This means that there will be recurrent places where there is a surge of mergers and acquisitions due to their reliance on business cycles. Indeed, the return of the cycle of mergers and acquisitions has been observed in recent times, in lockstep with the resurgent share-market recovering from the 2008 financial crisis.2 As such, it is foreseeable that there will soon be an instance in the near future where there may be a pressing need to clarify the boundaries and criteria of the public benefits test in a specific authorisation case.

This article first sets out a brief description of the main welfare standards employed in authorisation decisions and the salient characteristics of these standards as they are understood in the context of this article. This is done in acknowledgment of the fact that these standards can mean different things to different people. Thereafter, this article reviews the standards employed in the public benefits test applied by the Australian Tribunal in the Qantas decision, and contrasts this with the approach taken by the New Zealand Commission and New Zealand High Court in respect of the same proposed alliance. Canada, being a jurisdiction ahead of the trend in giving a greater role to efficiencies in merger analyses, is looked to for important lessons. This article then proceeds to analyse whether the welfare of Australians, being the expressed goal of Australian competition policy under the Trade Practices Act 1974 (Cth) (TPA),5 is met by attaching small weights to private benefits in merger analyses. The analysis discusses the different interpretations of public and private benefits and the pros and cons of applying the balancing weights standard to merger analyses. Next, the article attempts to reconcile the potential trend in giving a bigger role to efficiencies in merger analyses with the application of the balancing weights standard. The article finally concludes by suggesting how the Australian Tribunal should interpret public benefits in subsequent authorisation decisions.

II Main welfare standards

The enhancement of the welfare of Australians has been stated to be the objective of the TPA. This is intended to be achieved via ‘the promotion of competition and fair trading’ and ‘provision for consumer protection’.6 On its face, this objective might be thought to be compatible with the application of a range of welfare standards as set out below:

1) Price standard
The price standard is founded on welfare economics and the (actual) Pareto improvement criterion, that is, at least one person, whether a consumer or a shareholder, is made better off, without making any other person worse off. A merger cannot pass the threshold of a strong version of this criterion so long as there is a price increase, irrespective of overall efficiency gains. This is an extreme standard that in effect gives zero weight to producers and all the weight to consumers.\(^8\)

2) Consumer surplus standard

A merger may be approved under this standard even if there is a price increase, as this standard allows for non-price factors that increase consumer surplus to be taken into account, such as the improved quality or an increase in the variety of products and services available.\(^8\) Like the price standard, no weight is given to producers while all the weight is given to consumers. This is however a less stringent standard than the price standard, as non-price factors can count towards consumer surplus. Irrespective of gains in producer surplus, a merger can only meet this standard if there is an increase in consumer surplus with the merger.\(^9\)

3) Total surplus standard

The total surplus standard has been said to satisfy the Kaldor-Hicks (hypothetical) compensation criterion and is hence closely tied to the (potential) Pareto improvement criterion, that is, at the end of the day, the persons who gain from the merger will be able to compensate the persons who sustain losses as a result of the merger.\(^10\) Theoretically, no one is worse off and there are net gains, even if actual compensation does not occur. Under this standard, consumers and producers are treated neutrally and any merger that results in an increase in the sum of consumer surplus and producer surplus will be approved. Wherever consumer surplus is the sum of the difference (whether positive or negative) between consumers’ willingness to pay and the actual price of a specific good, producer surplus is the aggregate of all profits accruing to producers in the relevant industry.\(^11\) Redistributive effects are disregarded, though efficiency gains or losses taken into account under this standard.\(^12\) With reference to Figure 1 below, if B > C, the merger would be approved.

