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Notice under s66 of the Commerce Act 1986

Application by Transpacific Industries Group (NZ) Limited

to acquire

the Christchurch solid waste collection business of Enviro Waste Services Limited

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CONTENTS

COMMERCE ACT 1986: BUSINESS ACQUISITION

SECTION 66: NOTICE SEEKING CLEARANCE

21 August 2007

The Registrar
Business Acquisitions and Authorisations
Commerce Commission
P0 Box 2351
Wellington

Pursuant to s66(1) of the Commerce Act 1986 notice is hereby given seeking **clearance** of a proposed business acquisition.

Glossary

The following terms are used in this Notice.

Blenheim/Nelson Application	The application for clearance for the acquisition by TPI of the business and assets of ESL's solid waste collection businesses in Blenheim and Nelson dated 16 August 2007.
Blenheim/Nelson Transaction	The acquisition by TPI of the business and assets of ESL's solid waste collection businesses in Blenheim and Nelson, where required, subject to divestment undertakings as contemplated by the Blenheim/Nelson Application.
CWS	Canterbury Waste Services Limited
Decision 604	Decision of the Commerce Commission dated 30 May 2007 in relation to the application for clearance for TPI to acquire the South Island Assets and Businesses of Enviro Waste Services Limited and up to 50% of the shares in Manawatu Waste Limited.
Dunedin Application	The application for clearance for the acquisition by TPI of the business and assets of ESL's solid waste collection business in Dunedin dated 20 August 2007.
Dunedin Transaction	The acquisition by TPI of the business and assets of ESL's solid waste collection business in Dunedin, where required, subject to divestment undertakings as contemplated by the Dunedin Application.
ESL	Enviro Waste Services Limited.
Ironbridge	Ironbridge Capital Pty Limited and, where the context requires, Barra Bidco Limited being the company which purchased the shares in ESL from Fulton Hogan.
Joint Venture Companies	Pikes Point Transfer Station Limited, Canterbury Waste Services Limited and Midwest Disposals Limited.
Original Notice	The application for clearance for TPI to acquire the South Island Assets and Businesses of Enviro Waste Services Limited and up to 50% of the shares in Manawatu Waste Limited dated 14 December 2006.
Timaru Application	The application for clearance for the acquisition by TPI of the business and assets of ESL's solid waste businesses in Timaru and Oamaru dated 16 August 2007.
Timaru Transaction	The acquisition by TPI of the business and assets of ESL's solid waste business in Timaru and Oamaru, where required, subject to divestment undertakings as contemplated by the Timaru Application.
Christchurch Transaction	The acquisition of the business and assets of ESL's solid waste collection businesses in Christchurch.
Transpacific	Transpacific Industries Group Limited, the listed Australian parent company of TPI.
TPI	Transpacific Industries Group (NZ) Limited.

PART I: TRANSACTION DETAILS

1. What is the business acquisition for which clearance is sought?

1.1 Clearance is sought for the acquisition, by Transpacific Industries Group (NZ) Limited (*TPI)* or a wholly owned subsidiary of TPI, of the business and assets of ESL's solid waste collection business in Christchurch (*the Christchurch Transaction*). The business comprises solid waste collection only.

1.2 This application for clearance is made without prejudice to any argument or material which may be used in support of TPI's appeal against Decision 604.

1.3 For the reasons outlined in this application, TPI believes the Christchurch Transaction will not have the effect, or likely effect, of substantially lessening competition in any market.

1.4 However, should the Commission not be satisfied that the Christchurch Transaction will not have the effect, or likely effect, of substantially lessening competition in any market, but without prejudice to any argument or material which may be used in support of TPI's appeal against that conclusion, TPI is prepared to provide either or both of the divestment undertakings under section 69A of the Commerce Act on the terms set out in Schedules 2A and 2B of this Notice.

1.5 As the Commission is aware, at the date of the Original Notice ESL was wholly owned by Fulton Hogan. Fulton Hogan has since sold all of the shares in ESL to Barra Bidco Limited, a company ultimately wholly owned by Ironbridge Capital Pty Limited (*Ironbridge*).

Information previously provided

1.6 In preparing this Notice, TPI has not repeated information contained in the Original Notice or information subsequently provided to the Commission in the course if its investigation in relation to the Original Notice. TPI requests that the Commission take that information into account in its consideration of this Notice (in addition to the information provided in and accompanying this Notice).

2. Who is the person giving this notice?

2.1 This notice is given by:

Greg Campbell
Managing Director
Transpacific Industries Group (NZ) Limited
86 Lunn Avenue
Mt Wellington

Telephone: (09) 574 0880
Facsimile: (09) 274 5254

2.2 All correspondence and notices in respect of this Notice should be directed in the first instance to:

Chapman Tripp Sheffield Young
Level 35
ANZ Tower
23-29 Albert Street
Auckland

Telephone: (09) 357 9020
Facsimile: (09) 357 9099

Attention: Lindsey Jones
(09) 357 9020

Huw McKinlay
(09) 357 9254

3. Confidentiality

3.1 Do you wish to request a confidentiality order for the fact of the proposed acquisition?

No. Confidentiality is not required for the fact of the proposed acquisition.

3.2 Do you wish to request a confidentiality order for specific information contained in or attached to the notice? If so, for how long? Why?

(a) Yes. Confidentiality is sought in respect of the information contained in this Notice which is set out in square brackets and shaded. That information is not included in the Public Copy of this notice.

(b) Confidentiality is sought under section 100 of the Commerce Act 1986 and under section 9(2)(b) of the Official Information Act 1982 on the grounds that:

(i) the information is commercially sensitive and contains valuable information which is confidential to TPI, Ironbridge and ESL; and

(ii) disclosure of it is likely to give an unfair advantage to TPI and ESL's competitors and unreasonably prejudice their commercial positions.

(c) TPI also requests that it is notified of any request made to the Commission under the Official Information Act for the confidential information, and that the Commission seeks TPI's views as to whether the information remains confidential and commercially sensitive at the time those requests are being considered.

4 Who are the participants (i.e. the parties involved)?

4.1 The Applicant

Transpacific Industries Group (NZ) Limited

86 Lunn Avenue
Mt Wellington
Auckland

Telephone: (09) 574 0880
Facsimile: (09) 274 5254
Attention: Greg Campbell

4.2 The Target

Enviro Waste Services Limited

Level 2
345 Nielson Street
Onehunga
Auckland

Telephone: (09) 622 8458
Facsimile: (09) 636 3561
Attention: Gary Saunders

Ironbridge Capital Pty Limited

Level 27, PwC Tower
188 Quay Street
Auckland

Telephone: (09) 363 2972
Facsimile: (09) 363 2727
Attention: Kerry McIntosh

All correspondence and enquiries in relation to ESL and Ironbridge should be directed in the first instance to:

Russell McVeagh
Vero Centre
48 Shortland Street
Auckland

Telephone: (09) 367 8000
Facsimile: (09) 367 8163
Attention: Andrew Peterson

5 Who is interconnected to or associated with each participant?

5.1 A chart setting out the interconnected bodies corporate of Transpacific is set out in Appendix 2. (There have been some changes since the structure chart provided with the Original Notice, notably to reflect the acquisition of Cleanaway in Australia.)

5.2 TPI does not have any information about the interconnected bodies corporate of Ironbridge Capital Pty Limited, beyond that referenced in the Original Notice. TPI understands that Ironbridge's New Zealand investments are: Enviro Waste Services Ltd; Auckland Central Backpackers Holdings Ltd; Qualcare Group Holdings Ltd; and 70% of CanWest MediaWorks (NZ) Ltd.

