



## COMMERCE COMMISSION

### **Decision No. 604**

Determination pursuant to the Commerce Act 1986 in the matter of an Application for clearance of a business acquisition involving:

**Transpacific Industries Group (NZ) Limited**

**and**

**Ironbridge Capital Pty Limited**

- The Commission:** Paula Rebstock  
David Caygill  
Peter Taylor  
Denese Bates QC
- Summary of Application:** Transpacific Industries Group (NZ) Limited has applied for clearance to acquire the South Island Assets and Businesses of EnviroWaste Services Limited and up to 50% of the shares in Manawatu Waste Limited from a subsidiary of Ironbridge Capital Pty Limited (the Acquisition).
- Determination:** Pursuant to section 66(3)(b) of the Commerce Act 1986, the Commerce Commission determines to decline to give clearance to Transpacific Industries Group (NZ) Limited for the Acquisition.
- Date of Determination:** 30 May 2007

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## ABBREVIATION LIST

The following abbreviations are used in the report

<i>CWS</i>	Canterbury Waste Services Limited.
<i>DIY</i>	Do it Yourself
<i>DoJ</i>	United States Department of Justice
<i>FEL</i>	Front End Load
<i>LATE</i>	Local Authority Trading Enterprise
<i>MGB</i>	Mobile Garbage Bin (Wheelie Bin)
<i>MRF</i>	Materials Recovery Facility
<i>NZWS</i>	New Zealand Waste Strategy
<i>PQM</i>	Price Quality Method
<i>REL</i>	Rear End Load
<i>RTS</i>	Refuse Transfer Station
<i>SLC</i>	Substantial Lessening of Competition
<i>TLA</i>	Territorial Local Authority
<i>TPI</i>	Transpacific Industries Group (NZ) Limited.
<i>TPA</i>	Tonnes of waste per annum.
<i>TWC</i>	Transwaste Canterbury Limited

## EXECUTIVE SUMMARY<sup>1</sup>

### The Proposal

1. A notice pursuant to s 66(1) of the Commerce Act 1986 (the Act) was registered by the Commerce Commission (Commission) on 14 December 2006. The notice sought clearance for the acquisition by Transpacific Industries Group (NZ) Ltd (TPI) to acquire:
  - the South Island assets and businesses of EnviroWaste Services Ltd (EnviroWaste); and
  - up to 50% of the shares in Manawatu Waste Ltd (Manawatu Waste).

This is relevant acquisition (Acquisition).

### Background and Parties

2. The New Zealand waste management industry has an estimated annual turnover of between \$400 and \$550 million, and comprises a range of different services, including solid waste collection, transfer and handling stations, treatment and processing, recycling, disposal, and a range of specialist activities and services. The total volume of waste disposed of in New Zealand's landfills is approximately three million tonnes per annum.
3. TPI is a wholly owned subsidiary of Australian listed Transpacific Industries Group. EnviroWaste is owned by Ironbridge Capital Pty Ltd (Ironbridge), an Australian-based private equity provider. These two companies operate in waste markets throughout New Zealand.<sup>2</sup> Manawatu Waste is a joint venture between Colmar Holdings and EnviroWaste that operates in waste markets in Taupo, New Plymouth, Wanganui, Palmerston North and Horowhenua/Kapiti.
4. As EnviroWaste has noted, the industry is "rapidly moving to a two player market" – TPI and EnviroWaste - and the Acquisition would result in the removal of one of these two players from the whole of the South Island and part of the North Island, via its shareholding in Manawatu Waste.
5. Ironbridge and TPI have entered into an agreement for Ironbridge to sell the South Island assets of EnviroWaste and half of EnviroWaste's existing 50% share of Manawatu Waste to TPI. [

]. These transactions are the Acquisition and are conditional on the Commission giving clearance.

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<sup>1</sup>This Executive Summary is provided for the assistance of readers of the Commission's determinations. It does not purport to completely encompass all details of the Applications, the Commission's investigation of the facts, the Commission's analysis of those facts, the reasons for the Commission's determinations or the determinations themselves. Readers are referred to the body of the reasons for the Commission's determinations for a complete picture.

<sup>2</sup> Except that EnviroWaste does not compete with its joint venture company, Manawatu Waste.



6. Post-acquisition, Ironbridge intends to retain and operate the remainder of EnviroWaste's assets in the upper half of the North Island.
7. The South Island assets of EnviroWaste include 50 per cent of Canterbury Waste Services (CWS), a joint venture with TPI that partially owns, and is contracted to operate, the Kate Valley landfill in North Canterbury. Other South Island businesses of EnviroWaste are waste collection businesses in Nelson, Blenheim, Christchurch, Timaru/Oamaru and Dunedin and a contract to provide a collection and recycling service to the Timaru District Council.

### **The Investigation**

8. The Commission undertook a significant number of interviews with industry participants during its investigation of this Application and received written submissions. The investigation has necessarily been detailed and lengthy as a result of, amongst other factors, the large number of combinations of product, functional and geographic markets that have required investigation and analysis. That is also one of the reasons for the length of this Decision.
9. The Commission has carefully weighed all the evidence, taking into account the motivations and commercial positions of those parties directly interested in the Acquisition, and has endeavoured where possible to test the competing views with parties independent of the Acquisition.

### **Relevant Markets**

10. In Decision 355 of May 1999,<sup>3</sup> the Commission adopted a broad waste collection product market definition which saw all types of waste collection service as part of one market. However, for the combination of reasons explained in the Decision, the Commission considers that the broad waste collection product market definition adopted in Decision 355 is not appropriate for the analysis of this Acquisition.
11. Rather, reflecting the weight of evidence gathered during the investigation, the Commission considers that a number of distinct waste collection product markets exist. In arriving at this view, the Commission has considered the characteristics of demand- and supply-side substitutability with regard to the various types of waste collections, including local authority collection contracts and privately contracted collections from wheelie bins, front end load bins (FEL) and gantry bins.<sup>4</sup> The Commission has also identified an additional market to those considered in Decision 355 – that for the provision of waste management services to national customers which have sites in multiple regions.
12. From the demand side, the Commission has found very little evidence of customers switching between types of waste collection services given an increase in price or reduction in the quality of service. When switching has occurred it has been for non-price reasons.
13. From the supply side, there is an important distinction between wheelie bin and FEL waste collection services on the one hand, and gantry type of collection

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<sup>3</sup> The merger between Waste Care and Waste Management.

<sup>4</sup> These different types of waste collection services are explained in the Decision.

services on the other. The former are operated as scheduled services, and their efficiency, and hence profitability, relies heavily on the network structure. In contrast, gantry waste collection services are dedicated or non-scheduled collection services—the delivery and pick-up are arranged with each customer—and require dedicated service trips for each. Specialised vehicles are also required for each type of waste collection.

14. The Commission also took into account other jurisdiction's views of waste mergers when defining the markets. Mergers in the waste collection industry have been considered by the United States Department of Justice (DoJ) on numerous occasions over the period 1996 – 2005.<sup>5</sup> In each case the DoJ adopted a similar analysis of competition in a FEL market (there called “small container commercial waste collection”). In particular, the DoJ separated FEL collection from other collection product markets, and rejected the proposition that different types of collection product are sufficiently substitutable. This accorded with the views of most market participants who submitted information during the investigation.
15. It became apparent during this investigation that since 1999, EnviroWaste had emerged as a national, rather than regional, player in waste markets. This has meant that it has been able to compete with TPI to supply waste management services to national customers with sites in several or many regions. These customers demand a national waste management service, which includes much more than mere collection of waste. Additional services required by customers in this market include analysis and rationalisation of their waste and recyclables collection methods, waste monitoring/minimization programmes, recyclables monitoring/maximization programmes, amalgamation of invoices from multiple business sites, and collation and presentation of waste and recyclables volume data from those sites. Moreover, the evidence shows that this national supply delivers to national customers a waste management service at a much lower cost overall than would local supply.
16. The Commission considers that the relevant markets are:
  - local/regional markets for the provision of local authorities' contracts for public kerbside collection of solid non-hazardous waste ("*local authority collection contract market*") in Taupo District, Taranaki Region, Manawatu District and Palmerston North City, Kapiti Coast District, Horowhenua District, Christchurch City, Selwyn District, Waimakariri District, Timaru District and Dunedin City;
  - local/regional markets for the provision of privately contracted collection of solid non-hazardous waste in wheelie bins (including refuse bags and drums) from households and small commercial customers ("*wheelie bin collection market*") in Taupo, New Plymouth, Wanganui, Palmerston North, Kapiti Coast/Horowhenua, Nelson, Christchurch and Dunedin;

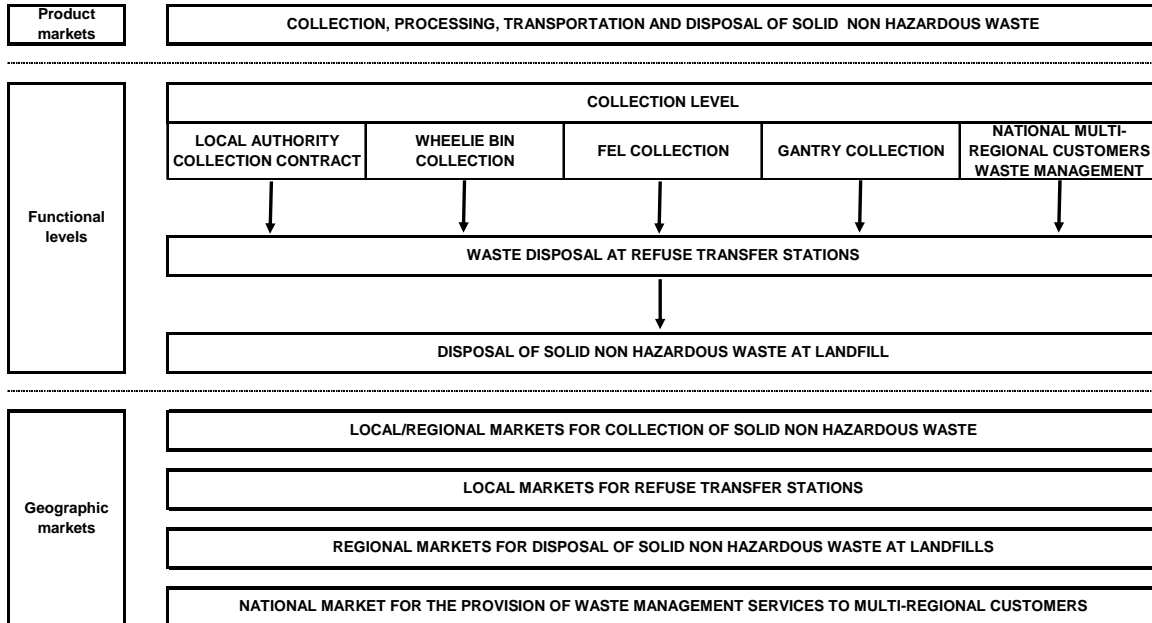
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<sup>5</sup> *USA v Waste Industries Usa, Inc* (2005); *USA & New Jersey v Waste Management, Inc & Anor* (2003); *USA & Florida v Waste Management, Inc & Ors* (2003); *USA & Ors v Waste Management, Inc & Ors* (1999); *USA & Ors v USA Waste Services, Inc & Ors* (1998); *USA v Waste Management of Georgia, Inc & Ors* (1996) *USA & Florida v Reuter Recycling of Florida, Inc & Anor* (1995).

- local/regional markets for the provision of privately contracted collection of solid non-hazardous waste in front-end-loaded bins from commercial customers ("*FEL collection market*") in Taupo, New Plymouth, Wanganui, Palmerston North, Kapiti Coast/Horowhenua, Nelson, Christchurch, Timaru and Dunedin;
- local/regional markets for the provision of privately contracted collection of solid non-hazardous waste by gantry and huka bins ("*gantry collection market*") in Taupo, New Plymouth, Wanganui, Palmerston North, Kapiti Coast/Horowhenua, Nelson, Christchurch, Timaru and Dunedin;
- local markets for refuse transfer stations ("*RTS market*") in Taupo, New Plymouth, Wanganui, Palmerston North, Kapiti Coast/Horowhenua, Christchurch, Timaru and Dunedin;
- regional markets for disposal of solid non-hazardous waste at landfills ("*landfill market*") in New Plymouth, Wanganui, Palmerston North, Kapiti Coast/Horowhenua, Christchurch, Timaru and Dunedin; and
- the national market for the provision of waste management services to multi-regional customers ("*national multi-regional customers waste management market*").

17. These markets are summarized in the diagram below.

**Diagram A: Summary of Relevant Markets**



**Counterfactual and Factual**

18. In deciding whether an acquisition is likely to have the effect, or likely effect, of substantially lessening competition in a market, the Commission assesses the likely difference in competition outcomes between two hypothetical situations,

one with the acquisition (the factual) and one without (the counterfactual).<sup>6</sup> The difference in competition between these two future scenarios is the expected competitive impact of the acquisition.

19. If the Acquisition were to proceed the Commission considers that characteristics of the factual will be:

- TPI would acquire up to 50% of the shares of Manawatu Waste;
- EnviroWaste would not be a competitor in Manawatu Waste's markets<sup>7</sup>;
- as part of its acquisition of up to 50% of Manawatu Waste, TPI would be likely to acquire greater influence over Midwest Disposals;
- TPI would acquire 100% of the assets of the South Island businesses of EnviroWaste;
- EnviroWaste would be removed as a competitor or potential competitor in collection markets in Nelson, Christchurch, Timaru/Oamaru and Dunedin, along with Blenheim, where TPI currently has no business operations;
- TPI would acquire full control over CWS. CWS and the Canterbury Joint Steering Committee would continue to, together, own TWC and the Kate Valley landfill;
- EnviroWaste would not provide a national waste management service to companies with multiple sites. TPI would be the only company able to provide such a service; and
- TPI's vertical ownership or part ownership of (and/or operation contract for) landfills, refuse transfer stations (RTSs) and waste collection businesses could provide it with the potential to squeeze competitors in waste collection markets.

20. The Commission has considered three potential counterfactuals:

- EnviroWaste retains the South Island assets because [
  - ]. Ironbridge would continue to operate the EnviroWaste businesses in their pre-acquisition form. [
    - ]. TPI and EnviroWaste would remain as competitors in the relevant markets in the South Island as would TPI and Manawatu Waste in the relevant markets in the North Island. Such a counterfactual would be equivalent to the status quo;
  - [ ]; and
  - [ ].

<sup>6</sup> *Air New Zealand & Qantas Airways Ltd v Commerce Commission* (No.6), unreported HC Auckland, CIV 2003 404 6590, Hansen J and KM Vautier, Para 42.

<sup>7</sup> Or a near entrant in those markets.

21. Of the first two listed alternative counterfactual scenarios, the Commission considers that the first is more likely than the second. [

].

22. Therefore, the counterfactual will largely have the characteristics of the status quo. EnviroWaste and Manawatu Waste will both remain as competitors with TPI in each relevant geographic market. EnviroWaste will continue to compete with TPI in the national market for waste management services to customers with multiple sites.

### **Competition Analysis**

#### *Local Authority Waste Collection Markets*

23. The Commission concludes that although the Acquisition would reduce the number of likely potential bidders in the factual compared to the counterfactual in the North Island regions, TPI would continue to face competition from, and be constrained by, local, national and international competitors.
24. In addition, barriers to entry into local authority collection contracts are not high, although some are higher than others. The term of local authority waste collection contracts is generally such that the capital costs associated with them are recoverable over that term. The Commission also considers that while the countervailing power of the local authorities is not sufficient on its own to prevent a substantial lessening of competition, it would provide some constraint on the combined entity post-merger.
25. The Commission is, therefore, satisfied that the Acquisition will not have, or would not be likely to have, the effect of substantially lessening competition in any of the relevant local authority collection markets.

#### *Wheelie Bin Collection Markets*

26. The Commission concludes that in the factual TPI will not be sufficiently constrained by existing or potential competitors from exerting market power in the wheelie bin collection markets in the regions (other than in Horowhenua/Kapiti Coast, Nelson and Christchurch) where horizontal aggregation of market shares occurs for the following reasons:
- while it is relatively easy for an entrant to purchase the necessary equipment and begin a wheelie bin collection business, TPI, as the incumbent, will have economies of scale and route density. This means that an entrant must compete with higher costs than TPI because of the absence of economies of scale and density;

- residential wheelie bin customers are contracted for between three months and one year and sometimes for three years if they are business customers. Residential wheelie bin customers pay in advance for up to one year. Many of these customers will not be immediately available to an entrant;
  - companies serviced as national customers by either TPI or EnviroWaste are not available to an entrant as potential customers.
  - the models provided by TPI and Manawatu Waste of entry into wheelie bin/refuse bag collection markets do not demonstrate that small scale entry is likely to be profitable;
  - in certain cases TPI, Manawatu Waste and EnviroWaste have the ability to obtain volume discounts at landfills or RTSs or in fact own (or operate) landfills and RTSs. Such discounts are either not available or are lower to smaller existing competitors or entrants; and
  - local authority waste collection contracts, generally available only to larger players with experience in the market, provide cost advantages not available to an entrant.
27. Therefore, the Commission is not satisfied on the evidence that has been provided to it that the Acquisition will not have, or would not be likely to have, the effect of substantially lessening competition in wheelie bin collection markets in Wanganui, Palmerston North, and Dunedin. The Commission is satisfied, however, that the unilateral market power effects of the Acquisition will not have, or would not be likely to have, the effect of substantially lessening competition in wheelie bin collection markets in Horowhenua/Kapiti Coast, Nelson and Christchurch.

*FEL Collection Markets*

28. The Commission concludes that in the factual TPI will either be in a monopoly position or will not be sufficiently constrained by existing or potential competitors from exerting market power in the FEL collection services market in relevant geographic areas where horizontal aggregation of market shares occurs for the following reasons:
- the Acquisition would create a merger to monopoly in FEL collection markets in Taupo, Palmerston North, Horowhenua/Kapiti Coast and Dunedin;
  - in FEL collection markets in Nelson, Christchurch and Timaru, there is existing competition to TPI and EnviroWaste from small players. However, the Commission does not consider the existing competition in these markets sufficient to constrain TPI from exercising market power in the factual;
  - an entrant into FEL collection markets must obtain economies of density similar to the incumbent operators to be successful. A significant barrier to the achievement of those economies of density is the industry standard three year FEL customer collection contracts containing automatic roll over and price matching provisions; and

- the models provided by TPI and Manawatu Waste of entry into FEL collection markets do not demonstrate that small scale entry is likely to be profitable;
- 29. For the reasons given above, the Commission concludes that in the factual TPI will either be in a monopoly position or will not be constrained by existing or potential competitors from exerting market power in the FEL collection services market in relevant geographic areas where horizontal aggregation of market shares occurs.
- 30. Therefore, the Commission is not satisfied on the evidence that has been provided to it, that the Acquisition will not have, or would not be likely to have, the effect of substantially lessening of competition in FEL collection markets in Taupo, Palmerston North, Horowhenua/Kapiti Coast, Nelson, Christchurch, Timaru/Oamaru and Dunedin.

#### *Gantry Collection Markets*

- 31. The Commission concludes that because of the extent of existing competition, and relative ease of entry into and expansion in, gantry markets, there do not appear to be any significant competition issues in any relevant gantry market. Because gantry services are operated on a non-scheduled basis requiring a gantry bin pick-up followed in each case by transport to a disposal facility, the possession of economies of density and scale are not vital to an entrant's viability.
- 32. The Commission is therefore satisfied that the Acquisition will not have, or would not be likely to have, the effect of substantially lessening competition in any of the relevant gantry waste collection markets.

#### *RTS Markets*

- 33. There will be aggregation of market shares only in the Wanganui geographic market. Manawatu Waste and TPI each have approximately a 50% market share in the Wanganui RTS market. The Acquisition will result in TPI controlling 100% of the local market for RTSs in Wanganui.
- 34. Absent a divestment of one RTS, which would necessarily include an associated waste stream, the Commission is not satisfied that the Acquisition will not have, or would not be likely to have, the effect of substantially lessening of competition in the RTS market in Wanganui.
- 35. The Commission is satisfied that the Acquisition will not have, or would not be likely to have, the effect of substantially lessening competition in any of the other relevant RTS markets.

#### *Landfill Markets*

- 36. The Commission concludes that the Acquisition will not result in any aggregation of market shares, other than TPI increasing control of the joint ventures with Manawatu Waste and EnviroWaste which own and operate Bonny Glen and Kate Valley landfills. Because of this, and because TPI and either Manawatu Waste or EnviroWaste are considered as one head in the market in both the factual and the counterfactual, the Commission is satisfied that the Acquisition will not have, or

would not be likely to have, the effect of substantially lessening competition in any of the relevant landfill collection markets.

*National Multi-Regional Customers Waste Management Market*

37. The Commission is not satisfied, on the evidence that has been provided to it, that the Acquisition - which would remove EnviroWaste from all of the South Island and effectively from the lower half of the North Island<sup>8</sup> – will not have, or would not be likely to have, the effect of substantially lessening of competition in the national multi-regional customers waste management market. The Commission's reasons are that:
- EnviroWaste and TPI are the only participants in this market. EnviroWaste would not provide national supply if its businesses were confined to the upper half of the North Island;
  - the Commission does not accept that international waste brokers would enter into the New Zealand market in the factual due to the small size of the market and because there would be a monopoly collector (TPI) in many areas; and
  - the Commission does not accept that multiple small collection contractors collecting from each regional site are an adequate substitute for a national waste management service of the price and standard provided by TPI and EnviroWaste.

*Co-ordinated Market Power*

38. While noting it has concerns, particularly in respect of three waste collection markets in Horowhenua/Kapiti Coast, Nelson and Christchurch, the Commission makes no finding as to whether any increased likelihood of co-ordinated market power in some discrete markets will, or will not, have the effect (or likely effect) of substantially lessening competition in a market. A finding has been unnecessary for present purposes.

*Vertical Integration*

39. The Commission considered the increased vertical integration between collection and disposal operations resulting from the Acquisition in the relevant geographic markets, and its effect on competition in downstream collection services. These vertical effects are likely to result in the strengthening of TPI's horizontal position in those geographic markets where TPI, as a vertically integrated operator, will hold a significant market share in wheelie bin and FEL collection markets. The Commission has found that the Acquisition is likely to provide TPI with the ability to apply a price-squeeze to its rival collectors, through its control of a RTS in New Plymouth and ownership and control of the Bonny Glen landfill.
40. The Commission concludes that further competition concerns are likely to arise from vertical integration in New Plymouth and Wanganui through the creation of the potential for TPI to enhance its market power in the wheelie bin and FEL collection markets. Therefore, the Commission is not satisfied on the evidence

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<sup>8</sup> Because Manawatu Waste would be half owned, in the factual, by its only competitor in this market.



that has been provided to it that, as a result of vertical integration, the Acquisition will not have, or would not be likely to have, the effect, or likely effect of substantially lessening competition in wheelie bin and FEL collection markets in New Plymouth and Wanganui.

41. The Commission is satisfied, however, that, the Acquisition will not have, or would not be likely to have, the effect of substantially lessening competition in the Christchurch market, as a result of vertical integration.

#### **Overall Conclusions in Relation to the Acquisition**

42. The Commission is not satisfied that the acquisition of the South Island assets and businesses of EnviroWaste Services and up to 50% of the shares in Manawatu Waste will not have, or would not be likely to have, the effect of substantially lessening competition in:
- wheelie bin/refuse bag waste collection markets in Wanganui, Palmerston North and Dunedin;
  - FEL waste collection markets in Taupo, Palmerston North, and Horowhenua/Kapiti Coast; Nelson, Christchurch, Timaru/Oamaru and Dunedin;
  - the RTS market in Wanganui;
  - the national multi-regional customer waste management market (partially as a result of the acquisition of the assets and businesses of EnviroWaste in the South Island and partially as a result of the acquisition of 50% of the shares of Manawatu Waste); and
  - wheelie bin/refuse bag and FEL collection markets in New Plymouth and Wanganui due to vertical effects.

#### **Determination of Notice Seeking Clearance**

43. Pursuant to section 66(3)(b) of the Commerce Act 1986, the Commission determines to decline to give clearance for the Acquisition.
44. Table A below summarises the Commission's findings in declining to give a clearance to the Acquisition for the assistance of readers.

Table A: Summary of Commission Findings<sup>9</sup>

Product Markets / Market power effects	Geographic Markets									
	Taupo	New Plymouth	Wanganui	Palmerston North	Horo/Kapiti Coast	Nelson	Blenheim	Christchurch	Timaru/Oamaru	Dunedin
Local Authority Contracts	No SLC	No SLC	No SLC	No SLC	No SLC	No SLC	No SLC	No SLC	No SLC	No SLC
Wheelie Bin Collection	<i>De minimus</i> aggregation	No aggregation	SLC	SLC	No finding made	No finding made	No aggregation	No finding made	No aggregation	SLC
FEL Collection	SLC	No aggregation	No aggregation	SLC	SLC	SLC	No aggregation	SLC	SLC	SLC
Gantry Collection	No SLC	No aggregation	No aggregation	No aggregation	No SLC	No SLC	No aggregation	No SLC	No SLC	No SLC
RTS	No aggregation	No aggregation	SLC	No aggregation	No aggregation	No aggregation	No aggregation	No aggregation	No aggregation	No aggregation
Landfill	No aggregation	No aggregation	No aggregation	No aggregation	No aggregation	No aggregation	No aggregation	No aggregation	No aggregation	No aggregation
Vertical integration effects	No SLC	SLC	SLC	No SLC	No SLC	No VI	No VI	No SLC	No VI	No SLC
Coordinated Market Power	No SLC	No SLC	No SLC	No SLC	No finding made	No finding made	No aggregation	No finding made	No SLC	No SLC
National Multi-site Market	SLC									

**Key**

- = The Commission is satisfied in the absence of aggregation of market share or vertical effects, that no substantial lessening of competition results from the Acquisition.
- = The Commission is satisfied that no substantial lessening of competition results from the Acquisition.
- = The Commission is not satisfied that no substantial lessening of competition results from the Acquisition.
- = Competition issues exist but the Commission has made no finding as to whether or not a substantial lessening of competition results from the Acquisition.

<sup>9</sup> This table is provided for the assistance of readers of the Commission's decision. In respect of the actual findings made by the Commission, readers are referred to the body of the reasons for the Commission's decision.

## THE PROPOSAL

1. A notice<sup>10</sup> pursuant to s 66(1) of the Commerce Act 1986 (the Act) was registered with the Commerce Commission (the Commission) on 20 December 2006 seeking clearance for Transpacific Industries Group (NZ) Limited (TPI) to acquire:
  - the South Island assets and businesses of EnviroWaste Services Limited (EnviroWaste) from a wholly owned subsidiary of Ironbridge Capital Pty Limited (Ironbridge); and
  - up to 50 per cent of the shares of Manawatu Waste Limited (Manawatu Waste) [ ].
2. Ironbridge has acquired all the shares of EnviroWaste from Fulton Hogan Limited (Fulton Hogan). TPI has entered into a separate Heads of Agreement with Ironbridge to acquire the South Island assets and businesses of EnviroWaste and half of EnviroWaste's shares of Manawatu Waste, from Ironbridge. TPI has subsequently entered into a number of conditional sale and purchase agreements with Ironbridge for the purchase of these assets. In this Decision the transaction to acquire these assets is termed "the Acquisition."
3. The Acquisition is subject to the granting of a clearance by the Commission.

## PROCEDURE

4. Section 66(3) of the Act requires the Commission either to give a clearance or to decline to give a clearance clear to the Acquisition referred to in a s 66(1) notice within 10 working days, unless the Commission and the person who gave notice agree to a longer period. Extensions of time were agreed between the Commission and TPI and a decision on the Application was made on 30 May 2007.
5. TPI sought confidentiality for specific aspects of the Application. A confidentiality order was made in respect of the information for up to 20 working days from the Commission's determination notice. When that order expires, the provisions of the Official Information Act 1982 will apply.
6. The Commission's approach to analysing the Acquisition is based on principles set out in the Commission's Mergers and Acquisitions Guidelines.<sup>11</sup>

## STATUTORY FRAMEWORK

7. Under s 66 of the Act, the Commission is required to consider whether the Acquisition would have the effect, or likely effect, of substantially lessening competition in a market. If the Commission is satisfied that the proposal is not likely to substantially lessen competition then it is required to grant clearance to the Application. Conversely if the Commission is not satisfied it must decline. The

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<sup>10</sup> In this Decision, the notice is termed the "Application."

<sup>11</sup> Commerce Commission, *Mergers and Acquisitions Guidelines*, January 2004.

standard of proof that the Commission must apply in making its determination is the civil standard of the balance of probabilities.<sup>12</sup>

8. The substantial lessening of competition test was considered in *Air New Zealand & Qantas v Commerce Commission*, where the Court held:

We accept that an absence of market power would suggest there had been no substantial lessening of competition in a market but do not see this as a reason to forsake an analysis of the counterfactual as well as the factual. A comparative judgement is implied by the statutory test which now focuses on a possible change along the spectrum of market power rather than on whether or not a particular position on that spectrum, i.e. dominance has been attained. We consider, therefore, that a study of likely outcomes, with and without the proposed Alliance, provides a more rigorous framework for the comparative analysis required and is likely to lead to a more informed assessment of competitive conditions than would be permitted if the inquiry were limited to the existence or otherwise of market power in the factual.<sup>13</sup>

9. In determining whether there is a change along the spectrum that is significant the Commission must identify a real lessening of competition that is not minimal.<sup>14</sup> Competition must be lessened in a considerable and sustainable way. For the purposes of its analysis the Commission is of the view that a lessening of competition and the creation, enhancement or facilitation of the exercise of market power may be taken as being equivalent.
10. When the impact of market power is expected to be predominantly upon price, for the lessening, or likely lessening, of competition to be regarded as substantial, the anticipated price increase relative to what would otherwise have occurred in the market has to be both material, and ordinarily able to be sustained for a period of at least two years or such other time frame as may be appropriate in any given case.
11. Similarly, when the impact of market power is expected to be predominantly upon the non-price dimensions of competition such as reduced services, quality or innovation, for there to be a substantial lessening, or likely substantial lessening of competition, these also have to be both material and ordinarily sustainable for at least two years or such other time frame as may be appropriate.