4) Balancing weights standard

This is a standard that can be said to fall somewhere between the consumer surplus standard and the total surplus standard. Without committing to a precise set of weights, this standard calculates a balancing weight, \(w\). A value judgment is then exercised as to whether the appropriate weight on consumer surplus is reasonably greater than or less than this critical value.\(^13\) With reference to Figure 1 below, \(w\) can be determined by the equation \((1-w)(A+B) - w(C+A) = 0.\)

**Figure 1**

The welfare standards above can be more clearly understood by reference to the Williamson example,\(^14\) when two firms in an industry merge to become a monopoly. While the monopoly will experience lower average costs as a result of synergies, the price of a good is assumed to increase due to an exercise of the increased market power post-merger. As demonstrated by the diagram above, \(B\) represents a transfer of surplus from consumers to producers due to the price increase, \(B\) represents the increase in producer surplus gain due to cost savings or productive efficiency gain, while \(C\) represents a deadweight or allocative efficiency loss due to the higher price and lower output. The net effect is taken to be positive if \(B > C\).

III Interpretations of public benefits in Australia and New Zealand

Under s 95AT of the TPA, the Australian Tribunal has the discretion to grant an authorization to a person or corporation for mergers and acquisitions which would otherwise contravene s 50 of the TPA. The Australian Tribunal is prohibited from granting the authorization unless it is satisfied that the

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10 Patton, above n 9.
11 Ibid.
12 S P King, "The public benefit standard for merger authorisations" (2005) 34 ABLR 38 at 40.
14 Patton, above n 9.
acquisition of shares or assets will bring about such a benefit to the public that justifies allowing the acquisition to occur.25 Before the TPA was amended by the Trade Practices Legislation Amendment Act (No 1) 2006 (Amendment Act), the consideration of mergers and applications was put either through an informal review, or an application for merger authorization to the Australian Competition and Consumer Commission (ACCC). The ACCC has been observed to apply a consumer welfare standard frequently, and it has a 'tendency to give greater weight to efficiencies that directly benefit consumers than to efficiencies that directly benefit producers'.26 In Qantas, Qantas and Air NZ had entered into an agreement for the acquisition of 22.5% of the shares in Air NZ by Qantas. Cooperative arrangements for the coordination of airfares and flight schedules on Air NZ flights, and Qantas flights to, and from New Zealand, were incorporated into other agreements entered into between the two carriers. Notably, the combined market share of Qantas and Air NZ for trans-Tasman air passenger services under this proposed alliance was said to amount to approximately 80%. The proposed merger would also affect competition in the ancillary markets. However, the increased presence of rival carriers Emirates and Virgin Blue in the trans-Tasman passenger market was considered by the Australian Tribunal to be capable of constraining the abilities of Qantas and Air NZ to lower their outputs or raise prices in the long run. With the exception of time-sensitive passengers who may face difficulties as a result of the proposed alliance between Qantas and Air NZ, the Australian Tribunal further considered that most other passengers would view Emirates and Virgin Blue as viable alternatives should Qantas or Air NZ raise airfares or limit the availability of seats on their flights. Moreover, the Australian Tribunal was satisfied that the overall result of the proposed alliance would be an improved international airline for Australia, which is better able to compete with other international airlines by virtue of the proposed alliance satisfied the Australian Tribunal that there will be demonstrable public benefits in Australia resulting from the alliance.29 In assessing public benefits generated by the proposed alliance, the Australian Tribunal, following the enactment of the Amendment Act, adopted what has been characterized as an 'adjusted total welfare' standard,30 subject to a caveat that the weight accorded to benefits accruing to producers might depend on whether and to what extent other benefits or any cost savings were passed on to consumers. As its name applies suggests, the standard branches out from the total welfare standard and can be adjusted appropriately in accordance with the distribution of benefits and costs between consumers, producer firms, the employees of such firms and their shareholders.31 One relevant consideration in the application of the adjusted standard is the extent to which any benefits or costs savings is passed on to consumers, and furthermore, regardless of

such pass through to consumers, whether the efficiency gains benefit only a limited number of members in the community.32 Another relevant consideration is the extent to which such efficiency gains are perceived as sustainable.33 The adjusted standard in the Qantas decision appears to embody wealth redistribution concerns. Nevertheless, it has been observed that the ACCC and Australian Tribunal in recent years have moved from their initial focus on producer welfare redistribution to consumers, to sustainability of efficiency gains.34 Notably, one of the main justifications offered in their decisions is that efficiency gains cannot be sustained by producers unless such gains are passed through to consumers.35 The Qantas decision has been said by Fallon to be effectively adopting either one of the following standards: the price standard; the consumer welfare standard; or a standard whereby weights are applied to producers' gains and are discounted for the uncertainty of their sustainability.36

