

Determination

Tennex Capital Limited and San-i-pak Limited [2018] NZCC 25

- The Commission:** Dr Mark Berry
Sue Begg
Anna Rawlings
- Summary of application:** An application from Tennex Capital Limited seeking authorisation to acquire up to 100% of the medical and quarantine waste collection and treatment assets of San-i-pak Limited.
- Determination:** Under section 67(3)(b) of the Commerce Act 1986, the Commerce Commission grants authorisation to the proposed acquisition, as it is satisfied that the proposed acquisition will result, or will be likely to result, in such a benefit to the public that it should be permitted.
- Date of determination:** 19 December 2018

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CONTENTS

EXECUTIVE SUMMARY	4
THE PROPOSED ACQUISITION.....	5
OUR DECISION	5
OUR INVESTIGATION.....	5
OUR FRAMEWORK.....	5
Analysing the competition effects of an acquisition.....	6
Assessing the public benefit of an acquisition	7
THE PARTIES	9
Tennex Capital Limited (Tennex).....	9
San-i-pak Limited (San-i-pak)	9
INDUSTRY BACKGROUND.....	9
PREVIOUS CLEARANCE DECISION.....	10
MARKET DEFINITION.....	11
WITH AND WITHOUT SCENARIOS	11
With the acquisition	12
Without the acquisition	12
COMPETITION ANALYSIS	18
Summary of Tennex’s submissions	19
Existing competition.....	20
Potential competition	21
Countervailing power.....	26
Conclusion on substantial lessening of competition.....	28
PUBLIC BENEFITS AND DETRIMENTS	29
Summary of Tennex’s submissions	30
Our assessment of benefits.....	31
Our assessment of detriments	40
Balancing of benefits and detriments	50
DETERMINATION ON NOTICE OF AUTHORISATION.....	56
ATTACHMENT A: SITE MAPS.....	57
ATTACHMENT B: ASSUMPTIONS UNDERLYING FIGURE 1.....	60

Executive summary

- X1. On 17 September 2018, the Commerce Commission registered an application (the Application) from Tennex Capital Limited (Tennex, or the Applicant) seeking authorisation to acquire up to 100% of the medical and quarantine waste collection and treatment assets of San-i-pak Limited (San-i-pak) (the proposed acquisition).
- X2. The Commission grants authorisation to the proposed acquisition, as it is satisfied that the proposed acquisition will result, or will be likely to result, in such a benefit to the public that it should be permitted.
- X3. The relevant markets for the purposes of assessing the proposed acquisition are the markets for the collection of medical and quarantine waste in the South Island and the treatment and disposal of medical and quarantine waste in the South Island.
- X4. Tennex, through its subsidiary, International Waste Limited (IWL) and San-i-pak are the only parties in the South Island providing collection, treatment and disposal of medical and quarantine waste services. With the acquisition, IWL would (absent new entry) be the only supplier. The number of facilities for the treatment of medical and quarantine waste services in Christchurch would reduce from two to one.
- X5. Without the acquisition, we consider that San-i-pak is likely to continue to operate in the relevant markets independently of Tennex and in competition with IWL. Initially, we consider that it is likely that San-i-pak would continue to operate under its current ownership, but would ultimately be purchased by a third-party.
- X6. We are not satisfied that the acquisition will not have, or would not be likely to have, the effect of substantially lessening competition in the relevant markets. This is because the acquisition would remove the only existing competitor in the relevant markets and we are not satisfied that new entry into the relevant markets is likely to be sufficient, of sufficient extent and would occur in a timely enough way in the future to prevent a substantial lessening of competition.
- X7. We are satisfied that the proposed acquisition will result, or will be likely to result, in such a benefit to the public that it should be permitted. This is because, in our view, the quantified and unquantified benefits likely to be achieved by the acquisition would likely be greater than the negative consequences that the acquisition would be likely to bring.
- X8. The acquisition would be likely to result in benefits in the form of cost savings, and we are satisfied that these savings would most likely outweigh any efficiency losses that would result from the acquisition (as a result of likely price rises). Allocative efficiency detriments arising from the acquisition are likely to be limited by the nature of demand for these services, which is relatively inelastic. These detriments may be further moderated by the competitive effect and constraint that the threat of entry by Waste Management and/or other third-parties (by competing in contract tenders) may have on the prices faced by, in particular, large customers.

The proposed acquisition

1. On 17 September 2018, the Commerce Commission registered an application (the Application) from Tennex Capital Limited (Tennex, or the Applicant) seeking authorisation to acquire up to 100% of the medical and quarantine waste collection and treatment assets of San-i-pak Limited (San-i-pak) (the proposed acquisition).

Our decision

2. The Commission grants authorisation to the proposed acquisition, as it is satisfied that the proposed acquisition will result, or will be likely to result, in such a benefit to the public that it should be permitted.

Our investigation

3. In preparing this Determination, we obtained information from a wide range of sources. In the course of this process, we have, amongst other actions:
 - 3.1 reviewed the information and analysis in the application;
 - 3.2 posted a public version of the application and a statement of preliminary issues on our website;
 - 3.3 sought further information and clarification from Tennex and San-i-pak on a range of issues;
 - 3.4 obtained information from other interested parties through interviews and information requests;
 - 3.5 published a draft determination; and
 - 3.6 considered submissions from Tennex, San-i-pak and interested parties.

Our framework

4. Any person who proposes to acquire assets of a business or shares and considers that the acquisition may have the likely effect of substantially lessening competition can make an application for an authorisation under section 67 of the Act.
5. Section 67(3)(a) of the Act requires us to give clearance for a proposed acquisition if we are satisfied that the proposed acquisition will not have, or would not be likely to have, the effect of substantially lessening competition in a market. If we are not satisfied, clearance must be declined, although we may still grant an authorisation under section 67(3)(b) of the Act if we are satisfied that “the acquisition will result, or will be likely to result, in such a benefit to the public that it should be permitted.” If we are not satisfied that the acquisition will result, or will be likely to result, in such a benefit to the public that it should be permitted, or we are in doubt¹ as to whether it is likely that the acquisition will create a public benefit, we must decline an authorisation under section 67(3)(c). Therefore, the Act requires us to:

¹ *Commerce Commission v Woolworths Limited* (2008) 12 TCLR 194 (CA) at [98] and [107].

- 5.1 first, determine whether to clear the acquisition (ie, to decide whether we are satisfied that the acquisition will not be likely to substantially lessen competition in any market); and
- 5.2 second, if we do not grant clearance, determine whether to authorise the acquisition (ie, to decide whether we are satisfied that the acquisition will be likely to result in such a benefit to the public that it should be permitted).²

Analysing the competition effects of an acquisition

6. Our approach to analysing the competition effects of the proposed acquisition is based on the principles set out in our Mergers and Acquisitions Guidelines,³ and summarised below. We call this part of the analysis our competition assessment.

The substantial lessening of competition test

7. As required by the Act, we assess mergers and acquisitions using the substantial lessening of competition test.
8. We determine whether a merger is likely to substantially lessen competition in a market by comparing the likely state of competition if the merger proceeds (the scenario with the merger, often referred to as the factual), with the likely state of competition if the merger does not proceed (the scenario without the merger, often referred to as the counterfactual).⁴
9. A lessening of competition is generally the same as an increase in market power. Market power is the ability to raise price above the price that would exist in a competitive market (the 'competitive price'),⁵ or reduce non-price factors such as quality or service below competitive levels.

When a lessening of competition is substantial

10. Only a lessening of competition that is substantial is prohibited. A lessening of competition will be substantial if it is real, of substance, or more than nominal.⁶ Some courts have used the word 'material' to describe a lessening of competition that is substantial.⁷
11. As set out in our guidelines, there is no bright line that separates a lessening of competition that is substantial from one which is not. What is substantial is a matter of judgement and depends on the facts of each case.⁸
12. A lessening of competition or an increase in market power may manifest itself in a number of ways, including higher prices or reduced services.⁹

² *Godfrey Hirst NZ Ltd v Commerce Commission* (2011) 9 NZBLC 103,396 (HC) (Godfrey Hirst 1) at [49].

³ Commerce Commission, *Mergers and Acquisitions Guidelines* (July 2013).

⁴ *Woolworths* (CA) above n1 at [63].

⁵ Or below competitive levels in a merger between buyers.

⁶ *Woolworths & Ors v Commerce Commission* (2008) 8 NZBLC 103,128 (HC) at [137].

⁷ *Ibid* at [129].

⁸ *Mergers and Acquisitions Guidelines* above n3 at [2.23].

When a substantial lessening of competition is likely

13. A substantial lessening of competition is ‘likely’ if there is a real and substantial risk, or a real chance, that it will occur. This requires that a substantial lessening of competition is more than a possibility, but does not mean that the effect needs to be more likely than not to occur.¹⁰

Assessing the public benefit of an acquisition

14. As described above, where we decline to clear an acquisition, an applicant can ask us to consider whether to grant an authorisation. The Act requires us to authorise an acquisition where we are satisfied that the acquisition is likely to result in such a benefit to the public that it should be permitted. We refer to this as the ‘public benefit’ test.
15. Relevant benefits and detriments are those that arise from the acquisition¹¹ and are likely to occur, in the sense that there is a real and substantial risk that it will happen.¹²

What amounts to a public benefit

16. Section 3A of the Act is the only section giving a specific indication of what constitutes a “benefit”. It refers to “efficiencies” that are likely to arise from the acquisition. However, while efficiencies are mandatory relevant considerations,¹³ efficiencies are not the only public benefits that can be counted.
17. A public benefit is:¹⁴
- ... anything of value to the community generally, any contribution to the aims pursued by the society including as one of its principal elements (in the context of trade practices legislation) the achievement of the economic goals of efficiency and progress.¹⁵
18. In *Godfrey Hirst*, the Court of Appeal indicated that in making an authorisation decision we are to have regard to efficiencies when weighed together with long-term benefits to consumers, the promotion of competition, and any economic and non-economic public benefits at stake in all markets.^{16 17}

⁹ Ibid at [2.21].

¹⁰ *Woolworths* (HC) above n6 at [111].

¹¹ *Godfrey Hirst 1* above n2 at [119].

¹² *NZME Limited & Ors v Commerce Commission* [2018] NZCA 389 at [83] citing *Port Nelson Ltd v Commerce Commission* [1996] 3 NZLR 554 (CA) at 562-563.

¹³ *NZME* (CA) above n12 at [32].

¹⁴ *Authorisation Guidelines* (July 2013) at [35].

¹⁵ See *Air New Zealand and Qantas Airways Limited v Commerce Commission* (2004) 11 TCLR 347 (Air NZ No 6) at [319] and *Telecom Corporation of New Zealand Ltd v Commerce Commission* (1991) 4 TCLR 473 (HC) (AMPS-A HC) at 527-530 quoting *Queensland Co-operative Milling Association Ltd* (1976) ATPR 40-012 at 12,242 and *In Re Rural Traders Co-operative (WA) Ltd* (1979) ATPR 40-110 at 18,123.

¹⁶ *Godfrey Hirst NZ v Commerce Commission* [2016] NZCA 560 (CA) at [36].

¹⁷ We note that we are updating our *Authorisation Guidelines* in line with the Court of Appeal’s judgments in *Godfrey Hirst* and *NZME*.

19. Accordingly, we regard a public benefit as any gain to the public of New Zealand that would result from the proposed acquisition regardless of the market in which that benefit occurs or to whom in New Zealand it benefits.¹⁸ We do not take into account any benefits that would occur both with and without the acquisition.
20. In *NZME* the Court of Appeal noted that New Zealand's legislation, like that in Australia,¹⁹ permits but does not require the use of a "modified total welfare approach".²⁰ Under the modified total welfare approach in Australia, benefits (or detriments) that flow only to a limited number of members in the community can be given less weight than benefits (or detriments) that are spread widely among members of the community generally. For example, cost savings that are likely to be retained by a small number of shareholders of the merging parties may be given less weight than cost savings that are likely to be passed onto the merging parties' customers.
21. In quantifying benefits, we take into account any costs that might be incurred in achieving those benefits.