6 Does any participant, or any interconnected body corporate thereof, already have a beneficial interest in, or is it beneficially entitled to, any shares or other pecuniary interest in another participant?

6.1 There has been no change to the information provided in section 6 of the Original Notice. Neither TPI nor any of its interconnected bodies corporate has any beneficial interest in shares or any other pecuniary interest in Ironbridge, ESL or any of their interconnected bodies corporate other than the Joint Venture Companies.

6.2 As far as TPI is aware, neither Ironbridge, ESL nor any of their interconnected bodies corporate have any beneficial interest in shares or any other pecuniary interest in TPI or any of its interconnected bodies corporate other than ESL's interest in the Joint Venture Companies. However, Transpacific, is a publicly listed company and it is possible that Ironbridge, ESL or one of their interconnected bodies corporate may have a beneficial interest in shares in Transpacific. TPI is not, however, aware of that being the case.

7 Identify any links, formal or informal, between any participant/s including interconnected bodies corporate and other persons identified at paragraph 5 and its/their existing competitors in each market.

7.1 Details of formal or informal links between the participants, including their interconnected bodies corporate and other persons identified at paragraph 5 and other competitors were provided in the Original Notice. Of those, the only ones that are relevant to the markets affected by this Notice are:

- membership of the Waste Management Institute of New Zealand; and
- waste disposal arrangements whereby TPI and ESL's collection competitors deposit waste at the transfer station in Christchurch owned by Canterbury Waste Services Limited.

7.2 Since the Original Notice, Transpacific has acquired the solid waste business of Cleanaway in Australia. Cleanaway and ESL are parties to a joint venture, Enviroway Limited, which holds a collection contract with the Auckland City Council.

This joint venture is confined to Auckland and does not affect the Christchurch market.

8 Do any directors of the 'acquirer' also hold directorships in any other companies which are involved in the markets in which the target company operates?

8.1 No directors of Transpacific or TPI hold directorships in any other companies that operate in the markets in which ESL operates, other than in:

- the Joint Venture Companies or other joint venture companies identified in section 9 of the Original Notice;
- All Brite Industries Limited; and
- wholly owned subsidiaries of Transpacific.

9 What are the business activities of each participant?

Transpacific

9.1 The business activities of the wider Transpacific Group and of TPI in New Zealand were outlined in section 9 of the Original Notice so they are not repeated here. In relation to solid waste in New Zealand, TPI's businesses include:

- solid waste collection businesses in Northland, Auckland, Hamilton, Rotorua, Tauranga, Whakatane, Taupo, Gisborne, Hawkes Bay, New Plymouth, Palmerston North/Feilding, Wanganui, Kapiti, Wellington, Nelson, Christchurch, Timaru, Queenstown/Wanaka and Dunedin;

- ownership interests in and/or operation under contract of refuse transfer stations in Southland, Canterbury, Horowhenua, Wanganui, Hawkes Bay, Waikato, Greater Auckland and Northland;

- ownership interests in and/or operation under contract of landfills in Canterbury (Kate Valley), Horowhenua, Manawatu/Palmerston North (Bonny Glen), and Greater Auckland (Redvale); and

- collection and processing of recyclable waste in Auckland, Gisborne, Hawkes Bay, Bay of Plenty, Palmerston North and Greater Wellington through its recently acquired, 80% owned subsidiary, All Brite Industries.

9.2 TPI owns the Redvale Landfill in Auckland and it has a 50% shareholding in Midwest Disposals Limited, which owns the Bonny Glen Landfill near Marton. It also has a 50% shareholding in Canterbury Waste Services Limited (*CWS*) which owns and operates a transfer station in central Christchurch; has a 50% shareholding in Transwaste Canterbury Limited (which owns the Kate Valley Landfill north of Christchurch) and manages and operates the Kate Valley landfill. [[redacted]].

ESL

9.3 Enviro Waste's assets currently include:

- solid waste collection businesses in Auckland, Tauranga, Hamilton, Nelson, Blenheim, Christchurch, Timaru, Oamaru and Dunedin;

- a 50% shareholding in Manawatu Waste, which has assets including solid waste collection businesses in Taupo, Wanganui, Palmerston North and Horowhenua/Kapiti, interests in transfer stations in the central North Island and a 50% interest in Midwest Disposals Limited;

- a 50% shareholding in CWS;

- contracts in relation to transfer stations, a resource recovery centre and the landfill, all in Timaru; and

- a landfill (Fairfield) and transfer station in Dunedin.

Potential changes to business activities of the participants

9.4 As the Commission is aware, TPI also has agreements with Ironbridge to acquire:

(a) the shares held by ESL in CWS (giving TPI 100% of the shares in CWS);

(b) the Dunedin landfill and transfer station owned by ESL and Tartan Industries Limited

(c) ESL's collection businesses in Blenheim/Nelson, Timaru, and Dunedin; and

(d) 50% of the shares held by ESL in Manawatu Waste Limited.

9.5 Based on the Commission's analysis, as outlined in Decision 604, TPI proposes (subject to approval from the Overseas Investment Commission) to proceed with the acquisition of the shares in CWS and the acquisition of the Dunedin landfill and transfer station. For the purposes of this Notice, TPI suggests that the Commission treat TPI ownership of CWS and the Dunedin landfill and transfer station as part of the background against which it assesses the Christchurch Transaction.

9.6 In addition, TPI has filed, or will be filing, clearance applications in relation to some or all of the businesses or shares referred to in paragraph 9.4(c) and (d) (the *Other Transactions*). If:

- the Commission grants clearance for the Blenheim/Nelson Transaction, the Timaru Transaction and/or the Dunedin Transaction, the Commission is asked to consider the Christchurch Transaction against the background that the transactions for which clearance has been given will proceed as permitted by the relevant clearance (but that TPI will not have completed, or will not complete (except to the extent clearance is given subsequent to a decision on this Notice), the balance of the Other Transactions); and

- the Commission declines to grant clearance for the Blenheim/Nelson Transaction, the Timaru Transaction and/or the Dunedin Transaction the Commission is asked to consider the Christchurch Transaction against the background that TPI has not completed, and will not complete (except to the extent clearance is given subsequent to a decision on this Notice), any of the Other Transactions.

10 What are the reasons for the proposal and the intentions in respect of the acquired or merged business?

10.1 In Decision 604 the Commission declined to grant clearance for TPI to acquire all of ESL South Island solid waste businesses and up to 50% of the shares in Manawatu Waste Limited. Pending the outcome of its appeal on Decision 604, TPI wishes to acquire those of ESL's businesses and assets for which the Commission is prepared to grant clearances, whether with or without divestment undertakings. TPI is filing a series of clearance applications in relation to ESL assets and businesses and necessarily reserves its rights to appeal against refusal of any of those applications. When the Commission has determined the current applications, TPI will settle the scope of the appeal (or appeals) that it will pursue to hearing.

10.2 As outlined in the Original Notice, Transpacific's business strategy is to expand in New Zealand through organic growth and targeted acquisitions. The Christchurch Transaction is consistent with this strategy.

10.3 [ ].