The main reasoning within the decision of the New Zealand Commission and the New Zealand High Court rejecting the proposed alliance hinged on the generation of inefficiencies, more specifically, dynamic inefficiencies caused by the lack of competitive pressures which help to keep prices close to costs.37 This approach taken is closer to the total surplus standard than that adopted by the ACCC or Australian Tribunal. The object of the Commerce Act is the promotion of competition for the 'long-term benefit of consumers' within New Zealand.38 This wording may explain why efficiencies impacted upon the final decision. It is further noted that the New Zealand Commission also picked on the fact that transfers from consumers are not to the New Zealand carrier, but instead to an Australian carrier, being Qantas, and is hence a detriment, as it is not for the benefit of consumers 'within New Zealand'. This disregard of benefits to non-nationals is frequently mirrored in Australian decisions.

IV Lessons from Canada

As Australia, like other jurisdictions, moves towards giving a greater status to efficiencies in merger analyses, lessons can be drawn from the Canadian experience, which has been said to be ahead of the wave in this respect.39 Section 96.1(1) of the Canadian Competition Act explicitly prohibits the Canadian Competition Tribunal (Canadian Tribunal) from intervening in a merger so long as the efficiencies are 'greater than and offset the

23 Qantas Airways Ltd [2005] ACCT 9 at [183]. If the gains only benefit a small group in the community, such gains will carry little weight.
24 Ibid, at [181].
25 Professor A Fells AO and T Grimmwood, 'Authorisation: Is It Still Relevant to Australian Competition Law?' (2002) 11 CCLJ 1 at 17. See also the Master of Prestige Metals Group Ltd [2010] ACCT 2 and Applications by Talisman Corporation Limited ABN 39 051 770 556 [2010] ACCT 1. It is noted that these two recent decisions of the Australian Tribunal express that efficiency considerations are relevant to any analysis of the effect of conduct on competition.
26 Fallon, above n 9, 336.
27 Ibid, at 340.
29 Competition Act 1986 s 1A.
30 Ross and Winter, above n 15, at 472.
anticompetitive effect. Before Commissioner of Competition v Superior Propane Inc., efficiencies were given a prominent role, and was said to overact the importance of anti-competitive effects in merger review. In Superior Propane, the Canadian Tribunal allowed Superior Propane to merge with ICG Propane because it was satisfied that the efficiencies would offset any lessening of competition. This was despite the fact that the merger was acknowledged by the Canadian Tribunal to have the effect of preventing competition in Atlantic Canada and substantially lessening competition in many markets across Canada. The Canadian Tribunal, while acknowledging the conditions in the propane industry in Canada, such as the high barriers to entry, the absence of foreign competition and the lack of effective competition, approved the merger on the ground of efficiencies. The Canadian Court, however, did not agree with this initial judgment of the Canadian Tribunal that efficiency gains were the overriding concern in Canadian competition law. Instead, the Canadian Court commented in favour of the ‘balancing weights’ approach and yet allowed the Canadian Tribunal flexibility by its requirement that weight be given to factors, though not specifying exactly how much weight was to be given. This has been said to be a rejection by the Canadian Court of the unqualified application of the total surplus approach.

Interestingly enough, the Canadian Tribunal distinguished between citizens of different income levels and looked at the Canadian tax code for guidance in determining the relative value to attach to such citizens, being shareholders and consumers. Ross and Winter’s calculations have however indicated that this balancing weights standard leads to a result that deviates minimally from that achieved under the total surplus standard, even if gains to the poorest consumers are given twice the weight of gains to other market participants. The evidence in the Superior Propane case supported attaching higher weights only on the poorest consumers, and this, when combined with the large number of business purchasers as consumers and the presence of taxpayers as shareholders, explains the insignificant numerical impact in using the balancing weights standard as against the total surplus standard. Nevertheless, this modified total surplus standard, or balancing weights standard, is aligned with the prevailing view among economists as being the correct benchmark.