### **Partial/Multiple Clearance**

12. During the investigation TPI inquired as to its ability to amend its Application to seek:
- a clearance for the acquisition of all the businesses described in its Application; or in the alternative
  - individual clearances for the acquisition of each of the individual businesses.
13. TPI recognised there was a potential for the Commission to find a substantial lessening of competition in one or some, but not all of, the multiple markets to be considered under the Application. On TPI's proposed amendment, the Commission

<sup>12</sup> *Foodstuffs (Wellington) Cooperative Society Limited v Commerce Commission* (1992) 4 TCLR 713-722.

<sup>13</sup> *Air New Zealand & Qantas Airways Ltd v Commerce Commission*, HC Auckland, CIV 2003 404 6590, Hansen J and K M Vautier, Para 42.

<sup>14</sup> *Fisher & Paykel Limited v Commerce Commission* (1996) 2 NZLR 731, 758 and also *Port Nelson Limited v Commerce Commission* (1996) 3 NZLR 554.

would grant clearance only for the acquisition of assets and businesses in those markets in which it found there was no substantial lessening of competition.

14. The Commission’s response was that it was not possible for it to give, in effect, a partial clearance in relation to an application (as here) which proposes multiple transactions. In this case, a clearance could only be given if the Commission were satisfied that the Acquisition – as defined in the Application – would not have the effect, or likely effect, of substantially lessening competition in any of the relevant markets.<sup>15</sup> An option which was available to TPI – and which the Commission brought to its attention – was to file multiple clearance applications in respect of each of the individual assets and businesses sought to be acquired by TPI as listed in its Application. TPI did not, however, choose to explore that option with the Commission.

### **ANALYTICAL FRAMEWORK**

15. The Commission applies a consistent analytical framework to all its clearance decisions. The first step the Commission takes is to determine the relevant market or markets. As acquisitions considered under s 66 are prospective, the Commission uses a forward-looking type of analysis to assess whether a lessening of competition is likely in the defined market(s). Hence, an important subsequent step is to establish the appropriate hypothetical future with and without scenarios, defined as the situations expected:
- with the acquisition in question (the factual); and
  - in the absence of the acquisition (the counterfactual).
16. The impact of the acquisition on competition is then viewed as the prospective difference in the extent of competition in the market between those two scenarios. The Commission analyses the extent of competition in each relevant market for both the factual and the counterfactual, in terms of:
- existing competition;
  - potential competition; and
  - other competition factors, such as the countervailing market power of buyers or suppliers.

### **THE PARTIES**

#### **Transpacific Industries Group (NZ) Limited (TPI)**

17. TPI is a wholly-owned subsidiary of Transpacific Industries Group Ltd, an Australian company listed on the Australian Stock Exchange. The company is the largest waste management provider in New Zealand, and is involved in the collection, recycling, transport and disposal of solid, liquid and hazardous waste.<sup>16</sup>

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<sup>15</sup> Section 66(3) requires the Commission to give a clearance if it is satisfied the acquisition will not have the effect, or likely effect, of substantially lessening competition in “a market” (or conversely to decline to give a clearance if it is not satisfied it will not have this effect in “a market”).

<sup>16</sup> The Acquisition is principally about solid waste assets and businesses.

18. TPI entered the solid waste business in New Zealand by purchasing Waste Management NZ Limited (Waste Management) for \$877 million in June 2006. In 2005, the last financial year prior to TPI's acquisition, Waste Management generated total revenue of \$252m in both New Zealand and Australia.<sup>17</sup> The New Zealand operations generated total revenue of \$195m, of which the collection segment counted for around 76%, the disposal segment another 20% and other activities for the remainder.
19. Since the acquisition of Waste Management, TPI has acquired a number of other companies involved in the solid waste business in New Zealand. For example, TPI recently purchased 80% of All Brite Industries, a national waste recycling company.
20. TPI is one of only two companies that operate nationally in the collection, transport and disposal of solid waste, the other being EnviroWaste. TPI's businesses include:
- solid waste collection businesses in Whangarei, Auckland, Hamilton, Rotorua, Tauranga, Whakatane, Taupo, Gisborne, Hawke's Bay, New Plymouth, Palmerston North/Fielding, Wanganui, Kapiti, Wellington, Nelson, Christchurch, Timaru, Queenstown/Wanaka and Dunedin.
  - ownership and/or operation under contract of refuse transfer stations (RTSs) in Southland, Canterbury, Horowhenua, Wanganui, Hawkes Bay, Waikato, Greater Auckland and Northland;
  - ownership and/or operation under contract of landfills in Canterbury (Kate Valley), Horowhenua, Manawatu/Palmerston North (Bonny Glen), Waikato and Greater Auckland (Redvale); and
  - collection and processing of recyclable waste in Auckland, Gisborne, Hawkes Bay, Bay of Plenty, Palmerston North and Greater Wellington through its recently acquired, 80% owned subsidiary, All Brite Industries.
21. TPI owns the Redvale Landfill in Auckland and it has a 50% shareholding in Midwest Disposals Limited (Midwest Disposals), which owns the Bonny Glen Landfill near Marton. It also has a 50% shareholding in Canterbury Waste Services Limited (CWS) which has a 50% shareholding in TWC Canterbury Limited (TWC) which owns the Kate Valley Landfill north of Christchurch.

#### **EnviroWaste Services Ltd (EnviroWaste)**

22. EnviroWaste is the second largest national operator in the markets for the collection, recycling, transport and disposal of solid waste. EnviroWaste's annual revenue for the 2006 financial year was \$[ ]million. EnviroWaste's collection segment accounted for around [ ]% of its annual sales and disposal (including recycling and landfill monitoring services) for the remainder.
23. EnviroWaste's assets include:

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<sup>17</sup> Annual Report 2005: Waste Management NZ Limited.

- solid waste collection businesses in Auckland, Tauranga , Hamilton, Nelson, Blenheim, Christchurch, Timaru, Oamaru and Dunedin;
  - a 50% shareholding in Manawatu Waste, which has assets including solid waste collection businesses in Taupo, Wanganui, Palmerston North and Horowhenua/Kapiti;
  - a 50% shareholding in CWS. CWS owns and operates a transfer station in central Christchurch; has a 50% shareholding in TWC (which owns the Kate Valley landfill north of Christchurch); and manages and operates the Kate Valley landfill;
  - contracts in relation to transfer stations, a resource recovery centre and the landfill, all in Timaru; and
  - a landfill (Fairfield) and transfer station in Dunedin.
24. EnviroWaste was owned by Fulton Hogan Limited (Fulton Hogan). Fulton Hogan entered into an agreement to sell all of the shares in EnviroWaste to Barra Bidco Limited, a company ultimately wholly owned by Ironbridge. In this Decision, Barra Bidco is referred to as Ironbridge (its owner).

#### **Ironbridge Capital Pty Ltd (Ironbridge)**

25. Ironbridge is an Australian provider of private equity. It is owned by a number of individuals. Its strategy is to acquire businesses with strong market positions and identifiable growth opportunities. Ironbridge is focused on investments in medium-to large-sized management buyout and expansion capital transactions in Australia and New Zealand.
26. Ironbridge's New Zealand investments are:
- EnviroWaste Services Ltd;
  - Auckland Central Backpackers Holdings Ltd;
  - Qualcare Group Holdings Ltd;<sup>18</sup> and most recently
  - 70% of CanWest MediaWorks (NZ) Ltd.
27. [
- ]
28. [
- ]
29. On 6 December 2006, Ironbridge announced that it had acquired EnviroWaste from Fulton Hogan. The price paid was \$[ ] million. The sale was completed on 27 April 2007 following its approval by the Overseas Investment Office.

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<sup>18</sup> Which owns 16 retirement villages throughout New Zealand.

30. Prior to the announcement of the Acquisition, TPI and Ironbridge had entered into a Heads of Agreement whereby TPI would acquire certain assets of EnviroWaste and shares in Manawatu Waste from Ironbridge. That transaction is described more completely at paragraph 224.
31. [
- ].<sup>19</sup>

## **OTHER RELEVANT PARTIES**

### **Manawatu Waste Ltd (Manawatu Waste)**

32. Manawatu Waste is a joint venture between EnviroWaste and Colmar Holdings Limited (Colmar). It operates waste and recyclables collection, transfer and disposal services in the central North Island, including Taupo, Palmerston North, Wanganui and New Plymouth. Manawatu Waste also has a 50% shareholding in Midwest Disposals Limited which owns the Bonny Glen landfill near Marton.
33. The other 50% shareholding in Midwest Disposals is owned by TPI.

### **JJ Richards Ltd (JJ Richards)**

34. JJ Richards is a waste collection company that operates in Auckland, Tauranga and Hamilton. It entered the New Zealand market in 2000 as a wholly-owned subsidiary of JJ Richards Australia, which has existed for 70 years. JJ Richards is almost exclusively involved in front-end-load (FEL) collection in New Zealand.

### **Metro Waste Ltd (Metro Waste)**

35. Metro Waste is a family-owned waste collection business that has been operating for 25 years and is primarily based in Auckland. Metro Waste is active in commercial collection, residential collection (including user pays and local authority contracts), and gantry bin collection. It also owns a transfer station near Orewa in Auckland.

### **Streetsmart Ltd (Streetsmart)**

36. Streetsmart is a waste and recyclables collection company based in Auckland that operates in the greater Auckland region, Tauranga, Nelson and Invercargill. Streetsmart is mainly involved in the provision of local authority collection contracts.

### **Midwest Disposals Ltd (Midwest Disposals)**

37. Midwest Disposals was formed in 2000 by Waste Management (now owned by TPI) and Manawatu Waste to acquire the Bonny Glen Landfill from the Rangitikei District Council. Bonny Glen provides disposal facilities for waste collected from the surrounding areas, in particular Wanganui and Palmerston North. The joint venture also operates the Levin transfer station and the Levin landfill.

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<sup>19</sup> [

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### **Canterbury Waste Services Ltd (CWS)**

38. CWS is a joint venture, owned in equal shares by TPI and EnviroWaste. It was formed to participate in the Kate Valley Landfill project in Canterbury.
39. CWS owns:
  - a RTS in Christchurch, which is a competitor to the three other RTSs in Christchurch owned by Meta NZ Ltd;
  - 50% of the shares of the TWC Canterbury Ltd (TWC) joint venture company, the owner of the Kate Valley landfill in North Canterbury;
  - a seven year contract with TWC to transport solid waste from RTSs in Canterbury to Kate Valley landfill; and
  - a contract with TWC to manage and operate the Kate Valley landfill.

### **Transwaste Canterbury Ltd (TWC)**

40. TWC is a public-private joint venture company. It is owned in equal shares by the Canterbury Regional Landfill Joint Committee<sup>20</sup> (the Joint Committee) and CWS. It owns and operates the Kate Valley Landfill.
41. The local authorities that comprise the Joint Committee entered into a Memorandum of Understanding with TPI's predecessor, Waste Management Ltd, and with EnviroWaste. The proposal was that the two companies would incorporate a company that would own 50% of the shares of TWC, a company that would select, build, own and operate a Canterbury Regional landfill. The Kate Valley landfill was duly opened in June 2005. It cost \$[ ] million to consent and build.<sup>21</sup>
42. There are eight directors of TWC, four appointed by CWS and four by the Joint Committee.
43. Under the Memorandum of Understanding the owners of TWC receive a fixed pre-tax return of [ ]% over the life of their investment in the Kate Valley landfill.

### **THE COMMISSION'S INVESTIGATION**

44. Commission staff undertook a significant number of interviews with industry participants during its investigation of this Application. Parties interviewed by the Commission and/or who have provided written submissions include those listed in Attachment 23.
45. This investigation has necessarily been a detailed and lengthy one as a result of the:
  - large number of combinations of product, functional and geographic markets that have required investigation and analysis;

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<sup>20</sup> The Joint Committee comprises the Christchurch City Council and the Ashburton, Selwyn, Waimakariri and Hurunui District Councils. Ownership is in varying shares with Christchurch City Council the largest shareholder at 40%.

<sup>21</sup> That cost comprised approximately \$[ ]million for the Resource Management Act consent process, \$[ ] for the land purchase, \$[ ] million for civil engineering works and the balance for plant and vehicles.

- absence of any specialist economic advice on market definition or horizontal competition issues in the Application;
- absence of any information on market shares in the Application, which required additional time to obtain, test and analyse;
- provision of a substantial amount of new information relating to the Application by TPI midway through the investigation, all of which required testing and analysing;
- receipt by the Commission of a number of lengthy written submissions from parties potentially affected by the Acquisition, which it was necessary to put to TPI to allow it to respond; and
- presence of strongly held views of market participants, almost universally opposing the Application, which required testing and analysing.

The Commission has carefully weighed all the evidence, taking into account the motivations and commercial positions of those parties directly interested in the Acquisition, and has endeavoured where possible to test the competing views with parties independent of the Acquisition.

## **INDUSTRY BACKGROUND**

### **New Zealand Waste Industry**

46. The New Zealand waste management industry has an estimated annual turnover of between \$400 and \$550 million, and comprises a range of different services, including solid waste collection, transfer and handling stations, treatment and processing, recycling, disposal, and a range of specialist activities and services. The total volume of waste disposed of in New Zealand's landfills is approximately three million tonnes per annum.
47. Waste is generated in households, offices, businesses and industry. It is collected and disposed of by both public and private enterprises.
48. There has been considerable consolidation in all levels of the waste industry since 1999, with Waste Management and EnviroWaste leading the way. These two companies have made a number of acquisitions, and have entered into multiple joint ventures in various geographic areas.
49. The important joint ventures involving Manawatu Waste, EnviroWaste and TPI in the relevant markets are:
  - CWS - 50/50 joint venture between EnviroWaste and TPI to own a RTS, landfill transport and landfill operation contracts and half of the Kate Valley landfill (accepting about [ ] tonnes of solid waste per annum);
  - Manawatu Waste – a 50/50 joint venture between EnviroWaste and Colmar to own half of Midwest Disposals, three RTSs and to collect and dispose of about [ ] tonnes of solid waste per annum; and

- Midwest Disposals – 50/50 joint venture between Manawatu Waste and TPI to own two transfer stations, a landfill operating contract, and the Bonny Glen landfill (accepting about [ ] tonnes of solid waste per annum).

### **Collection**

50. Collection of solid waste is the largest segment of the waste management industry accounting for approximately 50-60% of the total industry turnover. This involves the collection of a range of waste types across a broad customer mix and transportation to disposal sites, either directly to landfills, or to RTSs for aggregation, consolidation and compaction.

#### *Local Authority Waste*

51. Local authority waste is mainly waste generated by residential households that is left on the kerbside for collection on a regular basis. Household waste is placed in bags or wheelie bins and collected by an appropriate truck often with a compactor of some kind. The collected waste is deposited either at a transfer station for onward haulage to a landfill, or taken directly to a landfill for disposal.
52. The role of local authorities in collection of residential waste varies. In some regions the council is directly involved in the collection of waste. In other regions the local authority out-sources the collection services to the private sector or has no involvement in waste collection, other than enforcement of the local waste bylaws. In the latter case, householders are required to arrange their own waste disposal, usually by contracting with a private sector operator to provide the service. Wanganui and Rangitikei District Councils are examples of this entirely private user-pays system.
53. Contracts for the collection, transport and disposal of residential waste where required, are managed by local authorities. The contracts for local authority waste collection are generally long-term contracts, often of about seven years to correspond to the life of a collection vehicle. However, longer contracts do exist; for example, Timaru District Council recently let a 15 year contract for residential waste collection and the provision of a materials recovery facility (MRF).
54. Householders' waste is collected at kerbside from wheelie bins or refuse bags. There are various systems for payment for the cost of its collection and disposal:
- if funded from local authority rates, with collection being arranged by a local authority, householders may be issued with a wheelie bin or a fixed number of refuse bags annually by the local authority; or
  - if funded by residential private user-pays, with collection being arranged by a local authority, householders may be required to purchase purpose-specific refuse bags (or alternatively stickers to attach to any suitable bag) from retail outlets; or
  - if funded by residential private user-pays, with collection being arranged by householders themselves with a private provider, payment may be made in advance (three months to one year) for a wheelie bin service, or via the purchase of refuse bags from retail outlets.

*Business Waste*

55. Business waste is mostly collected under contracts with private providers of the service (in some cases, local authorities do provide a waste collection service for their CBD ratepayers). This segment includes office, business, industry and institutions. Business waste is collected by means of a number of different collection devices, including wheelie bins, refuse bags, FEL bins, gantry-loaded-bins (also known as “skips”) and very large “huka” bins.<sup>22</sup>

Wheelie bins and refuse bags (see attachments 18 and 20 for illustrations of collection vehicles)

56. Wheelie bins and refuse bags are mostly used for local authority contracts, private residential consumers and small waste-volume businesses. Waste in wheelie bins and refuse bags is collected by rear-load or side-load vehicles.

Front-End-Loaded Bins (see attachments 19 and 21 illustrations of collection vehicles and bins)

57. FEL bins are mostly used by businesses with medium to high volumes of waste. The bins range in size from about 1m<sup>3</sup> to about 6m.<sup>3</sup> The name arises from the method of emptying the bin into the collection truck. This type of truck is fitted with forks on hydraulic operated arms which engage into slots on the bin. The truck approaches the bin front on, the forks are engaged and the bin is lifted over the top of the truck cab, inverted and emptied into an enclosed container on the truck. This type of truck is also fitted with compactors that allow waste to be compacted in a volume ratio of three to one. Large FEL trucks may collect up to 90m<sup>3</sup> of waste (after three to one compaction to fit into a 30 m<sup>3</sup> container mounted on the vehicle). This is potentially an efficient type of collection system as the truck may collect from many consumers’ bins before it must travel to a disposal point at a RTS or landfill.<sup>23</sup> This type of service is almost exclusively used by business customers (except that the owners of residential apartment blocks, for example, may, through the body corporate, also use the FEL product). FEL bins have many advantages over other collection products for consumers whose waste volumes are regular and not very bulky or heavy. The advantages and disadvantages of each type of collection product (or service) available to businesses are discussed later in this Decision.

Gantry (Skip) and Huka (see attachments 16 and 17 for illustrations of gantry and huka collection vehicles and bins)

58. Gantry bins are used for business and residential customers who have generated bulky or heavy waste. The term gantry arises from the fact that such bins are loaded from the back onto a flat deck truck using a gantry lifting device attached to

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<sup>22</sup> The Commission notes that EnviroWaste describes these different services in much the same way in its Information Memorandum, page 23. The EnviroWaste Services Ltd Information Memorandum, September 2006 (Goldman Sachs/JB Were) is a document produced for the purpose of effecting the sale of EnviroWaste and obtained by the Commission during the investigation of the Application for clearance.

<sup>23</sup> “Potentially” because the efficient collection pre-supposes sufficient customers to form a dense network.

the truck. Gantry bins can hold up to 9m<sup>3</sup> of waste but the truck must travel to a disposal point after each bin collection.

59. Huka bins are used for very high volume waste applications. These large bins can hold up to 30m<sup>3</sup> of waste. Because of their weight and the weight of refuse they contain, they cannot be lifted onto the rear of a flat deck truck. Instead, they must be hooked onto a cable and dragged on wheels onto the rear of the truck – hence the industry expression “huka”.
60. These collection products are described in further detail in the market definition analysis section of this Decision. Photographs of these bin types are shown in Attachments 16 – 21.

### **Transfer Stations**

61. Transfer stations are an intermediate step towards final disposal. Householders or small businesses choosing to dispose of their garden or household waste themselves may take the waste by car or trailer to a transfer station. Commercial operators also use transfer stations, especially where a long haul to a landfill with a small collection truck can thereby be avoided. The transfer station then aggregates the waste for onward haulage to a landfill. In some cases, transfer stations are located adjacent to landfills. Increasingly, because of Occupational Safety and Health (OSH) regulations, cars, trailers and small trucks are not permitted access to landfills, thus forcing them to use transfer stations.
62. With the trend towards larger, regionally-based landfills (see the discussion at paragraph 85), and the closure of small local rubbish dumps, the latter are often being replaced by transfer stations to provide the same degree of convenience of access for local users.

### **Landfills**

63. A landfill is an engineered and regulated land containment site for receipt of refuse designed to minimise environmental effects. Waste is received directly from waste collection operators, customers and transfer stations. There has been a continuing reduction in the number of landfills throughout New Zealand (60 in 2006 with a further eight to 10 landfills due to close over the next 24 months).
64. Because of the difficulty of finding suitable sites for new landfills (typically, many sites are investigated and then rejected before one is found), the cost of developing the large sites required (both land purchase and construction costs), the elaborate consent procedures under the Resource Management Act, together with appeal rights to the Environment Court, the process of building a new landfill is both lengthy and expensive. Industry participants suggested that a period of from three to five years may elapse before operations can begin. The cost may be in the range from \$20 to \$50 million, all of which are costs incurred before any revenues are earned, and hence are fixed in nature.
65. Where there is competition between adjacent landfills in the larger centres, such as Auckland, competition for the ownership of waste streams becomes very important. Landfill operators are likely to become vertically integrated to ensure that their landfills maintain their share of the market, either by ownership or by contract, as

rival operators will almost always take their waste to their own landfills. In this context, appropriately located transfer stations are crucial strategically in capturing a share of the waste stream.

66. The concentration of waste disposal in a smaller number of larger landfills, increasingly owned privately, rather than by local territorial authority, has raised fears amongst some smaller, non-vertically integrated operators that their access to disposal sites may become increasingly difficult, thereby jeopardising their continuing operation. Indeed, EnviroWaste observes that “an integrated service offering provides a number of strategic advantages, enabling efficiencies to be derived throughout the value chain from collections to disposal, and is a key reason for the recent consolidation trend within the waste industry.”<sup>24</sup>

## PREVIOUS COMMISSION DECISIONS

67. The Commission has previously considered a merger in the waste industry in Decisions 355 and 359: *Waste Management NZ Limited and Waste Care Limited (1999)*. Initially, the Commission declined to grant clearance for Waste Management’s acquisition of Waste Care (Decision 355) deciding that the Acquisition was likely to lead to the combined entity acquiring or strengthening a dominant position in the Auckland Regional Market for the Disposal of Solid, Non-hazardous Waste:

Over the latter stages of the five year time frame the combined entity would face no existing competition compared to the counterfactual...The Acquisition would also raise barriers to the entry for Hampden Downs, (at that time the proposed new Auckland/Waikato regional landfill – since built and in operation) ...by reducing the waste flows available to it and by the potential for strategic behaviour which could reduce the viability of entry.<sup>25</sup>

The potential strategic behaviour from the merged entity comprised appeals under the Resource Management Act and selectively pricing at marginal cost to retain waste streams for the merged entities’ own landfills.

68. The Commission granted clearance for Waste Management to acquire Waste Care in Decision 359. This change was as a result of an offer to divest half of a RTS in Auckland, together with the contractual rights to dispose of half the waste from that RTS.
69. In these decisions, the Commission considered the relevant markets to be the:
- local/regional market for the collection and delivery of solid non-hazardous waste;
  - Auckland local market for waste transfer stations for solid non-hazardous waste; and
  - Auckland regional market for the disposal of solid non-hazardous waste.

<sup>24</sup> EnviroWaste Information Memorandum, page 7.

<sup>25</sup> Commerce Commission Decision 355 *Waste Management NZ Ltd and Waste Care Ltd* at paragraph 193.

### Changes since Decisions 355/359

70. The Commission considers that there have been a number of significant changes since it last considered the waste industry in 1999. The most important of these changes are briefly outlined below.

#### *Competition Threshold and Merger Guidelines*

71. At the time of decisions 355 and 359, section 66(3) of the Act, when read in conjunction with section 47(1) of the Act, required the Commission to give a clearance if it was satisfied that the proposed acquisition would not result, or would not be likely to result, in a person acquiring or strengthening a dominant position in a market. However, the Commerce Amendment Act 2001 replaced “dominance” with a “substantial lessening of competition” test.
72. Following that change, in January 2004 the Commission introduced its current “Mergers and Acquisitions Guidelines”, which reflected the altered legal test and the further issues raised for merger and acquisition analysis as a result of the new competition threshold.
73. Accordingly, the market definition used eight years ago in Decision 355, and in the contexts of a different threshold and different facts, may not necessarily be appropriate to the present investigation. The Commission notes particularly that market definition is merely a tool to lay bare the competition issues given the particular factual circumstances, rather than an end in itself. In particular, the Commission notes helpful recent jurisprudence:

It is important to recognise that market definition is a tool for competition analysis rather than an end in itself. A decision to define the market by reference to crates only can provide an appropriate basis for analysis of the competition issues which need to be decided, but defining the market in that way should not lead to any underestimation of the potential substitutability and level of constraint on market participants in that narrowly defined market, from cardboard packaging both pre-merger and post-merger.<sup>26</sup>

and

Market definition is a tool for competition analysis rather than an end in itself. It is intended to reveal the effective constraints upon a firm's business behaviour. Accordingly, it should focus on the real competition issue in the case, while recognising potential substitutability and constraints from products or services that may fall outside the chosen market definition.<sup>27</sup>

#### *Consolidation in the Waste Industry*

74. There has been consolidation in all levels of the waste industry since 1999. In particular, TPI, Manawatu Waste<sup>28</sup> and Enviro Waste<sup>29</sup> have grown organically and

<sup>26</sup> *Brambles New Zealand Ltd v Commerce Commission* (2003) 10 TCLR 868 at 137:

<sup>27</sup> *Commerce Commission v New Zealand Bus Ltd* (2006) 11 TCLR 679 at 123

<sup>28</sup> Manawatu Waste has acquired Portabins (May 2001); Handican (August 2001); Trashman Rubbish Removals (September 2001); Apex Bins (October 2001); Taupo Wheelie Bins (August 2002); Stuart Walker Contractors (December 2003); Ryan's Wheeliebins (July 2004); Clean Earth Ltd (September 2004); Clean Green Bins Ltd (July 2005); and Mr Garbage (April 2007).

<sup>29</sup> EnviroWaste has acquired The Yellow Rubbish Company; Cooper Waste Ltd; Dave's Tidy Bins Ltd and Mini Skips Ltd.

through acquisition. In that time Onyx, a large national waste market participant, has almost entirely exited the New Zealand waste industry.<sup>30</sup>

75. TPI (as itself or its predecessor Waste Management), in addition to roles in the new joint ventures of Midwest Disposals and CWS, owners of all or part of significant regional landfills, has acquired Onyx New Zealand's Christchurch collection business, All Brite Industries, Cairns's front load business, Waste Management and a number of smaller waste collection businesses. These acquisitions of TPI are shown in Table 1.

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<sup>30</sup> The Commission was informed that Onyx's only remaining collection contracts are for North Shore City Council. [ ]



**Table 1: Acquisitions by TPI and its Predecessor Since 1999<sup>31</sup>**

Acquired entity/business	Description of business acquired	Approx acquisition date
Cairns Transport Ltd	Solid waste collection in Palmerston North	May 2000
Multi Services (HB) Ltd	Solid waste collection in Hawkes Bay	May 2000
Sunny Disposals Ltd	Solid waste collection in Rotorua	November 2000
Rhino Portable Sanitation	Portable Toilets Auckland	April 2001
Commercial Rubbish Contractors	Small solid waste collection in Timaru. Collects approximately 2,500 tonnes per annum, mainly via FEL	1 July 2002
Wellington Wheelibins Ltd	Solid waste collection in Wellington	July 2003
Onyx commercial collection business	Solid waste collection in Dunedin. Residual commercial business following Onyx losing council contract.	December 2003
Bin Man, Taupo	Solid waste collection in Taupo	July 2004
Sunshine Garden Bags & Bins Limited	Garden Waste Collection Auckland	November 2004
Ring a Bin, Te Puke	Solid waste collection in Eastern Bay of Plenty	February 2005
Onyx gantry, MGB, Bag collection business	Solid waste collection in Auckland	March 2005
Te Awamutu Bins	Solid waste collection in Waikato	August 2005
Bin Shifters	Solid waste collection in Auckland	November 2005
Parkes Bins	Solid waste collection in Whangarei	January 2006
Onyx residential collection business	Solid waste collection in New Plymouth, Wellington and Christchurch	February – September 2006 (staged settlement)
Eastern Bins Limited	Solid Waste collection Auckland	1 July 06
Waste Management	Solid Waste collection and other waste services in many regions of New Zealand	July 2006
Environmental Green Bins	Solid waste collection in Tauranga	1 September 2006
Kapiti Wheelie Bins	Solid waste collection in Kapiti Coast	1 September 2006
80% interest in new joint venture which has purchased the business and assets of All Brite Industries Limited.	Resource recovery in Napier, Palmerston North, Gisborne, Tauranga, Auckland and Wellington.	20 November 2006

76. An illustration of the consolidation in the waste industry is shown in Table 2. This table compares market share data obtained by the Commission during its investigation of the Waste Management/Waste Care merger in 1999 in two geographic areas with data obtained for the same areas during the investigation of this Acquisition.
77. Moreover, as EnviroWaste notes, at present the waste industry is “rapidly changing to a “two player” market.”<sup>32</sup> The two players referred to are TPI and EnviroWaste. Hence the Commission considers that in such an environment it must be especially cognisant of the competition effects where, as a result of the Acquisition:

<sup>31</sup> Information provided by TPI.

