COMMERCE COMMISSION NEW ZEALAND

The Usual Rules Do Not Apply: the treatment of foreigners under New Zealand's authorisation provisions

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Disclaimer

The views expressed herein are my own and do not necessarily reflect those of the New Zealand Commerce Commission.

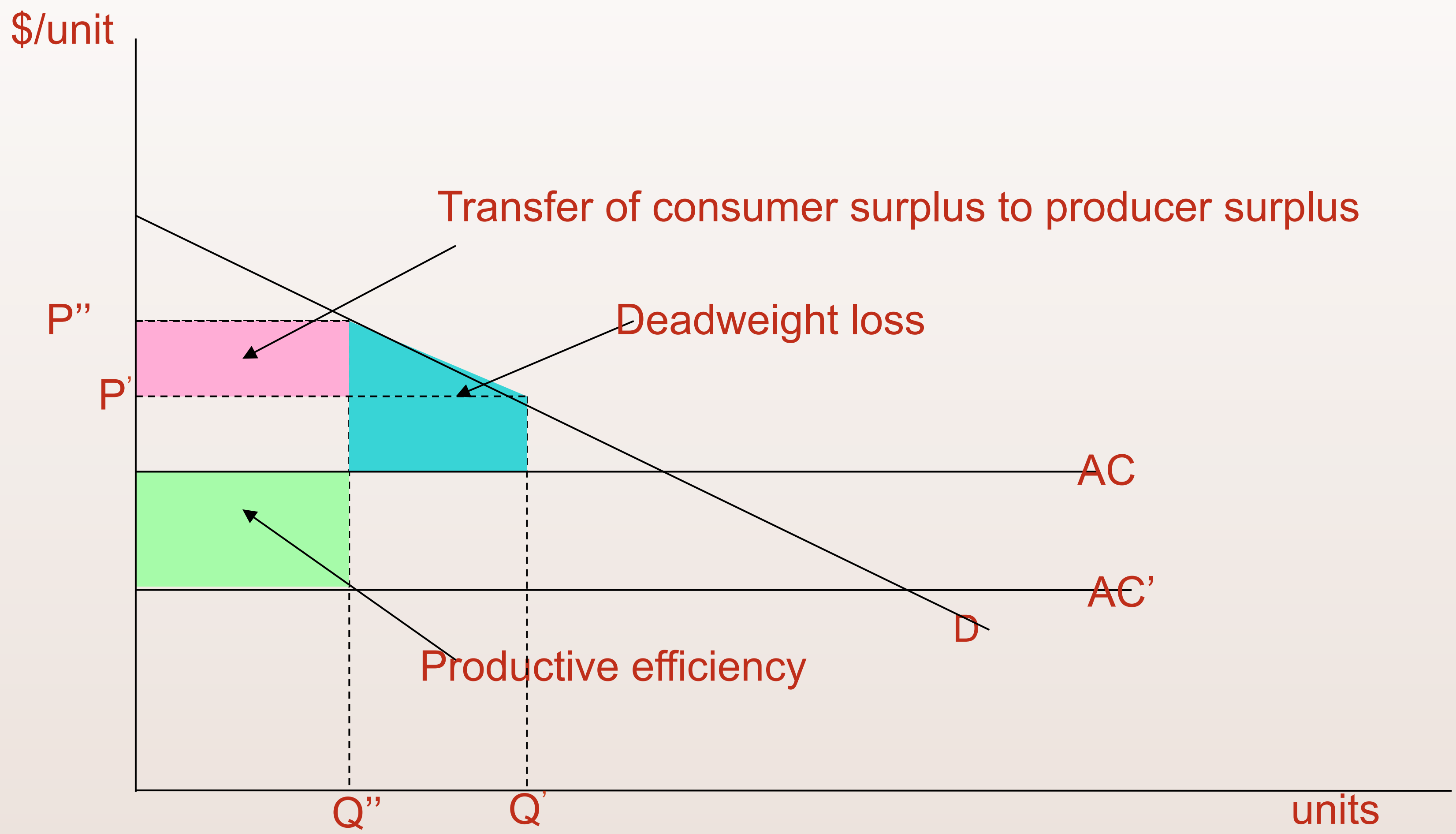
Merger Authorisations and the "Public"

- Mergers that result in a substantial lessening of competition may still be authorized if the Commission is satisfied "if will be likely to result in such a benefit <u>to the public</u> that it should be permitted" (Commerce Act, section 67)

“Public” defined?