Detriments that are relevant to our assessment

22. The detriments that arise from an acquisition likely include, but are not limited to, allocative efficiency detriments (welfare losses from increased prices/reduced quality), productive efficiency losses (higher costs over time), and dynamic efficiency losses (reduced incentive to innovate) arising in any markets.²¹
23. As the Courts have long recognised, efficiency considerations are relevant but do not exhaust society's interest in a transaction or conduct.²² It would be an error to exclude a public benefit or detriment on the ground that the Act is concerned with efficiency alone.²³ We must therefore also consider non-economic detriments in appropriate cases.
24. In some circumstances, wealth transfers from New Zealanders to non-New Zealanders may also give rise to a detriment to New Zealand.²⁴

¹⁸ An example of this is *Air NZ No 6* above n15. In that case, the High Court considered the Commission's assessment of increased tourism as a benefit.

¹⁹ See *Qantas Airways Ltd* [2005] ACompT 9, (2005) ATPR 42-065 at [185] and *Australian Competition and Consumer Commission v Australian Competition Tribunal* [2017] FCAFC 150, (2017) 254 FCR 341 at [67].

²⁰ *NZME (CA)* above n12 at [75]. The Court noted at [75] that it "...should not be taken to say, however, that the Commission must follow the modified total welfare approach in practice".

²¹ In appropriate cases these may include economic detriments arising in markets other than where the competition is lessened: *NZME NZCA* above n12 at [69] to [76], and *NZME Limited v Commerce Commission* [2017] NZHC 3186 (HC) at [210] to [214].

²² *NZME (CA)* above n12 389 at [71], and *AMPS-A (HC)* above n15 at 528.

²³ *Ibid* at [76].

²⁴ *Authorisation Guidelines* above n14 at [53]-[55]. Our approach was endorsed by the High Court in *Godfrey Hirst NZ Ltd v Commerce Commission* [2016] 3 NZLR 645 (Godfrey Hirst 2) and was not overturned in the Court of Appeal.

Our approach to assessment

25. We will grant authorisation if we are satisfied, on the evidence before us, that the acquisition will result, or will be likely to result, in such a benefit to the public that it outweighs the detriments resulting from the acquisition.
26. We are required to exercise our judgement, in what has been described by the Courts as a “qualitative judgment”,²⁵ to determine whether in our view the acquisition is likely to produce a benefit to the public so that it should be authorised.
27. As directed by the Courts, we have endeavoured so far as is possible to make quantitative assessments of the likely benefits and detriments attributable to the acquisition.²⁶ However, as the Courts also recognise, there is in many cases a limit to the assistance that quantification can provide, and factors that are unquantifiable should weigh no less in our assessment.²⁷
28. We also have regard to the quality of the evidence available and make judgements as to the weight to be given to the evidence.

The parties

Tennex Capital Limited (Tennex)

29. Tennex is a privately-owned New Zealand company. Tennex provides medical and quarantine waste collection, treatment and disposal services through its subsidiary, International Waste Limited (IWL).
30. IWL operates facilities for the treatment of medical and quarantine waste in Auckland, Wellington, Christchurch and Dunedin. It collects medical and quarantine waste on a national basis for processing at its treatment facilities. IWL also provides disposal and recycling services for other products such as fluorescent tubes.

San-i-pak Limited (San-i-pak)

31. San-i-pak is a privately-owned New Zealand company that provides medical and quarantine waste collection, treatment and disposal services, as well as general waste services.
32. San-i-pak operates a single facility for the treatment of medical and quarantine waste in Lyttelton. San-i-pak collects medical and quarantine waste primarily in the greater Canterbury region.

Industry background

33. The acquisition relates to the collection, treatment and disposal of medical and quarantine waste.

²⁵ *Godfrey Hirst 2* above n24 at [35] and [37].

²⁶ *Telecom Corporation of New Zealand Ltd v Commerce Commission* [1992] 3 NZLR 429 (CA) (AMPS-A CA) at 447 and *Air NZ No 6* above n15 at [319], *Ravensdown Corporation Ltd v Commerce Commission* High Court, Wellington (16 December 1996) AP168/96.

²⁷ *Godfrey Hirst 1* above n2 at [115] to [117].

34. Medical and quarantine waste is classified as hazardous waste material and is subject to strict regulatory and other requirements governing its containment, transportation, storage, treatment and disposal.
35. Medical waste includes anatomical waste, blood, body parts and infected animal carcasses; disposables, including hypodermic needles, scalpels and syringes; soiled dressings and swabs; laboratory waste; and pharmaceutical and chemical waste. It is generated by a wide range of parties including hospitals, laboratories, pharmacies, dentists, universities, medical centres, vets and tattoo parlours. District Health Boards (DHBs) account for a significant portion of all medical waste.
36. Quarantine waste comprises the refuse originating from overseas flights landing at international airports and from ships arriving from overseas ports, as well as items potentially representing a biosecurity risk to New Zealand such as waste within a fruit fly exclusion zone. Quarantine waste must be handled and disposed of in accordance with standards specified by the Ministry for Primary Industries (MPI).

Previous clearance decision

37. The Commission has previously considered this acquisition in a clearance context. On 29 February 2016, the Commission declined to give clearance to Tennex to acquire the medical and quarantine waste collection and treatment assets of San-i-pak.²⁸ The Commission declined to give clearance for the reasons summarised below.²⁹
- 37.1 IWL and San-i-pak were the only parties in the South Island providing treatment and disposal of medical and quarantine waste services. With the acquisition, IWL would have been (absent new entry) the only supplier (ie, the structure of the relevant markets would shift from duopoly to monopoly). Conversely, without the acquisition, the treatment and disposal of medical and quarantine waste services offered by San-i-pak would continue to be available independent of Tennex in competition with IWL.
- 37.2 We were not satisfied that, faced with a price increase, that large customers would have sufficient countervailing power or incentive to use what power they had in order to constrain the merged entity and offset a substantial loss of competition given that they would have few strong alternative options to a merged IWL/San-i-pak or it would be costly to self-supply. We noted that competition between IWL and San-i-pak was driving down prices faced by large customers in Canterbury,
[
].
- 37.3 Smaller customers that paid list prices and which had no alternatives to a merged IWL/San-i-pak were likely to face price increases post-acquisition of a magnitude that would be substantial. We considered that smaller customers

²⁸ Tennex Capital Limited and San-i-pak Limited [2016] NZCC 5 (29 February 2016).

²⁹ Ibid at [54] and [60].

were likely to face at least a []% price increase post-acquisition,
[].

- 37.4 We were not satisfied that new entry into the South Island market for the treatment and disposal of medical and quarantine waste services was likely, of sufficient extent and would occur in a timely enough way to constrain the merged entity.

Market definition

38. Market definition is a tool that helps identify and assess the close competitive constraints the merged entity would face. Determining the relevant market requires us to judge whether, for example, two products are sufficiently close substitutes as a matter of fact and commercial common sense to fall within the same market.
39. We define markets in the way that best isolates the key competition issues that arise from a merger.³⁰ In many cases this may not require us to precisely define the boundaries of a market. What matters is that we consider all relevant competitive constraints, and the extent of those constraints. For that reason, we also consider products and services which fall outside the market but which still impose some degree of competitive constraint on the merged entity.
40. Consistent with the Commission's previous clearance decision, we consider that, the relevant markets for the purposes of assessing the proposed acquisition are the markets for:
- 40.1 the collection of medical and quarantine waste in the South Island; and
- 40.2 the treatment and disposal of medical and quarantine waste in the South Island.³¹
41. In its application for authorisation, Tennex does not dispute that these are the appropriate markets.³²

With and without scenarios

42. To assess whether a merger is likely to substantially lessen competition in a market, we compare the likely state of competition if the merger proceeds (the scenario with the merger, often referred to as the factual), with the likely state of competition if the merger does not proceed (the scenario without the merger, often referred to as the counterfactual).³³

³⁰ *Mergers and Acquisitions Guidelines* above n3 at [3.10-3.12].

³¹ While we received some evidence to suggest that the geographic scope of the relevant markets could potentially be wider for large customers than for small customers, and that San-i-pak is better placed to compete for customers close to its Lyttelton site than across the entire South Island, the evidence was not sufficiently compelling to lead us to define the relevant markets more narrowly than in previous decisions. We also do not consider that it would make a difference to the outcome in this case.

³² Application at [22].

³³ *Mergers and Acquisitions Guidelines* above n3 at [2.29].

With the acquisition

43. IWL and San-i-pak are the only parties in the South Island providing collection, treatment and disposal of medical and quarantine waste services. With the acquisition, IWL would (absent new entry) be the only supplier.³⁴ The number of facilities for the treatment of medical and quarantine waste services in Christchurch would reduce from two to one. This is because IWL would treat all waste at its existing Christchurch site and San-i-pak's treatment plant at Lyttelton would be shut down.

Without the acquisition

44. We have considered what is likely to happen to the medical and quarantine waste business of San-i-pak absent its sale to Tennex. This is relevant to our assessment of whether the proposed acquisition is likely to substantially lessen competition, and our assessment of the benefits and detriments of the acquisition. In reaching a view on the likely counterfactual, we have considered submissions and evidence obtained from Tennex, San-i-pak and interested parties.

45. San-i-pak has stated that, absent sale to Tennex, []³⁵ This is because:³⁶

45.1 [

];

45.2 [

]; and

45.3 [

]

46. While we accept that the current owners wish to exit the business, we do not accept that closure of San-i-pak is a likely scenario absent sale of the business to Tennex (ie, we consider that there is no real chance of this scenario).

47. Notwithstanding San-i-pak's submissions, the evidence we have gathered does not support a conclusion that the complete exit of San-i-pak from the relevant markets is

³⁴ As discussed further later, a third-party, Waste Management, also undertakes treatment of medical and quarantine waste in the North Island. In addition, Grey Hospital on the West Coast of the South Island self-supplies and operates an onsite incinerator to dispose of its medical waste.

³⁵ San-i-pak information request response to the Commerce Commission (20 September 2018) and Commerce Commission interview with San-i-pak (15 October 2018).

³⁶ Ibid.

a likely counterfactual. For the purposes of its application for authorisation, Tennex has accepted that San-i-pak’s continued operation is a likely counterfactual.^{37 38}

48. Without the acquisition, we consider that San-i-pak is likely to continue to operate in the relevant markets independently of Tennex and in competition with IWL. Initially, we consider that it is likely that San-i-pak would continue to operate under its current ownership, but would ultimately be purchased by a third-party. We consider that this is the only likely without-the-acquisition scenario. This is because:

48.1 San-i-pak is a profitable (rather than loss-making) business;

48.2 San-i-pak is contracted to provide services to Christchurch International Airport until [] and the Port of Lyttelton until []^{39 40} [];

48.3 []
];⁴¹

48.4 [], our market enquiries indicate that [] third-parties have expressed a credible interest in acquiring San-i-pak and have taken significant steps towards an acquisition (including

³⁷ Application at [23-24].

³⁸ In response to our Draft Determination, Tennex submitted that it was comfortable with this as a conclusion for the purposes of our decision. However, Tennex commented that it considered the closure of San-i-pak to be a likely counterfactual scenario, and much more likely than continued operation of San-i-pak under new ownership, since no third-party had acquired San-i-pak since the Commission’s previous clearance decision. Submission from Tennex to the Commerce Commission (6 December 2018) at 1.

³⁹ []

⁴⁰ []
[]
]

⁴¹ San-i-pak information request response to the Commerce Commission (20 September 2018) and []].

[]);⁴²

48.5 [],⁴³
[];
and

48.6 over the remaining term of the two supply contracts noted above, San-i-pak would be likely to have an incentive to compete against IWL for other customers and to retain these supply contracts, in order to keep the value of the business as high as possible so as to maximise the value at which the current owners might potentially sell it to a third-party in the future.