PART II: IDENTIFICATION OF MARKETS AFFECTED

Horizontal Aggregation

11	**Are there any markets in which there would be an aggregation of business activities as a result of the proposed acquisition?**

MARKET DEFINITION

Commerce Commission views to date

11.1 In Decision 604, the Commission determined the following markets as relevant to its investigation into the Original Notice:

(a) local/regional markets for the provision of local authorities' contracts for public kerbside collection of solid non-hazardous waste ("*local authority collection contract market*");

(b) local/regional markets for the provision of privately contracted collection of solid non-hazardous waste in wheelie bins (including refuse bags and drums) from households and small commercial customers ("*wheelie bin collection market*");

(c) local/regional markets for the provision of privately contracted collection of solid non-hazardous waste in front-end-loaded bins from commercial customers ("*FEL collection market*");

(d) local/regional markets for the provision of privately contracted collection of solid non-hazardous waste by gantry and huka bins ("*gantry collection market*");

(e) local markets for refuse transfer stations ("*RTS market*");

(f) regional markets for disposal of solid non-hazardous waste at landfills ("*landfill market*"); and

(g) the national market for the provision of waste management services to multi-regional customers ("*national multi-regional customers waste management market*").

11.2 TPI does not agree with the Commission's conclusions in respect of the collection market to the extent the Commission found separate product markets for privately contracted collection of solid non-hazardous waste in different types of bins – ie separate markets for collection of waste in gantry and huka bins, the collection of waste in FEL bins and the collection of waste in wheelie bins. Nor does TPI agree with the Commission's conclusion that there is a separate market for the provision of waste management services to multi-regional customers.

11.3 However, for the purposes of this Notice, and without prejudice to its appeal of Decision 604, TPI has adopted the above market definitions.

TPI and ESL solid waste activities in the Christchurch area

11.4 The following table identifies the solid waste activities of TPI and ESL in the Christchurch area. It assumes that TPI will have acquired the shares held by ESL in CWS.

Table 1: TPI and ESL solid waste activities in Christchurch

Activity	TPI	ESL
Landfill disposal services	Yes	No
Transfer station ownership/operation	Yes	No
Operation of recycling facilities	No	No
Local authority collection contract	Yes Christchurch City Selwyn District Waimakariri District	No
Waste Collection: wheelie bin	Yes	Yes
Waste Collection: FEL bins	Yes	Yes
Waste Collection: gantry	Yes	Yes

"Markets" relevant to Christchurch Transaction

11.5 Having regard to the activities of TPI and ESL in the Christchurch area and adopting the Commerce Commission's market definitions, the following markets will be relevant for this Notice:

- the local authority collection contract markets in Christchurch City, Selwyn District and Waimakariri District;
- the wheelie bin collection market in Christchurch;
- the FEL collection market in Christchurch;
- the gantry collection market in Christchurch; and
- the national multi-regional customers waste management services market.

Differentiated Product Markets

12 Please indicate whether the products in each market identified in question 11 are standardised (buyers make their purchases largely on the basis of price) or differentiated (buyers make their purchases largely on the basis of product characteristics as well as price).

12.1 In Decision 604, the Commission provided a summary at Table 3 (page 31) of the different "service characteristics" of the different modes of collection and commented on scheduled and non scheduled waste collection services. TPI does not consider that the differences identified by the Commission are such to warrant a conclusion that there are separate markets for collection in different bin types. TPI instead considers that the relevant collection markets are geographically distinct but contain several products differentiated by bin type.

12.2 As previously noted to the Commission, the collection of waste involves a diverse range of customers, waste with differing characteristics, and differing volumes that could be collected at different frequencies from locations with different physical characteristics. Putting a dividing line between collection of waste in FEL bins, gantry bins and wheelie bins does not take account of these features.

12.3 However, for the purposes of this Notice, TPI has adopted the Commission's market definitions so further comment on product differentiation is not required.

13 For differentiated product markets:

- ☐ **Please indicate the principal characteristics of products that cause them to be differentiated one from another.**
- ☐ **To what extent does product differentiation lead firms to tailor and market their products to particular buyer groups or market niches?**
- ☐ **Of the various products in the market, which are close substitutes for the products of the proposed combined entity? - which are more distant substitutes?**
- ☐ **Given the level of product differentiation, to what extent do you consider that the merged entity would be constrained in its actions by the presence of other suppliers in the market(s) affected?**

Not Applicable

14 Vertical integration

14.1 For the purposes of assessing the competition effects of the Christchurch Transaction, the Commission has been asked to assume that TPI will have acquired ESL's shares in CWS. Since TPI already has a waste collection business in Christchurch, the acquisition by TPI of ESL's waste collection business in Christchurch will not result in any additional vertical integration.

14.2 In Decision 604, the Commission stated:

> "On these facts, the Commission concludes that it is unlikely that TPI in the factual would have a significantly greater ability than in the counterfactual to put in place discriminatory access terms or increased gate prices at the Kate Valley landfill. As a consequence, the Commission concludes that the vertical integration effects from the Acquisition are unlikely to raise further competition concerns in the downstream markets for wheelie bin and FEL collection services in Christchurch of sufficient magnitude to constitute a substantial lessening of competition." [para 616]

14.3 TPI agrees with the Commission's conclusion and accordingly makes no further comment on vertical integration in Christchurch.

15 In respect of each market identified in question 11 identify briefly:

- **all proposed acquisitions of assets of a business or shares involving either participant (or any interconnected body corporate thereof) notified to the Commission in the last three years and, in each case,**
  - **the outcome of the notification (e.g. cleared, authorised, declined, withdrawn)**
  - **whether the proposed acquisition has occurred.**
- **any other acquisition of assets of a business or shares which either participant (or any interconnected body corporate) has undertaken in the last three years.**

TPI

15.1 TPI has undertaken a number of acquisitions in the New Zealand market over the last three years. A number of these were advised to the Commission in the context of the Commission's investigation into the merger of TPI and Waste Management in mid 2006 and further transactions undertaken in the period to 14 December 2006 were set out in the Original Notice. Since then:

(a) Transpacific has undertaken a number of acquisitions in Australia but the only transaction affecting the New Zealand market has been the acquisition of the solid waste business of Cleanaway; and

(b) TPI has acquired the following businesses:

- Corrosion Control, an industrial sand blasting and coatings business located in Kawerau;

- Mullan & Noy (by way of a joint venture with the existing owner, Stevensons) – a manufacturer of bins and aerators (for use in waste water treatment ponds); also runs a machine shop machining parts for large commercial businesses;

- East West Waste Limited which operates a solid waste collection business in Northland from its base in Kerikeri. (Until this acquisition, TPI did not operate in the same geographic area as East West Waste.)

ESL

15.2 As far as TPI is aware, ESL has not undertaken any business or share acquisitions since the date of the Original Notice.

Ironbridge

15.3 As far as TPI is aware, the only acquisition by Ironbridge since the Original Notice is the acquisition of shares in CanWest MediaWorks (NZ) Limited. Ironbridge has since made a full takeover offer.

THE FOLLOWING SECTIONS ADDRESS PARTS III, IV AND V: CONSTRAINTS ON MARKET POWER BY EXISTING AND POTENTIAL COMPETITION AND OTHER POTENTIAL CONSTRAINTS IN RELATION TO EACH OF THE IDENTIFIED PRODUCT MARKETS

16. Collection markets

Introduction

16.1 As outlined above, the Christchurch Transaction will affect the following markets (as defined by the Commission in Decision 604):

- the local authority collection contract markets Christchurch City, Selwyn District and Waimakariri District;
- the wheelie bin collection market in Christchurch;
- the FEL collection market in Christchurch;
- the gantry collection markets in Christchurch; and
- the national multi-regional customers waste management market.