<sup>32</sup> EnviroWaste Information Memorandum, page 54.

- EnviroWaste would exit the whole of the South Island; and
- TPI would become a joint owner of Manawatu Waste, its most important rival in a large area of the lower North Island.

**Table 2: Comparison of Market Shares of TPI in 1999 and 2007 in Two Regions**

<b>Region</b>	<b>Waste Management's<sup>33</sup> Estimated Share of the Collection of All Solid Waste in 1999</b>	<b>TPI's (including Waste Management's) Estimated Share of the Collection of All Solid Waste in 2007<sup>34</sup></b>
Christchurch Region	[ ]%	[ ]%
Dunedin Region	[ ]%	[ ]%

*Regulatory framework*

78. At present the legislative and regulatory framework for the Industry consists of:
- Part XXXI of the Local Government Act 1974;
  - the Local Government Act 2002;
  - the New Zealand Waste Strategy (NZWS); and
  - the Resource Management Act 1991 (RMA).
79. The Waste Minimisation (Solids) Bill currently before Parliament is likely, if passed, to bring change to the industry, including most importantly the imposition of a waste levy.
80. The regulatory framework has also changed significantly since 1999. Under the Local Government Act 2002 all local authorities are required to prepare waste management plans. According to the Ministry for the Environment, the number of local authorities with waste management plans rose from 16 in 1999 to 82 in 2005.<sup>35</sup> Local authorities are also required to review all by-laws, including any waste by-laws, made under the Local Government Act 1974 prior to 1 July 2008.
81. In 2002 the NZWS, a joint effort between the Government and Local Government New Zealand, was released. While no direct obligations were imposed by the strategy, many local authorities appear to have put its goals of reducing the waste stream while achieving more effective and efficient waste management and minimisation into practice.

<sup>33</sup>Waste Management's businesses were acquired by TPI in 2006. These market shares are after Waste Management's merger with Waste Care Ltd in 1999. Refer to Table 1, page 17 of the Commission's Decision 355.

<sup>34</sup> The Commission's estimate of current market share of TPI in these two geographic markets is based on information received from TPI, EnviroWaste, and other smaller market participants correlated where possible with information obtained from local authorities in the regions.

<sup>35</sup> *Waste Management in New Zealand: A Decade of Progress* (2005).

82. Of the five core policies arising out of the NZWS, three are of particular note:
- *High environmental standards:* over 2001 – 2004 Local Government New Zealand and the Ministry for the Environment prepared a wide range of guidelines/performance standards for waste treatment and disposal.<sup>36</sup> These standards were intended to increase environmental protection (with the welcome consequence of increasing the cost of disposal – see efficient pricing below).
  - *Efficient pricing:* efficient pricing refers to the inclusion of all costs, including environmental and long-term costs, in the cost of waste disposal. This is said to reduce the “subsidy” that waste generators receive if rate payers (through their TLA) bear the hidden costs of waste disposal.<sup>37</sup>
  - *Efficient use of materials:* improving efficient use of materials consists of reducing material use, and increasing re-use and recycling of recovered materials. This is commonly referred to as “Reduce, Re-use, Recycle”.
83. The Ministry for the Environment and the local government sector have developed a nationally coordinated waste strategy.<sup>38</sup> The strategy, in conjunction with the need to revise waste management plans and waste by-laws, has focused local authorities on waste management, including waste minimisation and recycling. As a result, the diversion of waste from landfills has become much more important in terms of local authority collection. For example, the number of local authorities offering kerbside recycling has increased from around 30% in 1999 to 75% in 2005.<sup>39</sup>
84. Further, the influence of environmental issues on the minds of consumers has led to commercial benefits from the recycling of business waste, as firms seek to establish themselves as responsible corporate citizens. Commercial benefits from recycling have also increased as a result of increased waste disposal costs.
85. As part of the Waste Strategy there has been a continuing reduction in the number of landfills throughout New Zealand, from 209 in 1998,<sup>40</sup> to 60 in 2006, with a view to a further eight to 10 due to close in the next 24 months.<sup>41</sup> Discussions with industry participants indicate there are significant, and perhaps increasing, difficulties in obtaining resource consent. These barriers are faced by both public and private ventures, and in respect of both new and existing landfill operations.

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<sup>36</sup> <http://www.mfe.govt.nz/issues/waste/landfills/index.html>.

<sup>37</sup> To this end the Ministry for the Environment has produced a “*Landfill Full Cost Accounting Guide*” to help decision-makers account for the full cost of landfills. This incorporates landfill planning, development, operation, closure and aftercare, with the expectation that this will encourage waste generators to meet the costs of the waste they produce.

<sup>38</sup> “The New Zealand Waste Strategy”, March 2002; “Review of Targets in the New Zealand Waste Strategy”, February 2004;

<sup>39</sup> Ibid 16.

<sup>40</sup> The 2002 Landfill Review and Audit, March 2003, MFE.

<sup>41</sup> Targets in the New Zealand Waste Strategy: 2006 Review of Progress, Ministry for the Environment (2007) <http://www.mfe.govt.nz/publications/waste/waste-strategy-review-progress-mar07/html/index.html>.

*Developments in Local Authority Contracting*

86. The Commission has observed two emerging trends that are serving to increase the size and scope of local authority contracts, as they seek a more streamlined and coordinated approach to their waste management obligations. First, local authorities appear to support moves towards the aggregation of their collection contracts. For example, in 2006 the three local authorities in Taranaki replaced three separate collection contracts with one joint contract.<sup>42</sup>
87. Secondly, discussions with local authorities and industry participants also indicate a trend towards the bundling of council collection, recycling and composting contracts, and operation of transfer stations and landfills. The Timaru District Council's contract let in 2005 provides the most striking example of this, covering all aspects of waste collection in the region for a 15 year period.
88. These trends result in large waste contracts with significant capital requirements. As a result, local authority contracts appear to be increasing in duration to reflect the need to allow recovery of these large capital investments. EnviroWaste estimates capital requirements of \$[ ] million for an integrated Dunedin contract, and \$[ ] million for the Christchurch contract.

*Other matters*

89. In Decision 355 the Commission noted that those opposed to the Application considered that three year, fixed-term contracts with automatic roll-over provisions were a barrier to entry. The Commission inspected Waste Management's contracts and considered, at that time, that they left "*the customer free to determine the length of the contract*".<sup>43</sup>
90. The Commission's present investigation has revealed that since 1999, there has been a general tightening of the terms of commercial collection contracts, at least partly as a response to the successful entry of JJ Richards into Auckland collection. Contracts frequently include three year terms, liquidated damages for breach and automatic roll-over provisions.<sup>44</sup> The Commission is also aware of attempts to enforce these provisions, although TPI [ ]. The Commission is unaware of any attempt to enforce the provisions in Court.
91. In that same Decision, the Commission also noted that "*Rear-loading trucks can also easily be modified to undertake front-end loading.*"<sup>45</sup> However, inquiries have revealed only four such conversions, operating in the relevant markets discussed below, over the period 1999 to the present.<sup>46</sup> The Commission's present view is that a modified rear-end loading truck would not be able to achieve the route density of a dedicated front-end loader, and would not usually be suitable for the larger 3m<sup>3</sup> and 4.5m<sup>3</sup> bins. The Commission notes that successful new entrants in

<sup>42</sup> New Plymouth District Council, South Taranaki District Council and Stratford District Council.

<sup>43</sup> Decision 355, *Waste Management NZ Ltd / Waste Care Ltd* at paragraph 90.

<sup>44</sup> EnviroWaste estimates that [ ]% of its commercial contracts have such terms.

<sup>45</sup> Decision 355, *Waste Management NZ Ltd / Waste Care Ltd* at paragraph 56.

<sup>46</sup> Silver Drum Hire and Just Rubbish in New Plymouth, Can Plan in Nelson and Mr Garbo in Timaru.

the period 1999 to present (JJ Richards, Manawatu Waste and Cleanway) all purchased dedicated FEL trucks. That is, they did not modify their existing rear-loading trucks.

92. The Commission noted in Decision 355 that “*Estimation of the market shares of waste collection operators in the various regions has proved difficult.*”<sup>47</sup> That has not proved the case in this investigation. The Commission has collected comprehensive market share information from industry participants and local authorities. Industry estimates of market shares have been largely consistent with data obtained from local authority sources. The Commission considers that information gathering by industry and local government has improved significantly since 1999.

### **Commission Staff Investigations**

93. TPI noted that since 1999 there have been a number of internal Commission staff investigation reports involving the waste industry that followed the market definition adopted in Decisions 355/359.<sup>48</sup>
94. The Commission considers that these staff investigation reports do not provide significant assistance in regard to this Acquisition. As previously noted, the Commission considers that market definition is a tool for competition analysis, intended to reveal the effective constraints upon a firm's business behaviour. Conclusions on market definition are inherently related to the competition issues that arise in each case being analysed.
95. While the investigations referred to by TPI do concern the waste industry, they largely involve different competition issues from those arising from this Acquisition. For example, the July 2006 investigation report was concerned with the liquid hazardous market, and the December 2003 investigation dealt with an allegation of price-fixing in the tender for Auckland City Council waste contracts (as to the 2006 report, see paragraph 125).

### **OTHER JURISDICTIONS' VIEWS OF WASTE MERGERS**

96. It is useful to note briefly - as part of this introductory background – the views of other jurisdictions on waste mergers. These views have been helpful in formulating the Commission's own approach in this case to market definition and barriers to entry.

#### **United States of America**

97. Mergers in the waste collection industry have been considered by the United States Department of Justice (DoJ) on numerous occasions over the period 1996 – 2005.<sup>49</sup>

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<sup>47</sup> Decision 355, *Waste Management NZ Ltd / Waste Care Ltd* at paragraph 77.

<sup>48</sup> These reports, while prepared by Commission staff and approved by managers under appropriately delegated authority, were not considered or endorsed by the Commission itself.

<sup>49</sup> *USA v Waste Industries Usa, Inc* (2005); *USA & New Jersey v Waste Management, Inc & Anor* (2003); *USA & Florida v Waste Management, Inc & Ors* (2003); *USA & Ors v Waste Management, Inc & Ors* (1999); *USA & Ors v USA Waste Services, Inc & Ors* (1998); *USA v Waste Management of Georgia, Inc & Ors* (1996) *USA & Florida v Reuter Recycling of Florida, Inc & Anor* (1995).

In each case the DoJ adopted a similar analysis of competition in a FEL market (there called “small container commercial waste collection”). In particular, the DoJ:

- separated FEL collection from other collection product markets, and rejected the proposition that different types of collection product are sufficiently substitutable; and
- considered that there are significant barriers to entry in the FEL market, specifically the difficulty in achieving sufficient economies of scale and density, the common use of long-term contracts with restrictive terms, and the ability of existing firms to price discriminate.

98. The most recent example is *United States Of America v Waste Industries USA, Inc.*<sup>50</sup> There, the DoJ filed a Competitive Impact Statement which noted, in respect of substitutability:

Providers of other types of waste collection services (*e.g.*, residential and roll-off services) are not good substitutes for small container commercial waste collection firms. In their waste collection efforts, these firms use different waste storage equipment (*e.g.*, garbage cans or semi-stationary roll-off containers) and different vehicles (*e.g.*, rear-load, side-load, or roll-off trucks), which, for a variety of reasons, cannot be conveniently or efficiently used to store, collect, or transport waste generated by commercial accounts, and hence, are generally not used on small container commercial waste collection routes. The Complaint alleges that, in the event of a small but significant increase in price for small container commercial waste collection services, customers would not switch to any other alternative and that, therefore, the provision of small container commercial waste collection services constitutes a line of commerce, or relevant service, for purposes of analyzing the effects of the transaction.

and in respect of barriers to entry:

There are significant entry barriers in small container commercial waste collection services. A new entrant in small container commercial waste collection services must achieve a minimum efficient scale and operating efficiencies comparable to those of existing firms to provide a significant competitive constraint on the prices charged by market incumbents. In order to obtain comparable operating efficiencies, a new firm must achieve route density similar to existing firms. Because most customers have their waste collected once or twice a week, a new entrant generally requires several hundred customers in close proximity to construct an efficient route. However, the common use of price discrimination and long-term contracts by existing commercial waste collection firms can leave too few customers available to the entrant in a sufficiently confined geographic area to create an efficient route. The incumbent firm can selectively and temporarily charge an extraordinarily low price to specified customers targeted by new entrants. Long-term contracts often run for three to five years and may automatically renew or contain large liquidated damage provisions for contract termination. Such terms make it more costly or difficult for a customer to switch to a new hauler and obtain lower prices for its collection service. Because of these factors, a new entrant may find it difficult to compete by offering its services at price levels comparable to the incumbents' pre-entry prices. Such difficulties may cause an increase in the cost and time required to form an efficient route, thereby limiting a new entrant's ability to build an efficient route and reducing the likelihood that the entrant will ultimately be successful.

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<sup>50</sup> US District Court, Virginia, Docket No: 2:05CV468.

## Canada

99. The Canadian Competition authorities have also considered the waste industry in the context of mergers and the abuse of market power. In *Canada (Director of Investigation and Research) v. Laidlaw Waste Systems Ltd*, the Canadian Competition Tribunal separated solid non-hazardous waste collection into a number of markets<sup>51</sup> :

Solid waste collection and disposal services can be classified into three categories: the collection and disposal of garbage which has been placed in bags or cans, usually at curbside; the collection and disposal of garbage which has been placed in bins which remain on the customer's premises at all times; the collection and disposal of garbage which has been placed in very large containers which are transported to the dump site to be emptied.

The first type of service is usually required by residences, small apartments and those establishments which generate relatively small quantities of garbage. The vehicles used for this service are often of a rear- or side-load configuration, usually containing a compactor, into which the bags of garbage are loaded manually.

The third type of service (roll-off or giant-haul service) is required by customers who generate large amounts of waste, some of it non-compactible. These customers are often industrial undertakings such as large factories or construction sites. The large containers (up to forty cubic yards in size) are loaded onto a flat-bed roll-off truck and, as has been noted, taken to the dump site for emptying. The empty container is then returned to the customer's premises unless it has been rented for one occasion only.

It is the second type of service which is the product in issue in this case. While it is sometimes referred to in the evidence as commercial service or front-end service, it is common ground that a more accurate description is lift-on-board service. This service is required by customers who generate a significant quantity of solid waste. These customers are often commercial enterprises such as restaurants, office buildings and campgrounds. The bins may be as small as two cubic yards or as large as twelve cubic yards. The vehicles used for collection are often front-load vehicles which lift the bin over the front of the truck by a hydraulic hoist. The waste material is thus emptied into the vehicle where it is compacted. These trucks while usually of a front-load configuration may also be of either a side-load or rear-load variety.

100. The Tribunal's consideration of the barriers to entry in the FEL market (there called "lift-on-board" market) contains some similar conclusions to the findings of the DoJ:<sup>52</sup>

The most significant barrier to entry is acquiring a sufficient customer base within a reasonable period of time to allow the business to become profitable.

While barriers to entry in the industry are low, much higher barriers exist in the markets under discussion as a result of the contracting practices of Laidlaw. It is these contracting practices, along with other allegedly anti-competitive acts, which it is argued lead to both Laidlaw's dominant position and a substantial lessening of competition in the markets in question.

101. These "contracting practices" were described in some detail by the Tribunal.<sup>53</sup> These practices have much in common with the practices referred to by the DoJ, and encountered by the Commission in its investigation.

<sup>51</sup> {1992} 40 C.P.R. (3d) 289 (Comp. Trib.) at paragraphs 3 – 6.

<sup>52</sup> Ibid at paragraphs 119-120.

102. The waste industry was considered again by the Tribunal in *The Commissioner of Competition v. Canadian Waste Services Holdings Inc.*,<sup>54</sup> a merger that primarily concerned waste disposal. The agreed statement of facts on which the Tribunal proceeded adopted the same collection markets, with the addition of recycling. Inquiries of the Canadian Competition Bureau confirm that the Bureau continues to apply these collection markets.

### **Australia**

103. Inquiries of the Australian Competition and Consumer Commission (ACCC) disclose that the collection of solid non-hazardous waste has been considered only in the context of the JJ Richards / Cleanaway Australia informal clearance, and only in respect of “domestic waste collection” (ie the collection of household waste under contracts with local government). Relevant to that market the ACCC concluded that:<sup>55</sup>

- a number of other waste management service providers can provide domestic waste collection services ... in South East Queensland;
- {there are} low barriers to entry into the South East Queensland market for the provision of domestic waste collection services ...; and
- {there is} some countervailing power on part of the councils when negotiating domestic waste collection ... contracts with waste management service providers.

### **European Union**

104. The European Union has in the past adopted two product markets in the collection of solid non-hazardous waste: household waste collection (equivalent to “domestic waste collection services” above); and commercial and industrial waste collection.<sup>56</sup> However, these decisions have primarily focused on competition issues arising in other waste markets, such as disposal.<sup>57</sup>

### **MARKET DEFINITION**

105. Section 3(1A) of the Act defines a market as:

... a market in New Zealand for goods or services as well as other goods or services that, as a matter of fact and commercial common sense, are substitutable for them.

106. In *Telecom Corp of NZ Ltd v CC* the High Court established the following principles in the approach to defining markets:<sup>58</sup>

First, and most generally, we seek to identify the area or areas of close competition of relevance for the application(s). In other words, we seek to identify the constraints upon the price and production policies of firms or divisions of firms whose conduct is of relevance for the matters litigated.

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<sup>53</sup> Ibid at paragraphs 40-55.

<sup>54</sup> 2001 Comp. Trib.3.

<sup>55</sup> <http://www.accc.gov.au/content/index.phtml/itemId/758925/fromItemId/751043>.

<sup>56</sup> IV/M916 Lyonnaise des Eaux/Suez; M2897 Sita Sverige Ab / Sydkraft Ecoplus.

<sup>57</sup> The Commission also noted that these decisions were made under a “dominant firm” test, similar to that used in New Zealand prior to 2001.

<sup>58</sup> *Telecom Corp of NZ Ltd v CC* (1991) 4 TCLR 473, 501-502.



Secondly, competition may proceed both through substitution in demand and substitution in supply in response to changing prices or, more comprehensively, the changing price-product-service packages offered... The mental test that prompts a summary evaluation of the evidence is to ask how buyers and sellers would likely react to a notional small percentage increase in price of the products of interest.

Thirdly, the market is a multi-dimensional concept – with dimensions of product, space, functional level and time.

107. For the purpose of competition analysis, a relevant market is the smallest space within which a hypothetical, profit-maximising, sole supplier of a good or service, not constrained by the threat of entry, could impose at least a Small yet Significant and Non-transitory Increase in Price, assuming all other terms of sale remain constant (the ‘SSNIP test’). For the purpose of determining relevant markets, the Commission will generally consider a SSNIP to involve a five percent increase in price for a period of one year.<sup>59</sup>
108. The Commission defines relevant markets in terms of five characteristics or dimensions:
- the goods or services supplied and purchased (the product dimension);
  - the level in the production or distribution chain (the functional level);
  - the geographic area from which the goods or services are obtained, or within which the goods or services are supplied (the geographic extent);
  - the temporal dimension of the market, if relevant (the timeframe); and
  - the customer dimension of the market.
109. Market boundaries should be drawn by reference to the conduct at issue. The process of defining markets is inevitably an imprecise one, since transactions in the economy do not fall neatly into a series of discrete and easily observable markets. In any case, it may not often be necessary – or practical – to identify the precise boundaries of the activities included in the market. As has already been noted, market definition is a tool for competition analysis rather than an end in itself, and a decision to define a market does not mean that potential substitution or constraint from outside that market is discarded.<sup>60</sup>
110. TPI submitted that the relevant market definitions are those:<sup>61</sup>
- adopted by the Commission in its decisions on the application by Waste Management for clearance to acquire Waste Care, and in subsequent investigations into the waste industry.
111. TPI submitted that the appropriate markets against which to assess the competition implications of the Acquisition are:
- local/regional markets for the collection and delivery of solid non-hazardous waste (collection markets);

<sup>59</sup> Commerce Commission, *Merger and Acquisitions Guidelines*, page 15.

<sup>60</sup> *Brambles New Zealand v Commerce Commission* (2003) 10 TCLR 868.

<sup>61</sup> Decisions 355 (14 May 1999) and 359 (9 June 1999). The Applicant cites only one investigation: *Investigation Report into Transpacific Industries Acquisition of Waste Management, 21 July 2006 – prepared by the Commission staff.*

- local markets for the provision of waste disposal services at waste transfer stations (transfer station markets); and
  - regional markets for the disposal of solid, non-hazardous waste (disposal markets).
112. TPI suggested that competition issues arose from the Acquisition in Taupo, Taranaki (New Plymouth), Wanganui, Mid-Central (Manwatu/Palmerston North/Horowhenua/Kapiti), Tasman, Marlborough, Canterbury, Timaru and Dunedin.
113. As will be seen later, the Commission *essentially* agrees with TPI in respect of the geographic and functional dimensions of the relevant markets. It disagrees with TPI on the issue of product market definition as explained in the remainder of this section.

### Product Markets

114. In previous Decisions on, and investigations into, the waste industry, the Commission has found relevant product markets encompassing collection, transportation, treatment and disposal of solid and liquid waste, in its non-hazardous and/or hazardous forms.
115. Solid non-hazardous waste can be defined as all non-hazardous waste that is generated in a solid form or converted to a solid form for disposal. Other types of waste:
- hazardous waste (both liquid and solid);
  - liquid non-hazardous waste;
  - construction and demolition waste (C and D),
- differ from solid non-hazardous waste. Hazardous waste requires treatment before it can be disposed of in landfills in solid form. Specialised transportation and treatment facilities are necessary. Liquid waste can be disposed of through “trade waste systems” rather than disposal at landfills. C and D waste is usually more economically disposed of in special clean fills than in general landfills.<sup>62</sup> A significant volume of waste may also be diverted from landfills through recycling processes.
116. From both demand- and supply-side perspectives, it is appropriate to treat the collection, treatment and transportation of solid and liquid hazardous, and C and D, waste as belonging to a separate product market from that for the collection and transportation of solid non-hazardous waste.
117. Customers wishing to dispose of solid and liquid hazardous, and C and D, waste would not consider that the services provided for solid non-hazardous waste were a close substitute. Customers know that it is illegal for their hazardous waste to be merely tipped into the pit of a RTS or over a landfill tipping face. Customers with C and D waste do not wish to attract higher prices for specialised bins, transport

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<sup>62</sup> C and D waste may be used for such projects as land reclamation on farms or water, filling of disused quarries or major landscaping works.

and landfills used for solid non-hazardous waste. Equally, suppliers of the transport and other facilities used for solid non-hazardous waste do not appear to also use that type of equipment to handle and dispose of solid and liquid hazardous waste. For example, in contrast to solid non-hazardous waste, hazardous waste must be collected, transported and treated in a manner that does not expose it to the environment. Moreover, the main activity of firms collecting and disposing of C and D firms is often not related to the waste industry. Rather, they operate in the demolition, and road or building construction, industries.

118. Hence, the Commission takes the view that the product markets relevant to this Application encompass collection, transportation and disposal of *solid non-hazardous waste*, but notes that disposal at landfills may also be used for treated solid and liquid hazardous waste.
119. The Commission's experience is that market boundaries are often blurred, and that is the case here for the product markets for the collection of solid non-hazardous waste. One of the concerns raised by the Acquisition is the risk that in this case the use of broader product market definitions, as advanced by TPI, might distort relevant competition issues arising from the Acquisition in collection services. Therefore, the Commission has especially relied in this case, in determining appropriate markets, on the information provided by a wide range of industry participants interviewed in the course of its investigation.

*Collection of solid non-hazardous waste*

120. As a result of its investigation and analysis, the Commission disagrees with TPI's approach to defining markets for the collection of solid non-hazardous waste. The Commission considers that to analyse properly the competition issues arising from the Acquisition, various different collection markets need to be distinguished. The Commission's approach is discussed in more detail below.

*Previous Investigations*

121. In Decision 355 of May 1999, the Commission considered the approach suggested by the Applicant (Waste Management NZ) to separate collection markets into three segments: municipal, commercial and DIY waste. The Commission took its usual approach of considering market definition from both demand- and supply-sides.
122. The Commission observed that there were strong reasons to believe that household and commercial markets were not substitutable from a demand-side perspective. The two services could easily be differentiated because of the size of bins used in two markets; the collection bins used for commercial collections were typically much larger than those used for household rubbish.
123. However, at that time, there appeared to be a substantial degree of overlap in the supply-side characteristics of the two markets. In some geographic areas, such as in Auckland, TPI had been using the same vehicle for the collection of wheelie bins on the local authority's contract (household collections) as on commercial contracts (business collections). In addition, some commercial waste was also collected in the form of refuse bags, as was household waste. Ultimately, the Commission considered that this degree of supply-side substitutability suggested that the two

types of waste collection constituted one market, despite the lack of demand-side substitutability.

124. In Decision 359 of June 1999, the Commission considered that the markets defined in Decision 355 were relevant for the purpose of assessing the dominance implications of TPI's (then Waste Management NZ) proposal, which included an undertaking to divest particular assets.
125. More recently, an internal Commission staff report about TPI's acquisition of Waste Management in July 2006 referred only briefly to solid non-hazardous waste, and considered that the relevant market was for the collection and treatment of solid waste, where the term 'solid waste' meant solid non-hazardous waste. As Transpacific Industries had no existing assets in this market, there was no difference in the level of competition as a result of the transaction.
126. None of the Commission's investigations into the waste industry since Decision 355 undertook a detailed analysis of the relevant market definition for the collection services for solid non-hazardous waste in New Zealand. Rather, it was sufficient for the analysis of the relevant competition issues in those cases to rely upon the markets used in Decision 355 and market definition as a result was simply not an issue.
127. Paragraphs 70 to 92 of this Decision describe a number of significant changes that have occurred subsequent to its 1999 Decisions 355/359, which will impact on market definition. The changes to the competition threshold, the further industry consolidation, altered regulatory frameworks and local authority contracts, together with new or revised information received from industry participants, have required the Commission to reconsider its market definition. That has been done in order to properly allow the competition issues arising from this Acquisition to be identified and analysed.
128. The Commission considers that the broad waste collection product market definition adopted in Decision 355 no longer holds. Rather, a number of distinct markets exist as explained below. The Commission has considered the characteristics of demand- and supply-side substitutability with regard to the various types of collections, including local authorities' contracts and privately contracted collections. As stated, this reflects the information received from a wide range of participants, market developments since 1999, and a more detailed analysis of both local authorities' contracts for the collection of household refuse, and of recyclables collections.

*Local authorities' contracts*

129. In some regions local authority collection contracts provide the same service to (mainly) households as does the privately contracted collection of waste. From the perspective of a householder, the two services may be the same as long as the prices are comparable. However, that does not necessarily mean that the two types of collection are substitutes for each other. In the former, the customer is the local authority contracting for a specified collection service and not the individual householder. Local authorities have much more stringent requirements of the

parties with which they will contract, than do householders. Therefore, in most districts, local authorities are likely to have a strong influence in shaping the waste services markets within their geographic boundaries. In addition, the local authority contracts are contracted for a longer period than privately contracted collections. For example, the Commission notes that the Timaru District Council's waste service contract has a 15 year term (see footnote 63). Seven years is another typical term for local authority collection contracts. A privately contracted residential wheelie bin collection contract has terms of three months, six months or one year, depending on the customer's choice of payment option.

130. From a demand-side perspective, local authorities' contracts involve well defined service provision agreements with waste collectors, and there seems to be little, if any, flexibility in the characteristics of the demand by a local authority for a kerbside waste collection service for households, and sometimes for small businesses.
131. In some areas local authority contracts compete with privately contracted collection services for waste generated by households. Examples are in Taupo, New Plymouth and Palmerston North. In other geographic areas, there is absolutely no substitute for local authority contracts, for example, in Timaru<sup>63</sup> and potentially in Christchurch.<sup>64</sup> That is because a wheelie bin service is provided by the local authority and paid for by residential consumers' rates. Consumers in Timaru (and Christchurch in the future) opting for a privately contracted service would be, in effect, paying twice for an identical service. These characteristics lead to this service sometimes being amalgamated, for analytical purposes, with the privately contracted collection, commonly defined as privately contracted (or user pays) waste collection service, and sometimes being distinguished as a market in its own right from a demand-side perspective. The Commission also notes, that the following four bidders – [ ] – have each presented a bundled tender for kerbside collection, recyclables processing and organics processing as part of the current Christchurch City Council tendering process. If any of these four bidders are awarded a bundled contract, a contracting environment similar to that in Timaru, (except for landfill operations) will be created.
132. From a supply-side perspective, since the competition for a local authority's collection contract is defined as competition for the market, rather than competition in the market, there will usually be one single contractor selected to provide the service specified under the local authority's contract.