49. Under new ownership, San-i-pak (as a competitor for IWL) is likely to be as effective as it is today. In addition, the evidence before us suggests that an alternative purchaser of San-i-pak may expand the business and make San-i-pak a stronger competitor for IWL in the relevant markets. This is because
[

].⁴⁴

50. We note, however, that
[

].⁴⁵ Because of this, there remains uncertainty as to the likely timing and extent of any expansion. We factor this in later to our quantification of any detriment associated with a loss of potentially increased competition without the acquisition and our qualitative assessment when weighing the benefits and detriments of the acquisition.

51. In terms of alternative third-party purchasers for San-i-pak, we consider that the most likely purchasers are [], as these parties have taken significantly more steps towards an acquisition than other parties. We further note that:

51.1 [

].⁴⁶

⁴² []

⁴³ Commerce Commission interview with San-i-pak (15 October 2018).

⁴⁴ []

⁴⁵ []

⁴⁶ []

[]

51.1.1 [

San-i-pak told us that

[

].⁴⁸ In writing, external legal counsel for San-i-pak

[

San-i-pak's external legal counsel told us that

[

].⁵⁰ We have viewed

[

];⁵¹

]⁴⁷

].⁴⁹

51.1.2 [

];⁵²

51.1.3 [

]⁵³

[

]⁵⁴

⁴⁷ Ibid.

⁴⁸ Commerce Commission interview with San-i-pak (15 October 2018).

⁴⁹ E-mail from Mitchell Mackersy lawyers (on behalf of San-i-pak) to [].

⁵⁰ E-mail from Mitchell Mackersy lawyers (on behalf of San-i-pak) to the Commerce Commission (8 November 2018).

⁵¹ []

⁵² Ibid.

⁵³

[

]

⁵⁴

[

[
] ⁵⁵

[
] ⁵⁶
San-i-pak told us that,
[
], ⁵⁷

51.1.4 [
] ⁵⁸
[

]; ⁵⁹ and

51.1.5 [
] ⁶⁰

51.2 [

]

⁵⁵ []
⁵⁶

[]

⁵⁷ Commerce Commission interview with San-i-pak (15 October 2018).

⁵⁸ []

⁵⁹ []

⁶⁰ Ibid.

]61 [

]62

51.2.1 [

];

51.2.2 [

];

51.2.3 [

];

51.2.4 [

]; and

⁶¹ []

⁶² []

51.2.5 [].

51.3 []⁶³

51.4 We also asked the large national general waste companies if they were interested in acquiring San-i-pak. []⁶⁴ []⁶⁵ Waste Management []⁶⁶.

51.5 In addition to the general waste companies noted above, there is also some evidence that some other third-parties are interested in an acquisition of San-i-pak. This is because [],⁶⁷ and []⁶⁸.

52. In the competition analysis section that follows, we consider whether the proposed acquisition would have the effect of substantially lessening competition compared to the without-the-acquisition scenario where San-i-pak continues to operate in the relevant markets independently of IWL under the ownership of [] as this without-the-acquisition scenario is the most competitive scenario that is likely to occur.

Competition analysis

53. A merger can substantially lessen competition if it increases the potential for the merged entity to be able to unilaterally raise prices. Where two suppliers compete in the same market and the constraint from other competitors is limited, a merger

⁶³ []

⁶⁴ []

⁶⁵ []

⁶⁶ E-mail from Waste Management to the Commerce Commission (17 October 2018).

⁶⁷ E-mail from Mitchell Mackersy lawyers (on behalf of San-i-pak) to the Commerce Commission (21 September 2018).

⁶⁸ []

could remove a competitor that would otherwise provide a competitive constraint, allowing the merged entity to raise prices.⁶⁹

54. In the Commission's previous clearance decision, we were not satisfied that the acquisition would not substantially lessening competition due to horizontal unilateral effects (for the reasons summarised above at [37]).
55. For similar reasons, which we set out below, we are not satisfied that the acquisition will not have, or would not be likely to have, the effect of substantially lessening competition in the relevant markets.
56. We summarise first below Tennex's submissions on matters relevant to the competition analysis before going on to set out our assessment of the competition analysis.

Summary of Tennex's submissions

57. For the purposes of its application for authorisation, Tennex has largely accepted the competition analysis set out in the Commission's previous clearance decision.⁷⁰ It specifically submitted that:
 - 57.1 IWL and San-i-pak are the only two existing suppliers in the relevant markets;⁷¹
 - 57.2 there have not been industry changes that would alter the view the Commission reached in its previous clearance decision on potential competition;⁷² and
 - 57.3 large customers generate around 60% of medical and quarantine waste in the upper South Island, with the two largest customers being Christchurch International Airport and the Canterbury DHB.^{73 74}
58. Subsequent to its application, Tennex submitted (in terms of potential entry) that it had no doubt that Waste Management would be successful in tender processes to provide services to DHBs in the South Island, if the proposition it offered was sufficiently competitive.⁷⁵ Tennex further submitted that Waste Management is clearly a real competitive threat as a potential entrant, advising that it understood that Waste Management had sought resource consent to establish a facility in Christchurch to process medical and laboratory waste, including needles, controlled waste and soft tissue.⁷⁶ In response to our Draft Determination, Tennex further

⁶⁹ *Mergers and Acquisitions Guidelines* above n3 at [3.62-3.63].

⁷⁰ Application at [3].

⁷¹ Ibid at [25].

⁷² Ibid at [28].

⁷³ Ibid at [29-30].

⁷⁴ In response to our Draft Determination, Tennex submitted that large customers are able to defeat a price increase by partnering with alternative suppliers. Submission from Tennex to the Commerce Commission (6 December 2018) at [11].

⁷⁵ Submission from Tennex to the Commerce Commission (24 October 2018) at [5.1].

⁷⁶ Ibid at [6].

submitted that it is not necessary for Waste Management to win the Canterbury DHB contract for it to be a competitive constraint, stating that Tennex would be constrained by the real threat of Waste Management winning the contract and entering the relevant markets.⁷⁷ Tennex also submitted that the constraint provided by Waste Management would likely be more effective than any constraint in the counterfactual provided by San-i-pak under new ownership.⁷⁸

Existing competition

Treatment and disposal

59. IWL and San-i-pak are the only parties in the South Island currently providing services in terms of the treatment and disposal of medical and quarantine waste.
60. We consider that IWL and San-i-pak provide a material competitive constraint on each other in the treatment and disposal of medical and quarantine waste. Evidence from customers is that IWL and San-i-pak regularly compete against each other for customer contracts, and that this competition constrains the prices they offer. There are no other existing competitors that provide a strong and effective constraint. The acquisition would result in a substantial loss of existing competition in the treatment and disposal of medical and quarantine waste in the South Island, as IWL would be the only supplier (ie, the relevant markets would be reduced to a single supplier). However, customers on term supply contracts may be protected from price increases caused by this loss of competition until the expiry or renewal of their contracts (depending on the provisions in their contracts relating to price changes).

Collection

61. While there is some medical and quarantine waste collected by other waste companies operating in the South Island (eg, Waste Management), these parties do not provide material competitive constraint on IWL and San-i-pak for the majority of customers. This is because the volume of waste collected by such parties is small, and the treatment and disposal of this waste is sub-contracted to IWL and San-i-pak (the only two parties with treatment plants in the South Island). Waste Management []⁷⁹ compared to the [] tonnes of medical waste collected by Tennex and San-i-pak combined in the South Island over the same period. Waste Management noted that []⁸⁰ It also commented that it is not economic for it to do collections without having a plant to treat any medical and quarantine waste.⁸¹
- ⁸² []

⁷⁷ Submission from Tennex to the Commerce Commission (6 December 2018) at [9].

⁷⁸ Ibid at [10].

⁷⁹ E-mail from Waste Management to the Commerce Commission (24 October 2018).

⁸⁰ Ibid.

⁸¹ Submission from Waste Management to the Commerce Commission (17 October 2018).

⁸² []

62. Notwithstanding the above, parties like Waste Management may compete with IWL when customer contracts come up for tender. The competitive tension provided by such bidders could reduce the potential for price increases to these customers from the loss of competition between Tennex and San-i-pak, although we are not satisfied that this would be likely to be sufficient to prevent a substantial lessening of competition in relation to these customers. However, we take into account the likelihood of other parties bidding for customer contracts, and its potential effect on prices, in our benefits and detriments assessment.

Potential competition

63. In the section above, we found that the proposed acquisition would result in the loss of important existing competition in the relevant markets. In this section we consider whether new competitors would enter and effectively compete with the merged entity in the relevant markets if prices increased.⁸³ This requires entry to be likely, sufficient in extent, and timely (referred to as the 'LET test').⁸⁴
64. For the reasons set out below, we are not satisfied that new entry into the relevant markets is likely to be sufficient, of sufficient extent and would occur in a timely enough way in the future to prevent a substantial lessening of competition. We are therefore not satisfied that the threat of new entry would be sufficient to constrain the prices that IWL offers to all customers post-acquisition.⁸⁵

Conditions of entry and expansion

65. The likely effectiveness of entry and expansion is determined by the nature and effect of the aggregate conditions of entry and expansion into the relevant markets. The conditions of entry and expansion can take a variety of forms, including structural, regulatory and strategic conditions.⁸⁶
66. In the Commission's previous clearance decision, we considered that the obstacles to entry were high and included access (through customer contracts) to sufficient volumes of waste in a timely fashion to make entry viable.⁸⁷ We have not identified any significant changes in the industry that would materially alter our assessment of the conditions of entry, in particular the need to secure customer contracts. A number of parties that we contacted during our investigation cited the need to secure customer contracts and waste volumes as being necessary to justify investment in a treatment plant, and considered that there could be barriers to a new entrant convincing customers to switch.⁸⁸ The fact that there are only a few, large customer contracts for medical and quarantine waste in the South Island

⁸³ *Mergers and Acquisitions Guidelines* above n3 at [3.91].

⁸⁴ *Ibid* at [3.96].

⁸⁵ We have considered the threat of entry over a longer period in our assessment of all likely benefits and detriments arising from the acquisition.

⁸⁶ *Mergers and Acquisitions Guidelines* above n3 at [3.108].

⁸⁷ Tennex Capital Limited and San-i-pak Limited above n28 at [77].

⁸⁸ See, for example, Submission from Waste Management to the Commerce Commission (17 October 2018), []

(which account for a significant proportion of the relevant markets) means that only infrequently do potential entrants have the opportunity to tender for such contracts.

67. Other obstacles include the need to obtain relevant resource consents to treat and dispose of waste, although the costs of consents are modest. The purchase of a treatment plant does not appear to be a significant impediment to new entry given the relatively low-cost second-hand plant overseas which is readily available. Information provided by Tennex indicated that it would cost \$[] to purchase new plant from overseas, but that the value of [] year old plant would be \$[].⁸⁹
68. We note that any new entrant may face higher obstacles to entry than those faced by IWL before it established a medical and quarantine waste treatment plant in Christchurch in 2015 on the back of it winning the Canterbury DHB contract. This is because, in 2015, IWL was already an existing competitor in the relevant South Island markets. IWL had a treatment plant in Dunedin and already had some contracts with customers in Christchurch for medical and quarantine waste.
[]
When IWL established its plant in Christchurch, it was merely expanding its presence in the relevant markets.

Whether the LET test is met

69. The possibility of entry is insufficient to constrain the merged entity. Entry must be likely, sufficient in extent, and timely before it could constrain the merged entity and prevent a substantial lessening of competition.⁹⁰
70. In the Commission's previous clearance decision, we were not satisfied that, if the merged entity increased prices by an amount that reflected a substantial lessening of competition, entry would meet the LET test. We considered that prices would have to increase by a significantly larger amount before entry became likely. Additionally, we did not identify any parties with plans to, or which we considered were likely to, enter the relevant markets.⁹¹ The evidence we have gathered in preparing this Determination largely supports this conclusion.
71. We consider that Waste Management is a party that is well placed to enter the relevant markets, given that it operates a medical and quarantine waste treatment plant in Auckland. Through bidding for large customer contracts (eg, the Canterbury DHB), Waste Management may provide some competitive tension in the market for contracted customers. If Waste Management wins the Canterbury DHB contract when it comes up for tender in [], then it is likely to enter the relevant markets. However, there is also a real chance that Waste Management will not win the

⁸⁹ Application at Appendix 4.
[]

⁹⁰ *Mergers and Acquisitions Guidelines* above n3 at [3.96].