Bill C-249 was introduced after the Superior Propane case and would have repealed s 95(1) of the Canadian Competition Act if enacted. Bill C-249 provided that efficiency gains were to be a factor in merger analyses, not an overriding concern. A consumer benefit requirement was also proposed, such that only efficiency gains benefiting consumers, in the form of increased product choices and lower prices, will count. Bill C-249 encompassed a social redistribution goal limited to those considered poor final consumers of a necessity, as does Superior Propane, and would have allowed the Canadian Tribunal to consider the impact of efficiency gains on consumers, without being constrained to any specific formulae. Although Bill C-249 was not passed, it represents an intention by the legislature to concretize the position in Superior Propane which casuistically moves away from a strict application of the total surplus standard towards holding consumers in higher regard in merger analyses.

V Analysis of the public benefits test
A) Public benefits and private benefits

The public benefits test in merger analyses essentially beg the question of what the term public really means. The TPA does not define the word ‘public’, and hence the term is open to a variety of meanings. The wider but unusual definition of public is simply ‘the people constituting a community’. This has been said to include, in the context of the public benefits test, private and non-private benefits, insofar as the community is being considered. In contrast, a narrower definition of the public is as ‘the opposite of private’, which attempts to exclude private benefits altogether. It is submitted that, for the purposes of the public benefits test, all individuals including the shareholders and employees of producer firms, should be regarded as part of the public. It follows that benefits accruing to these individuals should be counted as public benefits. Officer and Williams put forth strongly that:

There is no theory or evidence to suggest that consumers as a class are necessarily different from producers or owners, to the extent that a dollar distributed to consumers away from producers, is going to raise society’s total utility (benefit).

43 Ross and Winter, above n 33, at 36.
44 Competition Bureau, above n 34. The bill died on the Order Paper prior to the 2004 election.
47 Officer and Williams, above n 46.
48 Ibid, p 161.
It should be noted that the wider interpretation of public, and correspondingly public benefits, appear to be endorsed by the Australian Tribunal, by virtue of its erosion, in a latter decision Re 7-Eleven Stores Pty Ltd, of the broad construction of "public benefit" in Re Queensland Co-operative Milling Association Ltd and Defiance Holdings Ltd as "anything of value to the community generally." In Re Australasia Performing Rights Association Ltd, the Australian Tribunal again adopted the wider interpretation of public benefits, such that it includes benefits to market participants as well as to the society at large.

Taking this broad interpretation of public benefits, private benefits can be rightly understood to include benefits which accrue to producers, or "private firm benefits." Alternatively, such private benefits can also be interpreted as benefits which impact only a small part of the community. This small fraction of the community can consist of, in addition to producer firms, any individual including without limitation, a consumer, an employee or a shareholder of a producer firm. For the purposes of this discussion, only the earlier interpretation of private benefits as "private firm benefits" will be employed for the following reasons. First, this interpretation will not defeat the intended purpose of this article's discussion which hinges on a distinction between producer interests and the interests of the members of the public at large.

Second, it follows that this interpretation of private benefits lends a meaning, within the broader definition of public benefits, to non-private benefits as against "private firm benefits." Such non-private benefits can refer to benefits that flow to members of the community, such as consumers, shareholders and employees of producer firms. Nevertheless, this interpretation of private benefits as "private firm benefits" should still be treated with caution in merger analysis. This is because "private firm benefits" do actually flow to shareholders and may flow to employees of producer firms, if producer surplus as a result of greater profit margins of firms are distributed to all or certain employees in the form of higher salaries, or if such producer surplus is simply utilised to hire more employees for the same work function. Shareholders and employees of producer firms are as much members of the public as are consumers. As a result, non-private benefits recorded by members of the community are generated from "private firm benefits." This blurs the distinction between the beneficiaries of what is commonly understood as "private firm benefits" and the beneficiaries of non-private benefits. The point really is that any perceived boundary between private and non-private benefits is arbitrary.