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<sup>63</sup> An extreme example of a local authority's influence in shaping the waste services markets is provided by the Timaru District Council which introduced a three-system (organics, recyclables and general waste) wheelie bin kerbside collection in 2006. Timaru District Council tendered a contract that included the three-system kerbside collection with the operation of multiple waste facilities in a single location (green waste composting, RTS, MRF and landfill).

<sup>64</sup> The Commission was informed that the Christchurch City Council has requested proposals for the provision of an integrated waste and recyclables collection and processing contract and that a number of proposals have been received. At the time of this Decision, the Christchurch City Council has not announced its intended course of action.

133. Some local authorities do not prevent collection contractors from carrying out their privately contracted collection business simultaneously with, and using the same vehicles to service the local authority's collection contract. In allowing such supply-side substitutability, the local authorities have an ability to affect product market boundaries.
134. However, in some geographic markets, the local authorities strictly prohibit the collection contractor from co-mingling the waste collected under the local authority contract with any other waste. For example, the Dunedin City Council informed the Commission that:<sup>65</sup>
- Council's contract, (No. 2346) with EnviroWaste for the kerbside refuse and recycling collection, prohibits the contractor from co-mingling Council official bags, with any other waste under part 2.2 of that contract.
- [
- ]
135. Local authority contracts are normally awarded through a tendering process initiated with an expression of interest from various parties. After receiving an initial expression of interest from interested parties, the local authorities will short-list only a limited number of candidates (usually three or four) on the basis of price and non-price factors.
136. The Commission notes that, in many local authority areas, waste collectors operating privately contracted collections cannot easily switch to (tender for) local authority contracts unless they have previous experience in operating this type of waste collection service. This will limit the number of potential bidders for local authority contracts. Even some large and experienced waste collectors may score low in a tendering process when non-price attributes, such as track record and technical skills, are taken into account in the overall score. For example, TPI submitted [
- ].<sup>66</sup>
137. For large local authority contracts, local authorities require experienced waste collectors capable of collecting large quantities of waste, but in some cases the local authorities (for example the Dunedin City Council) may tender a number of partial contracts for their region to be awarded to separate waste collection contractors.
138. Taking all these factors into account, the Commission's view is that local authority contracts are sufficiently differentiated from privately contracted collections on both demand and supply sides to form a separate product market.

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<sup>65</sup> Email from John Mackie received on 15 May 2007 at 2.47pm: "RE: DCC refuse & recyclables collection contract".

<sup>66</sup> Letter received from Chapman Tripp dated 16 April 2007, paragraph 5.2, page 2.

*Privately contracted collection*

139. Turning to privately contracted collection services, the further question arises as to whether these should be broken down into separate markets. Again, this has to be tested by considering demand- and supply-side substitution.
140. As has already been noted in the earlier section on Industry Background, industry operators distinguish several types of services that they provide to their customers using different types of specialised vehicles and waste receptacles. The following classification of the modes of collection services have been identified on the basis of the information provided in the EnviroWaste Information Memorandum<sup>67</sup> and received from various industry participants:
- Wheelie bins and refuse bags<sup>68</sup> – the collection is serviced by rear-end load (bags and wheelie bins) or side-load (wheelie bins) trucks. The users are households and businesses generating small volumes of waste. The typical sizes of wheelie bins are 120 or 240 litres (0.12m<sup>3</sup> and 0.24m<sup>3</sup>), but 660 litres (0.66m<sup>3</sup>) and 1.1m<sup>3</sup> bins are becoming more common for collection of waste from business customers.
  - Front-end load (FEL) - the collection of FEL bins is, with a few exceptions, serviced by specialised FEL trucks. The users are businesses and industrial customers generating medium to high volumes of waste. The size of FEL bins ranges from 1.5m<sup>3</sup> to 4.5m<sup>3</sup>, with the most popular size being 3m<sup>3</sup>.
  - Gantry - the collection of gantry bins (often called “skips”) is serviced by gantry trucks. The users are businesses and industrial customers generating medium to high volumes of waste, but some households use gantry bins for one-off collection of waste. The size of gantry bins ranges from 3m<sup>3</sup> to 9m<sup>3</sup>.
  - Huka - the collection of huka bins is serviced by large flat deck trucks fitted with a winch to drag the huka bin onto the truck’s tray. The users are businesses and industrial customers generating high volumes of waste. The size of huka bins ranges from 15m<sup>3</sup> to 30m<sup>3</sup>;
  - Others – Hiabs, canopy trucks, bobcats, fork lifts, etc. These collection services represent a very small part of the waste collection business, and are often complementary to the four main collection services listed above. The Commission will, therefore, exclude them from its market definition analysis.
141. The EnviroWaste Information Memorandum usefully details information for each collection business unit. That is, for wheelie bins, FEL bins, gantry and huka bins. The information concerns customer numbers, annualised lift volumes, and revenues. It shows that, in terms of average volume of waste collected per month, wheelie bin customers generate about [ ] m<sup>3</sup>, front load customers about [ ] m<sup>3</sup> and gantry/huka customers about [ ] m<sup>3</sup> of waste. In addition, the Commission has found that the prices per cubic metre of waste differ substantially between various

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<sup>67</sup> See footnote 13.

<sup>68</sup> In some geographic markets, waste collectors also provide receptacles in the form of drums, but this is represented only marginally across all geographic markets.

collection services. In terms of average revenue per customer in each collection business, a proxy for an average price of each collection service, EnviroWaste charged on average per month around \$[ ] per wheelie bin customer, \$[ ] per front load customer, \$[ ] per gantry customer and \$[ ] per huka customer.

142. TPI provided information on the prices it is charging for wheelie bins, FEL and gantry collection services in Dunedin, which show that, if an average business customer generates around [ ]m<sup>3</sup> of solid non-hazardous waste (general rubbish) and wants to contract a weekly collection service, TPI would charge around \$[ ] for one FEL bin of 3m<sup>3</sup> size, \$[ ] for twelve wheelie bins of 0.24m<sup>3</sup> size and \$[ ] for one gantry bin of 3m<sup>3</sup> size, assuming that the waste weighs about 90kg/m<sup>3</sup>. This example demonstrates how much prices vary between these different collection services – pricing being a relevant consideration to the issue of market definition. In addition, TPI advised the Commission that a 3m<sup>3</sup> gantry bin would not be used for 270kg (at 90kg per cubic metre) or 0.3 tonnes alone, but it would be collected when full, as this bin type is frequently used for very dense material (up to 1,500kg per cubic metre).<sup>69</sup>
143. Apart from these differences in prices, the Commission has also found that these collection services meet customer demand in different ways. The various dimensions of customer service include:
- the frequency of waste generation (regular versus sporadic or ‘one-off’), requiring scheduled dedicated services or non-scheduled or on-call services;
  - vehicle access to allow FEL or gantry bin pickups;
  - the type of waste to be collected (‘light’ requiring wheelie bin and FEL versus ‘heavy’ requiring gantry/huka);
  - whether a closed top on the bin is required (to avoid wind-blown loss of waste or collection of rain water within the bin);
  - whether the bin must be lidded and lockable to prevent “non-payers” using the receptacle;
  - and whether the bin is light enough to be fitted with wheels so that it can be manually moved if required.
144. These varying characteristics of customer demand mean that the various privately contracted collection services are heavily differentiated, reducing the likelihood that they may be substitutable in terms of meeting a particular customer’s needs.
145. Having regard to the information provided to the Commission, detailed above, Table 3 summarizes the characteristics of the various modes of collection.

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<sup>69</sup> Email from Lindsey Jones (Chapman Tripp) received on Friday 23 March 2007 at 11.11am. Subject: *Transpacific Dunedin bin charges*.



**Table 3: Service Characteristics of Different Modes of Collection<sup>70</sup>**

	<b>Wheelie bin</b>	<b>Front End Load</b>	<b>Gantry and huka</b>
<b>Form and size of waste container</b>	Wheelie bin, lidded. Usually 0.24m <sup>3</sup> containers but larger sizes are available	Front end load bin, lidded, lockable, often fitted with wheels. Commonly varies between 1 and 4.5m <sup>3</sup> – average size 3m <sup>3</sup>	Open top skip. Varies between 2 cubic metres and 15 cubic metres
<b>Loading method and type of truck</b>	Rear end load (REL) for wheelie bins, refuse bags and drums. Side load (SL), often with automated loading, for wheelie bins	Front end load (FEL)	Truck mounted crane or gantry to lift on, or winch to drag on in the case of large Huka bins
<b>On truck compaction</b>	Sometimes	Yes	No
<b>Typical Collection frequency</b>	Scheduled collection – often once per week	Scheduled collection – at least once per week, perhaps more often	Usually non-scheduled, i.e. on demand (when container is full)
<b>Type of consumer</b>	Households and small business, restaurant, offices	Business and industrial customers requiring regular collection	Industrial customers, household cleanups or renovations, building sites, excavations
<b>Contracts</b>	Three months to one year term. Scheduled collection service	One year to three year terms. Liquidated damages provisions, automatic roll over provisions. Scheduled collection service	Non-scheduled service and often one-off contract for on demand collection. Some regular business and industrial customers may have one to three year contracts
<b>Applications</b>	Light waste – small quantities, not bulky	Medium weight, semi bulky waste but not concrete or earth. Suitable for organic waste	Heavy bulky waste such as concrete or earth or demolition materials. Not suitable for organic waste (health regulations apply)
<b>Properties of bin</b>	Wheelie bin not generally locked, has lid, on wheels, very mobile. Bins emptied on site	Lockable, with lid, on wheels. Minimum loading height above the truck (at least 90cm). Difficult truck access; requires a lot of space for manoeuvring the truck. Bins emptied on site	Not lockable so difficulties with other parties' waste being deposited; no lid so difficulty with wind blown egress and water ingress; no wheels and unable to be moved. Easy truck access. Bins emptied off site (avoids noise, dust and spillage on site)

<sup>70</sup> Source: The Commission's investigation.

146. TPI submitted that although the FEL service comprises one of a series of options available to suit commercial customers' demand, it does not comprise a market on its own. It also presented a table showing the various advantages and disadvantages of each type of service that TPI offers to its customers.<sup>71</sup> For example, in terms of capacity, gantry bins branded 'Jumbo' (ranging from 2m<sup>3</sup> to 12m<sup>3</sup> size) have greater bin capacity than FEL bins (ranging from 1.5m<sup>3</sup> to 6m<sup>3</sup> size), which have limited payload (maximum 150 kg per cubic metre). In terms of service frequency, FEL services normally require a fixed empty schedule to suit a collection route, while gantry services are normally provided on demand when the bin is full.
147. TPI provided evidence showing that some commercial customers had switched from one collection service to another, thus suggesting that there might be some degree of substitutability between those services. Examples included the following: one business customer switching from a 1.5m<sup>3</sup> FEL bin service to a 660 litres REL bin service; another business customer converting from a 4.5m<sup>3</sup> FEL bin collected five times a week to a 10m<sup>3</sup> compactor collection; and another converting from a 3m<sup>3</sup> FEL bin collected four times a week to a 9m<sup>3</sup> gantry bin. As TPI placed considerable reliance on the evidence of switching, the Commission tested this evidence with industry participants as detailed below.

*TPI's Examples of Switching between Collection Types*

148. The Commission interviewed a number of customers listed by TPI, to explore their reasons for switching between collection services, as relevant to the issue of product market definition. A summary of these interviews and findings are noted briefly below:
- [ ] from Auckland informed the Commission that it was using 1.5m<sup>3</sup> FEL bins provided by TPI for many years. When this customer opened a new business site, TPI was unable to provide the same service, because of the difficulty in manoeuvring the FEL truck. The customer then approached [ ] who offered the REL-type collection of 660 litres (0.66m<sup>3</sup>) bins;
  - [ ] from Auckland switched its type of collection service to be provided by TPI. [ ] changed from one 1.5m<sup>3</sup> FEL bin collected once a month to two 240 litres (0.24m<sup>3</sup>) wheelie bins collected fortnightly, when it moved to new premises where TPI was not able to gain truck access to empty FEL bins. Although its wheelie bin collection is now costing more than FEL collection, the customer switched because there was no alternative;
  - [ ] from Auckland also switched between FEL and wheelie bin collection services, when it moved to new premises where FEL-type collection was not practical due to the lack of room for FEL bins. This

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<sup>71</sup> Application for Clearance by Transpacific Industries (NZ) Limited to acquire certain aspects of the business of EnviroWaste Services Limited: *Supplementary Paper on the Waste Collection Market and Services Offered to the Commercial Sector*, March 2007.

customer switched from one 1.5m<sup>3</sup> FEL bin collected once a week to two 240 litres (0.24m<sup>3</sup>) wheelie bins collected twice a week;

- [ ] Ltd informed the Commission that it switched from having a 1.5m<sup>3</sup> FEL bin serviced by TPI to a 660 litres (0.66m<sup>3</sup>) REL bin serviced by JJ Richards, because it was not satisfied with the service it was receiving from TPI. The new REL bin costs a similar price to the previous FEL bin;<sup>72</sup>
  - [ ] informed the Commission that, contrary to TPI's statements, it had never used a FEL bin service, but instead it had been using five 44 gallon drums and, had subsequently, switched to one REL-type Hiab bin, when its business expanded and its waste collector suggested that it would be easier to empty one large bin than a number of small bins;
  - [ ] informed the Commission that it switched from 1.5m<sup>3</sup> FEL bin to its local authority collection contract, when it moved its operations from a commercial area workshop in Manurewa to a residential house which it converted into the company's offices. A local authority collection was thus available to it at less cost;
  - [ ] also switched from a 1.5m<sup>3</sup> FEL bin to its local authority contract. However, the customer informed the Commission that it used the FEL bin for only two to three months and found that the receptacle was too big for the waste it generated and, therefore, could not justify using FEL collection. The customer then switched to wheelie bin-type collection, but again found that an even better option was its local authority refuse bag collection;
  - [ ] informed the Commission, contrary to TPI's statements, that it did not switch from a 1.5m<sup>3</sup> FEL bin to its local authority collection contract. Rather, the customer switched supplier, from TPI to EnviroWaste, using the same type of FEL bin, because the latter agreed to sponsor the [ ] and, as well, offered a lower priced FEL collection service; and
  - [ ] informed the Commission that it switched from a 4.5m<sup>3</sup> FEL bin picked up twice a week to a 15m<sup>3</sup> huka bin collected when full. The decision to switch was made because its business, and hence waste volumes, expanded beyond the capacity of a 4.5m<sup>3</sup> bin.
149. In the Commission's view, these samples of the switching examples provided by TPI have not demonstrated substitutability between the various waste collection products. All that the examples show is that:
- in some cases customers are forced to switch from a preferred product to another product (FEL to wheelie bins) because they no longer have sufficient access for FEL collection;

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<sup>72</sup> The Commission notes that the 660 litres (0.66m<sup>3</sup>) REL bin is not a typical type of bin offered in the market for wheelie bin collection service. It is more characteristic of a FEL bin.

- if the business's waste volume expands (or reduces) it will change its product to suit the increased (or decreased) volume; or
  - the examples were incorrectly stated to be switching between substitute products.
150. Given the very large number of waste customers of TPI and its competitors (see attachment 13), TPI provided relatively few examples of switching between collection service type. Moreover, all the examples given by TPI which were investigated by the Commission proved to be examples of substitution as a result of factors such as a consumer's physical service requirements altering. Importantly, the switching has not occurred in response to changes in relative prices of two types of collection service. More, generally, there seems to be no evidence that the substitution has taken place on a bigger scale, and across all types of collection services, in response to changes in relative prices. While such switching, as does occur, should not be ignored in considering relevant constraints in the competition analysis, the lack of switching in response to relative price changes, which is the key to market definition, further supports the view that the broad product market definition, argued for by TPI, is not appropriate.
151. In short, the extent of switching appears to be small in number and, when it does occur, for non-price reasons.

*Scheduled Versus Non-scheduled Services*

152. In particular, there is an important distinction between wheelie bin and FEL collection services on the one hand, and gantry or huka type of collection services on the other. The former are operated as scheduled services, and their efficiency, and hence profitability, relies heavily on the network structure. Lift volumes need to be high, and this depends upon having a network that allows economies of scale and density of lifts to be gained. The size and density of the customer base within the collection area appears to be critical in achieving these economies.
153. Increasingly, operators of these services have required their customers to commit themselves to longer term collection contracts, ranging from up to 12 months for household customers using wheelie bin collection services, to three years for business customers using FEL and/or gantry collection services.
154. In addition, in the case of FEL collections, specialised FEL vehicles are used which, in the case of purpose-built FEL vehicles, are fitted with a compactor device that allows waste to be reduced in volume by one third. This allows multiple pick-ups (up to 30) before the vehicle has to break off its collection route and transport its full load to either a transfer station or a landfill. Providing a collector has sufficient customers to allow a dense collection route, this has the effect of further increasing the productive efficiency of FEL business and industrial waste collection in comparison to gantry or huka type of collection services.
155. In contrast, gantry and huka collection services are dedicated or non-scheduled collection services—the delivery and pick-up are arranged with each customer—and require dedicated service trips for each. These services also rely on the collection of waste generated by non-permanent customers. The gantry type of

collection service, for example, is used by households for renovation waste or garden makeovers, and by businesses for minor renovations and building work.

156. In addition, the waste collected by either gantry or huka vehicles cannot be compacted and aggregated across two or more customers. TPI submitted that for the gantry service, each bin collected has to be taken to a disposal point for emptying of the contents as there is normally no means of aggregation, apart from smaller size bins (2m<sup>3</sup>), two of which can be carried on a specially designed lifting frame for delivery or emptying.<sup>73</sup> A gantry truck can usually do about ten disposal trips per day. This means that beyond a minimum size to keep at least one truck occupied, the size and density of the customer base does not necessarily provide the waste collector with significantly improved efficiency.
157. In addition, a waste collector operating one type of service would need to acquire another specialised vehicle to be able to offer the other type of service. FEL vehicles can only be used to provide FEL services, and gantry vehicles only gantry services. Information from industry participants and suppliers indicates that an investment in FEL vehicles involves capital costs that are significantly higher than those involved in investment in gantry vehicles. For example, TPI submitted that the cost of a large 32 m<sup>3</sup> FEL vehicle was about \$[ ]. [ ] FEL bins associated with the vehicle would cost between \$[ ]. Gantry vehicles on the other hand would cost only about \$[ ]. [ ] gantry bins associated with the vehicle would cost about \$[ ].<sup>74</sup>
158. TPI submitted that FEL services were provided not by “specialist providers” but as part of a “portfolio of services”. However, while many industry participants offered a portfolio of services, most portfolios did not include FEL services. Only [ ] indicated they were considering adding FEL services.
159. Smaller industry participants, which provide either gantry or wheelie bin services, indicated they were unable to, and did not intend to, enter FEL markets. For example, [

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<sup>73</sup> Application for Clearance by Transpacific Industries (NZ) Limited to acquire certain aspects of the business of EnviroWaste Services Limited: *Supplementary Paper on the Waste Collection Market and Services Offered to the Commercial Sector*, March 2007.

<sup>74</sup> These number of bins associated in turn with FEL and gantry collection are the minimum numbers that would be required for the business to be an economic operation.

<sup>75</sup> See Attachment 22.

*Summary: Broad Market Definition Inappropriate*

160. To summarise, the weight of evidence suggests that the broader market definition for privately contracted collection services is no longer appropriate. The range of factors considered above, all suggest quite strongly that the different types of privately contracted collection services fall into different markets given:
- the significant variations in price per cubic metre of waste;
  - the differences in the nature of the service required by the customer such as frequency of bin empty; whether the bin is to be emptied on or off site, bins lidded and wheeled, or not; and weight and volume carrying capacity of bin;
  - the suitability of different services to handle different types of waste;
  - the different types of (often specialised) equipment needed;
  - the ability of some forms of collection devices to compact the waste and so prolong the collection run; and
  - variations in the structure of the suppliers' operations
161. From a demand-side perspective, the various types of collection services are only marginally substitutable, and certainly not on a broad scale between all services. From a supply-side perspective, there are at least two distinctive models and types of services involved in privately contracted collection services, scheduled and dedicated/non-scheduled. Applying a SSNIP, it would appear that most customers would not be likely to shift to another service, nor would an operator supplying one of the services readily be able to switch to supply the other, without a significant investment in new trucking and receptacle capacity. This applies particularly to the switch from dedicated/non-scheduled (gantry/huka) to scheduled (wheelie bin/FEL) collection services.
162. The Commission is, therefore, of the view that scheduled (wheelie bin/FEL) and dedicated/non-scheduled (gantry/ huka) collection services are in different markets.

*FEL versus Kerbside Collections*

163. A further question arising from the discussion above is whether a scheduled collection service needs to be further disaggregated into separate markets:
- kerbside collection of solid non-hazardous waste in wheelie bins (or refuse bags, drums or other small waste receptacles) from households;
  - kerbside collection of solid non-hazardous waste in wheelie bins from business customers; and
  - collection of solid non-hazardous waste in FEL bins from business customers.
164. In respect of kerbside collection from *households*, collection of refuse bags, drums, wheelie bins, and other small waste receptacles are likely to be close substitutes from a demand-side perspective. However, the Commission did not find any evidence suggesting that collection by FEL bins is a close substitute for these types of kerbside household collection services. The EnviroWaste Information Memorandum states that around [ ]% of their customers using wheelie bin

collection services are householders while FEL commercial collection services are provided exclusively to business customers. Even the smallest size of FEL bin (1 - 1.5m<sup>3</sup>) is likely to be far too big for the volume of waste generated by a medium-size household (0.24m<sup>3</sup> collected once a week), and less frequent collections are not likely to be acceptable from a health point of view.

165. In respect of collection from *business customers*, it has been argued by TPI that there is some level of demand-side substitutability between wheelie bin and FEL collection services and that some wheelie bin operators compete with FEL operators in various geographic areas. Therefore, the argument runs, wheelie bin and FEL collections are substitutable. However, the weight of information provided to the Commission (see Table 4 below) indicated that it is unlikely that a business customer generating about 1.5m<sup>3</sup> of waste per week which is collected in FEL bins, would switch to a 240 litre (0.24 m<sup>3</sup>) wheelie bin service in response to a SSNIP.<sup>76</sup> As an example, EnviroWaste provided comparative prices for FEL and wheelie bin collections in Dunedin which are shown in Table 4.<sup>77</sup>

**Table 4: Comparative Prices of FEL and Wheelie Bin Collection<sup>78</sup>**

Collection Service	Customers Waste Volume Per Week	
	1.5 m <sup>3</sup>	3 m <sup>3</sup>
<b>FEL Bins</b>	[\$ ]	[\$ ]
<b>Wheelie Bins</b>	[\$ ]	[\$ ]

166. As mentioned earlier, while some business customers have switched between wheelie bin and FEL services, the extent of such switching appears marginal. Such switching that the Commission was able to investigate had not occurred in response to changes in relative prices.
167. From a supply-side perspective, FEL trucks seem to be the most efficient vehicles used to provide waste collections, both for medium to high volume businesses and for industrial customers who require a frequently scheduled service. These vehicles are specialised, and other types of waste collection vehicle, such as rear-end-load (REL) and side-load trucks, cannot (at least without modification) do the same work. In addition, the FEL vehicles compact the waste in about a 3:1 ratio, and thus perform more efficiently in provision of collection services to business and/or industrial customers than either REL or side load vehicles.
168. The Commission has found that in relevant markets in New Plymouth, Nelson and Timaru, two wheelie bin operators were able to adapt their REL trucks to enable them to collect smaller FEL-type of bins (1.1m<sup>3</sup> and up to 3m<sup>3</sup>). However, as

<sup>76</sup> The Commission considers that the collection of the larger wheeled and lidded “so called” wheelie bins of just under 1 m capacity, occurs in the FEL market and not in the wheelie bin market.

<sup>77</sup> Comparisons of collection prices can only be validly made within a region. This is because collection prices are very dependent on local disposal prices, which might vary by as much as 300% from region to region.

<sup>78</sup> Information provided in confidence by EnviroWaste.

explained above, the service provided by such vehicles cannot be considered as an efficient substitute because of the lack of compacting capability, which impairs those suppliers' volume capacity, and hence the efficiency and profitability of each collection journey.

169. Similar conclusions have been reached in some overseas jurisdictions. For example, the DoJ<sup>79</sup> considered that FEL commercial routes were uniquely well suited to provide waste collection services to commercial customers (restaurants, large apartments, large apartment complexes, retail and wholesale stores, office buildings and industrial parks). In 1996 it defined the relevant product market as one for a “small containerized hauling service” collecting waste from commercial customers in two to ten cubic yard (1.5m<sup>3</sup> to 7.6m<sup>3</sup>) containers. In a more recent case in 2005, the definition was for “small container commercial waste collection services”, referring to one to ten cubic yard (0.76m<sup>3</sup> to 7.6m<sup>3</sup>) containers.
170. When in 1996 it compared this service with a residential-type of collection service (kerbside collection of refuse bags with REL trucks) the DoJ concluded that from a demand-side perspective:<sup>80</sup>

There are no practical substitutes for this [ ] service. Small containerized hauling service customers will not generally switch to noncontainerized service in the event of a price increase, because it is too impractical and more costly for those customers to bag and carry their volume of trash to the curb for hand pick-up.

171. In 2005 the DoJ confirmed that from a supply-side perspective:<sup>81</sup>

Providers of other types of waste collection services (e.g. residential and roll-off services) are not good substitutes for small container waste collection firms. In their waste collection efforts, these firms use different waste storage equipment (e.g. garbage cans or semi-stationary roll-off containers) and different vehicles (e.g. rear-end load, side-load, or roll-off trucks), which, for a variety of reasons, cannot be conveniently used to store, collect, or transport waste generated by commercial accounts, and hence, are generally not used on small container commercial waste collection routes.

172. In Canada, the Competition Tribunal accepted in 1991 the product market definition adopted by the Canadian Competition Bureau, identifying a separate product market for FEL commercial collection services:<sup>82</sup>

Commercial customers are served primarily by front-load vehicles that lift the containers over the front of the truck by means of a hydraulic hoist and empty the waste into the storage

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<sup>79</sup> See for example: *United States v. Waste Industries USA, Inc.*, 2005; *United States v. Allied Waste Industries and Browning-Ferris Industries*, 1999; *United States and Plaintiff States v. USA Waste Services, Inc, Dome Merger Subsidiary, and Waste Management, Inc.*, 1998; *United States v. Waste Management of Georgia, Inc., d/b/a Waste Management of Savannah, and Waste Management of Louisiana, Inc., d/b/a Waste Management of Central Louisiana, and Waste Management Inc.*, 1996.

<sup>80</sup> *Competitive Impact Statement: United States v. Waste Management of Georgia, Inc., d/b/a Waste Management of Savannah, and Waste Management of Louisiana, Inc., d/b/a Waste Management of Central Louisiana, and Waste Management Inc.*, February 15, 1996, page 6.  
<http://www.usdoj.gov/atr/cases/f0500/0540.pdf>

<sup>81</sup> *Competitive Impact Statement: United States v. Waste Industries USA, Inc.*, August 8, 2005, page 3.  
<http://www.usdoj.gov/atr/cases/f210400/210480.pdf>

<sup>82</sup> Competition Tribunal, *The Director of Investigation and Research v. Laidlaw Waste Systems Ltd.*, 1991, CT-91/02, Statement of Grounds and Material Facts.  
<http://www.ct-tc.gc.ca/english/CaseDetails.asp?x=67&CaseID=186#248>



section of the vehicle, where the waste is compacted. Automated rear-end and side loaders can also be used to service some commercial customers, but these trucks cannot physically handle large containers.

Front end containers are not interchangeable with industrial or roll-off containers and specific types of trucks must be employed with each category of service. Commercial containerized solid waste haulage service has no practicable substitutes.

There is no reasonable substitute to which a significant number of customers could turn in response to a small but significant and non-transitory price increase in commercial containerized haulage service. For the purposes of the Act, commercial containerized haulage service constitutes a distinct class or species of business.

173. In 1998, the Competition Tribunal confirmed that FEL commercial collection services constitute a separate product market:<sup>83</sup>

The commercial lift on board market, also known as front-end service, involves the collection of containers of waste by front-end trucks from customers who generate a significant quantity of solid waste and are often restaurants, offices, and small commercial establishments.

174. Overall, taking all the evidence and views into account, the Commission's view is that for the purposes of this Acquisition separate product markets should be defined for refuse bags/wheelie bin collection and for FEL collection services. Such an approach is consistent with that adopted by other competition authorities in the United States and Canada, as noted above.

*National multi-regional customers waste management market*

175. In addition, the Commission considers that there is another product market with characteristics which, on the evidence that has emerged in the course of the investigation of the Application, differentiates it from the collection markets described and discussed above. That product market is related to the waste management services provided to multi-regional (national)<sup>84</sup> customers. That is, business customers with collection points located in two or more distinctive collection geographic markets across the country.<sup>85</sup>
176. It became apparent during this investigation that since 1999, EnviroWaste had emerged as a national, rather than regional, player in waste markets. This has meant that it has been able to compete with TPI to supply waste management services to national customers with sites in several or many regions. These customers demand a national waste management service, which includes much more than mere collection of waste. Additional services required by customers in this market include:
- the analysis and rationalisation of their waste and recyclables collection methods;

<sup>83</sup> Competition Tribunal, *The Director of Investigation and Research v. Canadian Waste Services Inc. and Capital Environmental Resource Inc.*, 1998, CT-98/01, Notice of Application for a Consent Order. <http://www.ct-tc.gc.ca/english/CaseDetails.asp?x=67&CaseID=210#287>

<sup>84</sup> Industry participants generally refer to multi-regional customers as national customers or national accounts.