⁹¹ Tennex Capital Limited and San-i-pak Limited above n28 at [83] and [91].

Canterbury DHB contract and enter the market. Based on the evidence set out below, we are not satisfied that entry by Waste Management is likely in the face of a price increase reflecting a substantial lessening of competition.

71.1 Waste Management stated that it does not have a medical and quarantine waste treatment plant in the South Island because it has (to date) not been able to win DHB contracts in order to justify establishing a plant, noting that DHBs account for half of the market nationally. Waste Management advised that, if it won DHB contracts in the South Island in the future, this would justify it establishing a medical and quarantine waste treatment plant in the South Island to support the business generated under such contracts. But, it commented that DHB contracts are tendered, with the lowest price bidder winning the contract and no account being had to quality of service.⁹²

71.2 In response to us seeking further information from Waste Management on the conditions on which it might, and timeframe it would take to, establish a medical and quarantine waste treatment plant in the South Island, it advised that
[

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71.3 In respect of Waste Management's application for resource consent for a new site, it advised us that
[

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71.4 We acknowledge that if Waste Management is going to bid for DHB contracts in the South Island when they are next tendered, this will provide a constraint

⁹² Submission from Waste Management to the Commerce Commission (17 October 2018).

⁹³ E-mail from Waste Management to the Commerce Commission (24 October 2018).

⁹⁴ []

⁹⁵ E-mail from Waste Management to the Commerce Commission (25 October 2018).

on IWL post-acquisition and competitive tension. However, while Waste Management
[

]. Waste Management advised us that
[
].⁹⁶
[]

71.5 We note Waste Management does not have to win the Canterbury DHB contract (and enter the market) for it to have a significant competitive effect and constrain prices faced by the DHB. This is because, assuming that IWL does not know what price it needs to offer to win the DHB contract (ie, to not lose the DHB contract to Waste Management), this could affect IWL’s offer to the Canterbury DHB. However, the extent of this constraint may be tempered by the fact that IWL will know that it is bidding against a party (Waste Management) that faces the additional cost and risk associated with establishing a new plant. We also note that any constraint would be less than the constraint that would exist in the counterfactual where IWL would face at least two other rivals, one of which would have an existing plant, and significant existing market presence and existing customer relationships. This means that Waste Management may not fully replace the constraint currently provided by San-i-pak.

72. We considered whether there might be third-parties that would enter the relevant markets de novo, particularly given that there are third-parties interested in acquiring San-i-pak who have undertaken research on the relevant markets and,
[
].^{97 98} We consider that if such a party was to win a large customer contract (eg, the Canterbury DHB or Christchurch International Airport) through a tender process, then there is real chance that such a party would enter the relevant markets

⁹⁶ E-mail from Waste Management to the Commerce Commission (6 November 2018).

⁹⁷

[]

⁹⁸ San-i-pak told us that

[] E-mails from Mitchell Mackersy lawyers (on behalf of San-i-pak) to the Commerce Commission (11 December 2018).

de novo. However, the evidence suggests that this is not likely and that therefore any entry would not be likely to occur. We consider that such parties (which have no experience in operating medical and quarantine waste treatment plants in New Zealand) may face higher obstacles to entry than Waste Management, particularly in terms of their ability to win a major customer contract (eg, the Canterbury DHB contract) to justify entry.

72.1 [

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72.2 [

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72.3 [

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72.4 [

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99 []
 100 []
 101 []
 102 []

72.5 [

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73. We consider the question of countervailing power in the next section, including whether, in response to an increase in price and/or decrease in quality by the merged entity post-acquisition, large customers are likely to be incentivised to sponsor entry.

Countervailing power

74. A merged entity's ability to increase prices profitably may be constrained by the countervailing power of customers.¹⁰⁴ Countervailing power goes beyond the ability of a customer to switch to other suppliers. A customer's size and importance is not sufficient in itself to amount to countervailing power. Countervailing power exists when a customer possesses a special ability to substantially influence the price the merged entity charges.¹⁰⁵
75. In the Commission's previous clearance decision, we were not satisfied that the countervailing power of large customers would be sufficient to offset the loss in competition from the acquisition and subsequent shift in bargaining power.¹⁰⁶ This was largely because customers would have few strong alternatives to a merged IWL/San-i-pak or it would be costly to self-supply.¹⁰⁷ The evidence we have gathered in preparing this Determination supports this conclusion.
76. A few large customers account for the majority of the medical and quarantine waste generated in the South Island by volume. Evidence indicates that, in response to a price increase, some large customers may look to see whether they could sponsor new entry, but that customers are generally unsure as to whether parties would be interested in entering and at what price.¹⁰⁸ Other evidence indicates that, due to the critical nature of services supplied by IWL and San-i-pak, quality and continuity of service may mean that some customers may simply accept price increases, unless

¹⁰³ []

¹⁰⁴ *Mergers and Acquisitions Guidelines* above n3 at [3.113].

¹⁰⁵ For examples of the types of characteristics that may give rise to countervailing power see *Mergers and Acquisitions Guidelines* above n3 at [3.115].

¹⁰⁶ *Tennex Capital Limited and San-i-pak Limited* above n28 at [96].

¹⁰⁷ *Ibid* at [54.4].

¹⁰⁸ The evidence on the interest that parties have in entering was discussed under potential competition.

they were more than substantial. As discussed earlier, we are also not satisfied that there would be a third-party interested in entering the relevant markets [].

76.1 The Canterbury DHB
[

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76.2 Christchurch International Airport
[

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76.3 Port of Lyttelton
[

].¹¹¹

77. We have found no evidence to indicate that large customers would be likely to self-supply and establish their own waste treatment facilities. Tennex indicated that it considered that large customers would not self-supply.¹¹²

77.1 The Canterbury DHB advised that
[

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77.2 Christchurch International Airport advised that
[

].¹¹⁴

77.3 Port of Lyttelton advised that
[

].¹¹⁵

78. There are some non-DHB customers with operations in more than one location in New Zealand (eg, []), who contract and [] with IWL

¹⁰⁹ Commerce Commission interview with Canterbury DHB (9 October 2018).

¹¹⁰ Commerce Commission interview with Christchurch International Airport (8 October 2018).

¹¹¹ Commerce Commission interview with Port of Lyttelton (9 October 2018).

¹¹² Submission from Tennex to the Commerce Commission (6 December 2018) at [11].

¹¹³ Commerce Commission interview with Canterbury DHB (9 October 2018).

¹¹⁴ Commerce Commission interview with Christchurch International Airport (8 October 2018).

¹¹⁵ Commerce Commission interview with Port of Lyttelton (9 October 2018).

on a national basis. Such customers could be less vulnerable to price increases post-acquisition than other customers and may be able to use their position in parts of the North Island (where there is competition) to constrain pricing by IWL in the South Island. However, punishing a supplier in other markets would not be costless. In addition, the volumes of medical and quarantine waste that they generate is small compared to that of the largest customers in the South Island. Because of this, any countervailing power that such customers might possess is likely to be materially less than that which may be possessed by a large customer like the Canterbury DHB.

79. As noted in the Commission's previous clearance decision, even if large customers were able to substantially influence the price that the merged entity charges them by credibly threatening to take actions like sponsoring new entry or self-supplying, this would still leave smaller customers that pay the list price, vulnerable to a price increase post-acquisition.¹¹⁶ There are only a small number of large customers, but hundreds of small customers. While large customers account for the majority of waste generated in the South Island by volume, smaller customers are a material proportion of market revenue. The two largest customers (Christchurch International Airport and the Canterbury DHB) accounted for only around []% of the medical and quarantine waste revenue earned by IWL and San-i-pak in the year to 31 March 2018, meaning that all other customers accounted for around []% of revenue.
80. Waste Management submitted that, with the exception of DHBs, it does not believe that customers have special characteristics that would enable them to resist a price increase by the merged entity. Other customers will have no choice of where to go and will have no ability to resist a price increase. Transport costs are too high to go elsewhere.¹¹⁷

Conclusion on substantial lessening of competition

81. Based on the above, we are not satisfied that the acquisition will not have, or would not be likely to have, the effect of substantially lessening competition in the relevant markets. This is because the acquisition would remove the only existing competitor in the relevant markets and there is a real chance that any new entry (even if sponsored by large customers) might only occur if there were a substantial price increase and, therefore, would not constrain a substantial lessening of competition.
82. As noted above, customers on term supply contracts may be protected from price increases caused by this loss of competition (depending on the provisions in their contracts relating to price changes), although only until the expiry or renewal of their contracts. Additionally, such customers could be protected from price rises beyond the expiry of their contracts due to other parties competing in any tenders of their contracts, although this competition may still not be sufficient to defeat a substantial price increase to these customers.

¹¹⁶ Tennex Capital Limited and San-i-pak Limited above n28 at [100].

¹¹⁷ Submission from Waste Management to the Commerce Commission (17 October 2018).

83. However, we consider that any potential constraint that Waste Management or third-parties provide on the prices that the IWL offers the Canterbury DHB and contracted customers post-acquisition would not be sufficient to prevent a substantial lessening of competition for other customers (which, as noted, are a material proportion of market revenue). Such customers would have little or no protection from price increases until the Canterbury DHB contract (or another large contract) is tendered in [], and after that may continue to have no protection given that there is a real chance that Waste Management or a third-party will not win a large customer contract and enter the relevant markets.
84. We factor into our quantification of any detriment arising from the acquisition the constraint that Waste Management and third-parties (by competing in contract tenders) may have on the prices faced by contracted customers, and on customers generally.

Public benefits and detriments

85. As we are not satisfied that the proposed acquisition will not be likely to substantially lessen competition in the relevant markets in terms of section 67(3)(a) of the Act, we must now consider whether we are satisfied that the proposed acquisition will result, or be likely to result, in such a benefit to the public that it should be authorised in terms of section 67(3)(b) of the Act.
86. We are tasked with assessing whether the public benefits, which arise primarily from rationalisation of the merged entity's business operation, are sufficient to outweigh the detriments arising from the proposed acquisition.
87. We only consider the benefits and detriments that are likely, that is, for which there is a real chance that they will be realised if the acquisition proceeds. This means that for any cost savings associated with the rationalisation of IWL's and San-i-pak's operation to be treated as a benefit, the savings need to directly result from the acquisition and not also be achievable in the without-the-acquisition scenario where San-i-pak continues to operate in the relevant markets independently of IWL under the ownership of []. Similarly, the detriments that we take into account are only those arising from the proposed acquisition.
88. For the reasons set out below, we are satisfied that the proposed acquisition will result, or will be likely to result, in such a benefit to the public that it should be permitted. This is because, in our view, the benefits of the acquisition are likely to outweigh the detriments arising from the acquisition.
89. We summarise first below Tennex's submissions on benefits and detriments before going on to set out our assessment of the benefits and detriments.

Summary of Tennex's submissions

90. Tennex submitted that the proposed acquisition generates a substantial net benefit, which outweighs considerably the detriments from the acquisition.¹¹⁸ It estimated the quantifiable benefits at \$[] in net present value (NPV) terms over ten years, compared to detriments of up to \$[] on the same basis.¹¹⁹ Tennex also identified some non-quantifiable benefits and detriments.
91. In terms of the benefits of the acquisition, Tennex submitted that these include (with estimates of benefits, where Tennex quantified benefits):
- 91.1 San-i-pak avoiding estimated capital costs of \$[] relating to [] its operations [];
 - 91.2 ongoing estimated net operating cost savings of \$[] per annum (or \$[] in NPV terms over ten years) from consolidating IWL's and San-i-pak's operations in Christchurch;¹²⁰
 - 91.3 IWL being able to redeploy San-i-pak's plant in parts of its operations [];
 - 91.4 the medical and quarantine waste volumes currently treated by San-i-pak being treated more robustly by IWL post-acquisition, using superior risk management practices;
 - 91.5 fewer emissions, with San-i-pak's treatment plant no longer discharging odours directly to the atmosphere;
 - 91.6 reduced carbon emissions as a result of the merged entity being able to more efficiently collect all of the medical and quarantine waste currently collected by IWL and San-i-pak; and
 - 91.7 retention and realisation of the value of San-i-pak by its current owners who wish to retire.
92. In terms of detriments, Tennex submitted that these include (with estimates of detriments, where Tennex quantified them, in NPV terms over ten years):
- 92.1 allocative efficiency losses (ie, output reductions caused by post-acquisition price increases) of between \$[] and \$[];
 - 92.2 productive efficiency losses of up to \$[];
 - 92.3 dynamic efficiency losses of up to \$[];

¹¹⁸ Application at [5].