Market shares

16.2 As outlined in the Original Notice, TPI considered it was not able to accurately determine market shares for the solid waste collection market because of the range of waste that is collected: unsorted household refuse, sludge, unsorted business refuse, residential recyclables, municipal waste, glass, scrap metal, plastics, sawdust, cardboard, paper, C&D waste, greenwaste etc.

16.3 In Decision 604, the Commission reached a conclusion with regard to market shares in the various collection markets[1] stating at Footnotes 115, 118 and 141 that its source was "information obtained by the Commission from TPI, Manawatu Waste, Enviro Waste and other small industry participants and local authorities." TPI is not in a position to obtain information from most of those sources, in particular its competitors, and while it can obtain information from some local authorities, the information is not generally broken down in waste collected by bin type. Since the Commission's conclusions on market share in each of its separate collection markets are confidential, TPI cannot comment.

16.4 In this Notice, TPI does not attempt to estimate market shares of the more narrowly defined markets adopted by the Commission. The Commission has already reached its own conclusions in this regard in Decision 604. TPI expects, however, that its post-transaction share of waste collected in Christchurch will be outside the Commission's market share safe-harbours.

Local authority collection contract markets

16.5 In relation to the local authority collection contract markets in Christchurch City, Selwyn District and Waimakariri District, the Commission concluded in Decision 604:

[1] Tables 10,11 and 12 at pages 79, 91 and 106 of Decision 604.

Christchurch

"The Commission considers that the Acquisition is unlikely to have the effect, or likely effect of substantially lessening competition in this market in Christchurch given that there will be no real change in the number of potential bidders in the factual and the counterfactual. Other potential bidders from outside of the area, such as [ ] are likely to continue to constrain the combined entity from exercising market power." [para 318].

Selwyn

"In the Commission's view, EnviroWaste would be likely to be in a position to bid for the Selwyn contract when it comes up for tender in the next 2-3 years.

The Commission considers that the Acquisition is unlikely to have the effect, or likely effect of substantially lessening competition in this market in Selwyn given that there will be no real change in the number of potential bidders in the factual and the counterfactual. Other potential bidders from outside of the area, such as [ ] will continue to constrain the combined entity from exercising market power."[paras 321 & 322]

Waimakariri

"Therefore, in the Commission's view EnviroWaste is a potential bidder for the Waimakariri District Council contract in the next tender round.

The Commission considers that the Acquisition is unlikely to have the effect, or likely effect, of substantially lessening competition in this market in Waimakariri given that there will be no real change in the number of potential bidders in the factual and the counterfactual. Other potential bidders from outside of the area, such as [ ] will continue to constrain the combined entity from exercising market power." [paras 327 & 328]

16.6 TPI agrees with the Commission's conclusions outlined above and considers that the Christchurch Transaction is unlikely to have the effect, or likely effect, of substantially lessening competition in the local authority collection contract markets in Christchurch City, Selwyn District and Waimakariri District.

Christchurch gantry collection market

16.7 The Commission concluded in Decision 604:

"...because of the degree of existing competition, and the relative ease of entry into and expansion in, gantry markets, there do not appear to be any significant competition issues in any relevant gantry market. The Commission is therefore satisfied that the Acquisition will not have, or would not be likely to have, the effect of substantially lessening competition in all relevant gantry collection markets." [para 442]

16.8 TPI agrees that the acquisition by TPI of ESL's gantry collection business in Christchurch will not give rise to a substantial lessening of competition in the Christchurch gantry collection market. Accordingly, TPI makes no further comment in relation to the gantry market.

Christchurch wheelie bin collection market

16.9 In Decision 604, the Commission concluded in relation to the Christchurch wheelie bin collection market:

> "The Commission has determined that the [ ] participant in the Christchurch wheelie bin market is Mastagard. Mastagard collects waste from [ ] wheelie bins per week. Another smaller competitor, Waste-Away Bins, collects waste from [ ] wheelie bins. [ ]. There are also other one or two person wheelie bin collection businesses in Christchurch. The Commission considers that the presence of Mastagard and other smaller competitors would, therefore, provide some degree of constraint on TPI in the factual.
>
> For these reasons the Commission concludes that:
>
> - TPI will be constrained by existing competitors from exercising market power in the factual in wheelie bin/refuse bag collection markets in … Christchurch; ….
>
> …. The Commission is satisfied, however, that the unilateral market power effects of the Acquisition will not have, or would not be likely to have, the effect of substantially lessening competition in the wheelie bin collection markets in … Christchurch…."
> [paras 371 - 373]

16.10 Given the Commission's conclusion in this regard, TPI makes no further comment in relation to the horizontal effects of the acquisition of ESL's wheelie bin collection business on the Christchurch wheelie bin market.

16.11 In relation to co-ordinated market power, the Commission made no finding but said:

> "..on the facts which have emerged during this investigation, the Commission has a number of co-ordinated market power concerns." [para 510]

16.12 TPI does not know what facts the Commission is referring to in its comment at paragraph 510, but a range of factors indicate that the Christchurch Transaction is unlikely to increase the scope for co-ordinated market power in the wheelie bin market.

16.13 Tables 2 to 4 below comment on the market characteristics facilitating or impeding coordination as set out in the Commission's Mergers and Acquisitions guidelines:

Table 2: Scope for coordinated market power
Christchurch wheelie bin market

Factor	Present	Effect of Transaction
High concentration of sellers	Not really. Yellow Pages lists over a dozen suppliers of wheelie bin or drum services.	Increases concentration by one
Undifferentiated product	Some different service offerings (drums, 'back door' services, weekly, fortnightly, four weekly collections)	No change

Factor	Present	Effect of Transaction
Price inelastic market demand	Yes, for some customers; no for others – and there are increasing opportunities for recycling and competition from other products such as drums (for residential and small business customers) and FELs (for business customers).	No change
Entry by new firms is slow	Not really	No change
Few fringe competitors	Over a dozen suppliers of bin and drum services listed in Yellow Pages.	No change
Loss of an aggressive competitor	Not particularly	Mastagard Waste Away Bins and over a dozen competitors will remain
Static production technology	Some scope for new initiatives, particularly in resource recovery.	No change
History of anti-competitive behaviour	No	No change
Purchasers have countervailing power	Yes – customers can switch to the Council bag option or to one of the several other wheelie bin or drum operators	No change

Table 3 : Detection of deviation from coordination

Christchurch wheelie bin market

Factor	Present	Effect of Transaction
High concentration of sellers	Yes	Increases concentration by one
Frequent sales	Not particularly. All customers are continuous (ie repeated) buyers. Apart from marketing-generated opportunities, sales mainly occur when occupancy changes at a site (residential or business) which is relatively infrequent.	No change
Stable, slow growth in demand	No. Overall market growth varies with population.	No change
Price transparency	Residential – yes Commercial - no	No change
Cost similarities between businesses	No. Different product mixes, technologies and customer bases.	No change
Multi-market contact	Yes - but detection is similarly difficult in the other relevant markets.	No change
Lack of vertical integration	Only TPI will be vertically integrated	No change arising from acquisition of collection business.