<sup>85</sup> Collection geographic markets are discussed in the geographic market section below.

- the introduction of waste monitoring/minimization programmes including staff training;
  - the introduction of recyclables monitoring/maximization programmes including staff training;
  - offsetting of waste costs through the sale of recyclables;
  - a single centralised point of contact with their waste management provider;
  - amalgamation of invoices from multiple business sites;
  - collation and presentation of waste and recyclables volume data from those sites;
  - liability protection; and
  - employee safety training.
177. Also, the evidence shows that this national supply delivers to national customers a waste management service at a much lower cost overall than would individual local supply to each of their sites.
178. This service is different in its nature from the previously defined types of waste collection services, in that it often combines at least two types of collection services together within a single customer contract.
179. TPI suggested that this market could be considered as a waste brokerage market, where one firm could act as a co-ordinator and contractor of waste management services to multi-regional (national) customers, and sub-contract these services on a regional basis to local/regional waste collectors.
180. TPI instanced Thiess Services Ltd (Thiess) as an example of a waste broker that might enter New Zealand waste markets. [

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181. The Commission notes that Thiess is a large waste collector throughout Australia. In this respect, in Australia, it is in the same position as TPI and EnviroWaste in New Zealand. It offers (as do TPI and EnviroWaste in New Zealand) a national Australian waste management service through, either its own collection operations, or through sub-contractors which carry out collection in regions where it does not have collection operations.
182. The Commission does not consider that it is likely that waste brokers will, within the Commission's time frame, be a substitute for the national waste management service that TPI and EnviroWaste currently provide to multi regional customers. Rather, there are currently only two companies in New Zealand who, by virtue of operating nationally, are able to provide waste management services to national multi-regional customers, namely TPI and EnviroWaste. As a result of the

Acquisition, one of them (EnviroWaste) would exit from all of the South Island collection markets and effectively combine with TPI in collection markets in a large area of the lower North Island. EnviroWaste notes that this “national service” is important to “more easily offer national deals to larger businesses.”<sup>86</sup>

183. From a demand-side perspective, TPI argued that multi-regional (national) customers “could turn to regional competitors” for the provision of an equivalent service, thus suggesting that this product market is not distinguishable from other waste collection services markets. However, national multi-regional customers said that a single national waste management contract is important to them for various reasons including the cost savings and the add-on waste management services provided in this market, which have been listed in paragraph 176.
184. Some national multi-regional customers currently negotiate two separate multi-regional (national) contracts with both TPI and EnviroWaste in order to create and maintain competitive tension between the two suppliers. Fonterra, as a national multi-regional customer, informed the Commission that its contract with EnviroWaste allowed a cost saving of [ ]% and that of TPI, [ ]%. EnviroWaste informed the Commission that it was providing a [ ]% saving over the existing waste costs on a national service provided to Goodman Fielder, and on South Island services provided to Foodstuffs. The Warehouse advised that it had achieved a [ ]% cost saving by moving from individual waste collection contracts for its sites to a national waste management service.
185. A similar situation exists in Australia. TPI referred the Commission to the website of Thiess<sup>87</sup> where in reference to a waste management contract for Amcor, the packaging company, Thiess stated:

Thiess Services has also achieved a 20% reduction in the cost of waste management for Amcor across Australia, through efficiencies gained by offering a national service and greater bargaining power with sub-contractors.

This only underscores the point that a national service is able to deliver significant cost savings to national customers.

186. Such price reductions, as set out above, mean that, applying the SSNIP test, if national prices were to increase by 5-10%, multi-regional (national) customers would not switch to regional competitors.
187. Cost is not the only issue. Many large New Zealand companies now regard waste minimisation as a mark of good corporate citizenship. National contracts with a large waste management firm provide a better opportunity for properly organised waste minimisation and waste recycling programmes. For some companies such programmes are required in order to meet product stewardship obligations assumed under the New Zealand Packaging Accord signed in 2004.<sup>88</sup> While these obligations are presently voluntary, the Government has made it clear that “regulation will be considered if the accord is not making sufficient progress by

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<sup>86</sup> EnviroWaste Information Memorandum, page 54.

<sup>87</sup> [www.thiess-services.com.au](http://www.thiess-services.com.au)

<sup>88</sup> <http://www.mfe.govt.nz/issues/sustainable-industry/initiatives/packaging/index.html#5>.

2009.<sup>89</sup> In the Commission's view, the Accord is a further reason why national companies would not switch back to the acquiring of local services in the event of a small price increase for the national service.

188. Manawatu Waste, submitted that the difficulty is that setting up a national deal by an operator that does not otherwise operate on a national basis involves a great deal of trust and cooperation between companies (who are potentially rivals) around the country. Each individual company has different invoicing systems, product ranges and pricing.
189. From the supply side-perspective, it appears that a waste collector who wishes to provide waste management services to national customers must satisfy at least two basic criteria:
  - experience in operating all types of collection services (wheelie bin, FEL and gantry collections); and
  - collection business established across multiple local/regional collection markets.
190. For example, the information provided to the Commission by one national customer [ ] shows that its supplier [ ] offered wheelie bin, FEL and gantry/huka collection services across various regional sites. For example, in [ ] regional site the supplier offered 1.5m<sup>3</sup> and 3m<sup>3</sup> FEL collection as well as 0.24m<sup>3</sup> wheelie bin collection. In [ ] regional site, the same supplier provided 1.5m<sup>3</sup>, 3m<sup>3</sup> and 4.5m<sup>3</sup> FEL collection, as well as 9m<sup>3</sup> gantry and 30m<sup>3</sup> huka collections.
191. Table 5 shows the geographic presence of major waste collectors in the relevant geographic markets affected by the Acquisition.

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<sup>89</sup> Media Release, Minister for the Environment, 10 August 2004.

**Table 5: Major Waste Collectors in Relevant Geographic Markets**

	Taupo	New Plymouth	Wanganui	Palmerston North	Horowhenua / Kapiti Coast	Nelson	Christchurch	Timaru	Dunedin
<b>TPI</b>	X	X	X	X	X	X	X	X	X
<b>EnviroWaste / Manawatu Waste</b>	X		X	X	X	X	X	X	X
Lakeland Porta Bins	X								
Eazi Bins (New Plymouth)		X							
Just Rubbish (New Plymouth)		X							
Silver Drum Hire (New Plymouth)		X							
Heydon Priest (New Plymouth)		X							
J.A.B. Enterprises			X						
Dave Hoskins Carriers			X						
Compost Management			X						
Rangitikei Hire Bin Services (Rangitikei)			X						
Cairns Bins				X	X				
Owyak Waste Limited					X				
Levin Container Rubbish (Horowhenua)					X				
Nelmac Ltd						X			
Can Plan						X			
Streetsmart Ltd						X			
Mastagard							X		
Waste-Away							X		
Phil-a-Skip							X		
Garbo Rubbish Removals								X	
Timaru Bins								X	
Household Rubbish Removals								X	
Otago Metal Industries Ltd									X
Tidy Bin Services									X
Duffy's Skip Services									X
Awamoa Bins & Skips									
Peter Murdoch Transport Limited									

192. The Commission notes that, apart from TPI and EnviroWaste/Manawatu Waste, all other waste collectors operate collection services in one local/regional market only.<sup>90</sup> It is the Commission's view that in case of a SSNIP, these collectors would not be able to provide waste management services to a national customer within the Commission's timeframe of analysis. In order to do so, they would need to establish a separate collection business in each local/regional market where national customers are purchasing waste management services. The Commission also considers that these firms would not be able efficiently to provide waste management services to national customers due to their limited geographic presence.
193. In the Commission's view it is the demand-side characteristics that correctly delineate this market. National multi-regional customers are not demanding a system where they must personally organise local collection to each of their (sometimes many) sites and where they will receive little, if any, waste management services. Rather, these customers emphasised they are demanding a bundled, lower-priced waste management service that includes much more than the mere collection of waste and its disposal in the three types of bins. The customers' demands are for a full-service waste management system, the components of which have been described in paragraph 176.
194. The Commission notes that there are other industries in which a national and regional markets may co-exist having regard to the particular characteristics of that industry. Electricity is one example. Firms with national sites throughout the

<sup>90</sup> With the exception of Cairn Bins which operates in two adjacent geographic markets, Palmerston North and Horowhenua/Kapiti Coast.

country could arrange individual contracts with individual electricity retailers to supply their sites. However, many such firms choose to deal only with a single national supplier for their national supply. Such national retailers do not just supply electricity, rather they provide an electricity management service. The standard and degree of a nation electricity retailers add-on services may be the reason for their success or otherwise in obtaining national supply contracts. Typically services provided by national electricity retailers include:

- the supply of electricity to each site of a national customer;
- advice to customers on energy management and reduction of consumption;
- amalgamation of customers electricity bills;
- management of new connections; and
- the collection and collation of electricity consumption and other data for customers.

195. Taking into account all the information and views provided to it, the Commission considers that waste management services for multi-regional (national) customers constitutes a separate product market from other collection product markets.

*Summary of product markets*

196. To summarise, the Commission is of the view that separate product markets should be defined for the following collection activities:

- provision of local authorities' contracts for public kerbside collection of solid non-hazardous waste ("*local authority collection contract market*");
- provision of privately contracted collection of solid non-hazardous waste by wheelie bins (including refuse bags and drums) from households and small commercial customers ("*wheelie bin collection market*");
- provision of privately contracted collection of solid non-hazardous waste by front-end-loaded bins from commercial customers ("*FEL collection market*");
- provision of privately contracted collection of solid non-hazardous waste by gantry skips, huka bins, and other similar bin types ("*gantry collection market*"); and
- provision of waste management services to multi-regional (national) customers ("*national customers waste management market*").

197. These market definitions reflect normal approaches used in defining relevant markets, and are consistent with the overseas precedents identified in the industry under investigation. Adopting these product market definitions does not, however, prevent the Commission, in its analysis of the competitive effects of the Acquisition, from taking into account some level of potential substitutability and constraint that may exist on the margin between these forms of solid non-hazardous waste collection which it does in the competition analysis later in this Decision.

## Functional Markets

198. Between the point of generation and the point of disposal, waste passes through a number of processing stages, or functional levels, conventionally viewed as being arranged in a vertical sequence. In Decision 355, the Commission delineated the functional levels of the market as:
- waste collection and delivery;
  - waste transfer stations; and
  - waste disposal.
199. The Commission has considered whether this delineation of functional levels is still appropriate, and found largely that it is. This was also the view of all industry participants. However, there have been recent developments in the solid non-hazardous waste markets involving local authorities. They have been taking a more proactive role in promoting recycling, and they have also been tendering local authority contracts for operating material recovering facilities, and combining them with existing local authority contracts for operating transfer stations.
200. Waste transfer stations are used as an intermediate point at which small lots of collected waste are aggregated into large lots for onward haulage to a landfill, but not all waste now passes through them. There is an increasing trend in recycling household and business/industrial waste, a system that requires specialised facilities to process recyclable materials. The Commission, therefore, considers that there is a distinction between these two types of facilities, in terms of the materials they receive: recyclables pass through a MRF, and general rubbish goes to RTSs. From a demand-side perspective, these facilities cannot be regarded as being substitutable, once it has been decided to institute waste recycling.
201. From a supply-side perspective, the two types of facility are not close substitutes either. Each facility serves specific needs and can not substitute for providing the type of service that the other facility offers. A considerable amount of capital investment would be required by an RTS operator to switch to supply MRF services, and vice versa, and this investment would likely be largely sunk.
202. However, the Acquisition does not involve the provision of MRF services in any geographic market apart from that encompassed by the Timaru District Council's contract for bundled services referred to earlier. As the Timaru District Council contract is a single contract that requires the contractor to operate combined RTS and MRF services, and is unique in nature in that it combines all functional levels of solid non-hazardous waste services, it has to be considered as an exception in the overall competition environment affected by the Acquisition. For this reason, the Commission considers that it is not necessary to further consider MRF services in this decision.
203. A further refinement of Decision 355 concerns the relationship between RTSs and landfills. In some geographic markets, waste may by-pass RTSs by being hauled directly to the point of permanent disposal at landfills. This means that RTSs may compete to some extent with landfills for the receipt of waste. However, it is very common that landfill owners now prohibit or severely restrict direct access to

landfills by collectors or DIYers. For example New Plymouth District Council imposes a minimum weight restriction in order to dissuade direct disposal.

204. The Commission proposes to continue to use as the relevant functional markets, those adopted in Decision 355, namely:
- collections – collections of solid non-hazardous waste at the point of generation and its delivery to the point of disposal, either at RTSs (for temporary disposal) or at landfills (for permanent disposal);
  - RTSs – facilities used as an intermediate point at which small lots of collected waste are temporarily deposited, and which are then aggregated into large lots for onward haulage to a landfill; and
  - landfills – points of final, permanent disposal of solid non-hazardous waste.

### **Geographic Markets**

205. TPI submits that the Commission’s approach to the geographic waste markets adopted in Decision 355 and Decision 359 is the correct approach to assess the Acquisition. In Decision 355, which focused only on solid non-hazardous waste, the Commission defined the following geographic markets:
- local/regional markets for the collection and delivery of waste;
  - local markets for waste transfer stations; and
  - regional markets for the disposal of waste.
206. The Commission generally intends to maintain that approach in this Decision. As in Decision 355/359, the Commission considers that the geographic dimensions of the various functional levels of the waste market are likely to be either local (town, city or district-based), or regional (two or more adjacent districts). The markets may not necessarily coincide with the boundaries of the relevant local authorities.
207. Transport costs to convey waste from the point of collection to the point of disposal are an important factor in determining reasonable operational boundaries of collection businesses. Various industry participants<sup>91</sup> stated that their collection operations extend within a circle of about 50km radius from their depots.
208. TPI’s businesses while located in main population centre areas, sometimes service adjacent districts. For example its depot in:
- New Plymouth covers collection operations in the entire Taranaki region;
  - Wanganui covers both the Wanganui and Rangitikei districts;
  - Paraparaumu covers Kapiti Coast and Horowhenua districts; and
  - Timaru covers Timaru, Waimate and Mackenzie districts.
209. The Canadian Competition Bureau defined the relevant collection geographic market in the following terms:

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<sup>91</sup> For example, Easy Bins (New Plymouth) and Bin Hire (Hawera).



The relevant geographic market for commercial collection markets is local, typically corresponding to an approximate 50 km radius from the dispatch hubs (para 28)<sup>92</sup>

210. The Commission is of the view that the geographic extent of collection markets is likely, depending upon the urban or rural nature of the area, to be local or regional. Generally a reasonable operational boundary for a collection business will extend to a maximum of 50 kilometres from a collection business's depot, which will usually be located in the main population centre in the locality or region.
211. Each of the collection products is now examined to reveal any special features of the geographic markets that apply to individual collection products.

#### *Local Authority Contracts*

212. Local authorities are either buyers or providers of the collection services in their territories. The area of its territory necessarily determines the geographic extent of the market for a local authority's kerbside collection contract(s). Local authorities are, therefore, able to define the geographic boundaries of their kerbside collection contracts in a manner that is sometimes different from other types of waste collection. For example:

- the New Plymouth District Council, prior to 2006, had entered into a kerbside collection contract to cover kerbside waste collection, only within its territorial boundaries. However, last year the Council decided to let a joint contract with the other Taranaki local authorities<sup>93</sup>, to cover waste collection in all three districts in Taranaki;
- in the Kapiti Coast/Horowhenua region, there are two separate local authorities<sup>94</sup> who each enter into a kerbside waste collection contract to cover its own territory. Hence, there are currently separate geographic markets for Kapiti Coast and Horowhenua kerbside collection contracts. [

]; and

- similarly, there are several local authority kerbside collection contract geographic markets within the Christchurch area where kerbside collection contractors are likely to compete with each other.<sup>95</sup> Each is, therefore, analysed as a separate geographic local authority kerbside contracts market.
213. Moreover, the Commission considers that only local authority kerbside collection markets in which those two conditions apply are relevant to this Acquisition. First, the local authority has not entirely exited solid waste collection, and secondly, one of TPI, EnviroWaste or Manawatu Waste:
- is an incumbent kerbside collection contractor;

<sup>92</sup> Competition Tribunal, *The Director of Investigation and Research v. Canadian Waste Services Holdings Inc.*, 2000, CT-2000/02, Statement of Grounds and Material Facts at paragraph 28.

<sup>93</sup> Stratford and South Taranaki District Councils.

<sup>94</sup> Horowhenua District Council and Kapiti Coast District Council.

<sup>95</sup> The Christchurch City Council, the Selwyn district Council and the Waimakariri District Council have separate collection contracts in the region of Christchurch.

- has tendered unsuccessfully; or
  - has expressed interest in tendering or is considered a credible potential tenderer.
214. These geographic boundaries may change in time if local authorities combine their contracts or perhaps exit kerbside waste collection. However, the Commission considers that, for the purpose of the competition assessment of this Acquisition, the following geographic markets for local authority collection kerbside contracts are relevant:
- Taupo District;
  - Taranaki Region;
  - Manawatu District and Palmerston North City;
  - Kapiti Coast District;
  - Horowhenua District;
  - Christchurch City;
  - Selwyn District;
  - Waimakariri District;
  - Timaru District; and
  - Dunedin City.

*Wheelie Bin, FEL, and Gantry/huka Waste Collection*

215. Taking into account the geographic market definition principles discussed above, and the aggregations of market shares and vertical effects resulting from the Acquisition, the relevant local/regional markets for wheelie bin, FEL and Gantry/huka waste collection are the following:
- Taupo (aggregation of market share and vertical effects);
  - New Plymouth (vertical effects)
  - Wanganui (aggregation of market share and vertical effects);
  - Palmerston North (aggregation of market share and vertical effects);
  - Kapiti Coast/Horowhenua (aggregation of market share and vertical effects);
  - Nelson (aggregation of market share);
  - Christchurch (aggregation of market share and vertical effects);
  - Timaru/Oamaru (aggregation of market share and vertical effects); and
  - Dunedin (aggregation of market share and vertical effects).

*Refuse Transfer Stations*

216. Within the area of a waste collection business, there will usually be at least one RTS located in a main population centre. In larger cities there may be two or more. Where there is only one RTS, and no proximate alternatives for disposal, each RTS

is likely to operate within its own geographic market. In larger cities or districts with two or more RTSs operating within the boundaries of a collection business's area it is likely that both would compete in the same geographic market. In such a case, the city or district area is likely to constitute the geographic market. The relevant market for RTSs, for that reason, can loosely be characterised as local.

217. Taking into account the geographic market definition principles discussed above, the aggregations of market shares, and the potential for vertical effects resulting from the Acquisition, the relevant local/regional markets RTSs are the following:
- Taupo (potential vertical effects);
  - New Plymouth (potential vertical effects);
  - Wanganui (potential vertical effects and horizontal aggregation);
  - Palmerston North (potential vertical effects);
  - Kapiti Coast/Horowhenua (potential vertical effects);
  - Christchurch (potential vertical effects);
  - Timaru/Oamaru (potential vertical effects); and
  - Dunedin (potential vertical effects).

#### *Landfills*

218. Despite the trend towards the closure of smaller landfills and their replacement by larger ones servicing larger areas, all larger towns and cities appear to have access to adjacent landfills. The landfills typically service the population within one or more districts. There appear to be significant throughput economies in landfill operations because of the high absolute level, and high proportion, of fixed costs in their operation, especially for new ones because of initial Resource Management Act compliance and construction costs. The difficulty of finding suitable sites also appears to contribute to the relatively small number of landfills. The Commission concludes that the geographic extent of the market for disposal of solid non-hazardous waste at landfills is regional.
219. Taking into account the geographic market definition principles discussed above and the potential for vertical effects resulting from the Acquisition, the relevant local/regional markets for landfills are the following:
- New Plymouth (potential vertical effects);
  - Wanganui, Palmerston North, Kapiti Coast/Horowhenua, the catchment area of the Bonny Glen landfill (potential vertical effects);
  - Christchurch (potential vertical effects)
  - Timaru (potential vertical effects); and
  - Dunedin (potential vertical effects).
220. The Commission is of the view that these geographic areas should be considered in the competition analysis of the product market for disposal of solid non-hazardous waste at landfills and/or the vertical integration effects of the Acquisition.

*National Multi-regional customer waste management services*

221. The national market for multi-regional customer waste management services, has a geographic coverage that is, by definition, nationwide.

**Conclusion on Market Definition**

222. The Commission is of the view that, for the purposes of the present Application, the relevant markets are:

- local/regional markets for the provision of local authorities' contracts for public kerbside collection of solid non-hazardous waste ("*local authority collection contract market*") in Taupo District, Taranaki Region, Manawatu District and Palmerston North City, Kapiti Coast District, Horowhenua District, Christchurch City, Selwyn District, Waimakariri District, Timaru District and Dunedin City;
- local/regional markets for the provision of privately contracted collection of solid non-hazardous waste in wheelie bins (including refuse bags and drums) from households and small commercial customers ("*wheelie bin collection market*") in Taupo, New Plymouth, Wanganui, Palmerston North, Kapiti Coast/Horowhenua, Nelson, Christchurch and Dunedin;
- local/regional markets for the provision of privately contracted collection of solid non-hazardous waste in front-end-loaded bins from commercial customers ("*FEL collection market*") in Taupo, New Plymouth, Wanganui, Palmerston North, Kapiti Coast/Horowhenua, Nelson, Christchurch, Timaru and Dunedin;
- local/regional markets for the provision of privately contracted collection of solid non-hazardous waste by gantry and huka bins ("*gantry collection market*") in Taupo, New Plymouth, Wanganui, Palmerston North, Kapiti Coast/Horowhenua, Nelson, Christchurch, Timaru and Dunedin;
- local markets for refuse transfer stations ("*RTS market*") in Taupo, New Plymouth, Wanganui, Palmerston North, Kapiti Coast/Horowhenua, Christchurch, Timaru and Dunedin;
- regional markets for disposal of solid non-hazardous waste at landfills ("*landfill market*") in New Plymouth, Wanganui, Palmerston North, Kapiti Coast/Horowhenua, Christchurch, Timaru and Dunedin; and
- the national market for the provision of waste management services to multi-regional customers ("*national multi-regional customers waste management market*").

**COUNTERFACTUAL AND FACTUAL**

**Introduction**

223. In deciding whether an acquisition is likely to lead to a substantial lessening of competition, the Commission assesses the likely difference in competition outcomes between two hypothetical situations, one with the acquisition (the factual)

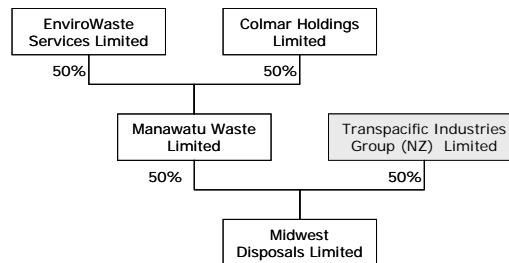
and one without (the counterfactual).<sup>96</sup> The difference in competition between these two future scenarios is the expected competitive impact of the acquisition.

### The Transaction

224. Fulton Hogan Ltd has sold all the shares in EnviroWaste to Ironbridge for \$[ ] million. The sale was conditional only on Overseas Investment Office approval and that was received by Ironbridge on 11 April 2007. The sale was completed on 27 April 2007.
225. Ironbridge and TPI have entered into a separate Heads of Agreement providing that TPI will purchase all of the South Island businesses of EnviroWaste and [ ], from Ironbridge. However, the Application seeks clearance for TPI to purchase up to 50% of the shares of Manawatu Waste so that this is the relevant factual – a 50% shareholding.
226. [

]. The diagram below shows the current ownership structure of Manawatu Waste and Midwest Disposals.

**Diagram 1: Current Ownership Structure of Manawatu Waste and Midwest Disposals**



227. The assets and businesses which TPI intends to purchase in the factual, and for which it seeks clearance to acquire, are shown in Table 6.

<sup>96</sup> *Air New Zealand & Qantas Airways Ltd v Commerce Commission* (No.6), unreported HC Auckland, CIV 2003 404 6590, Hansen J and KM Vautier, Para 42.

**Table 6: Assets to be Acquired by TPI in the Factual<sup>97</sup>**

<b>Asset to be Acquired</b>	<b>Type of Business Activity</b>
Up to 50% of the shares of Manawatu Waste	Manawatu Waste has RTS businesses in New Plymouth, Wanganui and Palmerston North; 50% ownership of Midwest Disposals; collection businesses in Taupo, Wanganui, Palmerston North and Horowhenua/Kapiti Coast
Nelson business unit of EnviroWaste	Wheelie bin, FEL and gantry collection businesses
Blenheim business of EnviroWaste	Wheelie bin, FEL and gantry collection businesses
Christchurch business of EnviroWaste	Wheelie bin, FEL and gantry collection businesses
EnviroWaste's shares of CWS	Owner of a RTS, effectively 25% of the shares of TWC (through CWS) and a transport contract and a landfill operation contract
Timaru Business Unit of EnviroWaste	Owner of contracts with Timaru District Council to collect its municipal waste, to own and operate a RTS and material recycling and composting facility; FEL and gantry collection business.
Oamaru Business Unit of EnviroWaste	Wheelie bin, FEL and gantry collection businesses
Dunedin Business Unit of EnviroWaste	Owner of a landfill and a RTS, wheelie bin, FEL and gantry collection businesses

228. The transaction does not include any of the North Island assets of EnviroWaste, other than half of its shareholding in Manawatu Waste.

229. The transaction is conditional on both Overseas Investment Office approval and Commerce Commission clearance being granted. If those hurdles were cleared, TPI would then purchase the South Island businesses of EnviroWaste and [ ] from Ironbridge for \$[ ] million.

### **The Nature of the Factual**

#### *TPI's View of the Factual*

230. In summary, TPI has submitted that in the factual:

- while there will be aggregation in collection markets in the South Island and in the Manawatu Waste area of operations, many competitors will remain in those geographic markets. Moreover, it is easy for a new market participant to enter collection markets. The “second player slot” currently filled by either TPI or EnviroWaste in the relevant geographic markets would, in the factual, rapidly be filled by a smaller local waste collection company, an-out-of-region larger collection company, such as Metro Waste or JJ Richards, or an overseas entrant;
- there is no aggregation in either the RTS or landfill markets, other than in Wanganui where TPI would own both of the existing RTSs. It is generally

<sup>97</sup> Source: Heads of Agreement between Ironbridge and TPI and TPI's Application for clearance.

easy to enter RTS markets. However, TPI has offered to divest one RTS in Wanganui;

- there is no national market for waste management services to businesses with multiple sites so there can be no additional aggregation. However, if such a market does exist, [ ], or other waste brokers and/or cost minimisation consultants would enter the multi-site services market. If this were not to occur, the option would remain for multi-site firms to return to individual collection contracts for each of their sites;
- because TPI currently owns 50% of both the CWS and Midwest Disposals joint ventures, there would be no change to competition as a result of its Acquisition of 100% of CWS and (effectively) up to 75% of Midwest Disposals. That is because TPI, by virtue of being associated with both joint ventures, already has the ability to exert a substantial degree of influence over the joint ventures; and
- there are no vertical competition effects. First, any increase in vertical integration between upstream markets (landfill and/or RTS) and downstream markets (collection) in the factual<sup>98</sup> does not necessarily mean that, in particular, a hypothetical predation strategy<sup>99</sup> would succeed. Collection markets have low barriers to entry and any high collection prices would be unsustainable. Such a predation strategy by TPI would be irrational. Secondly, in any event, “upstream owners prefer more intense downstream competition because this generates more upstream business.” If TPI were to attempt to raise landfill gate prices in the factual, it would be constrained by a potential decline in volumes of waste received at its landfills. That is because rivals in waste collection markets would switch to other landfills, or waste generators would respond by minimising their landfill waste.

*Manawatu Waste’s View of the Factual*

231. Manawatu Waste opposes the granting of clearance for the Acquisition. In summary, it has submitted that in the factual:

- there would be significant aggregation of market share in various product markets in several geographic regions. In some markets the aggregation would result in a reduction of two market participants to one. Because of TPI’s lower costs arising from its increased scale and density of collection (and RTS) volumes, and increased ability to obtain volume discounts from landfill and refuse station operators, it would be difficult for existing operators to expand or new operators to enter with sufficient scale to constrain TPI. No long-term business model is available to entrants in collection markets. Gantry collection is the exception to this statement;

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<sup>98</sup>As a result of TPI's Acquisition of EnviroWaste's share of the Kate Valley landfill, and up to 50% of Manawatu Waste's share of the Bonny Glen landfill.

<sup>99</sup>TPI reduces collection prices, rivals exit because they cannot compete, TPI increases collection prices.

- large scale expansion or entry by market participants is inhibited by the use of three year collection contracts between the major collection companies and customers;
- vertical effects would be strengthened. TPI would become a vertically integrated monopolist with the incentive and ability to deter competition in waste markets arising from its ownership of either landfills or significant streams of collected waste. For example, TPI would, [ ], have the ability to gain control of the disposal price at Bonny Glen landfill to the detriment of TPI's collection competitors; and
- there would be less competition from EnviroWaste to supply the multi-site collection market because of reduced geographic coverage. [ ].