¹¹⁹ Ibid at [58].

¹²⁰ Tennex's estimated quantifiable benefits of \$[] in NPV terms over ten years reflect this point and the first. Tennex assumes that the merged entity would save [].

92.4 a reduction in security of supply in Christchurch, as a result of the number of medical and quarantine waste treatment plants reducing from two to one. However, Tennex noted that it has three other treatment plants around New Zealand where waste could be transported for treatment if its Christchurch plant was unable to treat waste for a sustained period of time.¹²¹

Our assessment of benefits

93. We consider the benefits claimed by Tennex, in turn, below.

Capital cost savings

94. Tennex submitted that a benefit of the acquisition is that San-i-pak would avoid estimated capital costs of \$[] relating to [] its operations []. This is because, as noted earlier, [].

95. Tennex’s estimated figure of \$[] was based on the [].¹²² As part of our investigation, we obtained cost estimates from San-i-pak and other parties to assist us in assessing the reasonable of these figures.

95.1 San-i-pak advised that [].¹²³
 San-i-pak provided [].¹²⁴

95.2 [].¹²⁵

¹²¹ Application at [67].

¹²² Ibid at [38].

¹²³ Commerce Commission interview with San-i-pak (15 October 2018).

¹²⁴ San-i-pak information request response to the Commerce Commission (24 September 2018).

¹²⁵ []

]126

[

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95.3 [

]127

[

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96. For the capital cost savings associated with [] to be treated as a benefit, the savings need to directly result from the acquisition and not also be achievable in the without-the-acquisition scenario where San-i-pak continues to operate in the relevant markets independently of IWL under the ownership of []. If any future owner of San-i-pak’s assets had to incur full costs of [], then the benefit would be in the region of \$[] to \$[], as the acquisition would enable those costs to be avoided.^{128 129}

97. However, evidence indicates that [] would likely avoid a significant proportion of the costs involved in []. In a without-the-acquisition scenario where San-i-pak is sold to [

¹²⁶ []

¹²⁷ []

¹²⁸ []

¹²⁹ []

], such that the benefit that the acquisition would achieve would be materially less than Tennex’s estimates.

98. We have also considered whether we need to include an allowance for opportunity cost in any quantification of capital cost savings.

98.1 In the case of IWL, we consider that there would be low opportunity cost associated with it using its existing Christchurch site to treat San-i-pak waste volumes. This is because it will simply be putting more volume through its existing (not fully utilised) autoclave and processing more bins of waste through its building. There is not significant spare space on IWL’s site that it could sub-lease to a third-party for an alternative use, and what space there is outside its building has trucks driving in and out.

98.2 We have separately considered opportunity cost in the without-the-acquisition scenario where San-i-pak is acquired by []. We have specifically considered what the alternative use value is for [

].

98.2.1 [

[

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]131

98.2.2 [

]

98.2.3 However, we cannot exclude the real chance that there would not be some opportunity cost for

[].

Given that [] leases (rather than own) its site, we have included an allowance for annual rental income foregone in our estimates of

130 []
131 []

operating cost savings, not in our estimates of capital cost savings.¹³²

99. Given the above, we consider that a significant proportion of the capital cost savings claimed by Tennex as a significant benefit of the acquisition are likely to also be achievable without the acquisition. We estimate the one-off capital costs that would be avoided with the acquisition to be \$[] to \$[] in NPV terms over ten years. Table 1 provides a comparison of Tennex’s calculation of the one-off capital cost savings that would arise in [], estimates provided by San-i-pak and our estimates. []

Table 1: Comparison of estimated one-off capital cost savings in []

Item	Tennex’s estimate	San-i-pak’s estimates	Our estimates	Notes
[]				
[]	\$[] \$[] \$[]	\$[] \$[] \$[]	\$0	[]
[]				
[]	\$[] \$[] \$[] \$[] \$[]	\$[] \$[] \$[] \$[] \$[]	\$[] \$[] \$[] \$[]	[]
[]				
[]	\$[] \$[] \$[] \$[]		\$[] \$[]	[]
Total	\$[]	\$[] to \$[]	\$[] to \$[]	

Operating cost savings

100. Tennex submitted that a benefit of the acquisition is that there would be ongoing estimated net operating cost savings of \$[] per annum (or \$[] in NPV terms over ten years) from consolidating IWL’s and San-i-pak’s operations in Christchurch.

¹³² See footnote 137 for how we have calculated this opportunity cost.

These operating cost savings relate to staff costs, transport costs, premises costs and back office administration costs.¹³³

101. Waste Management submitted that there will be some benefits of scale for IWL with the acquisition.¹³⁴

102. We consider that there would be some net operating cost savings for IWL and San-i-pak with the acquisition. Tennex is the only acquirer of San-i-pak that could achieve cost savings in respect of operating autoclaves used to treat medical and quarantine waste, and therefore this efficiency is specific to the proposed acquisition. It would achieve this by consolidating IWL and San-i-pak's operations in Christchurch from two sites to one site and by reducing the number of autoclaves operated in Christchurch (thereby running fewer machines more cost effectively). We consider that the estimates provided by Tennex of the level of these cost savings are reasonable.

103. However, other categories of operating cost savings are likely achievable in part by other third-party acquirers of San-i-pak in the without-the-acquisition scenario where San-i-pak continues to operate in the relevant markets independently of IWL under the ownership of []. Because of this, these efficiencies cannot solely be attributed to the proposed acquisition. In addition, we have revised some estimates due to uncertainty as to the extent to which savings would actually be achieved.

104. As noted earlier,
[

].

104.1 [

] ¹³⁵

104.2 [

¹³³ Application at [40].

¹³⁴ Submission from Waste Management to the Commerce Commission (17 October 2018).

¹³⁵ []

].¹³⁶

105. Given the above, we consider that a proportion of the operating cost savings claimed by Tennex as a significant benefit of the acquisition may also be achievable without the acquisition. Although, at the upper end of our estimates, the reductions we have made to Tennex's estimates are offset in part by an allowance included for potential annual rental income foregone by [].¹³⁷ We estimate the operating costs that would be avoided with the acquisition to be in the range of \$[] to \$[] per annum (or \$[] to \$[] in NPV terms over ten years). Table 2 provides a comparison of Tennex's calculation of annual operating cost savings, compared to our estimates.

Table 2: Comparison of estimated annual operating cost savings

Item	Tennex's estimate	Our estimates	Notes
Premises costs, including plant repairs and maintenance	\$[]	\$[] to \$[]	Savings only in terms of []
Opportunity cost of premises		\$12,500	Discounted market rent
Staff costs	\$[]	\$[] to \$[]	Savings only in terms of [] ¹³⁸
Overheads and back office administration	\$[]	\$0	Avoided with sale to []
Transportation costs	\$[]	\$[] to \$[]	Revised range due to uncertainty and fact that some cost may be avoided with sale to []
Total	\$[]	\$[] to \$[]	

¹³⁶ []

¹³⁷ We have included an allowance of \$12,500 annual rent based on a search of commercial properties available for rent in Christchurch of a similar size to the building on [] site, discounting the annual rent by 50% based on the physical limitations that would make this space less attractive for sub-letting.

¹³⁸ []

106. The operating cost savings that would be achieved with the acquisition would be variable cost savings. To the extent that these savings reduce IWL’s marginal costs this would have downward influence on its profit-maximising price, which would, even if only partially, offset to some degree a price increase that IWL (as a monopoly) would impose on its customers. However, the costs avoided in the relevant South Island markets with the acquisition largely relate to the fixed costs that would no longer be incurred to operate San-i-pak. That is, there would be no need to operate two sites and treatment plants in Christchurch. Post-acquisition, IWL would still incur its own largely unchanged variable costs. IWL’s demand curve would shift outwards to reflect the fact that it is now facing all the market demand. Overall market demand is likely to be relatively inelastic, which would tend to increase its profit-maximising price.

Redeployment of surplus plant

107. Tennex submitted that a further benefit of the acquisition is that IWL would be able to redeploy San-i-pak’s plant in parts of its operations []¹³⁹ In doing so, Tennex submitted that IWL would avoid the existing costs it incurs in []¹⁴⁰].

108. []¹⁴¹]

109. Tennex provided us information estimating the costs IWL would incur (without the acquisition) to []¹⁴²

110. We consider that without the acquisition, IWL could achieve much of the same cost savings as it would achieve with the acquisition by []¹⁴²]. The only savings that would directly result from the acquisition would be in respect of the

¹³⁹ Application at [41-43].
¹⁴⁰ Ibid at Appendix 4.
¹⁴¹ Ibid.
¹⁴² Ibid.

one-off cost that IWL would avoid in
[
].¹⁴³

111. Based on the above, we consider that the proposed acquisition could result in a one-off cost saving in year 1 of \$[] in NPV terms over ten years.¹⁴⁴ Table 3 provides our calculation of the annual cost savings IWL would achieve from the redeployment of surplus plant. Our estimates are focused on any cost savings with respect to
[
].¹⁴⁵

Table 3: Redeployment of plant one-off cost saving in year 1

Item	Cost saving estimates	Notes
[]	\$[]	[]

Waste being treated more robustly

112. Tennex submitted that a non-quantifiable benefit of the acquisition was that the medical and quarantine waste volumes currently treated by San-i-pak would be treated more robustly by IWL post-acquisition, using superior risk management practices. It submitted that this was because IWL’s facility in Christchurch is designed so that all operations are undertaken inside the same closed building, to maximise containment and minimise the risk of harm. Conversely, at San-i-pak’s facility, only the processing of waste is undertaken inside.¹⁴⁶
113. Although there is a difference in IWL’s Christchurch facility and San-i-pak’s Lyttelton facility, San-i-pak’s plant meets the necessary requirements set by MPI and other parties for the treatment of medical and quarantine waste. There is also no evidence of any complaints about, or issues with, San-i-pak’s operations. In other words, it is not clear that there is an inefficiency that would be addressed with the acquisition.
114. We also note that, in the without-the-acquisition scenario where San-i-pak continues to operate in the relevant markets independently of IWL under the ownership of

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¹⁴⁴ We have included this cost savings in year 1 of our NPV analysis (as opposed to year 0) because
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¹⁴⁵ Application at Appendix 2.

¹⁴⁶ Ibid at [49].

[
].

115. Given this, we do not regard waste being treated more robustly as a significant benefit of the acquisition, as it is unclear that there is currently an issue that would be solved with the acquisition.

Reduced emissions

116. Tennex submitted that other non-quantifiable benefits of the acquisition related to reduced emissions. Specifically:
- 116.1 fewer emissions (odours), with San-i-pak's treatment plant no longer discharging odours directly to the atmosphere (in contrast to IWL's plant at which a bio-filter extracts and treats all discharges to air);¹⁴⁷ and
- 116.2 reduced carbon emissions as a result of the merged entity being able to more efficiently collect all of the medical and quarantine waste currently collected by IWL and San-i-pak using fewer vehicle trips.¹⁴⁸
117. Both San-i-pak's and IWL's sites currently meet the relevant consents for their sites.¹⁴⁹ There is also no evidence of any complaints about, or issues with, odours from San-i-pak's operations currently. In other words, it is not clear that there is a problem that would be solved with the acquisition in terms of odour emissions.
118. We also note that, in the without-the-acquisition scenario where San-i-pak continues to operate in the relevant markets independently of IWL under the ownership of [
]. Given this, we do not consider that there would be environmental benefits through the consolidation of IWL and San-i-pak's medical and quarantine waste treatment operations in Christchurch from two sites to one site.
119. If IWL was able to collect all of the waste currently collected by IWL and San-i-pak post-acquisition by travelling fewer kilometres, then reduced carbon emissions may be a benefit of the acquisition. This appears likely, as in Tennex's assessment of the operating cost savings from consolidating IWL's and San-i-pak's operations in Christchurch, it has estimated that there would be net annual savings of \$[] per

¹⁴⁷ Ibid at [51].