Table 4: Ability to retaliate

Christchurch wheelie bin

Factor	Present	Effect of Transaction
Credibility of threats to abandon collusion & expand output should prices fall	Fairly low scope for retaliation in ways that could enforce collusion. Output expansion would require capture of rivals' customers, which is the main growth objective of all parties anyway.	No change
Availability of excess capacity in hands of non-deviating parties	All participants have excess capacity but are constrained from selling it by competitive pressure from rivals.	No change
Non-deviating parties have strong profit incentive to preserve the collusion	All parties have similar profit incentives and there is no collusion.	No change
Ability to disadvantage deviating business by dumping output in deviating party's market	See first row of this table above.	No change

16.14 While there are some features of the Christchurch wheelie bin collection markets that suggest the market could be susceptible to coordination effects, the features outlined at paragraphs 16.15 to 16.22 below suggest coordination is unlikely or that the Christchurch Transaction will not materially change behaviours.

16.15 Coordination is most likely where there is a small number of similarly sized firms. Where one firm is materially larger, it will tend to be a price leader, particularly if it enjoys a scale-related cost advantage. This is not collusive: it merely indicates that the fringe players are optimising against the price/quantity constraints that the largest firm sets. TPI is probably already the leader in Christchurch, and the proposed transaction will not alter that.

16.16 There are numerous providers of wheelie bin services in Christchurch including: Action Tidy Bins, Bin Co, Container Waste Limited, Always Bin Reliable, Ezy Bin Hire, Mr Bins Limited, Tidy Bins, Waste Away Bins, Bin It, TSD Disposals, Phil A Skip Limited, Mastagard, Friendly Bins, Giant Rubbish Bags Service, Laffey Bins and Ace Bins. (Refer copies of website materials and Yellow Pages attached as Appendix 3).

16.17 There are also numerous providers of drum services in Christchurch. These services are an alternative to wheelie bins for both garden and general household waste. Suppliers include: Action Tidy Bins, All Round Services, Bin Co, Container Waste Limited, Always Bin Reliable, Bassco Bins, Buzzin Bins, Citywide Bins, Clearaway Bins, Mr Bins Limited, Tidy Bins, Waste Away Bins, Bin It, Friendly Bins, Garden City Waste and Bin Hire, Laffey Bins and Ace Bins.

16.18 The product differentiation in the Christchurch market would make co-ordination difficult. The range of service offerings is illustrated in the advertisements in the Yellow Pages. There are:

- wheelie bin and drum options;

- weekly, fortnightly and monthly collections;

- irregular collections/casual services;

- free drums with lids (new liner every pickup);

- giant rubbish bags for regular or casual services, domestic or commercial garden waste or general rubbish – pick up when you are ready; and

- "back door services" where bins are picked up from the premises (usually the back of the house) and kerbside services.

16.19 Where wheelie bins are used for commercial contracts, pricing is not transparent.

16.20 TPI restates its position that the barriers to new entry to the provision of wheelie bin services are low and in this regard refers to the comments in Schedule 1 of this Notice on constraints from potential competition.

16.21 TPI considers that the combination of the above factors suggest that the wheelie bin market in Christchurch is unlikely to be susceptible to co-ordination effects. If the Commission has information to suggest otherwise, TPI would contend that any such propensity toward co-ordination effects is unlikely to be materially enhanced by Christchurch Transaction.[2]

16.22 Some firms in the wheelie bin market in Christchurch also operate in other parts of the waste collection market. For example, Mastagard also provides gantry services. To the extent that there would be any concern that departure from any co-ordination might give rise to retaliatory conduct in gantry for instance, this transaction would not materially change that.

FEL collection in Christchurch

Unilateral effects

16.23 In Decision 604, the Commission concluded that the transaction would result in a substantial lessening of competition in all regions, including in Christchurch, for the following reasons:

- economies of density are a barrier to entry;

[2] TPI notes the Commission's comments at paragraph 131 of Decision 604 with regard to the Christchurch City Council contract: "In other geographic areas, there is absolutely no substitute for local authority contracts, for example, in Timaru and potentially in Christchurch." Clearly the Christchurch City Council has considerable power to determine the future of private residential waste collection services.

- the industry standard three year FEL customer collection contract containing automatic roll over and price matching provisions is a significant barrier to the achievement of those economies of density;
- examples of existing competition and entry at the margin will be too ineffectual to constrain TPI; and
- gantry and wheelie bins do not provide near competition or a constraint on FEL prices.

Economies of density

16.24 The Commission did not accept that TPI's financial models of an FEL operation correspond to the real life situation faced by an entrant in FEL collection. [para 409]. It concluded that:

- TPI's models were chosen to represent the favourable densities of an incumbent which has [a specified number] of existing bins to collect and that until the new entrant achieves a density of below about 3.5 kilometres per lift, it will not be profitable [para 418]; and
- an entrant into FEL collection markets must obtain economies of density similar to the incumbent operators to be successful [para 420].

16.25 A response to the Commission's comments in relation to TPI's models and further modelling of FEL entry has been provided in the separate paper from Covec Limited "*Competition for Scheduled Waste Services – Sustainable Market Structure*". Refer also to the comments in Part A of Schedule 1 of this Notice.

"Standard industry contract"

16.26 The Commission concluded that a significant barrier to the achievement of those economies of density is the industry standard three year FEL customer collection contract containing automatic roll over and price matching provisions. [para 420] The Commission also stated that the contracts have penalty provisions for customer non-performance, automatic roll over provisions in the absence of two month prior notice and a price matching clause. [para 421]. For the reasons outlined to the Commission in the context of the Original Application, TPI does not agree with the Commission's position that provisions of these contracts constitute a barrier to new entrants obtaining customers.

16.27 In any case, TPI's view is that there is a sufficient number of customers that are not on 3 year contracts to provide a potential customer base to new entrants in the event TPI were, in the factual, to attempt to raise its prices. [ ] of TPI's customers in Christchurch are not on contracts with three year terms as illustrated in the following table.

CONFIDENTIAL Table 5: FEL contracts

Christchurch

Contract type	Number	% of customers
[ ]	[ ]	[ ]
[ ]	[ ]	[ ]
[ ]	[ ]	[ ]
[ ]	[ ]	[ ]
[ ][3]	[ ]	[ ]
[ ]	[ ]	[ ]
Total FEL customers	[ ][4]	100

16.28 Even where customers are on three year contracts, in the next 12 months approximately one third of those contracts will be available for a new entrant to contest – in addition to the uncontracted customers and those on 12 month contracts. Within the Commission's two year time frame, a significant number of contracts will have been available for a new entrant to contest [ ].

Existing competition and entry at the margin

16.29 The Commission considered that the examples of existing competition and entry at the margin will be too ineffectual to constrain TPI in the factual [para 415] and, in particular, in Christchurch, Mastagard will not constrain TPI in the counter-factual.

16.30 TPI submits that Mastagard would be a real and effective constraint on its pricing in the factual scenario. The relevant questions therefore do not concern Mastagard's current intentions, but the incentives it would face if TPI, having acquired ESL's business, were to increase its FEL prices. A market with an apparent choice of only one player in TPI will be incentivised to encourage new entry or the expansion of an existing player such as Mastagard to keep TPI "honest". The prospect of losing market share would thereby constrain TPI's ability to increase prices in the factual. Having invested in market share through acquisition, TPI would be reluctant to lose it through a myopic pricing strategy.

16.31 Furthermore, Mastagard has the advantage of being a 'local' operator with considerable goodwill in the Christchurch market. TPI's view is that Mastagard is well placed to enter the FEL market. TPI also considers that Christchurch will be a very attractive market for entry by JJ Richards.

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[3] [ ]

[4] This figure differs from the figure provided to the Commission in the context of the Original Application as there has been some tidying up of TPI's database in the meantime.