*EnviroWaste's View of the Factual*

232. [ ]. In summary, they submitted that in the factual:

- [ ]
- there would be a lessening of competition in local authority collection markets, particularly for the local authorities in Dunedin, Christchurch, Timaru, and Waitaki which will require wheelie bin, rather than plastic bag, collection. Currently TPI and EnviroWaste were important participants in that market;
- competitors of TPI in collection would be mostly confined to gantry or small wheelie bin operators who would collect only a very small percentage of the total waste collected. Very few would be competitors in the FEL collection market;
- it would be very difficult to enter FEL markets with sufficient size and capacity to constrain TPI. Commercial customers are contracted for up to three years, these contracts have automatic roll over provisions absent two months notification of an intention to cancel, and contain penalty provisions for failure to honour the contract. As a result, a new entrant would not become profitable for a number of years;

there would be no competition to supply companies with multiple sites throughout New Zealand through one contract. Currently, TPI and EnviroWaste compete in this market with EnviroWaste securing business by making price reductions to multiple site customers of [ ]% to [ ]% below their current waste disposal costs. In the factual, [



]; and

- there would be extreme aggregation of market shares in collection markets in some regions, such as Christchurch, Timaru, and Dunedin.

*Canterbury Local Authorities' Views of the Factual*

233. The Commission received submissions from the Christchurch City Council, Waimakariri District Council and Timaru District Council opposing the granting of clearance to the acquisition, which contained similar views on the factual:

- Waimakariri District Council submitted that the two major companies who could tender for its municipal collection and recycling contracts would have merged in the factual. While smaller collection companies would remain, the Council's experience was that they would not be suitable for the Council's collection contracts on several grounds: lacking flexibility of equipment availability; management capability for reporting and partnering functions; and financial backing;
- Timaru District Council submitted that if its recent contract for collection and recycling had been let in the factual, it would have been able to short list only one company. There would only be one effective waste company to service the Timaru commercial and industrial businesses; and
- Christchurch City Council considered that in the factual it would be precluded from being able to test matters such as pricing, service and efficiency through a comparative contestable process.

*The Commission's View of the Factual*

234. If the Acquisition were to proceed the Commission considers that characteristics of the factual (analysed further in the competition analysis section of this Decision) will be:

- TPI would acquire up to 50% of the shares of Manawatu Waste. The Commission considers that this shareholding will mean that TPI and Manawatu Waste would not be competitors or potential competitors in collection markets in Taupo, New Plymouth, Wanganui, Palmerston North and Horowhenua/Kapiti Coast or in RTS markets in New Plymouth, Wanganui, Palmerston North or Horowhenua/Kapiti Coast. TPI and Manawatu Waste will be treated as one "head" in the market;
- EnviroWaste would not be a competitor in Manawatu Waste's markets<sup>100</sup> [
 

];
- as part of its acquisition of up to 50% of Manawatu Waste, TPI would be likely to acquire greater influence over Midwest Disposals (see diagram 1 for

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<sup>100</sup> Or a near entrant in those markets.

structure). Midwest Disposals owns RTSs and Bonny Glen landfill. The Commission considers that as a result of the Acquisition TPI will effectively control 75% of Midwest Disposals. This arises as a result of its existing 50% direct shareholding in that company along with, post-Acquisition, a 50% share in Manawatu Waste. This point is discussed later in this Decision in the Vertical Integration section;

- TPI would acquire 100% of the assets of the South Island businesses of EnviroWaste. For the reasons given later in this Decision, the Commission does not consider that EnviroWaste could re-enter the South Island wheelie bin, FEL or gantry/huka collection markets within the Commission's two year time frame of examination. Therefore, in the factual EnviroWaste would be removed as a competitor or potential competitor in such collection markets in Nelson, Christchurch, Timaru, Oamaru and Dunedin, along with Blenheim where TPI currently has no business operations;
- TPI would acquire full control over CWS, owner of a Christchurch RTS and 50% of the shares of TWC, owner of the Kate Valley landfill. CWS and the Canterbury Joint Steering Committee would continue to own TWC and the Kate Valley landfill;
- EnviroWaste would not provide a national collection service to companies with multiple sites because it would have no presence in the South Island or south of Taupo in the North Island to service such customers. There is no waste business, other than TPI, which would be able to provide such a national service in the factual. There are no waste brokers likely to substitute for EnviroWaste's national collection service within the two year time frame of the Commission's examination. In any event, in some markets a broker would have only TPI with which to negotiate; and
- TPI's vertical ownership or part ownership of (and/or operation contract for):
  - landfills in Dunedin, Canterbury, New Plymouth, Palmerston North, and Levin;
  - RTSs in New Plymouth, Wanganui, Palmerston North, Levin, Christchurch, Timaru, and Dunedin; and
  - large tonnage collected waste streams in New Plymouth, Wanganui, Palmerston North, Horowhenua/Kapiti Coast, Christchurch, Timaru and Dunedin,

could provide TPI with the potential to raise prices or squeeze competitors in landfill, RTS and collection markets.

*Conclusion on the Factual*

235. The Commission considers that additional characteristics of the factual would be likely to include:

- [ ] tendering for the large forthcoming municipal wheelie bin collection contracts in Dunedin and Christchurch;<sup>101</sup>
- increased recycling of local authority and commercial waste, particularly if the proposed waste-to-landfill levy comes into force. In order to fulfil their statutory requirement to reduce landfill waste, local authorities will move to rates-funded wheelie bin collection services. This will impact on user-pays residential wheelie bin collectors in those territories; and
- if [ ] were to obtain the Christchurch City Council's collection contract, they could seek to use the contract as a springboard to attempt to enter Christchurch FEL and gantry collection markets;

### **The Nature of the Counterfactual**

#### *The Heads of Agreement Provisions*

236. If clearance were not granted for the entire Acquisition, [ ]<sup>102</sup>. [ ]:
- [ ]
  - [ ]]; and
  - [ ]
  - [ ]]; and
  - [ ]
- ]

<sup>101</sup> These companies have all lodged expressions of interest for the parts or all of the Christchurch City Council's municipal collection contract, its MRF and its green waste composting facility.

<sup>102</sup> As discussed in paragraphs 12 – 14 [ ] appears to show some misunderstanding of the clearance process laid out in the Commerce Act and the consequences of making only one application to cover the acquisition of several assets and businesses.

**Table 7 - Purchase and Cost Prices from Heads of Agreement<sup>103</sup>**

<b>EnviroWaste Business unit</b>	<b>Purchase Price (\$Million)</b>	<b>Cost Value (\$Million)</b>	<b>Premium (\$Million)</b>
Christchurch Collections	[ ]	[ ]	[ ]
Dunedin Collections	[ ]	[ ]	[ ]
Nelson and Blenheim Collections	[ ]	[ ]	[ ]
Timaru Business <sup>104</sup>	[ ]	[ ]	[ ]
Dunedin landfill and transfer station business	[ ]	[ ]	[ ]
EnviroWaste's interest in CWS	[ ]	[ ]	[ ]
50% of EnviroWaste's present interest in Manawatu Waste	[ ]	[ ]	[ ]

*Ironbridge's View of the Counterfactual*

237. [

]

238. [

]

239. [

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240. [

]

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<sup>103</sup> From the Heads of Agreement provided to the Commission by TPI.

<sup>104</sup> Collections and the contracts for the operation of the MRF, transfer stations and landfill.

241. [

]

*The Commission's view of the Counterfactual*

242. The Commission has considered three potential counterfactuals:

- [

- ] Such a counterfactual would be equivalent to the status quo;

- [

- ] Such a counterfactual would be much the same as the status quo except that competition in the market for collection from customers with multiple sites would likely to be less than in the status quo in this scenario; and

- [

- ] Such a counterfactual would be less competitive than the status quo.

243. Of the first two listed alternative counterfactual scenarios, the Commission considers that the first is more likely than the second. [

]

244. The third scenario is considered unlikely. [

]

*Conclusion on the Counterfactual*

245. The Commission considers that the counterfactual will have the characteristics of the status quo. Ironbridge's subsidiary EnviroWaste and Manawatu Waste will both remain as competitors with TPI in each relevant geographic market and own the shares of CWS and Midwest Disposals. Under Ironbridge's control, EnviroWaste will be at least as profit driven as it was under Fulton Hogan, but, given Ironbridge's [ ] may well be more so. This will be important when comparing the likely waste disposal prices at Kate Valley and Bonny Glen landfills in the factual and the counterfactual.
246. However, EnviroWaste will continue to compete with TPI in national multi-regional customers waste management market.

**Comparison Of Competition In The Factual And Counterfactual***Introduction*

247. In order to assess the competition effects of the Acquisition, it is necessary to assess the extent to which competition may be lessened in the factual, when compared with the counterfactual.
248. The substantial lessening of competition test is the competition threshold which applies to the Acquisition. If the Commission is satisfied that this proposal will not have, nor be likely to have, the effect of substantially lessening competition in all relevant markets, then clearance must be given to the Acquisition. Otherwise it must be declined.
249. Existing competition occurs between those businesses in the market that already supply the product, and those that could readily do so by adjusting their product-mix (near competitors).
250. If necessary, constraints from potential competition are also examined. The effectiveness of the threat of new entry as a constraint is determined by the nature and effect of the barriers to entry into the relevant markets.
251. In relation to the issue of new entry, it is necessary to focus on whether cost disadvantages faced by potential entrants would allow an incumbent firm to raise prices for a substantial period of time. That is, the relevant inquiry can be framed in terms of the familiar question of whether 'the likelihood, extent and timeliness of entry' – sometimes referred to as the 'LET' test – would defeat an attempt to raise price above the pre-merger level. If actual or potential entry would not be sufficient to defeat a merger-induced price increase, the incumbent cost advantages that result in the failure of the LET test can be considered a barrier to entry in the context of a proposed merger.
252. The Commission must also consider whether an acquisition may lead to a change in market circumstances such that either coordination between the remaining

businesses is made more likely, or the effectiveness of pre-acquisition co-ordination is enhanced. Co-ordination covers both explicit agreements and tacit forms of behaviour. Tacit co-ordination involves the use of facilitating devices such as price signalling, conscious parallelism and price leadership.

253. Vertical integration arising from an acquisition that involves businesses operating at different functional market levels may also raise competition concerns and is examined. If market power exists at one of the relevant functional levels, the Commission considers whether the acquisition would have vertical effects in upstream or downstream markets, and whether that change would substantially lessen competition.
254. A combination of all of these factors allows the Commission to make a conclusion on the likelihood of substantial lessening of competition for all the markets.

#### *Market Shares*

255. An examination of concentration in a market can provide a useful indication of the competitive constraints that market participants may place upon each other, providing there is not significant product differentiation. Moreover, the increase in seller concentration caused by a reduction in the number of competitors in a market by an acquisition is an indicator of the extent to which competition in the market may be lessened.
256. A business acquisition is considered unlikely to substantially lessen competition in a market where, after the proposed acquisition, either of the following situations exist:
- The three-firm concentration ratio (with individual firms' market shares including any interconnected or associated persons) in the relevant market is below 70%, the combined entity (including any interconnected persons or associated persons) has less than, in the order of, 40% share; or
  - The three-firm concentration ratio (with individual firms' market shares including any interconnected or associated persons) in the relevant market is above 70%, the market share of the combined entity is less than in the order of 20%.
257. The Commission recognises that concentration is only one of a number of factors to be considered in the assessment of competition in a market. In order to understand the impact of the Acquisition on competition, and having identified the level of concentration in a market, the Commission nonetheless considers the behaviour of the businesses in the market.
258. The Commission has measured market shares in relevant collection product markets using tonnages of solid waste. The data used by the Commission is based on solid waste collection data provided to the Commission by EnviroWaste, TPI, Manawatu Waste and other market participants which was correlated with local authority provided data. The Commission's estimates of market shares in the relevant markets in the North and South Islands are respectively shown in Attachments 14 and 15.

259. The Commission notes that TPI did not, as is usual, provide any market share figures in its Application arguing that, even though weighbridges are generally located at RTSs and landfills, market shares in collection markets are impossible to determine with accuracy because there is a large portion of collected waste streams that does not pass over such weighbridges. TPI instanced recyclables, green waste and construction and demolition waste as examples. Other parties such as Kapiti Coast District Council, Manawatu Waste and Enviro Waste disagreed. In their view, weighbridge data was very representative of the market shares of participants in the relevant collection product markets. Kapiti Coast District Council, for example, stated that its green waste did pass over a weighbridge.
260. In any event, the Commission considers that TPI's argument that market share data is unreliable is unlikely to be relevant to private wheelie bin and FEL collection markets. That is because:
- while some paper and cardboard recyclables are collected in commercial wheelie bins/bags and FEL bins, by far the largest quantity of recyclables is collected under local authority kerbside collection contracts in special vehicles, often in special containers such as plastic crates, and is not part of these two markets. While some recyclables collection volume collected by participants in the private wheelie bin and FEL markets may not be accounted for by weighbridges, the Commission considers that those tonnages will be minor and will not materially affect any overall conclusions the Commission reaches about the market shares of the relevant parties;
  - any green waste collected in commercial wheelie bins/plastic bags or FEL bins will normally pass over a weighbridge as it will be mixed with other general waste within the wheelie bin/refuse bag or FEL bin. However, most business waste will not normally include greenwaste; and
  - construction and demolition waste will not be collected in commercial wheelie bin/refuse bags or FEL bins. Most wheelie bin/refuse bag customers' contracts prohibit them from using wheelie bins/refuse bags for this material. Front end load trucks have a weight limit for lifting bins of 150 kg/cubic metre which also precludes heavy loads of demolished concrete structures and/or earth.

*The Associated Persons Issue*

261. TPI submitted that it is 'associated' with CWS and Midwest Disposals for the purposes of section 47 of the Act. It also argues that it may be 'associated' with TWC. In each case it argues that its increased shareholding would not constitute the removal of a competitor (and hence there would be no lessening of competition).
262. Section 47 has recently been considered by the High Court which stated that:

{208} The defendants also contended, in the alternative, that they are associated persons for purposes of s47, so that any increase in NZ Bus' shareholding in Mana is to be treated as an internal transfer that does not substantially lessen competition.



{209} Section 47 provides that a person may not acquire assets of a business or shares if that would be likely to substantially lessen competition. A “person” includes two or more persons that are interconnected or associated. One person is associated with another if that person is able, directly or indirectly, to exert a substantial degree of influence over the activities of the other.

{212} It is true that there are decisions in which the Commission has granted a clearance on the ground that an increase in shareholding would not substantially lessen competition because the acquirer and the target were already associated. See for example *PPCS Ltd v Venison Rotorua Ltd* Commerce Commission Decision No. 550 12 May 2005. But such decisions rest on findings that the parties were already associated so that competition was unlikely in the counterfactual. The questions whether parties are associated and whether competition is likely in the counterfactual must be determined on the facts.

263. On the facts of this case, the counterfactual would involve TPI and EnviroWaste remaining as equal shareholders of CWS. CWS owns a RTS, a contract to transfer waste from RTSs to Kate Valley landfill, a contract to operate Kate Valley landfill and 50% of the shares of TWC, the owner of Kate Valley landfill.
264. The Commission agrees that CWS and TPI are associated persons and that the increased shareholding in CWS and TWC would not constitute the removal of a competitor. That is because in the counterfactual:
- given constrained waste streams due to the rise of recycling, and the presence of three local authority owned competing RTSs, it would be unlikely that TPI would build an RTS to compete with CWS. That would be likely to have the effect of partially stranding an existing asset of TPI;
  - TPI is unable to compete with CWS to transport waste from RTSs to Kate Valley or to operate the landfill because TWC has awarded those contracts to CWS; and
  - TPI is unable to compete with CWS/TWC by developing a landfill which competes with Kate Valley. Under the Heads of Agreement between CWS and the Joint Standing Committee of Canterbury local authorities to form TWC, all waste generated in the region must be disposed of at Kate Valley.
265. Again, the Commission agrees that TPI and Midwest Disposals are associated persons and that on the facts of this case, the counterfactual would involve TPI and Manawatu Waste remaining as equal shareholders of Midwest Disposals. Midwest Disposals owns a RTS in Levin [ ] and the Bonny Glen landfill. The Commission agrees that the increased shareholding in Midwest Disposals would not constitute the removal of a competitor, as Midwest Disposals is not likely to compete with TPI in the counterfactual because under the Midwest Joint Venture Agreement, [ ] This means under that agreement, [ ]].
266. The Commission, therefore, concludes that, in respect of TPI’s increased shareholding in CWS, TWC and Midwest Disposals, the Acquisition will not result

in any horizontal lessening of competition. This conclusion applies only to horizontal competition between TPI and CWS, TWC and Midwest Disposals which is not further analysed in this Decision.

267. The Commission's conclusion in this respect does not apply to vertical effects that the Commission has identified, which are discussed later in this Decision.

## **COMPETITION ANALYSIS**

268. In this next, and necessarily detailed section, the Commission analyses the competitive effects of the Acquisition in each of the relevant markets. The essential issue is whether, as a result of the Acquisition, the merged firm would have the ability to exert unilateral market power, such that competition would, or would likely, be substantially lessened as a result.
269. Unilateral market power analysis focuses on the actions of a single firm in the market. The larger a merged entity's market share, the greater the likelihood that a unilateral reduction in its output, or increase in its prices, would prove to be profitable, and that it would be able to exercise market power on a sustainable basis.
270. While the competitors remaining in the market – when acting independently – may have an incentive to increase their own production output in response to the increase in price, they may be too small to expand sufficiently to offset the output reduction within the reasonable time period. A business with a substantial market share is thus potentially able to exercise market power unilaterally, regardless of the independent behaviour of competitors in a market
271. Unilateral market power is likely to be exercised only when the market is unconstrained by potential entry, and where other competition factors are either absent, or are insufficient to nullify the unilateral market power.

### **Local Authority Collection Markets**

#### *Introduction*

#### Bidding Markets

272. In a typical market, where transactions occur (effectively) on a continuous basis, ideas like "entry" and "existing competitors" have conventional meanings. A feature of the market in this case is the periodic contests for single-provider contracts. This means that an important part of competition will be 'for' the market at the time of the contracting round, rather than 'in' the market. In this scenario, it could be argued that the only relevant point at which competition occurs is when local authorities request bids for the next round of contracts for the provision of refuse and recycling services. At this point, it seems that all providers, including the present incumbents, become "potential competitors" bidding for the provision of the services. This might suggest that the Commission's standard analysis of "existing competition" and "potential competition" should be abandoned, and instead the analysis of competition should focus on identifying the likely bidders for future contracts, and on the extent of competition these bidders would provide in the factual and the counterfactual scenarios.

### Non-price Attribute Requirements

273. As well as price, bidders are graded on the non-price attributes of their bid. In order to be eligible to win a local authority collection contract, service providers must demonstrate that they have the relevant expertise and equipment required to complete the contract.
274. The Price Quality Method (PQM) assesses the bids on price and non-price attributes. Each local authority uses its discretion to decide the weighting it gives to price and non price attributes; for example, Dunedin City Council applies a weighting of [ ]% on price and [ ]% on non price attributes.<sup>105</sup> Non price attributes include experience, track record, technical skills, management skills and methodology. The bidder that scores highest over both price and non-price attributes wins the contract. Under the PQM a bidder may offer the lowest price, but still fail to win the contract if it has scored relatively poorly on non-price attributes.

### *General Competition Analysis*

275. The Commission considers that the critical issue in assessing competition in this market is whether the merged entity would be constrained by any of the following:
- the ability of national players to bid competitively for local authorities' refuse and recyclables collection contracts;
  - the ability of local players to bid competitively for local authorities' refuse and recyclables collection contracts;
  - the ability of international players to bid competitively for local authorities' refuse and recyclables collection contracts; or
  - the countervailing power of local authorities.
276. TPI submitted EnviroWaste, Manawatu Waste and TPI each holds contracts with local authorities for the provision of regular municipal waste collection services.
277. In the North Island, TPI and EnviroWaste (or its joint venture interests) hold:
- about half of around 61 local authority collection contracts; and
  - 11 of the 24 contracts in regions with over 20,000 households and 20 of the 37 contracts with over 10,000 households.
278. In the South Island, TPI (or its joint venture interests) and EnviroWaste hold:
- ten of around 33 local authority collection contracts; and
  - three of the four contracts in regions with over 20,000 households and six of the nine contracts with over 10,000 households (two of which were acquired by TPI from Onyx when Onyx sought to exit the contracts).
279. Local authority waste collection is a relatively simple economic activity: households leave their refuse at some agreed location, usually outside their house,

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<sup>105</sup> Dunedin City Council file note, 11 December 2006

and the supplier collects it, usually once a week, and either drives it straight to a landfill or to a transfer station (for subsequent transfer to a landfill).

280. To provide a local authority waste collection service, a firm would need drivers, collection vehicles and a vehicle depot. Some local authorities will own a transfer station, but others may ask the collection service provider to arrange access to a transfer station as part of their contract.
281. Local authorities are the only purchaser of municipal collection services in any one area and so have the ability to affect competition through the way in which they procure, for example, the length of the contract, the aggregation of a contract across geographic boundaries, the aggregation of a contract across functional levels and the destination of the waste. The evidence from local authorities interviewed is that the average length of a municipal collection contract is five to seven years as this is about the life of the assets (that is, collection vehicles) which gives the supplier the ability to recover its investment over the term of the contract.
282. Local authorities may choose to aggregate waste collection contracts across boundaries. For example, in 2006 the three local authorities in the Taranaki/New Plymouth region replaced 3 separate collection contracts with one joint contract. Local authorities may also choose to aggregate collection with other functional levels such as the operation of transfer stations and landfills. For example, the Timaru contract includes council collection, recycling and composting and operation of transfer stations and landfills.
283. There is a trend for local authorities to design their contracts in the way discussed above because aggregation across geographic boundaries may bring lower prices if it better enables bidders to capture economies of scale or density, while aggregation across functional levels better enables bidders to capture economies of scope. Both could facilitate more intense competition in the short term but could reduce competition at the re-tender stage if they create strong incumbency advantages.
284. TPI submitted that there are other contenders for municipal contracts of all sizes and therefore the exit of EnviroWaste or Manawatu Waste as a competitor for local authority collection contracts in the regions affected by the proposed transaction will not result in a substantial lessening of competition for these contracts.
285. The key players for local authority collection contracts are TPI, EnviroWaste, Manawatu Waste and Streetsmart who hold a number of contracts throughout the country. In addition, there are other smaller firms who typically hold just one collection contract with a single local authority. And there are also overseas firms (usually Australian) that are some times potential bidders; however, this is only for large local authority contracts that are usually bundled to include a number of different services, for example, the current Christchurch City Council contract.
286. As discussed in the market definition section, the relevant geographic markets for local authority collection contracts affected by the Acquisition in the North Island are Taupo District, Taranaki Region, Manawatu District, Kapiti Coast District and Horowhenua District. It is the removal of Manawatu Waste as a potential bidder that may affect the competition for the local authority collection contracts in those

geographic areas. [

].

287. Again, as discussed in the market definition section, the relevant geographic markets for local authority collection contracts affected by the Acquisition in the South Island are Christchurch City, Selwyn District, Waimakariri District, Timaru District and Dunedin City. It is the removal of EnviroWaste as a potential bidder that may affect the competition for the council collection contract in those geographic areas.

288. In relation to the South Island, TPI submitted that [

]EnviroWaste should be considered as a potential tenderer for the Christchurch City Council contracts and any other local authority collection contracts that EnviroWaste would have tendered for in the counterfactual.<sup>106</sup>

*Competition Analysis - North Island*

289. Table 8 lists the current holders of Local Authority collection contracts relating to the North Island geographic areas affected.

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<sup>106</sup> Chapman Tripp letter dated 5 March 2007, para 17.

**Table 8: Current holders of the Local Authority collection contracts in the North Island geographic areas affected.<sup>107</sup>**

Area	Contractor	Bag/MGB
Taupo District Council Refuse & Recycling Collection	Manawatu Waste (EnviroWaste JV)	Bag
Taranaki Region - New Plymouth, Stratford and South Taranaki District Councils – Refuse & Recycling Collection	TPI	Bag (New Plymouth)  MGBs (Stratford and South Taranaki)
Manawatu District Council	Palmerston North City Council/City Enterprises	Bag
Kapiti Coast District (Kapiti & Otaki)	Manawatu Waste	Bag
Horowhenua District (Foxton, Horowhenua, Levin) Refuse & Recycling	Levin Container Rubbish	Bag/Bin

Taupo District

**Current Contractor**

290. The current contract is held by Manawatu Waste. This contract was tendered in 2002 for 5 years. The Taupo District Council informed the Commission that it received tenders from [ ]. The contract was won by Manawatu Waste with a price of \$[ ] per annum.

**Potential Bidders**

291. In late 2006, the Council again tendered for kerbside collection of refuse and recyclables. [

]

292. [

<sup>107</sup> As revealed by the Commission's investigation.

]

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

### Taranaki Region

#### **Current Contractor**

294. The New Plymouth District Council received [ ] expressions of interest in mid 2005 for its kerbside collection and recycling contract, but only [ ] were assessed to be suitable – [ ]
295. The contract was for seven years and covered bag collection for New Plymouth and wheelie bin collection for Stratford and South Taranaki. [ ]
- [ ]. Because TPI has such a strong presence in user pays collection in Taranaki it has the ability to use the same resources for its local authority collection contract as well as its private collection which gives the company economies of scale and density [ ].

#### **Potential Bidders**

296. New Plymouth District Council had no concerns about the competitive environment in kerbside collection, transfer station and landfill operations should the Acquisition go ahead. New Plymouth District Council believes the barriers to entry into its kerbside collection contract are not high as the only major requirement is the purchase of collection vehicles.<sup>108</sup>
297. In 2006 the three local authorities in the Taranaki/New Plymouth region replaced 3 separate collection contracts with one joint contract. However, New Plymouth District Council informed the Commission that in the next tender round it could go back to having separate contracts for the three areas if it thought that would promote more competition.
298. [ ]

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<sup>108</sup> New Plymouth District Council file note, 23 January 2007.

299. The Commission considers that the Acquisition is unlikely to have the effect, or likely effect of substantially lessening competition in this market in New Plymouth given the countervailing power of the local authorities to shape contracts in order to promote competition. Also, given the size of the contract, it is likely that other potential bidders from outside the area, such as [ ], will continue to constrain the combined entity from exercising market power by being a potential bidder.

#### Manawatu District

##### **Current Contractor**

300. Manawatu District Council went out to tender in July 2006 for a contract to collect kerbside waste and recyclables. It received three tenders – [ ] The collection contract was awarded to City Enterprises for 3 years.

##### **Potential Bidders**

301. In the Commission's view, the incumbent City Enterprises, and the merged entity are likely to be potential tenderers when Manawatu District Council next tenders its collection contract.
302. The Commission considers that the Acquisition is unlikely to have the effect, or likely effect of substantially lessening competition in this market in Manawatu given the likely constraint from City Enterprises on the merged entity from exercising market power.

#### Kapiti Coast District

##### **Current Contractor**

303. Kapiti Coast District Council went out to tender in July 2006 for a contract to collect kerbside waste and recyclables. [ ] The refuse collection contract was awarded to Manawatu Waste in November 2006, [ ]

##### **Potential Bidders**

304. Kapiti Coast District Council opposes the Acquisition on the basis [ ]
305. [ ] informed the Commission that it has recently placed a bid for the Wellington City Council contract and that it could be a potential bidder for the Kapiti Coast District Council contract when it comes up for tender in 5 years.
306. [ ]



307. The Commission considers that the Acquisition is unlikely to have the effect, or likely effect of substantially lessening competition in this market in Kapiti Coast given the relatively low barriers to entry and the ability of other contractors such as [ ] to enter the local authority collections market.

Horowhenua District

**Current Contractor**

308. Levin Container Refuse which is a local contractor operates the Horowhenua District Council's collection contract in bags for waste and recyclables. The contract is seven years old and may be re-tendered in 2008. The contract is worth around \$[ ] per annum.

**Potential Bidders**

309. [

] it will be going out for tender mid next year.

Horowhenua District Council said that the possible tenderers are [

]

310. The Commission considers that the Acquisition is unlikely to have the effect, or likely effect of substantially lessening competition in this market in Horowhenua given the relatively low barriers to entry and the ability of other contractors such as [ ] to enter the local authority collections market.

*Competition Analysis - South Island*

311. Table 9 lists the current holders of Local Authority collection contracts relating to the South Island geographic areas affected.

**Table 9: Current holders of the Local Authority collection contracts in the South Island geographic areas affected<sup>109</sup>**

Area	Contractor	Bag/MGB
Christchurch City Council Waste & Recycling	TPI (purchased from Onyx in 2006)	Bag/Crate
Selwyn District Council Waste & Recycling	TPI	MGB/Crate
Waimakariri District Council Waste & Recycling	TPI	Bag/Crate
Timaru District Council	EnviroWaste	MGBs
Dunedin City Council	EnviroWaste	Bags

### Christchurch City

#### **Current Contractor**

312. TPI is the current contractor in Christchurch after it acquired the Canterbury assets and business of Onyx Group Limited (Onyx), including the contract that Onyx had to collect domestic refuse and recyclable materials in Christchurch.