¹⁴⁸ Ibid at [52].

¹⁴⁹ We understand that the rules around air discharges are different in Lyttelton compared to the rest of Christchurch. Commerce Commission interview with San-i-pak (15 October 2018).

annum in terms of transport costs from better utilisation of vehicles and a reduction in the combined number of vehicles.¹⁵⁰ These reduced carbon emissions are less likely to be achievable without the acquisition where San-i-pak is acquired by []. However, it is unclear whether any benefit from reduced carbon emissions would be significant in magnitude.

120. Given the above, we consider that reduced emissions may be a small, but not significant benefit of the acquisition.

Retention of value

121. The final non-quantified benefit of the acquisition submitted by Tennex related to the retention and realisation of the value of San-i-pak by its current owners who wish to retire.¹⁵¹
122. With the acquisition, the current owners of San-i-pak would receive \$[] from the sale of its medical and quarantine waste treatment assets.
123. Without the acquisition, we consider that San-i-pak would be sold to a third-party. We do not know the exact price that a third-party might pay to acquire San-i-pak without the acquisition. However, as noted earlier, [],¹⁵² [].
124. Any higher value that San-i-pak's current owners would obtain from a higher sales price merely reflects a greater transfer from any future owners (which is itself may reflect a transfer from any future customers that would face higher prices as well as merger-related cost savings). Therefore, 'retention of value' does not constitute a net benefit of the acquisition.

Conclusion on benefits

125. We estimate the quantifiable benefits of the proposed acquisition to be in the range of \$[] to \$[] in NPV terms over ten years.
126. We have not accepted that there will be any material unquantified benefits arising from the proposed acquisition.

Our assessment of detriments

127. As noted above, Tennex submitted that the detriments arising from the proposed acquisition may include allocative efficiency losses, productive efficiency losses, dynamic efficiency losses and a reduction in security of supply. We consider the

¹⁵⁰ Application at [40.4] and Appendix 2.

¹⁵¹ Ibid at [54-55].

¹⁵² Commerce Commission interview with San-i-pak (15 October 2018).

detriments submitted by Tennex, in turn, below. In addition, we consider whether additional detriment would arise with the acquisition due to a loss of increased competition from San-i-pak under new ownership without the acquisition.

Loss of allocative efficiency from loss of existing competition with the acquisition

128. In general, when the price of a product increases because of a loss of competition (for example, as a result of a merger), demand for that product will likely fall as some customers switch to alternative products. These alternatives may meet customers' requirements in a less satisfactory way and/or are more costly to produce than the product they replace. Alternatively, customers may simply make fewer purchases, losing the benefit that they otherwise would have obtained from a product. In effect the net result is that the country's resources are allocated less efficiently.
129. The size of the allocative efficiency loss depends on the degree of price increase post-acquisition and how sensitive customers are to price changes (known as "elasticity of demand"). The higher the price increase, and the more sensitive to price increases customers are, the larger the loss of allocative efficiency. As such, to determine the most appropriate estimate for the loss of allocative efficiency we must estimate likely price increases and make assumptions about the elasticity of demand for the collection, treatment and disposal of medical and quarantine waste.
130. We have factored into our assessment of any loss of allocative efficiency the constraint that Waste Management and/or other third-parties (by competing in contract tenders) may have on the prices faced by large customers, and on customers generally.
131. If authorised, the proposed acquisition would likely extend the monopoly that IWL already has in parts of the South Island in the provision of treatment and disposal of medical and quarantine waste services. This could give the merged entity power to sustain a significant non-transitory increase in the price of medical and quarantine waste services in Canterbury. However, we have also taken into account the protection provided to customers by existing contracts.
132. Another consideration is the ability of a monopolist to price discriminate. If IWL was able to price discriminate between different types of customers, this could result in some customers facing greater price increases than other customers. In this regard, we note:
- 132.1 customers on term supply contracts will be initially protected from price increases post-acquisition depending on the provisions in their contracts relating to price changes). We considered whether, at the expiry of current supply contracts, the merged entity would face sufficient competition for large customer contracts from Waste Management and/or other third-parties to constrain it from raising prices to such customers, or constrain the extent of any price rises. In the case of the Canterbury DHB, whose contract expires in
[

]. IWL will not know what price it needs to offer to win the Canterbury DHB or other large customer contracts (to not lose such contracts to Waste Management). We consider that this would constrain to some degree the magnitude of any price increase faced by large customers. We have reflected this in our estimates of allocative efficiency losses. However, as noted earlier, the extent of this constraint may be tempered by the fact that IWL would know that it is bidding against parties that face the additional cost and risk associated with establishing a new plant. We also note that any constraint would be less than the constraint that would exist in the counterfactual where IWL would face at least two other rivals, one of which would have an existing plant, and significant existing market presence and existing customer relationships. This means that competition from Waste Management and/or other third-parties for such contracts may not fully replace the constraint currently provided by San-i-pak;

132.2 there are some non-DHB customers with operations across New Zealand (eg, []), who contract and [] with IWL on a national basis. Depending on the provisions of their contracts relating to price changes, such customers may be protected from price increases until the expiry of their contracts. After that, such customers could be less vulnerable to price increases post-acquisition than other customers, if other parties bid for their contracts and/or they are able to use their position in parts of the North Island (where there is competition) to constrain pricing by IWL in the South Island. However, punishing a supplier in other markets would not be costless; and

132.3 Tennex submitted that it []¹⁵³ However, we consider that smaller, uncontracted, customers that currently use San-i-pak would face up to a []% price increase post-acquisition, based on []. We also note Tennex's submission that []¹⁵⁴

133. To estimate the potential loss of allocative efficiency in the with-the-acquisition scenario, we must consider the likely impact that price increases would have on the quantity of medical and quarantine waste services purchased in the relevant markets post-acquisition (ie, the elasticity of demand). Tennex's estimated allocative efficiency losses were between \$[] and \$[], using demand elasticities of -0.2

¹⁵³ Submission from Tennex to the Commerce Commission (24 October 2018) at [9.3].

¹⁵⁴ Ibid at [9].

and -0.6.¹⁵⁵ Evidence from customers indicates that demand for medical and quarantine waste services may be relatively (if not very) inelastic, meaning that it may take large changes in price to effect a change in the volume of waste customers have treated. This is consistent with submissions from Tennex, which noted that there would be no obvious cheaper alternative for customers with the acquisition that was also lawful.¹⁵⁶ However, there is also evidence that some customers have been, or may be, able to reduce the amount of medical and quarantine waste that they generate by sorting waste more closely.¹⁵⁷ For the purposes of this Determination, we have adopted a wider range of potential elasticities, from -0.1 to -0.65.¹⁵⁸

134. Based on the information available to us, we consider that the estimated allocative efficiency losses provided by Tennex are a realistic and reasonable starting point, but could also underestimate the losses.

134.1 We consider that the minimum average price increases are likely to be higher than the lower bound of Tennex's estimates (which are based on a []% average price increase). This is for two reasons. First, average price increases across all customers are unlikely to be as low as []% given that smaller, uncontracted, customers that currently use San-i-pak would face up to a []% price increase post-acquisition. Secondly, information provided by IWL shows that its average prices are higher in areas of New Zealand where it faces no competition than they are in Christchurch (eg, average prices in Wellington are around []% higher than in Christchurch). We have adopted a lower bound of []%.

134.2 We consider that the upper bound of average price increases may be higher than Tennex's estimates (which are based on a []% average price increase). We have adopted an upper bound of []%. We considered whether a higher upper bound would be appropriate, but are of the view that a higher level of average price increase may be too high, as it may be more likely to attract new entry and is likely to overstate the average price increases across all customers. This is because smaller, uncontracted, customers that currently use IWL are not likely to be exposed to the post-acquisition price increases that San-i-pak customers will be exposed to (ie, only some small customers may face a price increase).¹⁵⁹ In addition, contracted customers who accounted for an estimated []% of the medical and quarantine waste revenue earned by IWL and San-i-pak in in the year to 31 March 2018 may

¹⁵⁵ Application at [57.1].

¹⁵⁶ Ibid at [62].

¹⁵⁷

[]

¹⁵⁸ An elasticity of up to -0.65 is consistent with past decisions of the Commission in waste. Nelson City Council and Tasman District Council [2017] NZCC 6 (24 April 2017) at [92.4].

¹⁵⁹

[]

have more protection from price increases (until their existing supply contracts come up for expiry or renewal and after that depending on whether third-parties bid for their contracts and the extent to which their prices constrain the merged entity's pricing). We also note that IWL's profit-maximising price may not be much higher than the upper bound price increase we have estimated, given the information discussed above and the fact that Waste Management or others may constrain the level of price increase that IWL can impose on the Canterbury DHB.¹⁶⁰

135. We consider that the proposed acquisition could result in allocative efficiency losses in the range of \$[] to \$[] in NPV terms over ten years. Table 4 provides a comparison of Tennex's calculation of allocative efficiency losses in NPV terms over ten years, compared to our estimates. We note that our dollar estimates differ to those of Tennex, due to different assumptions around the likely level of average price increases as well as differences in the underlying figures to which we have applied the inefficiency factor.

Table 4: Comparison of estimated allocative efficiency losses

Item	Tennex's estimates	Our estimates	Notes
Average price increases (across all customers)	[]%	[]%	[]% reflects difference in average prices in Wellington and Christchurch and []% likely upper bound
Elasticity	-0.2 to -0.6	-0.1 to -0.65	Revised estimate
Range of estimated allocative efficiency loss in NPV terms	\$[] to \$[]	\$[] to \$[]	

Loss of allocative inefficiency from loss of increased competition in the counterfactual

136. As noted earlier when discussing what is likely to happen to San-i-pak without the acquisition, we cannot exclude the real chance that
[

¹⁶⁰ The upper bound of []% used is consistent with that used in our Draft Determination. In response to our Draft Determination, Tennex submitted that the upper bound of any range of price increases should be []% not []% because it would not be able to implement price increases of this higher magnitude. Submission from Tennex to the Commerce Commission (6 December 2018) at [17]. We disagree with Tennex. Even if large customers face no price rises post-acquisition, price increases to small customers could result in average price rises across the market of []%.

]

].¹⁶¹ As noted earlier:

136.1 [

] ¹⁶²

136.2 [

] ¹⁶³

- 137. Given the above, we have considered whether additional detriment would arise as a result of the acquisition due to a loss of increased competition from San-i-pak under new ownership without the acquisition.
- 138. If an alternative purchaser of San-i-pak expanded the scale and/or geographic scope of San-i-pak’s medical and quarantine waste business without the acquisition, this would result in IWL facing competition in areas of the South Island where it currently faces no or limited competition from San-i-pak. This may, in turn, lead to customers in those areas benefiting from reduced prices for and/or increased quality of medical and quarantine waste treatment and disposal services.¹⁶⁴ With the acquisition, this

¹⁶¹ []

¹⁶² []

¹⁶³ []

¹⁶⁴ We note that information provided by IWL indicates that [

] Application at Appendix 4.

increased competition would be lost, which would likely result in welfare losses in the relevant markets.

139. In this particular case,

[

].¹⁶⁵ Because of this, there remains uncertainty as to the likely timing and extent of any expansion. Therefore, while we have factored this potential impact into our quantification of the upper bound of the likely detriment associated with a loss of increased competition without the acquisition, we have also limited the weight we placed on this impact as part of our overall qualitative assessment of the benefits and detriments of the acquisition.