- Not defined in the Commerce Act
- Or in the jurisprudence
- New Zealanders? Regardless of their location?
- People domiciled in New Zealand?

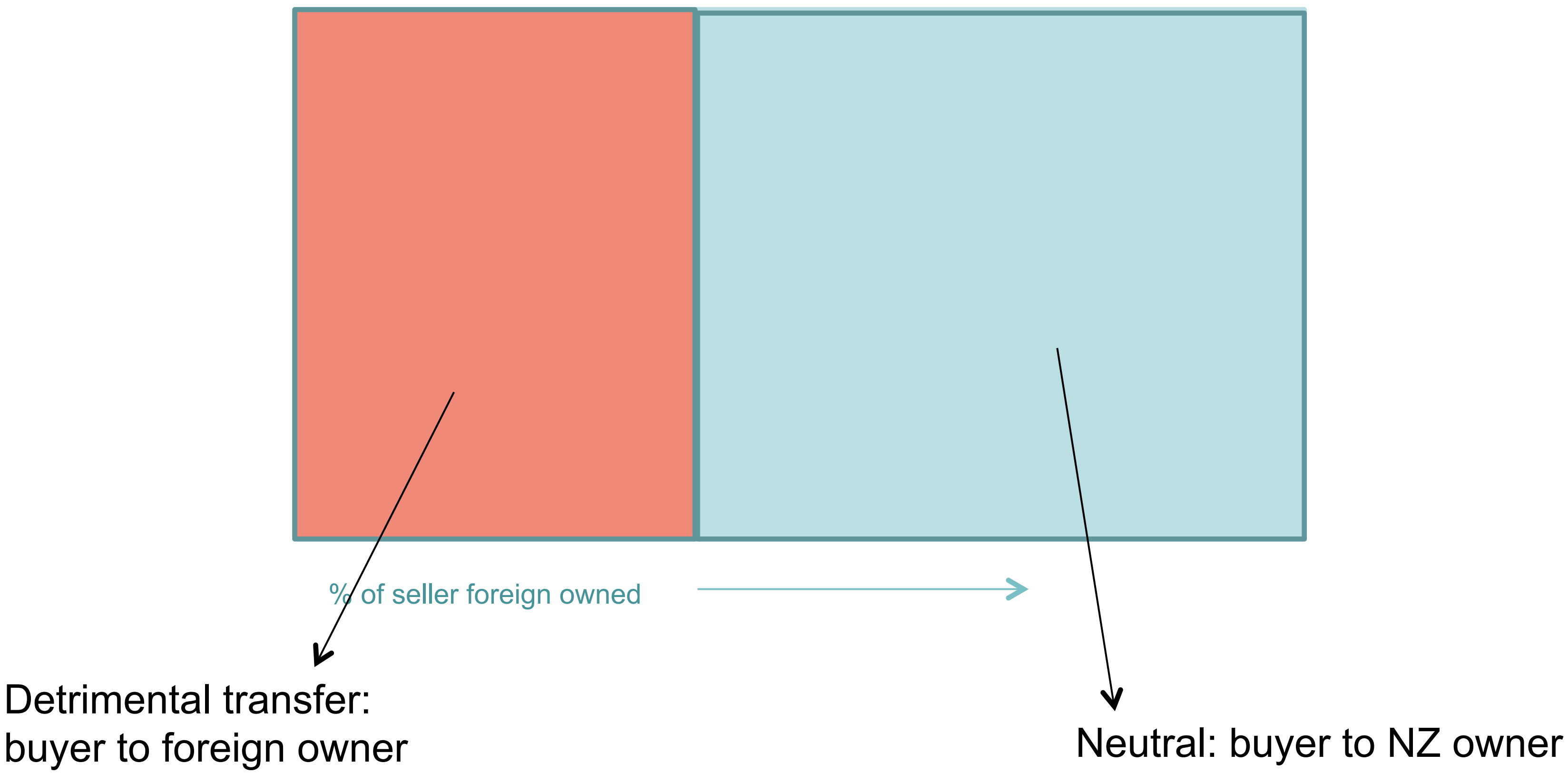
Trade-off: benefits v detriments



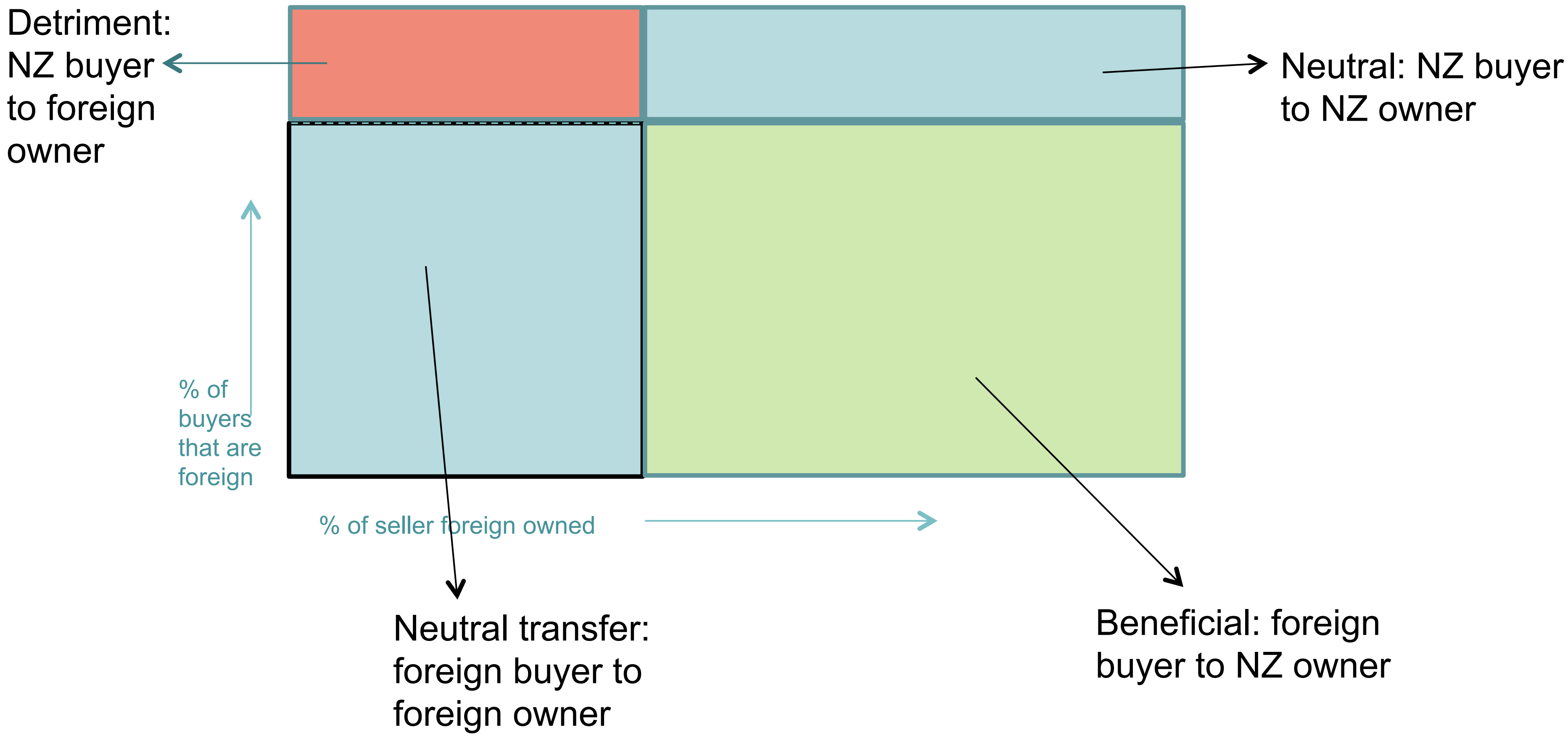
Cavalier Wool Scouring Authorisation

- Acquisition of NZWSI by Cavalier – merger to (domestic) monopoly
- Cavalier: 45% of shareholders are foreign owned
- Wool scouring buyers: 80% are foreign
- Wool suppliers: 98% are NZ owned