#### **Potential Bidders**

313. Christchurch City Council submitted that EnviroWaste is a major competitor and without its presence, TPI would be the largest operator in the solid waste collections market in the region. Christchurch City Council said if TPI acquires the assets and businesses of EnviroWaste in Canterbury it would leave only one major company in Christchurch currently capable of tendering for a contract with the Council for the collection of domestic refuse and recyclable materials.<sup>110</sup>

314. Christchurch City Council is currently in the process of tendering for a new refuse and recyclables collection contract. TPI submitted that the likely tenderers, in the counterfactual, in the next contract round in Christchurch are:

- [

]

<sup>109</sup> As revealed by the Commission's investigation.

<sup>110</sup> Christchurch City Council submission, 12 February 2007

315. If this proves to be the case, there would continue to be sufficient competitive tension in the contract round notwithstanding the exit of EnviroWaste.<sup>111</sup> The Christchurch City Council contract is one of the largest municipal contracts in the country. Due to its size it attracts a lot of interest not only from within New Zealand but also from Australia. In its investigations the Commission has identified a number of potential bidders for the next tender in Christchurch. Significantly, Christchurch City Council has since informed the Commission that they have received [ ] bids for the tender and that [ ] of these bids were for all three parts of the contract. [ ]

316. [ ]

] ]

317. [ ]

] ]

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

#### Selwyn District

##### **Current Contractor**

319. TPI currently operates the Selwyn District Council refuse, recycling and organics collection contract. The contract was awarded to TPI in 1998 and is for 10 years plus an additional 2 years if the Council is happy with the service the contractor is providing. Selwyn District Council also received bids for the 1998 contract from [ ]

] ]

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<sup>111</sup> TPI Clearance Application, page 40-41.

**Potential Bidders**

320. Selwyn District Council informed the Commission that its next tender is not likely to be until 2010. Selwyn District Council considered EnviroWaste to be the only other contractor, other than TPI, with a reasonable chance of being able to submit a realistic, competitive tender. Selwyn District Council said other potential tenderers are [ ] but that these bidders may struggle to satisfy SDC's track record attribute. Selwyn District Council said without the presence of EnviroWaste there is no foreseeable, effective competition to TPI and therefore in its opinion the Acquisition would not be in Selwyn District Council's interests.
321. In the Commission's view, EnviroWaste would be likely to be in a position to bid for the Selwyn contract when it comes up for tender in the next 2-3 years.
322. The Commission considers that the Acquisition is unlikely to have the effect, or likely effect of substantially lessening competition in this market in Selwyn given that there will be no real change in the number of potential bidders in the factual and the counterfactual. Other potential bidders from outside of the area, such as [ ] will continue to constrain the combined entity from exercising market power.

Waimakariri District**Current Contractor**

323. TPI currently operates the Waimakariri District Council's refuse and recycling collection contract after it acquired the Canterbury assets of Onyx. The contract was awarded in 2003 and is for 3 years plus an additional 2 years if the Council is happy with the service the contractor is providing.

**Potential Bidders**

324. The Waimakariri District Council lets kerbside collection contracts and transfer station operation contracts worth in excess of \$[ ] per annum. The contracts that Waimakariri District Council administer to deliver these services will all be due for re-tendering within the next 2-3 years. Waimakariri District Council submitted to the Commission that due to the recent acquisition of Onyx by TPI, there are now only two major nationally recognised waste companies active in the area, being TPI and EnviroWaste.
325. Waimakariri District Council says that while there are a number of smaller waste collection companies active in skip and bin collections, they would not be suitable for the larger contracts let by the Waimakariri District Council. Waimakariri District Council said these contracts rely on a significant amount of flexibility in terms of plant availability, a certain amount of middle management capability to provide the reporting and partnering functions required, and a reasonable degree of financial backing to ensure viability throughout a term contract. Waimakariri District Council said their experience has been that the majority of smaller contractors in their area would have difficulty in establishing these attributes, and

accordingly may struggle to satisfy the tendering requirements for this level of contract.<sup>112</sup>

326. The Waimakariri District Council submitted that it is critical that the number of companies with suitable capabilities to deliver the range of contracts it administers is not reduced any further. The practical effect of less competition would be a monopolistic environment, which will potentially lead to artificially elevated prices, a lower level of service and, reduction in choice and uncompetitive behavior.
327. As discussed previously, the Commission understands that both [ ].  
Therefore, in the Commission's view EnviroWaste is a potential bidder for the Waimakariri District Council contract in the next tender round.
328. The Commission considers that the Acquisition is unlikely to have the effect, or likely effect, of substantially lessening competition in this market in Waimakariri given that there will be no real change in the number of potential bidders in the factual and the counterfactual. Other potential bidders from outside of the area, such as [ ] will continue to constrain the combined entity from exercising market power.

#### Timaru District

##### **Current Contractor**

329. The Timaru District Council tendered a contract in February 2006 which was for refuse, compost and recyclables collection using a 3 bin system, the operation of the transfer station and landfill and also the building and running of a MRF. The contract was for 15 years and was based on the life of the bins, collection trucks and the facilities on the MRF site that the council owns.
330. [ ] bids were received for the Timaru District Council contract – [ ]. There was also interest shown from [ ]

##### **Potential Bidders**

331. [ ] EnviroWaste was the eventual winner. Timaru District Council informed the Commission that if this Acquisition had occurred [ ] Timaru District Council said this would have placed the Council in a most unsatisfactory position.<sup>113</sup>
332. The Commission considers it likely that EnviroWaste will still be a potential bidder in the next tender round even though they may not have any assets in the area.
333. The Commission considers that the Acquisition is unlikely to have the effect, or likely effect of substantially lessening competition in this market in Timaru given

<sup>112</sup> Waimakariri District Council submission, 9 February 2007.

<sup>113</sup> Timaru District Council submission, 23 February 2007.

that the size and value of the contract is likely to attract a number of potential bidders in the next tender round including EnviroWaste.

### Dunedin City

#### **Current Contractors**

334. The Dunedin City Council has three contracts for the collection and disposal of waste. These contracts cover the operation of its transfer stations and landfill, the collection of CBD waste and street waste, and the collection of domestic refuse and recyclables. These contracts are carried out respectively by Delta (a LATE), McCullum Sweeping, and EnviroWaste.
335. Dunedin City Council informed the Commission that it received [ ] bids for its refuse and recycling contract in 2003 – [ ] In assessing tenders, Dunedin City Council applies a [ ]% weighting on price and a [ ]% weighting on non price attributes.

#### **Potential Bidders**

336. Dunedin City Council was not concerned with the Acquisition, in spite of Onyx no longer being a potential tenderer. Dunedin City Council said [ ] may be a potential bidder next time and also [ ], who showed some interest in 2003.
337. As discussed previously, the Commission considers EnviroWaste to also be a potential bidder for the Dunedin City Council contract in the next tender round. [

]

338. The Commission considers that the Acquisition is unlikely to have the effect, or likely effect of substantially lessening competition in this market in Dunedin given that the combined entity will likely be constrained by other potential bidders such as [ ] from exercising market power.

#### *Conclusion on Markets for the Provision of Local Authority Collection Contracts*

339. As previously noted, the Commission has considered relevant, only those local authority kerbside collection markets in which the local authority has not entirely exited solid waste collection, and in which one of TPI, EnviroWaste or Manawatu Waste:
- is an incumbent kerbside collection contractor;
  - has tendered unsuccessfully; or
  - has expressed interest in tendering or is considered a credible potential tenderer.
340. As a result it has not analysed the competition issues in local authority kerbside collection markets in Wanganui and Rangitikei Districts (no local authority kerbside collection contract); Palmerston North City (local authority kerbside collection carried out by LATE), and Nelson City and Marlborough District (TPI and EnviroWaste neither incumbent nor potential tenderer).

341. The Commission concludes that although the Acquisition would reduce the number of likely potential bidders in the factual compared to the counterfactual in the North Island regions, TPI would continue to face competition from local contractors and [ ]
342. In addition, barriers to entry into local authority collection contracts are not high, although, some are higher than others. The length of term of contracts is generally such that the capital costs associated with them are recoverable over the term of the contract.
343. The Commission also considers that while the countervailing power of the local authorities is not sufficient on its own to prevent a substantial lessening of competition, it would provide some constraint on the combined entity post-merger.
344. The Commission is therefore satisfied that the Acquisition will not have, or would not be likely to have, the effect of substantially lessening competition in any of the relevant local authority collection markets.

### **Wheelie Bin/Refuse Bag Collection Markets**

#### *Introduction*

345. Characteristics of these markets have been set out earlier in this Decision. For the present purposes, the Commission notes briefly that the demand side of this market comprises private user-pays consumers of wheelie bin and refuse bag waste disposal services. Such consumers may be residential consumers disposing of domestic waste. Alternatively, they may be businesses. Examples could be tenants of high rise office buildings for paper refuse, restaurants for food waste and a myriad of small retail stores for general refuse. Their waste characteristic is small quantities of non bulky waste which requires an enclosed bin to be collected regularly.
346. There are various systems for residential refuse collection. Some local authorities provide collection services funded from rates. Refuse may be collected in plastic bags or wheelie bins which are issued free to residents. User-pays consumers of wheelie bins are unusual in regions where the local authority provides a wheelie bin service from rates (because the consumer will in effect be paying twice, once through rates and once to the collection company). Examples of this are Timaru District Council and some Auckland local authorities (although Auckland waste markets are not relevant to this Application). There are likely to be many user-pays wheelie bin consumers in regions where the local authority only provides a refuse bag collection from rates. That is because many consumers regard refuse bags as unsatisfactory in respect of their capacity and perhaps other matters such as security from scavenging animals. These consumers in effect are prepared to pay twice to gain convenience.
347. Other local authorities provide no general refuse collection service. In these territories, residents must contract privately for their domestic refuse removal. This may be effected by wheelie bins or plastic refuse bags or both, depending on the company supplying the service. Wheelie bin contracts for residential consumers may be three months, six months or one year in length with the consumer paying in

advance for the service. Five dollars per wheelie bin pick up is considered to be a standard industry price. Refuse bags may be purchased from stores at a price of up to \$2 per bag. Examples of this council system are Wanganui District Council, Kapiti Coast District Council, potentially [ ] District Council and Rodney (again not relevant to this Application).

348. Finally, there may be a mix of these systems with the council providing a user-pays (that is, not rates funded) refuse bag service in competition with a private supplier of refuse bags and wheelie bins. Examples of this system are Taupo, New Plymouth, Palmerston North, Nelson and Tasman District Councils and Dunedin City Council.

#### *Market Shares*

349. There are seven local or regional geographic markets for the collection of solid waste in user-pays wheelie bins or refuse bags where the Acquisition will result in the aggregation of market share. They are Taupo, Wanganui, Palmerston North, Kapiti Horowhenua, Nelson, Christchurch and Dunedin. However, in Taupo the degree of aggregation is minor with TPI collecting only [ ] tonnes per month in wheelie bins from a total of about [ ] tonnes per month from the region. The Commission considers that:

- there will be no practicable loss of constraint in the factual from any existing competition between TPI and Manawatu Waste in the wheelie bin/refuse bag collection market in Taupo; and
- the Commission need not consider the user pays wheelie bin/refuse bag market in Taupo further.

350. The market shares in the remaining six relevant markets are shown in Table 10 below.<sup>114</sup> Other than in the Nelson market, the combined market shares are high and are all well outside the Commission's safe harbours. This accords with the view of the majority of industry participants, including local authorities interviewed by the Commission, that should the Acquisition proceed there would be very large aggregation of market shares in many product and geographic markets.

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<sup>114</sup> For details of the "other" main competitors in all relevant markets see attachments 14 and 15.



**Table 10: Market Shares in User-pays Wheelie Bin/Refuse Bag Markets<sup>115</sup>**

<b>Geographic Market</b>	<b>Competitors</b>	<b>Market Share %</b>
Taupo	TPI	[ ]
	Manawatu Waste	[ ]
	<b><i>Combined Entity</i></b>	<b><i>[ ]</i></b>
	Others	[ ]
Wanganui	TPI	[ ]
	Manawatu Waste	[ ]
	<b><i>Combined Entity</i></b>	<b><i>[ ]</i></b>
	Others	[ ]
Palmerston North	TPI	[ ]
	Manawatu Waste	[ ]
	<b><i>Combined Entity</i></b>	<b><i>[ ]</i></b>
	Others	[ ]
Kapiti/Horowhenua	TPI	[ ]
	Manawatu Waste	[ ]
	<b><i>Combined Entity</i></b>	<b><i>[ ]</i></b>
	Others	[ ]
Nelson	TPI	[ ]
	EnviroWaste	[ ]
	<b><i>Combined Entity</i></b>	<b><i>[ ]</i></b>
	Others	[ ]
Christchurch	TPI	[ ]
	EnviroWaste	[ ]
	<b><i>Combined Entity</i></b>	<b><i>[ ]</i></b>
	Others	[ ]
Dunedin	TPI	[ ]
	EnviroWaste	[ ]
	<b><i>Combined Entity</i></b>	<b><i>[ ]</i></b>
	Others	[ ]

*Constraint by Existing Competition*

351. TPI submitted that:

- market share alone is not an indicator of market power - an examination of entry conditions and the constraint provided by entry is always necessary before that conclusion can be drawn in respect of an Acquisition;
- there is no restraint of trade that prevents EnviroWaste, which is very experienced in these markets, from re-entering the South Island collection markets in the factual. In those markets it has experience because it operated there prior to the Acquisition; and

<sup>115</sup> Source: Information obtained by the Commission from TPI, Manawatu Waste, EnviroWaste, other small industry participant and local authorities, all collated by the Commission.

- there are competitors in this market, other than TPI, Manawatu Waste and EnviroWaste in varying numbers in each of the relevant regions. These competitors are listed in the Application. In all regions there are competitors who were present in the market in 1999 and remain so. These existing competitors show the competitive nature of wheelie bin (and other) collection markets.

352. Manawatu Waste submitted that:

- it did not accept that TPI's list of competitors was entirely valid or accurate. For example, Plastic Recyclers, Budget Plastics and Otaki Plastic Recyclers never compete with Manawatu Waste for waste collection customers. Plastic recycling is a miniscule part of the solid waste stream. A number of companies listed as separate competing companies are in fact one company and others are no longer participants in collection markets having been sold;
- unless scale can be obtained wheelie bin competitors are not a constraining influence on large companies such as TPI or Manawatu Waste;
- over time, the number of market participants in this market has decreased and the market has become more concentrated especially because of acquisitions by TPI or Manawatu Waste; and
- large scale entry into user-pays wheelie bin/refuse bag markets has been possible only after a local authority decision to abandon rate-based funding of waste collection. When that happened, private companies were able to compete for residential and business consumers. Often these companies were able to enter and gain what was formerly the council's market share with ease. However, after about five years, growth in demand ceased and customer numbers began to fall.

353. Mastagard is a Christchurch-based waste collection company. It states that it is the [ ] largest in the city after TPI and EnviroWaste. It collects from about [ ] wheelie bins per week. [

]

354. Other parties submitted that the existing competitors, taken from the yellow pages and listed in the Application, did not properly represent the competitive situation. For example, some of the companies listed were in fact TPI subsidiaries - acquisitions operating under their former names. The majority of genuine competitors listed were mostly small wheelie bin (or gantry) operations. This is illustrated in attachments 14 and 15.

*Constraint from Potential Competition*

355. TPI submitted that:

- the large number of competitors in this market in the various regions outlined in the Application is indicative that barriers to entry cannot be high. Moreover, there have been a number of new entrants since 1999. For example, Auckland (50 new operators) and Wellington (20 new operators) since 1999 (Of course neither of those markets is affected by the Acquisition);
- while many of these competitors are small to medium sized operations, that does not mean that they would not provide a constraint on TPI in the factual. A number have been sold but that does not mean they are non-viable. Even if such businesses come and go, they nevertheless will provide a constraint whilst they are in existence;
- a model of a green fields entrant, which it provided to the Commission, indicated that profitable operations in the collection of wheelie bins was obtainable after a short time. Capital costs to enter are quite low with second hand equipment available. These costs are not a barrier to entry. The Commerce Commission has found higher entry costs in other industries were not barriers to entry;
- Manawatu Waste in southern North Island markets, Daily Waste in Wellington markets and Can Plan in Nelson region markets are examples of successful entry into a wheelie bin business;
- an example of green fields entry into the ready mix concrete market in Queenstown suggested that green fields entry into waste collection would be less difficult;
- customer contracts are not barriers to entry because there is always some of the market available as such contracts expire. The Commission in Decision 355 concluded that customer contracts were not prohibitive of entry;
- in some regions competitors in adjacent regions are near entrants. For example, Bay of Plenty collection companies are near entrants into the Taupo market;
- for most council-owned landfills, volume discounts are not available. For example, Nelson, Blenheim, Canterbury, Timaru and Dunedin;
- while economies of density mean that collection of wheelie bins is most efficiently provided by one firm, the market does not operate that way – there is always more than one provider. Moreover, if disposal at RTSs is available close to waste sources, do-it-yourself disposal is a practical proposition for customers and that will constrain any price rises by the merged entity; and
- the advent of Japanese second hand imported rear-loading trucks from 1990 onwards, lowered prices for the purchase of wheelie bins, and more transfer stations have lowered the entry barriers into this market.

356. Manawatu Waste submitted that:

- the Commission has previously underestimated barriers to entry into collection markets. An entrant faces a steep cost curve;
- an alternative model existed for a small wheelie bin entrant (see below for a discussion of the model);
- if Manawatu Waste and TPI become, by association, one head in the market, there would be significant gains in route density and cost and TPI would be in an unassailable position in the factual;
- wheelie bin customers are typically contracted for up to 12 months and pay in advance. These customers may be reluctant to change supplier during the term of their contract;
- there has been no new wheelie bin entry into markets in which Manawatu Waste operates, rather there has been consolidation by acquisition by larger market participants including Manawatu Waste and TPI;
- TPI's success stories of entry into wheelie bin collection markets have been those companies entering new markets, where user pays (rather than rates funded) kerbside collection has been introduced by local authorities and where consumer choice between council refuse bags and private wheelie bins or refuse bags arose for the first time. However, the markets in which this happened became mature after five years. Such markets are Wanganui, Palmerston North, Taupo and Kapiti Coast. An entrant in the factual would face a mature market competing against an operator with economies of density and scale.
- If the incumbent has the council contract as in New Plymouth, this allows it to offset the cost of private wheelie bins providing a further barrier to entry.

*The Entry Models Provided by TPI and Manawatu Waste*

357. TPI has provided two models of wheelie bin costs which it uses to argue the ease of entry into user-pays wheelie bin markets:

- Model 1 (see Attachment 1) purports to show that an entrant achieving [ ] commercial customers, by the end of its first year of operation, whose bins are collected twice per week can be reasonably profitable at the end of its second year of operation;
- Model 2 (see Attachment 3) purports to show that an entrant achieving [ ] residential customers, by the end of its first year of operation, whose bins are collected once per week can just be profitable at the end of its third year of operation; and
- Manawatu Waste has provided Models 3 and 4 (see Attachment 5), simplified first year of operation only models, which it uses to argue the difficulty of entry at a scale of [ ] commercial (twice per week) or [ ] residential (once per week), customers. Manawatu Waste's models both purport to show substantial losses in the first year of operation of an entrant.

358. The two models are structured slightly differently. TPI's models include sales costs to obtain the relevant number of customers and are based on a "work from home" situation. Manawatu Waste's model does not include sales costs but does allow for a rental truck to cover breakdowns, rental of premises to park trucks and store bins, advertising and administration.
359. The Commission was provided with TPI's live worksheets so was able to adjust some of TPI's parameters, in order to carry out a sensitivity analysis, and re-run the models. The following adjustments were made to TPI's assumptions:
- the capital cost to enter was increased from [                      ], wheelie bins aside. This was based on information provided by TPI that a [                      ].  
Alternatively this extra capital cost could include an allowance for the cost of a vehicle to be used whilst making sales calls (rather than walking the streets) and for a back-up truck to be used in the event of breakdown or maintenance;
  - the revenue gained per annum from commercial customers was reduced from TPI's figure of [                      ] per bin empty. The revenue for residential customers was reduced from TPI's figure of [                      ]

]. A person entering wheelie bin markets against the combined entity would need a bargaining point to induce customers to change from their existing known supplier to the unknown new entrant. Therefore, these slightly lower prices to customers were included in the entrant model.

360. Attachment 1 shows TPI's model for [                      ] commercial customers whose wheelie bins are emptied twice per week. The entrant is shown to be profitable after two years operation. Attachment 2 shows that model with the sensitivity adjustments made. In that case the entrant is not profitable after five years. Attachment 3 shows TPI's model for [                      ] residential wheelie bin customers whose wheelie bins are emptied once per week. Small profitability is achieved after three years operation. Attachment 4 again shows the adjusted model in which profitability is not achieved after five years. Attachment 5, Manawatu Waste's model of the same commercial and residential scenarios, shows an even grimmer situation facing the small entrant.

#### *The Commission's Conclusions*

361. As discussed above, and in summary, TPI has submitted that entry barriers into user-pays wheelie bin/refuse collection markets are low. The capital cost of a suitable truck plus wheelie bins is not large. TPI also submitted that small wheelie bin collection companies, already in the markets in the various regions (although more in some than others), provide competition to constrain TPI in the factual.
362. However, if those submissions are correct, the question arises as to why TPI, Manawatu Waste and EnviroWaste currently have such high market shares in all of the geographic wheelie bin/refuse bag collection markets under study (including Taupo and New Plymouth where Manawatu Waste and TPI respectively have very

high market shares) but one. The only exception is in the Nelson region. However, that market is one where Can Plan has a very high market share.

363. That this has not happened suggests to the Commission that (apart from Nelson and Horowhenua/Kapiti regions) the relevant user pays wheelie bin/refuse bag collection markets are examples of markets in which, while it is relatively easy to purchase the necessary equipment and begin trading, it is difficult for entrants or existing competitors to expand to such level of scale or density that they are able to effectively compete with the major market participants. That accords with the views of a number of small participants interviewed who indicated that it is not the cost of the truck, bins and other items that must be purchased that is the barrier to entry. Rather, it is the ability to generate scale and density by obtaining a sufficiently large customer base.
364. As previously noted, since 2000 Manawatu Waste and TPI have acquired many small collection companies. The Commission has also been advised that Lakeland Porta Bins in Taupo is currently for sale [ ].
365. While TPI has argued that it is not in the business of purchasing non-viable companies (and it assumes the same of Manawatu Waste), it is equally arguable that, under normal circumstances, owners of viable profitable businesses are reluctant to sell such businesses. If Manawatu Waste or TPI purchases a collection company that is struggling to gain scale and density of its customer base, the two companies are able to add the acquired customers to the scale and density of their existing collection customers, meaning the acquired customers are more valuable to the purchaser than to the seller.
366. The Commission also notes that the models provided by TPI and Manawatu Waste of entry into wheelie bin/refuse bag collection markets do not demonstrate that such small scale entry is likely to be profitable. The sales of small collection businesses detailed above is further evidence of that conclusion. In this scenario, individuals with some access to capital purchase the necessary equipment, enter the collection market, obtain some wheelie bin customers. However, because these customers are likely to be widely scattered amongst the customer bases of existing providers the density and scale of the collection business is insufficient to make proper returns on the assets invested. In such a case, once the owner realises that difficulty, he or she is likely to be happy to sell the business to recover some of the owner's investment. Moreover, as the Commission has demonstrated, TPI's models are very sensitive to the capital cost of entry and the revenue obtainable by an entrant selling wheelie bins to the incumbents' customers. Increasing the capital cost of entry and reducing the revenue, both by relatively small amounts, changes the conclusions TPI is attempting to demonstrate through its model.
367. The Commission considers on the information provided to it that, in response to an increase in price or decrease in service, the following factors would prevent entry into and/or expansion of existing competitors in wheelie bin/refuse bag collection markets with sufficient scale and density to constrain TPI in the factual:

- TPI will have economies of scale and route density. This means that any small entrant must compete against it with higher costs resulting from the entrant's lack of economies of scale and density;
- companies serviced as national customers by either TPI or EnviroWaste are not available to the entrant as potential customers. Given these national customers include chains such as [
  - [ ] amongst others, this is a barrier to the entrant gaining high revenue commercial customers;
- wheelie bin customers are contracted for between three months and one year and sometimes for three years if they are business customers. Domestic wheelie bin customers pay in advance for up to one year. Many of these customers will not be available to the small entrant;
- in certain cases TPI, Manawatu Waste and Enviro Waste have the ability to obtain volume discounts at landfills or RTSs or in fact own (or operate) landfills in their own right. [
  - [ ]
- local authority waste collection contracts, generally available to those larger players with experience in the market, provide advantages not available to a small entrant such as the ability of a collection business to share overheads and direct operating costs between council collection and commercial wheelie bin services. In some areas, a collection company has the ability to collect local authority refuse as well as its own privately sold bins. In this respect [
  - [ ] provided the Commission with its reasons for not tendering for the New Plymouth District:
    - [ ] showed some interest in the New Plymouth council collection tender but didn't end up placing a bid...said this was because he didn't think they could compete against TPI as they had a large presence in user pays in Taranaki and the council was going to let them run their council and private business at the same time which gave them economies of density.

[ ] also provided the Commission with its reasons for not entering New Plymouth collection markets.<sup>116</sup> It thus appears that when a company such as TPI has a large market share in private wheelie bin collection contracts and also provides the local authority collection, the two factors operating together will cause barriers to entry into both private and public waste collection markets. That is because under these conditions the incumbent is provided with particularly large economies of density;

- a small entrant has less ability to fund the debt or equity capital needed for expansion, possibly whilst in a negative profit situation. Expansion is unattractive to a business facing competition from a large vertically integrated player that has the ability in some cases to decide on the collection business's disposal rates at landfill or RTS; and
- in the past, successful entry into wheelie bin collection has occurred only when local authorities have abandoned rates-funded kerbside collection and allowed their rate payers a choice of municipal or commercial collection. That (along with acquisition) was the method by which Manawatu Waste was able to enter wheelie bin collection markets since 1999. These opportunities no longer exist for entrants;

368. As stated, it appears to the Commission that large scale entry into wheelie bin/refuse bag markets has been possible in the past only after a local authority in a geographic region decided to either abnegate entirely from any waste collection responsibility (for example, Wanganui District Council) or transfer funding of waste collection from rates to user pays refuse bags. An enterprising entrant will at that stage begin a marketing campaign to sell its own branded refuse bags and wheelie bins. Manawatu Waste states that was how it entered wheelie bin collection markets. [

] It is

no longer easy to build up a customer base rapidly to obtain early profitability. Examples are Lakeland, which when operating in Taupo and its environs, took [

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<sup>116</sup>“[



When compared to the total number of customers Manawatu Waste has in those regions as shown in Attachment 13, it is apparent that the days of rapid expansion of the Company's customer numbers are over. [ ]

369. Horowhenua/Kapiti Coast, Nelson and Christchurch are regions where there is a reasonably strong third presence in these markets (after TPI and EnviroWaste). In Nelson, Can Plan Ltd has been in existence for 11 years and was able to obtain, in the absence of strong competition, a large share of the Nelson region wheelie bin/refuse bag market when the local authorities in the area abandoned rates-based kerbside collection about 6 years ago. Nelmac, the Nelson City Council LATE, is another strong existing competitor in private wheelie bin markets in Nelson. Given the even spread of market shares, barriers to entry and expansion arising from economies of density and scale are not likely to be high in this area.
370. In Horowhenua/Kapiti Coast region a competitor in the factual will be Levin Container Rubbish. Along with the collection of [ ] wheelie bins in the region, it also has operated the Horowhenua District Council's refuse collection contract for 20 years. In addition to this existing competition, the Commission considers that there is the potential for entry from collectors who operate in the Porirua City region.
371. The Commission has determined that the [ ] participant in the Christchurch wheelie bin market is Mastagard. Mastagard collects waste from [ ] wheelie bins per week. Another smaller competitor, Waste-Away Bins, collects waste from [ ] wheelie bins. [ ]

[ ]. There are also other one or two person wheelie bin collection businesses in Christchurch. The Commission considers that the presence of Mastagard and other smaller competitors would, therefore, provide some degree of constraint on TPI in the factual.

372. For these reasons the Commission concludes that:
- TPI will be constrained by existing competitors from exercising market power in the factual in wheelie bin/refuse bag collection markets in Horowhenua/Kapiti Coast, Nelson and Christchurch; and
  - TPI will not be constrained by existing competitors, or from the likelihood of entry, from exerting market power in the wheelie bin/refuse bag collection services market in the other relevant geographic areas where horizontal aggregation of market shares occurs.
373. Therefore, the Commission is not satisfied on the evidence that has been provided to it that the Acquisition will not have, or would not be likely to have, the effect of substantially lessening competition in wheelie bin collection markets in Wanganui, Palmerston North, and Dunedin. The Commission is satisfied, however, that the unilateral market power effects of the Acquisition will not have, or would not be

likely to have, the effect of substantially lessening competition in wheelie bin collection markets in Horowhenua/Kapiti Coast, Nelson and Christchurch.