140. We have assumed that up to []% average price decreases could be foregone with the acquisition outside of Christchurch where San-i-pak's operations are focussed on the basis that:

140.1 in seeking to expand San-i-pak, [] would need to differentiate themselves from IWL. In a commodity-type market, price is the main way to do this; and

140.2 [] may not cut prices very aggressively while trying to make a return on the cost of entry and expansion and because

[

]. Although, as noted in footnote 164,

[

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141. We considered whether price decreases could be foregone with the acquisition even in Christchurch, due to a new owner of San-i-pak competing more aggressively for customers within Christchurch. However, we do not consider it likely that there would be significant price reductions in Christchurch without the acquisition. This is because

[

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142. We consider that the proposed acquisition could result in detriment arising from the loss of allocative efficiency from increased competition without the proposed acquisition in the range of \$0 to \$[] in NPV terms over ten years. Table 5 provides our calculation of the additional allocative efficiency losses in NPV terms over ten years resulting from this loss of increased competition in the rest of the South Island.

¹⁶⁵ [

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Table 5: Additional allocative efficiency losses

Item	Our estimates	Notes
Average price decreases (cuts) foregone	0-[]%	Estimated range of potential cuts
Elasticity	-0.1 to -0.65	As revised in Table 4
Range of allocative efficiency loss in NPV terms for other South Island customers	\$0 to \$[]	

Loss of productive efficiency

143. One outcome that can be associated with a loss of competition is that an entity gaining market power has less incentive to minimise costs and to avoid waste. Organisational slack may creep into its operations, and costs may increase, because a satisfactory level of profit is more assured even when the entity is less than fully efficient.
144. However, determining whether an entity may be susceptible to losses of productive efficiency is difficult. An entity seeking to maximise its profits will have an incentive to minimise its costs, irrespective of the level of competition in the market. For this reason, we do not assume that reductions in competition will necessarily lead to productive inefficiency.¹⁶⁶
145. Because IWL operates across New Zealand, its owners (Tennex) have the ability to benchmark its Christchurch operations against its other facilities. This ability to benchmark is likely to place a limit on productive efficiency losses, as Tennex will be able to accurately gauge the level of efficiencies achievable by IWL in Christchurch. In addition, we note customers that operate or tender contracts across New Zealand (eg, Health Benefits in terms of DHB contracts, or Southern Cross Hospitals) will equally be in a position to undertake comparisons across regions and put pressure on IWL post-acquisition.
146. We consider that (compared to the potential for allocative efficiency losses) the acquisition may not result in a substantial loss of productive efficiency.
147. Tennex estimated productive efficiency losses of up to \$[].¹⁶⁷ This estimate provided by Tennex is based on an inefficiency factor of between 0% and []%.
148. We consider that the proposed acquisition could result in detriment arising from the loss of productive efficiency in the range of \$0 to \$[] in NPV terms over ten years. We have included a range of estimates because the extent of any loss of productive efficiency that would arise with the acquisition (if any) is uncertain. Table 6 provides a comparison of Tennex's calculation of productive efficiency losses in NPV terms over ten years, compared to our estimates. We note that our dollar estimates differ

¹⁶⁶ *Authorisation Guidelines* above n14 at [68] to [71].

¹⁶⁷ *Application* at [57.2].

to those of Tennex, due to differences in the underlying figures to which we have applied the inefficiency factor.

Table 6: Comparison of estimated productive efficiency losses

Item	Tennex's estimates	Our estimates	Notes
Inefficiency factor	0-[]%	0-[]%	Per Tennex
Range of estimated productive efficiency loss in NPV terms	\$0 to \$[]	\$0 to \$[]	

Increased supply risk

149. The proposed acquisition would reduce the number of medical and quarantine waste treatment locations in Christchurch to one. In addition, []. Given this, we consider that there would be a materially increased risk of a plant outage causing significant losses with the acquisition.
150. Most customers that we spoke to expressed concern to us about the increased supply risk that would exist with the acquisition, noting that it was important that medical and quarantine waste was collected regularly and properly disposed of (in line with applicable standards and regulations). [] advised us that they had become aware, [], that plant breakdowns had occurred in the past, resulting in untreated waste having to be stockpiled (risking a biosecurity or health outbreak).¹⁶⁸ However, we also understand that the autoclaves used to treat medical and quarantine waste are relatively simple technology that is not prone to major breakdowns.¹⁶⁹
151. As noted above, Tennex submitted that no weight should be put on increased supply risk as a detriment, because IWL has three other medical and quarantine waste treatment plants around New Zealand (including in Dunedin) where waste could be transported for treatment if its Christchurch plant was unable to treat waste for a sustained period of time.¹⁷⁰ Data provided by IWL []. We also note that IWL [].¹⁷¹

¹⁶⁸ []

¹⁶⁹ Commerce Commission site visit to IWL (10 October 2018) and Commerce Commission site visit to San-i-pak (9 October 2018).

¹⁷⁰ Application at [67].

¹⁷¹ Commerce Commission site visit to IWL (10 October 2018).

152. We consider that increased supply risk would be a detriment arising from the reduction in number of treatment plants with the acquisition, but any risk of harm is offset to some extent by the ability that IWL would have to treat waste at its other treatment plants around New Zealand. Given this, we consider that any detriment is likely to be of a low magnitude. As such, we have not quantified this detriment.

Loss of dynamic efficiency

153. Dynamic efficiency typically refers to improvements made by firms over the long term concerning product quality, product variety, and cost efficiency through innovations in processes, equipment or managerial practices. A loss of a competitor might cause an entity to invest fewer resources in such improvements. In the present context, the acquisition would likely create a monopoly supplier in medical and quarantine waste treatment and might raise concerns that there would be a significant loss of dynamic efficiency.
154. We consider that the main source of dynamic efficiency in the relevant markets is likely to be investment over time in newer lower-cost production technologies, as opposed to innovation in the quality or service provided to customers (eg, different types of bins for collection of waste). There has been little innovation in recent years in the relevant markets. In addition, IWL (in establishing its medical and quarantine waste treatment plant in Christchurch) has already made all the investments that it needs to make for the foreseeable future. IWL has also shown itself willing to invest in areas of New Zealand where it faces no competition (eg, Wellington). Given this, we consider that (compared to the potential for allocative efficiency losses) a reduction in competition as a result of the acquisition may not result in a substantial loss of innovation by IWL. However, the acquisition still has the potential to lead to IWL investing fewer resources in any improvements in product quality in the future.
155. Tennex estimated dynamic efficiency losses of up to \$[].¹⁷² This estimate provided by Tennex is based on an inefficiency factor of between 0% and []%.
156. We consider that the proposed acquisition could result in detriment arising from the loss of dynamic efficiency in the range of \$0 to of \$[] in NPV terms over ten years. We have included a range of estimates because the extent of any loss of dynamic efficiency that would arise with the acquisition (if any) is uncertain. Table 7 provides a comparison of Tennex's calculation of dynamic efficiency losses in NPV terms over ten years, compared to our estimates. We note that our dollar estimates differ to those of Tennex, due to differences in the underlying figures to which we have applied the inefficiency factor.

¹⁷² Application at [57.2].

Table 7: Comparison of estimated dynamic efficiency losses

Item	Tennex's estimates	Our estimates	Notes
Inefficiency factor	0-[]%	0-[]%	Per Tennex
Range of estimated dynamic efficiency loss in NPV terms	\$0 to \$[]	\$0 to \$[]	

Conclusion on detriments

157. We estimate the detriments arising from the loss of competition with the proposed acquisition to be in the range of \$[] to \$[] in NPV terms over ten years.

Balancing of benefits and detriments

158. We now balance the likely benefits and detriments that may arise from the acquisition, drawing on the above discussion.
159. In weighing the benefits and detriments, we have considered the evidence and tested the assumptions that underpin the quantitative analysis. We have also taken into account unquantified (qualitative) matters and considered the quality of the evidence before the Commission.
160. As noted above, Tennex submitted that the proposed acquisition generates a substantial net benefit, which outweighs considerably the detriments from the acquisition.¹⁷³
161. For the reasons set out below, we are satisfied that the acquisition is likely to give rise to such a benefit that it should be authorised.

Quantified benefits and detriments

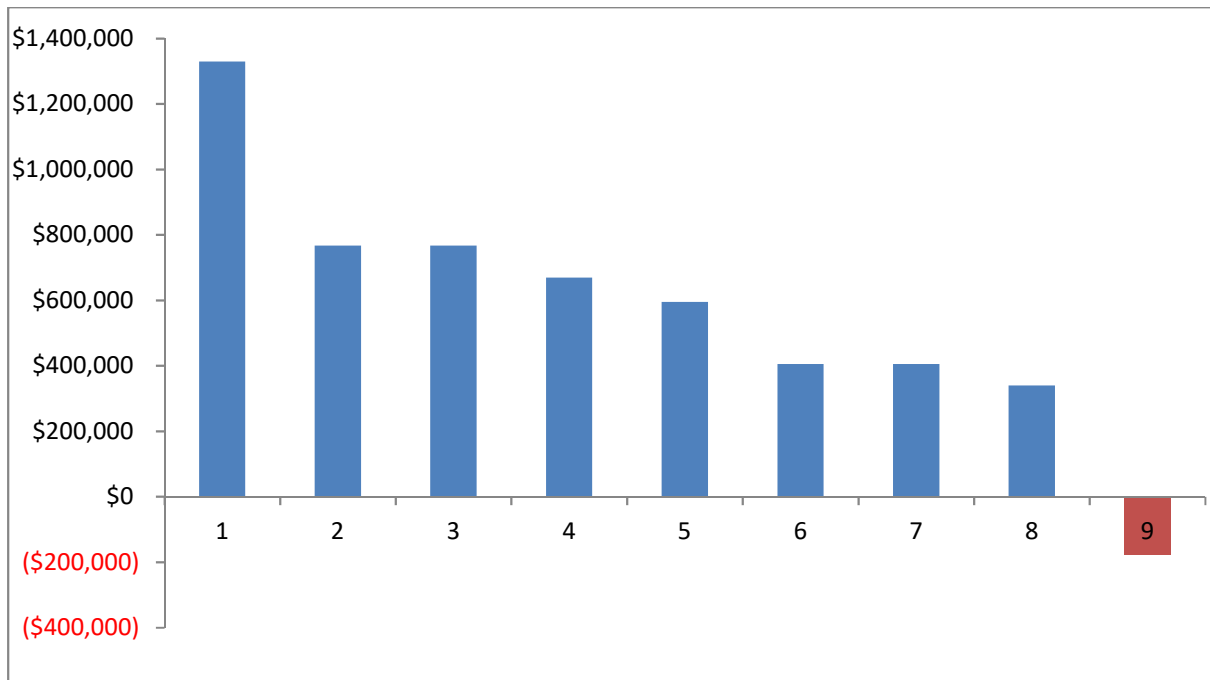
162. Table 8 summarises our assessment of the quantified benefits and detriments discussed above in NPV terms over ten years.
163. We have reached a different view to Tennex on some figures because our assessment is that a significant proportion of Tennex's claimed benefits are also likely to be achievable without the acquisition (reducing the benefits of the acquisition).

¹⁷³ Ibid at [5].

Table 8: Summary of quantified benefits and detriments (ten year NPV figures)

Item	Estimates
Benefits of the acquisition	
Capital cost savings	\$[] to \$[]
Operating cost savings	\$[] to \$[]
Redeployment of surplus plant	\$[]
Total quantified benefits	\$[] to \$[]
Detriments arising from the loss of competition	
Loss of allocative efficiency from reduction in existing competition in Christchurch with the acquisition	\$[] to \$[]
Loss of allocative efficiency from loss of potentially increased competition in rest of South Island in the counterfactual	\$0 to \$[]
Loss of productive efficiency	\$0 to \$[]
Loss of dynamic efficiency	\$0 to \$[]
Total quantified detriments	\$[] to \$[]
Net quantified detriment/benefit	-\$179,781 to \$1,329,541

164. Table 8 includes our assessment of the overall range of net quantified benefits and detriments. To assess the lower estimate of the overall net impact of the acquisition, we took the highest end of the range for likely detriments and the lowest end of the range for likely benefits. Similarly, to assess the upper estimate for the overall net impact of the acquisition, we took the lowest end of the range of likely detriments and the highest end of the range of likely benefits. At one end of the range, our assessment is that the acquisition would result in a net detriment in NPV terms over 10 years. At the other end of the range and in the majority of scenarios plotted, we estimate that the acquisition would result in a net benefit. This range of net outcomes (from net benefit to net detriment) is depicted in Figure 1. Details of the assumptions that go into each scenario are set out in **Attachment B**.