B) Pros of the balancing weights standard

It is submitted that the Qantas decision discussed above tilts the total surplus standard towards the consumer surplus standard or the balancing weights.

49 Re 7-Eleven Stores Pty Ltd (1994) ATR 41-527.
51 Re Queensland Co-operative Milling Association Ltd and Defiance Holdings Ltd (1976) 8 ALR 481; 25 FLR 169; 1 TPC 109; (1976) ATR 60-012.
52 Re Australasia Performing Rights Association Ltd (1958) ATR (Com) 50-256.

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standard. Generally speaking, consumers are less able than producers to exert any political power because the effect upon consumers in a given market situation is more dispersed than that for producers. Arguably, this imbalance against consumers can be addressed by 'attaching a heavier weight to consumer surplus than to producer surplus.'

Furthermore, it has been argued that the placing of weight on 'pass through' (the private benefits that are 'passed through' to consumers and deemed relevant in a merger review) will ensure that merging producer firms are more inclined to come up with more advantageous undertakings and hence end up having a merged structure that reduces deadweight loss and protects consumers. Gans, in his paper advocating a consumer surplus standard with a compensation mechanism that actually exists, has gone so far as to argue that placing weights on pass through is consistent with achieving total welfare maximisation, which the total surplus standard is concerned with. His view is that a total welfare standard in the public benefit test in merger analyses exacerbates a bias existing in the system, namely, that the parties to the merger have the advantage of proposing mergers and undertakings, an opportunity which consumers do not have. The differential weight placed on benefits which are passed through to consumers in a merger, will help to reverse this bias, and yet ensure that approved mergers maximise total welfare. It is noted that the aforementioned arguments by Gans can support the application of the balancing weights standard, even though Gans was not explicitly arguing for the same, but was instead advocating a consumer surplus standard, albeit with undertakings from the merged entity.

C) Cons of the balancing weights standard

Under the balancing weights standard, a dollar gain to a producer firm, the producer firm's employee or its shareholder is not accorded the same importance in merger analyses as a dollar loss to a consumer. Addressing this question however entails the making of a value judgment about optimal distributional impacts. It should be difficult, to say the least, for competition policy to try to address distributional goals, which are recognised by many economists to be essentially the role of tax laws and expenditure decisions of the government. Furthermore, the underlying premise of the balancing weights standard appears to be that producers are seen as a less deserving group of the surplus valuation over cost than consumers, which in turn relies on the assumption that shareholders of producer firms are wealthier than

54 Metsa, above n 13, p 20.
57 P Hughes, "Comments on Professor Joshua Gans's presentation "Reconsidering the Public Benefit Test" (2008) 34 ALR 49 at 53.
58 Gans, above n 56, at 37.
59 Ibid, at 37.
60 Fallon, above n 9, 347.
61 Officer and Williams, above n 46, p 138.
consumer buyers.\textsuperscript{62} This assumption arguably has an inherent fallacy as the actual identities of the individuals comprising the consumer and producer groups in a given market situation may be unknown and the composition of consumer and producer groups inevitably differs across various industries. The identities within such groups should be established before determining which group is more deserving of the surplus.\textsuperscript{63} In certain industries including the airline industry, or even those for luxury items, it may not be surprising to find that the opposite of the earlier assumption holds true instead, and that the consumers may be from higher income groups as compared to the shareholders of the producer firms.\textsuperscript{64} In such situations, where one considers the characteristics of particular industries, the common notion that surplus accruing to producer interests increases the income inequalities already existing between the 'rich' producers and the 'poorer' consumers, is turned on its head. That is, competition policy is an indirect and possibly ineffective way to redistribute income from the 'rich' to the 'poor'. Producer interests are diverse groups comprising of employees and shareholders, who are members of the public, and it is important to distinguish the wealth of a producer firm from the wealth of its shareholders and employees.\textsuperscript{65}