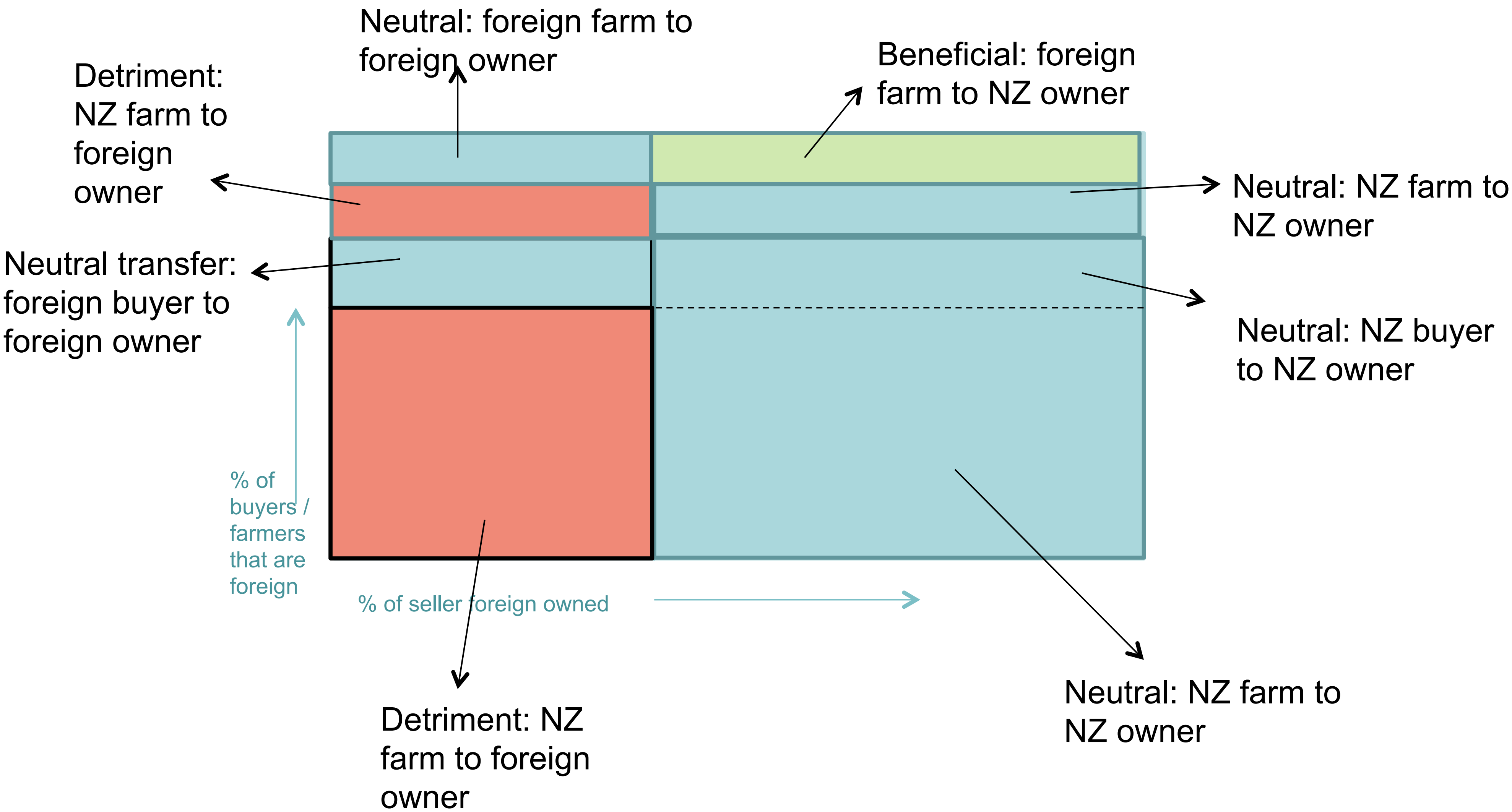
Transfers: seller foreign owned



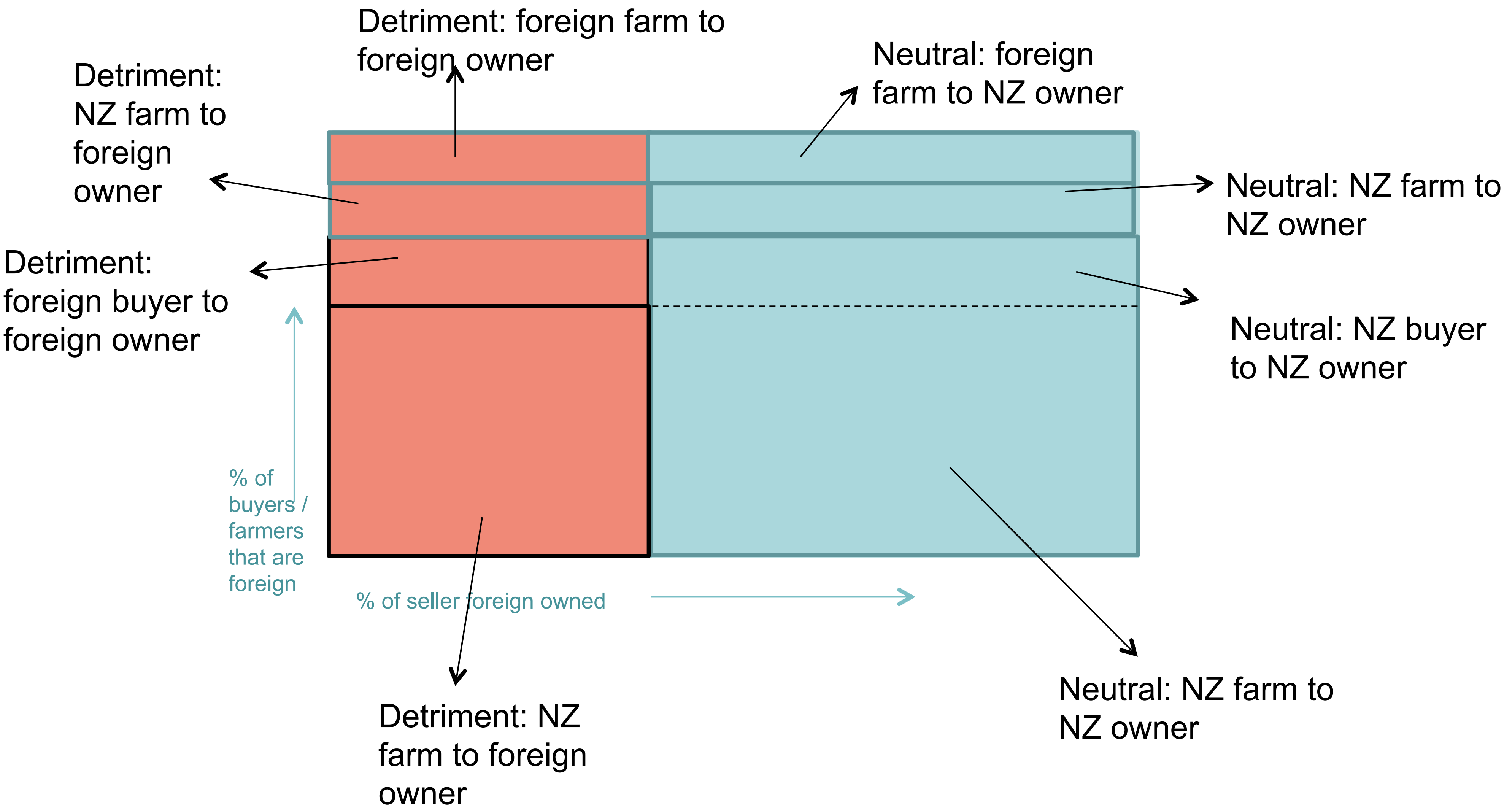
Transfers: buyers foreign owned



Transfers: farms NZ owned



Transfers: treat foreign buyers as NZ



Full-circle Logic

- Negative feedback effects: “reducing the return to these foreign owners of New Zealand-located businesses reduces the incentive for these owners to maintain their investment in New Zealand. This could ultimately lead to reduced inbound investment and a loss of the benefits that flow from such investment…” (para 610).

