

TENNEX CROSS-SUBMISSION

1 We refer to the submission dated 17 October 2018 by Waste Management New Zealand Limited (*Waste Management*) in response to the Commerce Commission's Statement of Preliminary Issues in relation to the purchase of San-i-pak Limited by Tennex Capital Limited.

Competition assessment

2 Waste Management's submission largely focusses on the Commission's assessment of whether it has jurisdiction to authorise the proposed transaction: that is, whether it is satisfied the proposed transaction will likely substantially lessen competition in a market.

3 The Commission has previously determined that this proposed transaction would likely lessen competition.¹ Tennex accepted this analysis as the starting point for consideration of its application for authorisation dated 17 September 2018 (*Application*).²

District Health Boards (DHBs)

4 Tennex agrees with Waste Management's views that securing a large DHB contract is one way to facilitate efficient entry into the South Island, and that DHBs have significant countervailing power generally (both in the South Island and the North Island) that allows them to resist price increases.

5 In that regard, Tennex notes:

5.1 Waste Management can (and Tennex understands it does) participate in tender processes to provide services to DHBs in the South Island from time to time. If its proposition is sufficiently competitive in any particular instance, no doubt it will be successful in any such processes.

5.2 A pre-existing plant is not a pre-requisite to entry as demonstrated by Tennex, which won the Canterbury DHB contract without having physical plant in Christchurch and was able to absorb the costs associated with transporting material for a period while the plant was built.

6 Tennex notes Waste Management's comment that it does not have a facility in the South Island and would need a DHB contract to justify one. Tennex understands that Waste Management has sought resource consent to establish a facility at 305 Marshs Road at which it will process medical and laboratory waste, including needles, controlled waste and soft tissue. While the specifics of the facility are unknown, it illustrates that Waste Management is clearly a real competitive threat as a potential entrant.

Benefits accruing to Tennex

7 Waste Management submitted that benefits of scale "are likely to accrue to Tennex as there will be no competitive driver to ensure that any cost saving is passed on to customers."³ We note that the Commission typically applies a total welfare standard

¹ See [2016] NZCC 5.

² Refer the executive summary in the Application at [1]-[4].

³ Refer Waste Management's submission at [9].

in assessing the benefits that flow from a transaction and, under that approach, the query raised by Waste Management has no bearing on the analysis.

8 Tennex acknowledges the Court of Appeal’s discussion of the total welfare standard in *NZME v Commerce Commission*⁴. In particular, the Court acknowledges that the Commission typically pursues a “total welfare approach” in assessing the benefits and detriments of a transaction,⁵ but also expresses the view that the Commerce Act 1986 permits a modified total welfare approach, whereby in some circumstances gains that only flow through to a limited number of people in the community could be given less weight than gains that are more widely distributed.⁶ The Court explicitly stated it was not requiring the Commission to follow the modified total welfare approach⁷ and it did not elaborate on the circumstances in which this approach might be more or less appropriate.

9 Tennex submits there is no reason for the Commission to diverge from its current practice for the Application because the benefits of this merger will be shared with a large number of New Zealand consumers. There are several reasons for this:

9.1 The vast majority of the merged entity’s business relates to customers with significant countervailing market power, such as the DHBs in Canterbury and in Nelson/Marlborough as well as Christchurch International Airport and Lyttelton Port. Those customers (and through them the large number of consumers of the services provided by those customers) can be expected to share in the benefits of the merger over time.

9.2 Tennex has provided evidence of its own continued investment in its offering [].⁸ This shows that the benefits of the merger will be shared with consumers of all categories in due course, all of which means the total welfare standard remains appropriate in the circumstances.

9.3 [].

⁴ [2018] NZCA 389.

⁵ At [46].

⁶ At [75].

⁷ At [75].

⁸ “Tennex – dynamic efficiencies”: note from Tennex to the Commerce Commission on the dynamic efficiency implications of the proposed transaction, provided 26 September 2018.