Competition policy embodied within the TPA has been argued to have a broad aim and to accord importance to the interests of consumers, but only as means to lead to an ultimate end, such end being the improvement of the welfare of Australians.\textsuperscript{66} Basing in mind the object provision of the TPA, it can be said that the TPA employs both the promotion of competition and the protection of consumers as means to achieve an end, being the welfare of Australians. However, the view that greater competition in the marketplace corresponds to a higher consumer surplus or welfare is founded on an assumption that all consumers are well-informed and rational. It has been argued that if consumers are not 'fully rational', competition makes consumers demand what they would otherwise not need, and hence may result in a welfare loss from overconsumption.\textsuperscript{67} The converse also applies, such that when there is a reduction in competition, for instance, when a firm post-merger with greater market power supplies less and charges more, there may instead be a potential gain in total welfare due to the reduction in overconsumption.\textsuperscript{68} A merger can therefore benefit naive, or non-fully rational consumers, but may result in welfare loss to the fully rational ones. It is submitted then that the welfare of naive consumers may have a direct relationship with the welfare of merged producer firms. This underscores the practical difficulties in making a meaningful distinction between producer and consumer interests.

63 Calvetli, above n 62, p 9.
64 Ibid, p 9.
65 Officer and Williams, above n 46, p 161.
68 Ibid.

VI A question of efficiencies and of imprecise weight
In light of the above considerations, whether the balancing weights approach, that is, according smaller weight to private benefits to promote the welfare of Australians is a difficult question to answer. As rightly put in the Qantas decision, the dichotomy between public and private benefits is limited assistance. The Australian Tribunal takes a broad definition of public benefits that is to say, the main question is really whether the benefits are shared with other members of the community. However, the Australian Tribunal goes on to say that even if a benefit has been determined to be of 'value to the community generally', a further question arises as to the weight that should be given to that benefit, having regard to the 'nature, characterisation and identity' of the beneficiaries.\textsuperscript{69} It is submitted that the consideration of the nature, characterisation and identities of the beneficiaries is not a separate question, but one to be addressed when contemplating whether a benefit is valuable to society in the first place. For the purposes of our discussion, we can consider a producer firm with characteristics such as diverse shareholders and a substantial number of employees. A benefit that accrues to such producer firm, with the mentioned characteristics, is likely to be of greater value to the community, as compared to another producer firm with fewer employees and a more concentrated shareholding. A greater 'weight', though not a specific or precise one, is given to such benefits which have a wider impact on the community. In merger analyses, notwithstanding the qualitative and quantitative difficulties in setting precise weights for private benefits or 'private firm benefits' as understood in this article, any assessment of public benefits will invariably involve making judgment calls of the 'weight' or value to attribute to benefits accruing to different groups.

The surprising point is that both the ACCC and the Australian Tribunal have not established a systematic and transparent framework to date to determine the appropriate differential weights to attach to benefits to consumer interests, producer interests, employees and shareholders of producer firms respectively. The Merger Guidelines 2008 (2008 Guidelines) released by the ACCC do contain detailed guidelines on the evaluation of public benefits, as it did earlier in its Merger Guidelines 1999 (1999 Guidelines) version. The 1999 Guidelines noted the distinction between the private and public benefits and the ability to accord a lesser weight to benefits which 'are not being spread widely across the members of the community', especially where such benefits cannot be sustained and may be dissipated over time.\textsuperscript{70} The omission of the details above from the 2008 Guidelines could be a reflection of the ACCC's intention to pay lesser attention to the distinction between public and private benefits and the discounting of private benefits as against public benefits in merger analyses. Furthermore and interestingly enough, the 'durability of the claimed public benefits' under Guideline 6.45 of the 1999 Guidelines appears to now be subsumed under Guideline 7.65 of the 2008 Guidelines, the latter of which now mentions instead that efficiencies are relevant to merger analysts when, among other things, there is clear evidence that 'these efficiencies will
not be dissipated post-merger’. There is an indication that efficiency gains, and their sustainability, which constitute public benefits, are given increasing importance in merger analyses. The Canadian experience in Superior Propane can be instructive in this respect in reconciling the roles of efficiencies and the balancing weights standard in merger analyses. While one should be wary of prioritising efficiencies in merger reviews above all other considerations, efficiency gains which constitute public benefits, as well as their impact on consumers, should be taken into account. In the same Superior Propane decision, there was occasion for a determination of differential weights to be attached to efficiency gains that ‘pass through’ to consumers and those that do not, but there is no requirement for determining specific weights. This is a laudable middle ground to reach, to avoid the pitfalls of the balancing weights approach. Not having to attach precise weights to gains to consumers and producers helps in partially circumventing the complexities that accompany the balancing weights standard. It also avoids the complications of attaching differential weights for consumers with dissimilar purchasing behaviour. That the discounting of private benefits as against public benefits is not mentioned in the 2008 Guidelines reflects the ACCC’s recognition that the balancing weights standard is to be employed as a ‘loose tool’ rather than a ‘precise mechanism’ and the possibility that the ACCC’s position may be inclined towards that reached in Superior Propane in the near future. The omission in the 2008 Guidelines of any mention of the distinction between public and private benefits is likely to reflect the ACCC’s acceptance that this distinction is a very tenuous one and is highly subjective.