Gantry and wheelie bins as constraints

16.32 The Commission concluded that gantry and wheelie bins do not provide near competition or a constraint on FEL prices. [paras 416 & 417]. TPI considers there is a greater degree of substitutability in price terms than the Commission has recognised. A separate paper from Covec will be provided in this regard.

16.33 In summary, TPI maintains that:

- economies of density are not a barrier to entry in Christchurch;
- the position with regard to contract terms in Christchurch market is such that within the Commission's two year time frame, there are likely to be significant numbers of contracts available for a new entrant to compete for;
- in Christchurch, there is no reason why Mastagard or JJ Richards could not be a constraint on TPI in the factual; and
- while not fully substitutable in all circumstances, gantry and wheelie bins do provide near competition and hence are a constraint on FEL prices.

Co-ordination effects

16.34 In the event the Commission should alter its conclusion in relation to the FEL market in Christchurch and find that the Christchurch Transaction would not enable TPI to exercise unilateral market power, the Commission should not be concerned that the Christchurch Transaction will increase the scope for co-ordinated market power in the FEL market in Christchurch. New entrants or an expanding existing supplier would be hungry for market share and as a consequence co-ordination effects are unlikely.

17. National multi-regional customers waste management service market

Introduction

17.1 In Decision 604 the Commission concluded that there was a separate national market for the provision of waste management services to multi-regional customers [para 222] and that the acquisition by TPI of ESL's South Island collection businesses and up to 50% of the shares in Manawatu Waste would lead to a significant lessening of competition in this market [para 488].

17.2 TPI does not concur with the Commission's view. A separate paper addressing competition in this market (without conceding market definition) is attached as Appendix 1 and forms part of this Notice (the *National Customers Paper*).

17.3 In addition, TPI notes that the Commission did not conclude in Decision 604 whether certain individual businesses could be purchased by TPI due to the structure of the clearance application (which sought clearance for *all* of the South Island assets of ESL). However, in a footnote to paragraph 489 (footnote 144) the Commission stated:

> "The Commission notes that it may be that some limited acquisitions of some of the relevant assets/businesses might not affect Enviro Waste's ability to provide national supply – if it were not to operate in only some discrete geographic markets. But as the Application related to the Acquisition as defined – namely all of Enviro Waste's South Island assets and businesses and part of its shareholding in Manawatu Waste – it has not been necessary, nor appropriate, for the Commission to consider whether smaller and discrete acquisitions would have the same effect in this market."

17.4 Without prejudice to the arguments put in the National Customers Paper, TPI makes the following comments specifically with regard to Christchurch.

Christchurch

17.5 In the context of the Original Notice, TPI provided a list of customer accounting for revenues over $5,000 per month where TPI provides waste collection services at more than one branch. TPI has assessed the revenue from its "national customers" which is attributable to Christchurch collection operations. These are set out in Table 6 below.

[CONFIDENTIAL] Table 6: "National customers" with branches in Christchurch

Customer	Annual Revenue	% of total revenue from that customer	Service type
[ ]	[ ]	[ ]	[ ]
[ ]	[ ]	[ ]	[ ]
[ ]	[ ]	[ ]	[ ]
[ ]	[ ]	[ ]	[ ]
[ ]	[ ]	[ ]	[ ]
[ ]	[ ]	[ ]	[ ]
[ ]	[ ]	[ ]	[ ]
[ ]	[ ]	[ ]	[ ]
[ ]	[ ]	[ ]	[ ]
[ ]	[ ]	[ ]	[ ]
[ ]	[ ]	[ ]	[ ]
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[ ]	[ ]	[ ]	[ ]
[ ]	[ ]	[ ]	[ ]
[ ]	[ ]	[ ]	[ ]
[ ]	[ ]	[ ]	[ ]
[ ]	[ ]	[ ]	[ ]
[ ]	[ ]	[ ]	[ ]
[ ]	[ ]	[ ]	[ ]

Customer	Annual Revenue	% of total revenue from that customer	Service type
[ ]	[ ]	[ ]	[ ]
[ ]	[ ]	[ ]	[ ]
[ ]	[ ]	[ ]	[ ]
[ ]	[ ]	[ ]	[ ]
[ ]	[ ]	[ ]	[ ]
[ ]	[ ]	[ ]	[ ]
[ ]	[ ]	[ ]	[ ]
[ ]	[ ]	[ ]	[ ]
[ ]	[ ]	[ ]	[ ]
[ ]	[ ]	[ ]	[ ]
[ ]	[ ]	[ ]	[ ]
[ ]	[ ]	[ ]	[ ]
[ ]	[ ]	[ ]	[ ]

17.6 Christchurch revenues from TPI's "national customers" as a percentage of total revenues from those customers are [ ]. While this percentage, the number of "national customers" with operations in Christchurch and the percentage contribution of their Christchurch operations to total revenues from the individual customers is higher than in Nelson/Blenheim, Timaru and Dunedin, ESL (and others) can still provide a "national service" from their operations elsewhere using subcontractors. TPI considers that the cost of providing the collection service through subcontracting arrangements where they do not have operations will not be materially different from providing the service themselves.

Divestment

17.7 If the Commission does not accept TPI's submissions that the Christchurch Transaction will not result in a substantial lessening of competition in the FEL or wheelie bin markets in Christchurch or the "national multi-regional customers waste management market" TPI submits (on a without prejudice basis as outlined in paragraph 1.4 above) that any concerns the

Commission may have with the Christchurch Transaction could be satisfied by one or both of the divestment undertakings set out in Schedule 2.

THIS NOTICE is given by Greg Campbell on behalf of Transpacific Industries Group (NZ) Limited (*TPI*).

I confirm that:

- all information specified by the Commission has been supplied;
- all information known to TPI which is relevant to the consideration of this Notice has been supplied;
- all information supplied is correct as at the date of this Notice.

I undertake to advise the Commission immediately of any material change in circumstances relating to the Notice.

Dated this day of August 2007.

Signed by Transpacific Industries Group (NZ) Limited:

____

Managing Director

I am an officer of Transpacific Industries Group (NZ) Limited and am duly authorised to make this Notice.

Schedule 1: Comments on constraint from potential competition

PART A: GENERAL

Economies of scale and route density

1 In relation to economies of scale and route density, the following comments from Decision 604 are noted:

> "However, if those submissions are correct, the question arises as to why TPI, Manawatu Waste and Envirowaste currently have such high market shares in all of the geographic wheelie bin/refuse bag collection markets under study… but one…
>
> That this has happened suggests to the Commission that (apart from Nelson and Horowhenua/Kapiti regions) the relevant user pays wheelie bin/refuse bag collection markets are examples of markets in which, while it is relatively easy to purchase the necessary equipment and begin trading, it is difficult for entrants or existing competitors to expand to such level of scale or density that they are able to effectively compete with the major market participants. That accords with the views of a number of small participants interviewed who indicated that it is not the cost of the truck, bins and other items that must be purchased that is the barrier to entry. Rather, it is the ability to generate scale and density by obtaining a sufficiently large customer base." [paras 362 & 363]
>
> The Commission does not accept that TPI's financial models of an FEL operation correspond to the real life situation faced by an entrant in FEL collection. The Commission considers that if the healthy profits, modelled by TPI, were so easily obtainable by entering FEL collection markets, there would have been much more entry into FEL collection markets than has actually occurred. [para 409]