Figure 1: Potential net benefits in various scenarios (ten year NPV figures)

165. The spread of the estimated ranges of benefits and detriments set out in Table 8 is wide, reflecting the uncertainty of, and assumptions behind, the estimates. Without a clear basis for concluding that a particular figure within a range is likely based on an assessment of probabilities, we are not able to adopt a particular point within this range.¹⁷⁴ In this instance, we do not consider that the facts and analysis available to us enable us to determine, on the basis of quantitative analysis alone, particular point(s) within the available range of benefits and detriments.

Qualitative benefits and detriments

166. In addition to the quantified benefits and detriments set out in Table 8, we also take into account unquantified (qualitative) matters when weighing up the likely benefits and detriments from the acquisition. We exercise a qualitative judgement as to the nature and significance of any unquantified benefits or detriments.

167. In our assessment of benefits above, we discussed whether waste being treated more robustly with the acquisition, reduced emissions and the retention of value were benefits of the acquisition, but did not quantify any benefit associated with these matters. In terms of these matters, we noted that:

167.1 we do not regard waste being treated more robustly as a significant benefit of the acquisition, as it is unclear that there is currently an issue that would be solved with the acquisition;

167.2 reduced emissions may be a small, but not significant benefit of the acquisition; and

¹⁷⁴ *Godfrey Hirst 1* above n2 at [199] and [323].

- 167.3 we do not regard retention of value as a significant benefit of the acquisition.
168. Overall, we do not consider there is a real chance that the acquisition would lead to material benefits from waste being treated more robustly, reduced emissions and the retention of value. Any benefit from such matters, as a result of the acquisition, is not of the same order of magnitude as the other benefits we have quantified.
169. In our assessment of detriments above, we discussed whether increased supply risk was a detriment of the acquisition. We noted that increased supply risk would be a detriment arising from the reduction in number of treatment plants with the acquisition, but that any risk of harm is offset to a significant extent by the ability that IWL would have to treat waste at its other treatment plants around New Zealand. Given this, we considered that any detriment is likely to be of a low magnitude. We do not consider that any detriment from increased supply risk would be significant, or of the same order of magnitude as the other detriments we have quantified.
170. Table 9 summarises our assessment of the unquantified benefits and detriments.

Table 9: Summary of unquantified benefits and detriments

Item	Evaluation
Waste being treated more robustly	Unclear that benefit would arise due to acquisition, but any benefit is not likely to be material
Reduced emissions	Likely that some benefit would arise (in terms of carbon emissions), but any benefit is not likely to be material
Retention of value	Unclear that benefit would arise due to acquisition, but any benefit is not likely to be material
Increased supply risk	Likely to be increased risk with acquisition, but detriment is not likely to be significant

Balancing

171. Having attempted to quantify the benefits and detriments, and having assessed the nature and significance of the unquantified benefits and detriments, we must exercise what has been described by the Courts as “qualitative judgment”,¹⁷⁵ to determine whether in our view the acquisition is likely to produce such a benefit to the public that it should be authorised, notwithstanding that we have found that it is likely to substantially lessen competition.
172. In making this judgement we have not undertaken a purely arithmetic exercise. As the Courts have noted, the need to take into account unquantifiable considerations

¹⁷⁵ *Godfrey Hirst 2* above n24 at [35] and [37].

compels that this is so. Rather, we have applied our judgement to the evidence available, and the submissions received, and have formed a view on the likelihood and likely magnitude of the considerations at play.

173. Based on our investigation and analysis, we are satisfied that the benefits of the acquisition are likely to outweigh the detriments arising from the proposed acquisition.
174. We note our estimates of quantified benefits and detriments have wide ranges, reflecting the inherent uncertainty of the estimates. We also note that (as depicted in Figure 1) at one end of the range, our assessment is that the acquisition would result in a net detriment, but that at the other end of the range and in the majority of scenarios we consider likely, we estimate a net benefit. Overall, we are satisfied that the quantified and unquantified benefits likely to be achieved by the acquisition would likely be greater than the negative consequences that the acquisition would be likely to bring. We are satisfied that the acquisition is likely to produce such a benefit to the New Zealand public that it should be authorised.
175. With the acquisition, IWL would likely be the only supplier. The number of facilities for the treatment of medical and quarantine waste services in Christchurch would reduce from two to one. The relevant markets would likely go from a duopoly to a monopoly. However, the acquisition would be likely to result in benefits in the form of cost savings, and we are satisfied that these savings would most likely outweigh any efficiency losses that would result from the acquisition (as a result of likely price rises). This is because, in our judgement, the negative consequences of the acquisition are unlikely to be at the upper end of our quantified range. Allocative efficiency detriments arising from the acquisition are likely to be moderated due to the competitive effect and constraint that Waste Management and/or other third-parties (by competing in contract tenders) may have on the prices faced by, in particular, large customers. If such a party was to enter the relevant markets on the back of winning a large customer contract, then the negative consequences for all customers could be reduced. Additionally, we consider that the relatively inelastic demand for these services would mean that the allocative efficiency detriments are less likely to be at the higher end of our estimated ranges. We have also placed less weight on the potential competitive expansion by an alternative third-party owner into the rest of the South Island if they acquired San-i-Pak given the uncertainty as to the likely timing and extent of any such expansion.
176. Furthermore, given the nationwide nature of IWL's operations and the ability to benchmark across regions, we also consider that any productive and dynamic efficiency losses from the acquisition would be more likely to be at the lower end of the estimated ranges.
177. While we were considering this matter, the Court of Appeal released its decision in NZME noting that consistent with the position in Australia, the Act permits us to take a modified total welfare approach to merger analysis, but it does not require it in every case. Accordingly, we have turned our minds to the question of whether this is an appropriate case for such an approach. We did not receive extensive submissions

on this point and did not receive any reasoned argument suggesting that we should modify the weighting of merger benefits in this case according to that approach. Neither do we consider that in all the circumstances of this case, having reached the conclusions that we have reached, that it is necessary for us to further analyse the merger effects in this way.

Determination on notice of authorisation

178. We are not satisfied that the proposed acquisition will not have, or would not be likely to have, the effect of substantially lessening competition in a market in New Zealand. However, we are satisfied that the proposed acquisition will result, or will be likely to result, in such a benefit to the public that it should be permitted.
179. Pursuant to section 67(3)(b) of the Commerce Act 1986, the Commerce Commission determines to grant authorisation to Tennex Capital Limited to acquire up to 100% of the medical and quarantine waste collection and treatment assets of San-i-pak Limited.

Dated this 19th day of December 2018

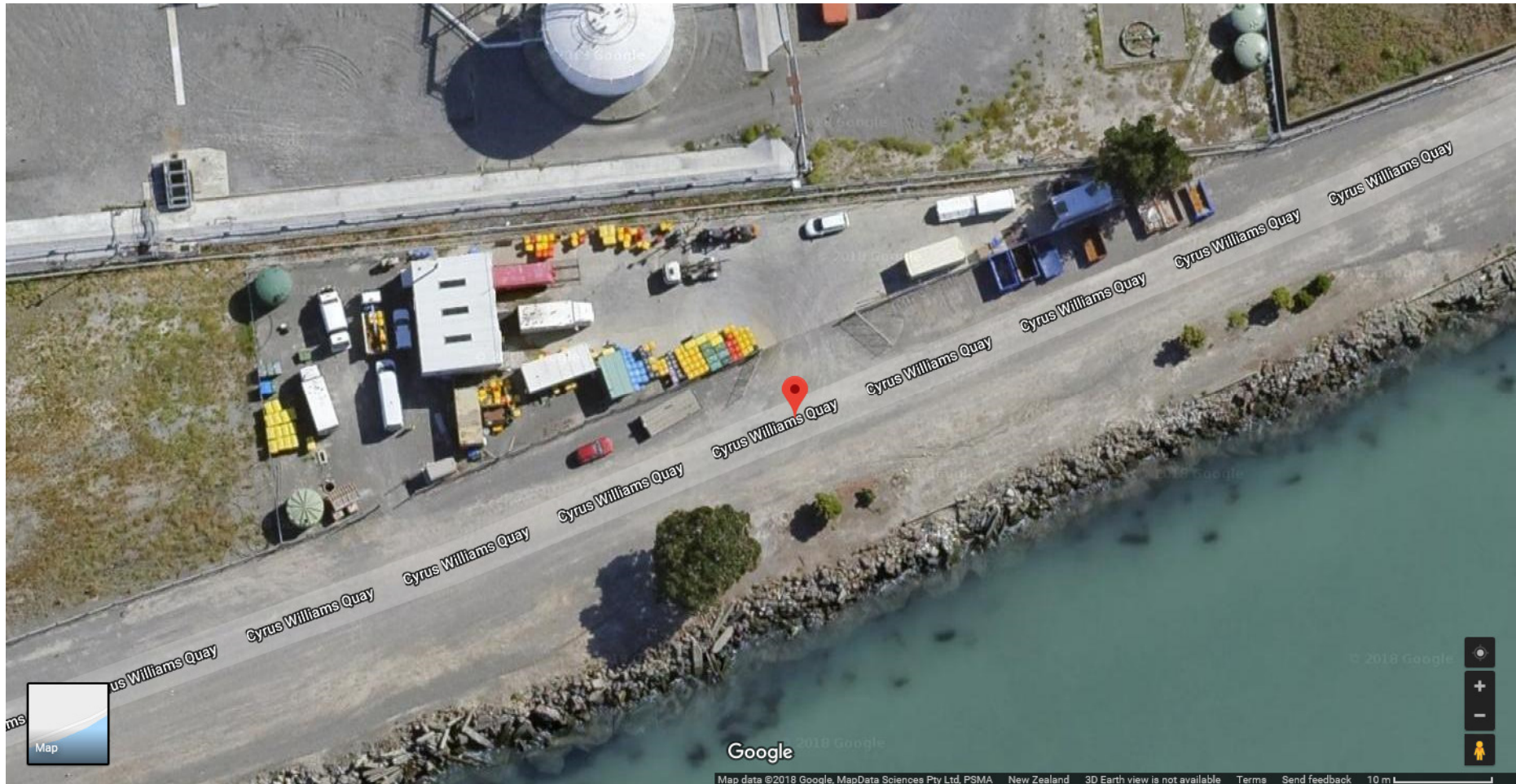
Dr Mark Berry
Chair

Attachment A: Site maps

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San-i-pak Lyttelton location – building is around 95m² and land around 1,600m²



IWL Christchurch location – building is around 1,044m²



Attachment B: Assumptions underlying Figure 1

Aspect of benefits and detriments		Low	High
B1	Capital cost savings	\$[]	\$[]
B2	Operating cost savings	\$[]	\$[]
B3	Redeployment of surplus plant	\$[]	\$[]
D1	Loss of allocative efficiency due to price increases	-\$[]	-\$[]
D2	Loss of allocative efficiency due to forgone price cuts	\$0	-\$[]
D3	Loss of productive inefficiency	\$0	-\$[]
D4	Loss of dynamic inefficiency	\$0	-\$[]

Aspect/total	Scenarios								
	1	2	3	4	5	6	7	8	9
B1	High	High	High	High	High	High	High	Low	Low
B2	High	High	High	High	High	High	High	High	Low
B3	High	High	High	High	High	High	Low	Low	Low
D1	Low	High	High	High	High	High	High	High	High
D2	Low	Low	Low	High	High	High	High	High	High
D3	Low	Low	Low	Low	High	High	High	High	High
D4	Low	Low	Low	Low	Low	High	High	High	High
Net benefit or detriment	\$1,329,541	\$[]	\$[]	\$[]	\$[]	\$[]	\$[]	\$[]	-\$179,781