VII Conclusion

According a smaller weight to private benefits, can be seen to be aligned with the goals of Australian competition policy, being the attainment of welfare for Australians, only if the following assumptions are made:

- The concept of weight is a relative one, as between public and private benefits, rather than a precise one; and
- Private benefits refer to ‘private firm benefits’ that do not have an outreach beyond a small portion of the community, even if they have an impact on shareholders and employees.

In applying the balancing weights standard however, one should realise that the redistribution of income, if achieved, is merely a desirable by-product, but not an end of competition policy. The balancing weights standard has purposes other than income redistribution, including without limitation, the reverse of bias in favour of producers. It should also offer some comfort to economists who stand firmly by the total surplus approach, because the effect of differential weights may be insignificant. Fears that an unduly onerous burden will be placed on the ACCC or the Australian Tribunal to collate the socio-economic profile of consumers and shareholders of the relevant producer firms are assuaged by the fact that many businesses do acknowledge the importance of compiling customer lists in their marketing efforts and, as such, consumer data is now more readily available than in the past. However, where numerical figures are employed in the application of the balancing weights approach, it should be borne in mind that these figures may be quantitatively inaccurate and are more guidance to assist one to reach a decision.11

Although the 2008 Guidelines do not have the force of law, the expressed role of sustainable efficiencies in merger analyses cannot be discounted. Efficiencies alone should never be allowed to play too large a role in reversing detrimental anti-competitive effects, particularly if such efficiencies are not sustainable and do not ‘pass through’ to consumers. Nevertheless, a rigorous application of the consumer surplus approach would not allow any room for the consideration of producer efficiency gains so long as there is a decrease in consumer surplus. Furthermore, the New Zealand Commission and New Zealand High Court’s approach to the Qantas case demonstrates that giving too much importance to efficiencies, or inefficiencies, can work against the authorisation of a merger, even with the application of the total surplus standard. This cannot be said to be a desired result either way. The balancing weights standard hence affords a reasonable compromise that allows for efficiencies gained to be taken into account while ensuring that consumer welfare is not altogether ignored. Last but not least, it should be noted that efficiencies do not come only in the form of resource savings which are part of the public benefits; efficiencies can also include technological advancements which are pro-competitive and are to be factored into the assessment of the harm caused to competition post merger, which is a crucial part of the assessment of public detriments, against which public benefits have to be netted off.12 Efficiencies can then be perceived as double edged swords in authorisation decisions, as consideration of them can work either to reduce the public detriments or to increase the public benefits, in favour of merger parties.

The relatively flexible balancing weights standard, despite its shortcomings, can prove more useful in the road ahead if the ACCC and the Australian Tribunal give greater transparency to future determinations as to the role of the balancing weights standard and efficiency gains in merger analyses. This will mitigate the unpredictability of the balancing weights standard or the adjusted total welfare standard and utilise methods that are more in tune with lessons from the economics literature.

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11 Rosseff, above n 53, at 36.
12 A Date, "A More Efficient Use of Efficiencies in Merger Authorisation Determinations" (2007) 34(4) ABLR 299.