2 With regard to the above, the following comments of the Court of Appeal in *Southern Cross*[5] are noted:

> "…the crucial point is rather whether there would be any significant barriers to entry or expansion if Southern Cross started to act in a supra-competitive manner [para 42]
>
> "the Commission's premise that there has been little, if any expansion or entry into the market in the past, a premise which the updating material somewhat undermines, does not in our view justify the inference that supra-competitive pricing by the merged entity would also be met by little, if any entry or expansion" para 87]
>
> "We have therefore come to the conclusion that the historical position does not support an inference of significant barriers to expansion" [para 89]

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[5] *Commerce Commission v Southern Cross Medical Care Society* (2001) 10 TCLR 269

> "It is not, however, sufficient to point simply to economies of scale to establish a barrier to entry or expansion. In the absence of a natural monopoly, or significant sunk costs, or other like advantages, the incumbent is unlikely to be insufficiently constrained." [para 91]
>
> "For these various reasons, we do not accept the soundness of the Commission's view that the reluctance it perceived on the part of other market participants to expand without having the economies of scale enjoyed by Southern Cross and despite the potential for economies of scope, was evidence of a significant barrier to expansion." [para 92]

3 While, obviously, it is recognised that health insurance and waste collection are very different functions and that the test under section 47 has changed from one of "dominance" to "substantial lessening of competition" and the Commission's approach to merger analysis has changed as a consequence, the above comments from *Southern Cross* are pertinent to the analysis of entry conditions. In particular, in Decision 604 the Commission appears to have reduced the 'per empty' revenues in its modelling (refer para 359) rather than assuming an increase in the per empty rates.

PART B: WHEELIE BINS

4 This section addresses, in relation to Christchurch, the Commission's comments on entry into the wheelie bin market.

5 The Commission appears to have accepted that, apart from the need to achieve economies of density, there are few barriers to entry to the wheelie bin collection market. At paragraph 363, the Commission noted:

> . " ... the relevant user pays wheelie bin/refuse bag collection markets are examples of markets in which, while it is relatively easy to purchase the necessary equipment and begin trading, it is difficult for entrants or existing competitors to expand to such level of scale or density that they are able to effectively compete with the major market participants. That accords with the views of a number of small participants interviewed who indicated that it is not the cost of the truck, bins and other items that must be purchased that is the barrier to entry. Rather, it is the ability to generate scale and density by obtaining a sufficiently large customer base.

National customers

6 At paragraph 367 of Decision 604, the Commission referred to companies serviced as national customers by either TPI or ESL as not being available to the entrant as potential customers and that this is a barrier to the entrant gaining high revenue commercial customers.

7 Of TPI's "national customers" only [[redacted]] use wheelie bin services.

Contract terms

8 At paragraph 367 of Decision 604, the Commission said:

> "Wheelie bin customers are contracted for between three months and one year and sometimes for three years if they are business customers. Domestic wheelie bin customers pay in advance for up to one year. Many of these customers will not be available to the small entrant."

9 The following table illustrates the range of contract terms for TPI's wheelie bin customers in Christchurch.

CONFIDENTIAL Table 7: Wheelie bin contracts

Contract type	Residential number of customers	% of Residential customers	Commercial number of customers	% of Commercial customers	% of Total customers
[ ]	[ ]	[ ]	[ ]	[ ]	[ ]
[ ]	[ ]	[ ]	[ ]	[ ]	[ ]
[ ]	[ ]	[ ]	[ ]	[ ]	[ ]
[ ]	[ ]	[ ]	[ ]	[ ]	[ ]
[ ]	[ ]	[ ]	[ ]	[ ]	[ ]
[ ]	[ ]	[ ]	[ ]	[ ]	[ ]
[ ]	[ ]	[ ]	[ ]	[ ]	[ ]
[ ]	[ ]	[ ]	[ ]	[ ]	[ ]
Total customers	[ ]	100	[ ]	100	100

10 This illustrates that [ ] TPI's residential wheelie bin customers in Christchurch] and [ ] will have been available for a new entrant to contest within the Commission's two year time. [ ]

Volume discounts at landfills

11 At paragraph 367 of Decision 604, the Commission said:

> "in certain cases, TPI, Manawatu Waste and Enviro Waste have the ability to obtain volume discounts at landfills or RTSs or in fact own (or operate) landfills in their own right"

12 Volume discounts are not available at the Kate Valley landfill. The waste is all taken to transfer stations (and there are three transfer stations that compete with the CWS transfer station) in the first instance and compacted before transport to the landfill.

Local authority waste collection

13 At paragraph 367 of Decision 604, the Commission said:

> " Local authority waste collection contracts, generally available to those larger players with experience in the market, provide advantages not available to a small entrant such as the ability of a collection business to share overheads and direct operating costs between council collection and commercial wheelie bin services. In some areas, a collection company has the ability to collect local authority refuse as well as its own privately sold bins… It thus appears that when a company such as TPI has a large market share in private wheelie bin collection contracts and also provides the local authority collection, the two factors operating together will cause barriers to entry into both private and public waste collection markets. That is because under these conditions the incumbent is provided with particularly large economies of density."

14 In Christchurch, the City Council does not allow operators to service their user pays customers while carrying out the municipal contract. The user pays collection has to be carried out at a different time or by a different vehicle.

Ability to fund debt or equity capital

15 At paragraph 367 of Decision 604, the Commission said:

> "a small entrant has less ability to fund the debt or equity capital needed for expansion, possibly whilst in a negative profit situation. Expansion is unattractive to a business facing competition from a large vertically integrated player that has the ability in some cases to decide on the collection business's disposal rates at landfill or RTS"

16 There are three points here:

16.1 While the intensity of competition is clearly relevant to business investment decisions, it would be unusual for well conceived expansion plans to be thwarted by a lack of financial capital.

16.2 For new entry into or expansion in wheelie bins, little in the way of financial capital is required.

16.3 In Christchurch, while TPI (through CWS) has an ownership interest in the landfill owning company, TPI does not have the ability to determine disposal rates at the landfill to advantage its collection arm over other collection competitors. There are also other competing transfer stations which impose a constraint on the pricing at the CWS transfer station.

Examples of new entry

17 At paragraph 367 of Decision 604, the Commission said:

> "in the past, successful entry into wheelie bin collection has occurred only when local authorities have abandoned rates-funded kerbside collection and allowed their rate payers a choice of municipal or commercial collection. That (along with acquisition) was the method by which Manawatu Waste was able to enter wheelie bin collection markets since 1999. These opportunities no longer exist for entrants..."

18 TPI does not agree with this. There is a continuing demand from householders, even years after a council has abandoned rates funded kerbside collections. This demand comes from changing household demographics (number of people in a home); change in house location (New Zealanders move house regularly); and changing preferences from bags to bins (for reasons such as dog strikes, price etc).

Conclusion

19 Having regard to the above, TPI submits that few of the features identified in Decision 604 as being barriers to entry to the wheelie bin market are in fact applicable in Christchurch.

Schedule 2A: Divestment Undertaking - FEL

Date:

PARTIES

Transpacific Industries Group (NZ) Limited, a duly incorporated company under the Companies Act 1993 having its registered office at Auckland (*TPI*).

The Commerce Commission, a body corporate established by section 8 of the Commerce Act 1986 (the *Commission*).

BACKGROUND

A On [ ] August 2007 TPI gave notice to the Commission pursuant to section 66(1) of the Commerce Act 1986 (the *Act*) seeking clearance for the proposed acquisition by TPI of the solid waste collection business of Enviro Waste Services Limited (*ESL*) in Christchurch (the *Clearance Application*).