Productive Efficiencies

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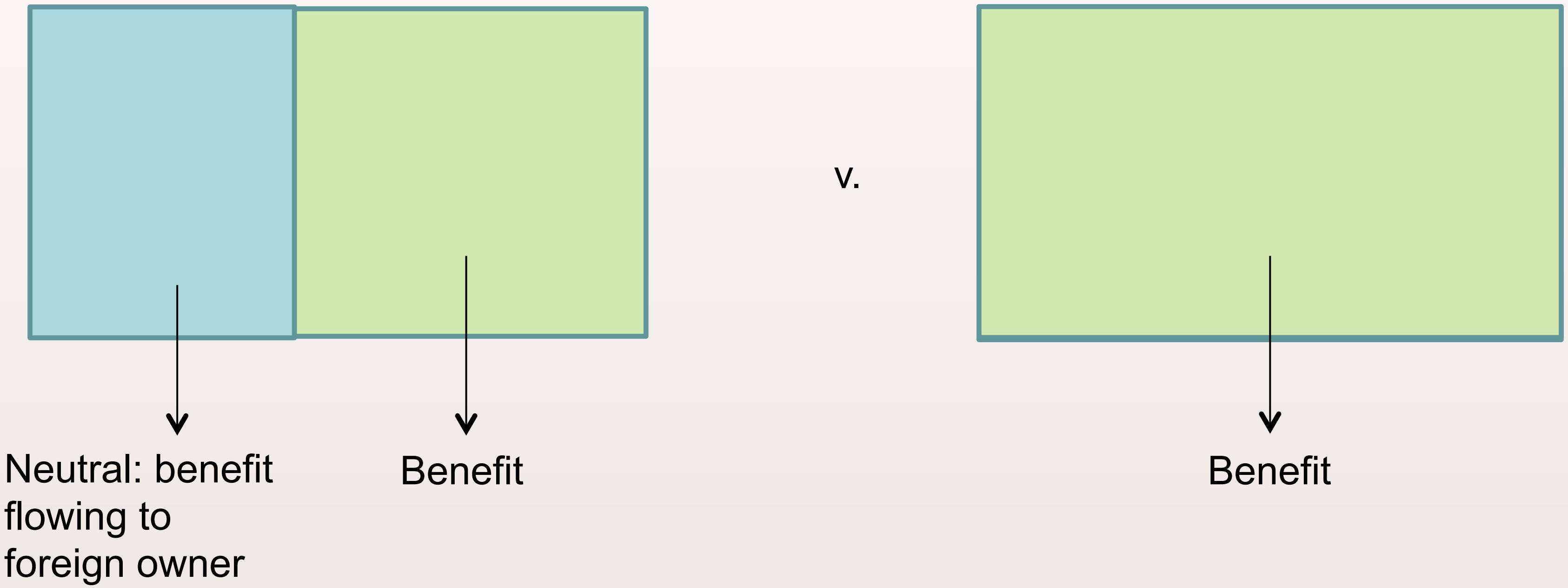

Logic: “Placing foreign owned businesses at a relative disadvantage in merger authorisations would create a disincentive for foreigners to undertake investment into New Zealand more generally.” (para 411)

Treatment of Foreigners

- If NZ-based business buying inputs: treat as if New Zealander, i.e., transfers neutral
- If foreign consumer in NZ: treat as foreigner (Air NZ/ Qantas), i.e., transfers from them are beneficial
- If NZ-based business making supra-normal profits: transfers to it are detrimental
- If NZ-based business increasing surplus: surplus increase is beneficial

Issues?

- Static approach: domestic today, foreign tomorrow?
- Domestic firm buying foreign one
  - argue that supra-normal profits earned by foreigner pre-merger earned by domestic firm post-merger is a benefit that can be balanced against the DWL resulting from a further price increase?