B In the event that the Commission concluded that the Clearance Application could not be granted on its own terms without divestments undertaking, TPI offered the Commission the divestment undertakings in the form of this deed, pursuant to section 69A of the Act, but without prejudice to any argument or material which may be used in support of an appeal by TPI against any determination by the Commission on the Clearance Application.

BY THIS DEED the parties agree as follows:

1 **DEFINED TERMS AND CONSTRUCTION**

1.1 In this Deed:

Completion means the date on which the sale and purchase contemplated in the ESL Sale Agreement is completed;

Divestment Date means the [ ] from Completion;

ESL Sale Agreement means the "Sale of Business Agreement – Christchurch Collections" between Barra Topco II Limited, Barra Bidco Limited, Transpacific Industries Group (NZ) Limited and Enviro Waste Services Limited dated [ ] 2007;

FEL Assets means the front end load trucks and front end load bins owned or leased by Enviro Waste Services Limited and which are used in the collection of solid non-hazardous waste from customers in the Territory;

FEL Contracts means the contracts between Enviro Waste Services Limited and customers in the Territory for the collection of solid non-hazardous waste in front end load bins using front end load trucks;

FEL Divestment Assets means the FEL Assets and the FEL Contracts;

FEL Purchaser means such purchaser or purchasers as the Commission may consider is or are able to operate the business of the collection of solid non-hazardous waste in FEL bins from commercial customers in the Territory and which is or are not an interconnected body corporate (as defined by section 2(7) of the Act) or an associated person (as defined by section 47(3) of the Act) of TPI;

Territory means Christchurch City.

1.2 In the construction of this deed, unless the context requires otherwise:

Documents: a reference to any document, including this deed, includes a reference to that document as amended or replaced from time to time;

Headings: headings appear as a matter of convenience and do not affect the construction of this deed;

Negative Obligations: a reference to a prohibition against doing any thing includes a reference to not permitting, suffering or causing that thing to be done;

2 COVENANTS

FEL Divestment

2.1 Subject to Completion, and no later than the Divestment Date, TPI will sell or procure the sale of the FEL Assets and the assignment or novation of the FEL Contracts to the FEL Purchaser to enable the FEL Purchaser to immediately operate the business of the collection of solid non-hazardous waste in FEL bins from commercial customers in the Territory.

2.2 The divestment of the FEL Divestment Assets shall be an unreserved divestment of all of the legal and equitable interests and rights held by or on behalf of TPI in the FEL Divestment Assets.

Conduct pending divestment

2.3 TPI will use reasonable endeavours to operate the FEL Divestment Assets as viable business assets and maintain them in as good a state of operating condition and repair as they are in at Completion (subject to reasonable wear and tear arising in the course of normal and proper use).

Notification

2.4 TPI will advise the Commission of the completion of the divestment of the FEL Divestment Assets to the FEL Purchaser.

3 MISCELLANEOUS

Binding and enforceable

3.1 TPI confirms that in entering into the obligations recorded in this deed it intends to create binding and enforceable legal obligations for the benefit of the Commission.

3.2 **Governing law**

This deed is governed by New Zealand law and the parties accept the exclusive jurisdiction of the New Zealand Courts.

3.3 **Counterparts**

This Deed may be executed in any number of counterparts each of which is deemed an original, but all of which together are to constitute an instrument. It is acknowledged that this Deed may be executed by an exchange of facsimile copies and executing of this Deed by that means is valid and sufficient execution.

Schedule 2B: Divestment Undertaking – Wheelie Bins

Date:

PARTIES

Transpacific Industries Group (NZ) Limited, a duly incorporated company under the Companies Act 1993 having its registered office at Auckland (*TPI*).

The Commerce Commission, a body corporate established by section 8 of the Commerce Act 1986 (the *Commission*).

BACKGROUND

B On [ ] August 2007 TPI gave notice to the Commission pursuant to section 66(1) of the Commerce Act 1986 (the *Act*) seeking clearance for the proposed acquisition by TPI of the solid waste collection business of Enviro Waste Services Limited (*ESL*) in Christchurch (the *Clearance Application*).

B In the event that the Commission concluded that the Clearance Application could not be granted on its own terms without divestments undertaking, TPI offered the Commission the divestment undertakings in the form of this deed, pursuant to section 69A of the Act, but without prejudice to any argument or material which may be used in support of an appeal by TPI against any determination by the Commission on the Clearance Application.

BY THIS DEED the parties agree as follows:

4 **DEFINED TERMS AND CONSTRUCTION**

4.1 In this Deed:

Completion means the date on which the sale and purchase contemplated in the ESL Sale Agreement is completed;

Divestment Date means the [ ] from Completion;

ESL Sale Agreement means the "Sale of Business Agreement – Christchurch Collections" between Barra Topco II Limited, Barra Bidco Limited, Transpacific Industries Group (NZ) Limited and Enviro Waste Services Limited dated [ ] 2007;

Territory means Christchurch City.

Wheelie Bin Assets means the trucks and wheelie bins owned or leased by Enviro Waste Services Limited and which are used in the collection of solid non-hazardous waste from wheelie bin customers in the Territory;

Wheelie Bin Contracts means the contracts between Enviro Waste Services Limited and customers in the Territory for the collection of solid non-hazardous waste in wheelie bins;

Wheelie Bin Divestment Assets means the Wheelie Bin Assets and the Wheelie Bin Contracts; and

Wheelie Bin Purchaser means such purchaser or purchasers as the Commission may consider is or are able to operate the business of the collection of solid non-hazardous waste in wheelie bins from customers in the Territory and which is or are not an interconnected body corporate (as defined by section 2(7) of the Act) or an associated person (as defined by section 47(3) of the Act) of TPI.

4.2 In the construction of this deed, unless the context requires otherwise:

Documents: a reference to any document, including this deed, includes a reference to that document as amended or replaced from time to time;

Headings: headings appear as a matter of convenience and do not affect the construction of this deed;

Negative Obligations: a reference to a prohibition against doing any thing includes a reference to not permitting, suffering or causing that thing to be done;

5 COVENANTS

Wheelie Bin Divestment

5.1 Subject to Completion, and no later than the Divestment Date, TPI will sell or procure the sale of the Wheelie Bin Assets and the assignment or novation of the Wheelie Bin Contracts to the Wheelie Bin Purchaser to enable the Wheelie Bin Purchaser to immediately operate the business of the collection of solid non-hazardous waste in wheelie bins in the Territory.

5.2 The divestment of the Wheelie Bin Divestment Assets shall be an unreserved divestment of all of the legal and equitable interests and rights held by or on behalf of TPI in the Wheelie Bin Divestment Assets.

Conduct pending divestment

5.3 TPI will use reasonable endeavours to operate the Wheelie Bin Divestment Assets as viable business assets and maintain them in as good a state of operating condition and repair as they are in at Completion (subject to reasonable wear and tear arising in the course of normal and proper use).

Notification

5.4 TPI will advise the Commission of the completion of the divestment of the Wheelie Bin Divestment Assets to the Wheelie Bin Purchaser.

6 MISCELLANEOUS

Binding and enforceable

6.1 TPI confirms that in entering into the obligations recorded in this deed it intends to create binding and enforceable legal obligations for the benefit of the Commission.

6.2 **Governing law**

This deed is governed by New Zealand law and the parties accept the exclusive jurisdiction of the New Zealand Courts.

6.3 **Counterparts**

This Deed may be executed in any number of counterparts each of which is deemed an original, but all of which together are to constitute an instrument. It is acknowledged that this Deed may be executed by an exchange of facsimile copies and executing of this Deed by that means is valid and sufficient execution.