## **FEL Collection Markets**

### *Introduction*

374. Characteristics of these markets have been set out earlier in this Decision. For present purposes, the Commission notes briefly that there are only three substantial FEL operators in the relevant geographic markets – TPI, EnviroWaste and Manawatu Waste. Of an approximate total of [ ] FEL customers in the relevant markets, TPI services about [ ], EnviroWaste about [ ] and Manawatu Waste about [ ] (those of EnviroWaste and Manawatu Waste are in different regions [ ]).
375. FEL operations are more capital intensive than are gantry or REL wheelie bin and refuse bag businesses. JJ Richards stated that a suitable FEL truck and 200 bins would cost about \$[ ]. However, it is a full time job selling collection of FEL bins to customers so along with a truck driver, a salesperson and car are also required. It is also necessary to have access to a spare truck to cover breakdowns and maintenance.
376. FEL bins are the most common waste disposal application for business consumers. FEL bins are medium size bins that may be mobile if fitted with wheels. They have lids and are lockable. Their volumes vary between 1 and 4.5 m<sup>3</sup> with both TPI and Manawatu Waste indicating an average FEL collection per pick up (or “lift” in industry parlance) of about [ ] m<sup>3</sup>. Collection of such bins is regular, for example, once per fortnight or once or twice per week. The bins are suitable for customers regularly generating medium weight, semi-bulky waste. They are not suitable for heavy loads of earth or concrete rubble, for example. Because FEL bins are lidded and lockable they are suitable for organic waste and cannot be used for disposal by parties other than the customer. They also do not fill with rain water.
377. JJ Richards is another large FEL waste collection company. It currently operates only in Auckland, Hamilton and Tauranga. It submitted that:
- FEL (collection) has huge efficiencies due to compaction and the ability to service many customers between disposal trips. For example, a 32m<sup>3</sup>, 8 by 4 truck (that is a vehicle with 8 wheels, 4 of which are driving wheels) should be able with a three to one compaction ratio to pick up [ ] m<sup>3</sup> of waste between trips to disposal. That would mean that this truck should be able to collect from up to [ ] customers between trips to disposal. This can be compared with a 9m<sup>3</sup> gantry collection operation which has no compaction equipment and requires [ ] trips to either landfill or refuse transfer station to dispose of the same amount of waste. If a hypothetical customer had 27m<sup>3</sup> of waste per week, that would require either two 4.5 m<sup>3</sup> FEL bins collected three times per week or a 9m<sup>3</sup> gantry bin collected three times per week. The cost of the FEL bin disposal (at JJ Richard's price of \$[ ] per lift would be \$[ ] per week. The cost of gantry bin disposal at \$[ ] per collection (again JJ Richard's contracted price) would be \$[ ] per week. The reason for this price difference is the ability of the FEL system to pick up, for example, another 35 customers on the same route before it was necessary to travel to a disposal point.

378. TPI, EnviroWaste and Manawatu Waste all arrange contracts with their FEL customers. FEL customers are now usually contracted for three years with automatic rollover provisions unless 60 days notice of an intention to terminate the contract is given. Previous contracts were for one year's duration. EnviroWaste and Manawatu Waste's FEL customer contracts are almost identical to that of TPI.
379. The three companies' contracts contain provisions similar to the following extracts from a TPI customer contract:

15...the Agreement shall apply for an initial term of thirty-six months unless the parties have specified another initial term on the front of this Agreement. At the end of such initial term, this Agreement shall be subject to automatic renewal for either (i) successive periods of the duration stated in the initial term (if less than thirty-six months); or (ii) thirty-six months; unless either party gives the other party written notice of termination not less than 60 days before the termination of such initial term or any renewal term which termination becomes effective at the end of such initial term or renewal term (as the case may be)

...

17. If the customer is in breach of any one or more of its obligations under the Agreement...the Contractor may elect...either to (i) to charge the Customer the following amount as pre-estimated and liquidated damages:

\* An amount equal to the amount billed by the Contractor for the preceding six month period....

21.The customer acknowledges that if during the term of or on or after termination or purported termination of the Agreement, it proposed to have the services supplied under the Agreement provided by one of the Contractor's competitors, it shall not enter into any such arrangement ...unless it has in good faith given the Contractor all reasonable opportunity to match the pricing and other service conditions which that competitor has offered to the Customer (of which the Customer will provide details, including copies of any written offer, the Contractor)...

380. EnviroWaste has advised the Commission that [ ]% of its Christchurch FEL volume is contracted for three years. Manawatu Waste stated that in Palmerston North, and Taupo, [ ]% of its FEL customers have three year contracts. In Christchurch, TPI stated that [ ]% of its customers have three year contracts and [ ]% have one year contracts. In Auckland, [ ]% of JJ Richard's FEL customers have three year contracts with the company.

#### *Market Shares*

381. The Commission has identified the following firms which operate FEL waste collection businesses in markets relevant to the Acquisition:
- Manawatu Waste in Taupo, Palmerston North and Horowhenua/Kapiti;
  - TPI in Taupo, New Plymouth, Wanganui, Palmerston North, Horowhenua/Kapiti, Nelson, Christchurch, Timaru and Dunedin;
  - Envirowaste in Nelson, Blenheim, Christchurch, Timaru and Dunedin;

- Just Rubbish and Silver Drum Hire in New Plymouth;<sup>117</sup>
  - Can Plan in Nelson;
  - Mastagard in Christchurch; and
  - Garbo Rubbish Removals in Timaru
382. There are seven local/regional geographic markets for FEL collection services in which the Acquisition will result in the aggregation of market shares. They are Taupo, Palmerston North, Kapiti Coast/Horowhenua, Nelson, Christchurch, Timaru and Dunedin. The estimated market shares for FEL commercial collection services in the relevant markets are shown in Table 11 below. The combined entity's market shares are outside the Commission's safe harbours in all geographic markets, and apart from Nelson and Timaru geographic areas where there is marginal FEL competition, the aggregation is such that it will create a monopoly market, that is, a two to one merger.

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<sup>117</sup> Just Rubbish of New Plymouth advised the Commission that it was an FEL collector. It had about [ ] FEL bins which it collected waste from. It operates its FEL truck [ ]. Also from New Plymouth, Silver Drum Hire advised it had modified a REL type truck to accept small FEL bins and has [ ] FEL customers. However, as there is no aggregation of market shares arising from the Acquisition in the New Plymouth FEL collection market, these two firms are relevant only to the Commission's later consideration of the vertical effects in that market.

**Table 11: Estimated Market Shares in the FEL Collection Market<sup>118</sup>**

<b>Geographic Market</b>	<b>Competitors</b>	<b>Market Share %</b>
Taupo	TPI	[ ]
	Manawatu Waste	[ ]
	<b><i>Combined Entity</i></b>	<b><i>[ ]</i></b>
	Others	[ ]
Palmerston North	TPI	[ ]
	Manawatu Waste	[ ]
	<b><i>Combined Entity</i></b>	<b><i>[ ]</i></b>
	Others	[ ]
Kapiti/Horowhenua	TPI	[ ]
	Manawatu Waste	[ ]
	<b><i>Combined Entity</i></b>	<b><i>[ ]</i></b>
	Others	[ ]
Nelson	TPI	[ ]
	EnviroWaste	[ ]
	<b><i>Combined Entity</i></b>	<b><i>[ ]</i></b>
	Others	[ ]
Christchurch	TPI	[ ]
	EnviroWaste	[ ]
	<b><i>Combined Entity</i></b>	<b><i>[ ]</i></b>
	Others	[ ]
Timaru	TPI	[ ]
	EnviroWaste	[ ]
	<b><i>Combined Entity</i></b>	<b><i>[ ]</i></b>
	Others	[ ]
Dunedin	TPI	[ ]
	EnviroWaste	[ ]
	<b><i>Combined Entity</i></b>	<b><i>[ ]</i></b>
	Others	[ ]

*Constraint from Existing Competition*

383. TPI submitted that:

- FEL services do not constitute a separate product market and that competition should be analysed in a broader market for collection of solid waste. This broader market encompasses collection of refuse bags, wheelie bins, FEL bins, gantry bins, “huka” bins. According to TPI, this market also includes the collection or refuse from national companies with multiple sites;
- on this basis, the price of FEL collection by TPI (and Manawatu Waste), post-acquisition will be constrained by competition from other smaller wheelie bin and gantry operators;

<sup>118</sup> Source: Information obtained by the Commission from TPI, Manawatu Waste, EnviroWaste, other small industry participant and local authorities, all collated by the Commission.

- FEL collection prices will also be constrained by companies disposing of their own waste at landfills and RTSs. [ ] do just that.

384. A number of market participants took issue with this. For example, the Timaru District Council submitted that:

Effectively there are now only two major recognised waste companies active in our area, being Waste Management (TPI) and EnviroWaste (EnviroWaste)...the proposed acquisition would reduce the competition significantly, to the detriment of the commercial and industrial businesses in the Timaru District.

After the proposed acquisition the market dominance of this major waste company with an estimated market share of over 90% would be a major concern for our community...<sup>119</sup>

385. [ ] is the largest second tier Christchurch gantry waste collection business. It and [ ] stated that “at present EnviroWaste and TPI fight like cats and dogs in Christchurch”<sup>120</sup> and submitted that:

If TPI succeed in this takeover, they will have monopoly in the South Island waste industry. Waste Management (TPI) and EnviroWaste are the only two companies that operate front load trucks. This would give them a complete monopoly in this area.<sup>121</sup>

and;

We are not and do not intend to become involved in front end loading (given a 10% increase in FEL prices)<sup>122</sup>

386. [ ], a large cleaning business in Christchurch submitted that:

- its costs for FEL bin waste disposal (50 bins at 3m<sup>3</sup> volume) were \$15,000 per annum;
- it does not wish to use a gantry or wheelie bin system as an alternative to his FEL bins;
- EnviroWaste (his supplier) and TPI constrain each other in the Christchurch market at present; and
- it objected to the Acquisition as it affects Christchurch, because there will only be one FEL operator, and prices will rise.<sup>123</sup>

387. [ ], a small gantry waste collector, submitted that it would not look into buying a FEL vehicle because it was “too risky,” and that the Acquisition would lessen competition in collection.<sup>124</sup>

#### *Constraint from Potential Competition*

388. TPI submitted that:

<sup>119</sup> Timaru District Council’s letter to the Commission of 23 February 2007.

<sup>120</sup> Note of meeting with [ ] of 6 December 2006.

<sup>121</sup> [ ] letter to the Commission of 13 February 2007.

<sup>122</sup> [ ]’s e-mail to the Commission of 16 May 2007.

<sup>123</sup> Note of a telephone interview with [ ] of 7 March 2007.

<sup>124</sup> Note of a meeting with [ ] on 12 December 2006.

- market share alone is not an indicator of market power. An acquisition is unlikely to result in a substantial lessening of competition if the businesses in that market continue to be subject to real constraint from the threat of market entry (the Commission does not disagree with this);
- there are a large number of waste collection operators in most areas affected by the Acquisition, and barriers to entry in the collection level market are low. Any anti-competitive effect of the Acquisition will be quickly offset by new entry in the markets;
- while the capital costs associated with the provision of FEL services are higher than other types of service and a new entrant starting out on a small scale may not elect to provide FEL services at the outset, the capital costs are not prohibitive. New entrants into the waste collection business enter using gantry or REL trucks. There are plenty of examples of new entrants, or expansion of smaller competitors, over the last decade, despite consolidation of larger operators.<sup>125</sup>
- The entry of JJ Richards into the New Zealand waste collection market illustrates that entry on a very significant scale is possible;
- the “second player” slot that EnviroWaste and Manawatu Waste currently fills will be rapidly filled by an existing waste collector in the region, JJ Richards or Metro Waste, an off shore entrant or a local new entrant;
- the FEL market is not “sewn up” by three year contracts. Not all TPI’s FEL customers are on contract. Of those that are, some are on one year contracts. Also at each point in time there are a number of customers with contracts set to expire which are available for capture by a competitor. [ ];
- and
- economies of density should not be overstated as the model provided by TPI purports to illustrate (discussed below).

389. [

].

390. Manawatu Waste submitted that:

- material economies of density exist which affect entry and expansion (see its model discussed below);
- customer contracts are a barrier to entry/expansion; economies of density are significant for FEL with a breakeven point of [ ] kms/bin empty. So entry is difficult as losses must be accumulated while market share is built up. In

<sup>125</sup> Application for Clearance by Transpacific Industries (NZ) Limited to acquire certain aspects of the business of EnviroWaste Services Limited: *Supplementary Paper on the Waste Collection Market and Services Offered to the Commercial Sector*, March 2007.

Palmerston North for example, this would require a [ ] market share before operation became profitable, let alone began to pay off accumulated losses. Manawatu Waste submitted that it is [ ]% cheaper to provide FEL services than gantry in the counterfactual. In the factual due to an increase in the economies of density that would rise to [ ]%.

- FEL prices were not constrained by providers of other collection products such as wheelie bin or gantry collection:

Our Palmerston North branch is unaware of any of our frontload customers that have cancelled their service with us in the last five years in favour of a gantry service offered by Cairns Bins Ltd. This is despite a very competitive gantry market...

...while some substitution (of front load bins by wheelie bins) may be possible for customers such as small commercial premises or smaller restaurants, the majority of customers utilising frontload bins have selected this type of bin due to the size and volume of refuse. An inspection of frontload bins for an average customer would quickly reveal that the type of refuse placed in frontload bins would not actually fit into wheelie bins.

- competitors in the Bay of Plenty are not near entrants into Taupo collection markets. TPI, JJ Richards and EnviroWaste are the main participants in the Bay of Plenty. Of those JJ Richards has just entered Bay of Plenty and [ ];
- Taupo was a good example of the difficulty of entry into FEL markets. Clean Earth acquired [ ] FEL bins over a [ ] year period. It then sold out to Manawatu Waste which has grown the customer base by [ ] further bins in [ ] years. [ ] customers switched from TPI to Manawatu Waste and the others moved from DIY to Manawatu Waste when Taupo District Council increased its prices to DIYers. There are about [ ] FEL customers in Taupo. [ ]

[ ]. This is an example of the high barriers to entry.

- Manawatu Waste was able to enter FEL markets in Palmerston North only because of different market dynamics to those that exist today: First at the time there were competing landfills at Bonny Glen and Awapuni (the latter is now closed); secondly it was then able to secure 50% of Midwest Disposals and the Bonny Glen landfill; and thirdly Cairns Bins sold its un-contracted FEL customers to TPI allowing Manawatu Waste to gazump some of those customers in the interim before TPI was able to arrange their term collection contracts. Nevertheless, Manawatu Waste took [ ] years to become profitable in its collection and RTS business.

391. EnviroWaste submitted that:

- Any operator such as JJ Richards that entered into South Island markets would lose money for a few years. Every commercial customer is on a three year contract and there are penalties for pulling out of the contract – six



months charges. These contracts would be a barrier to entry to a company such as JJ Richards;

- An entrant would need enough customers to warrant running a truck at \$[ ] per hour to pick up bins. Then if either EnviroWaste, Manawatu Waste or TPI own or have pricing rights to the RTS or landfill that the entrant must use, they have the ability to differentially price between themselves and the entrants for disposal pricing;
  - New entry into one of EnviroWaste's established FEL markets did not concern EnviroWaste because the entrant would lose money for probably five years and would be a minor threat to its business in that market;
  - FEL operations require the truck to lift about [ ] bins per hour to allow the truck to break even. This meant that [ ] bins per truck is the break even customer base;
  - Of all the yellow page collection operators listed in the Application for clearance, very few had a FEL vehicle or operation. The reason for this was both that they could not raise the [ ] dollars required to purchase a truck and bins and also because the contractual arrangements of incumbents prevent them from breaking even for a long time;
  - when JJ Richards entered the Auckland market 6 years ago many business customers were not on term contracts. Following JJ Richards entry into Auckland by taking customers from TPI and EnviroWaste, EnviroWaste had tightened up its contracts and someone like JJ Richards entering today would find the contractual scene very tight. In some cases the entrant would face the need to obtain access to transfer stations and landfills owned by its competitors at profitable prices;
  - if TPI effectively owns 75% of Midwest Disposals in the factual, it will dictate pricing at the Bonny Glen landfill, the Palmerston and Wanganui transfer stations. That will preclude anybody else from entering in that region; and
  - gantry collection did not constrain FEL collection. For example, EnviroWaste's price comparison was \$[ ] to pick up a 4.5m<sup>3</sup> FEL bin twice compared to \$[ ] to pick up a 9m<sup>3</sup> gantry skip once.
392. The Commission tested these competing views with a number of small and large waste collectors which are, or have been, operators of a FEL business.
393. JJ Richards of South Auckland submitted that:
- it carried out a FEL business;
  - it took [ ] years from entry to break even on operational profit in the Auckland market. [ ]
  - the possibility of anyone entering South Island FEL markets was very low. The South Island had only one third of waste volumes of New Zealand. In

Auckland there is half of the total commercial waste volumes of New Zealand within 50 kilometres of the centre of Auckland. It was possible in Auckland to get the necessary density of collection but much harder elsewhere;

- [ ]
- it had entered the market by undercutting its rivals and buying market share. It was able to enter because fewer customers were contracted for three years (with contracts that included the automatic rollover, price matching and liquidated damages provisions described above) at that time;
- it had recently entered the Hamilton and Tauranga markets in a green fields fashion and had obtained the collection of about [ ] bins in nine months. It has required the truck, the bins, a full time sales representative with a car (together at a cost of \$[ ] per annum), and a third party contract to deliver the bins to customers at \$[ ] per bin<sup>126</sup>. [ ]. For that to occur [ ] bins will be required. [ ];
- Any entry model which showed a large number of bins lifted one year after entry was rubbish. [ ]; and
- JJ Richards would never enter into the markets [ ].

394. Streetsmart said that [ ]

].

395. Onyx New Zealand submitted that FEL was not profitable for the first [ ] years. Barriers to entry are high, not because of the capital costs, but rather because of the difficulty of gaining customers who are all contracted for three years. Onyx was exiting New Zealand waste markets after 12 – 14 years. This was mainly because it did not own a landfill, in its view an essential requirement for a successful collection business.

396. Cairns Bins of Palmerston North said it had sold its FEL operation to TPI because it considered TPI too strong a competitor. As previously noted, [ ]

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<sup>126</sup> FEL trucks are not suitable for bin delivery.

].<sup>127</sup>

397. Importantly, as a medium sized waste company with previous experience in FEL collection, Cairns Bins stated that to make a credible move back into the FEL market would require an investment of \$[ ] (not including staff costs). Such an investment was not one to be made and then to “sit back and wait for customers.” [ ]. As an experienced operator of FEL collection services, Cairns Bins’s views are quite contrary to those expressed by TPI.

398. Clean Earth, a Hawkes Bay collection company, submitted that:

- gantry and wheelie bin collection does not constrain FEL:

...skip or hook (huka bin) is one bin, one exchange per journey to the landfill whereas a Front Loader can empty up to 100 bins per day with only 2 – 5 landfill trips. There are huge cost efficiencies involved in operating a front load system as opposed to a gantry system ie; they are not competitive.

Through out the entire period we have operated (21 years) in all aspects of the business we have never had a front load customer taken over by a wheelie bin operator (and there are approx another 10 businesses in HB that could do so).

A new entrant (into FEL) would be prohibited by cost, limited potential market (as discussed all Nationals (multisite customers) would be close to impossible (to obtain as customers) and any contractual obligation of a potential customer would have to be met) (ie contracts described above of up to three years duration)...it is not possible to operate on a small scale with a front loader – the equipment is simply too expensive to not have it working.<sup>128</sup>

- it has operated for eight years in Hawkes Bay in competition with TPI. After this time it has achieved a customer base of only [ ] FEL bins. In Clean Earth’s first year of operation it achieved only [ ] FEL customers. Its FEL operation became profitable after [ ] years.
- [ ]

].

399. Timaru’s Garbo Rubbish Removals (Garbo) advised the Commission that it had a FEL which holds [ ] tonnes of waste. The owner built the truck himself at a cost of \$[ ]. It can collect [ ] bins before travelling to a disposal site. Garbo is a small, self described “niche operator” [ ]

400. Can Plan of Nelson, advised the Commission that it currently had a [ ] bin FEL business. The bins are 1m<sup>3</sup> capacity. Can Plan has modified a rear loading truck with forks (unusually) attached to the rear to allow lifting of the FEL bins. This avoided the necessity of spending \$[ ] on a custom made FEL truck.

<sup>127</sup> The Commission considers that Cairns Bins’s submission is instructive and has included it in full in Attachment 22.

<sup>128</sup> Clean Earth’s marked up response to TPI’s March 2007 *Supplementary Paper on the Waste collection Market and Services Offered to the Commercial Sector*.

However, this truck had the disadvantage of slow loading compared to a custom made FEL vehicle. The existing truck is also used to pick up wheelie bins. [

]. However, currently Can Plan is a small operator with [ ]% of the Nelson FEL collection market.

*The Entry Models Provided by TPI and Manawatu Waste*

401. TPI has provided a number of models of FEL costs and profitability which it uses to argue the ease of entry into FEL markets. TPI has also provided variations in the models whereby the collection route becomes more dense and the entrant must travel respectively 3.7, 1.86, 1.54, 1.21 kilometres per lift (see Attachment 8). [

]. TPI also suggests that the models show that an improvement in route density by a factor of three merely provides a [ ]% reduction in the total costs. TPI argues that this comparison illustrates that collection costs do not decline in proportion to route density. TPI says this level of cost saving from economies of density does not represent an entry barrier.

402. One of the models provided by TPI illustrates an entrant achieving sales of [ ] FEL bins in Palmerston North after one year. Under Model 5 (see Attachment 6), after one year the entrant will obtain pre tax profit of about \$[ ] on total sales of about \$[ ] after paying itself wages of \$[ ]. Other models show increasing profitability with increasing density of collection. Model 5 purports to show that an entrant achieving [ ] FEL customers, by the end of its first year of operation, whose bins are collected once per week, can be very profitable in its first year of operation and remain so without increasing its number of customers. This model is based on a density of 0.6m<sup>3</sup> collected per kilometre travelled or alternatively one bin lift per 4.7 kilometres of truck travel (one modelled bin = 2.8m<sup>3</sup>).

403. Manawatu Waste has provided its own FEL models for Palmerston North. This model (see Attachment 9), is based on Manawatu Waste's current FEL operations which are recorded in the "July 06 – Dec 06 Annualised" column of the spreadsheet. Manawatu Waste's model is based on varying numbers of 3m<sup>3</sup> FEL bins picked up 24 times per year [ ] at varying collection densities. Manawatu Waste uses this model to argue economies of density in FEL collection exist and that they represent a significant barrier to an entrant. That is because the model purports to show that an entrant would incur losses for quite some time while attempting to build up market share. Manawatu Waste's model is charted at Attachment 10.

*The Commission's Conclusions*

404. A OECD<sup>129</sup> study concluded that the cost structure of solid waste collection from small to medium-scale waste producers is similar to other network-based or utility industries. The OECD report demonstrated that both economies of scale and economies of density are likely to affect the profitability of such collection operations.
405. The report noted that collection operations are characterised by presence of two extreme cases, collection of waste from residential customers who produce small quantities of waste and collection from industrial customers who produce large quantities of waste. Between these two extreme cases, there is a market for small and medium-sized business customers characterised by limited and imperfect competition. For example, the OECD cited one Canadian case<sup>130</sup> where the Canadian Competition Bureau considered that waste collection companies serviced these customers with different technology, that is with FEL trucks. As a result, the Canadian Competition Bureau defined a separate market for “commercial lift-on-board service” (known also as FEL in New Zealand) which involves the collection of container loads of waste, using FEL trucks, from customers who generate a significant quantity of solid waste, such as restaurants, offices, and small commercial establishments.
406. The Canadian Competition Bureau defined four product markets in the collection functional level:
- commercial lift-on-board market (FEL collection in New Zealand);
  - industrial, also known as roll-off, market (gantry/huka collection in New Zealand);
  - residential market (contracts generally awarded on the basis of tenders to collect mostly refuse bags)<sup>131</sup>; and
  - recycling market- collection of recyclables from residences and apartments (like residential market, the service is provided under council contracts and awarded on the basis of tenders).
407. Of the four (collection) markets defined, the Canadian Competition Bureau considered entry is the most difficult in the commercial lift-on-board market (FEL-type collection), owing to the need for a concentrated route, higher capital investments and the difficulty of obtaining customers. Within this industry, it is fairly common practice to use various contractual requirements which tend to restrict or limit the availability to a new entrant of a large volume of unfettered

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<sup>129</sup> Competition in Local Services: Solid waste management, OECD report, 31 July 2000, page 25.

<sup>130</sup> Canadian Competition Tribunal, in the matter of an Acquisition by Canadian Waste Services Inc., of certain non-hazardous solid waste management assets of WMI Waste Management of Canada, Inc. in Edmonton, Alberta, CT-1998/01.

<sup>131</sup> This is equivalent to New Zealand’s local authority collection market. It appears that in Canada residential waste is mostly collected by local authorities and paid for out of rates.

customers, thereby acting to raise the cost of entry into the commercial lift-on-board market.<sup>132</sup>

408. It appears to the Commission that on the facts of this case it is possible to draw similar conclusions in respect of the present Acquisition. Many of the market participants interviewed by the Commission have views consistent with the Canadian approach that FEL collection is a separate market with high barriers to entry.
409. The Commission does not accept that TPI's financial models of an FEL operation correspond to the real life situation faced by an entrant in FEL collection. The Commission considers that if the healthy profits, modelled by TPI, were so easily obtainable by entering FEL collection markets, there would have been much more entry into FEL collection markets than has actually occurred. In all the relevant geographic markets, there is existing competition to TPI and EnviroWaste in only four FEL collection markets in New Plymouth, Nelson, Christchurch and Timaru.<sup>133</sup> Moreover, neither the nature of the operations of these small scale competitors, nor their views on their market entry, support TPI's "low barriers to entry" argument as noted below.
410. Can Plan in Nelson currently services its [ ]<sup>134</sup> business customers with the smallest sized FEL bins by using a wheelie bin collection truck modified to allow FEL bin collection.<sup>135</sup> It has plans to provide a medium size FEL bin service<sup>136</sup> but its most optimistic projection of the take up of its new bin service is [

]. For these reasons, the Commission considers that the Can Plan model of existing or expanded business appears unlikely to constrain TPI in the factual within the Commission's two year time frame;

411. [

<sup>132</sup> Canadian Competition Tribunal: *Director of Investigation and Research vs. Canadian Waste Services Inc.*, Consent Order Impact Statement, 1997, paragraph 18.

<sup>133</sup> As stated, because there is no aggregation of FEL collection market shares in New Plymouth, as a result of the Acquisition, no unilateral market power issue arises in that market.

<sup>134</sup> In the factual, TPI would be collecting about [ ]FEL bins of all sizes)

<sup>135</sup> Can Plan has described its modified truck as being a much slower collector than its competitors' purpose-designed vehicles.

<sup>136</sup> [

]

].

412. Garbo in Timaru currently services business customers with [ ] FEL bins, of up to 3m<sup>3</sup> in size (TPI would have about [ ] bins in the factual), collected in a small open top truck, without a compaction unit, engineered locally for a dual purpose of collecting wheelie bins and FEL bins. Garbo can collect [ ] FEL bins in its truck before it must travel to disposal. It does not, therefore, have the opportunity to gain scale and density. Garbo noted that after an initial entry with [ ] FEL bins obtained within 18 months, in the last 18 months it has added [ ] to its customer base. Garbo has the capacity to expand by [ ] bins in the next two years. Given:

- Garbo’s emphasis that it really had a “niche market” so that it would not be affected by the Acquisition;
- the disparities in the sizes of Garbo and TPI in the factual, and Garbo’s limited ability to expand;
- TPI’s ability to use the price matching clause in its customer contract to provide one-off price reductions to those of its customers considering switching to Garbo; and
- its limited capability to efficiently service FEL customers with its existing equipment which has a low volume capacity,

the Commission considers that Garbo is not likely to constrain TPI from increasing prices or reducing service in the factual. This is also the view of the Timaru District Council which does not consider that Garbo would constrain TPI in the factual.<sup>137</sup>

413. [

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414. Streetsmart [ ]. However, the Commission considers that for similar reasons to those described in relation to Can Plan’s proposed FEL expansion, Streetsmart would be unlikely to constrain TPI in the factual in the Commission’s time frame.

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<sup>137</sup> Timaru District Council’s letter to the Commission of 23 February 2007.

<sup>138</sup> [

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415. The Commission considers that the nub of the matter is that these examples of existing competition and entry at the margin will be too ineffectual to constrain TPI in the factual. If this conclusion is correct, how then in the Commission's view does TPI's model depart from the commercial reality? The Commission has noted column "J" of Manawatu Waste's model of FEL collection in Palmerston North (Attachment 9). Manawatu Waste has informed the Commission that column J is not modelled but represents the real situation of Manawatu Waste's operations in Palmerston North. [

] the scenario of an entrant into FEL markets becomes one of on-going losses. This corresponds more accurately to the actual situation faced by an entrant into FEL markets as described to the Commission by JJ Richards, Clean Green and Manawatu Waste.

416. The Commission does not consider TPI's argument, that gantry collection provides near competition or a constraint on FEL prices, is correct. The Commission has compared, as an example, the prices for weekly collection of a 9m<sup>3</sup> gantry bin and twice weekly collection of two 4.5m<sup>3</sup> FEL bins in central Christchurch:

▪ [

].<sup>139</sup>

It is obvious that a consumer will always prefer the lower priced FEL service if its refuse is suitable for that kind of service. Customers chose gantry bins only if they have particularly voluminous (for example green waste from a section clearance), bulky or heavy waste (for example a mixture of wood waste, wall boards, earth and concrete from a renovation or construction project) or are located away from FEL collection routes. The Commission does not accept that gantry and FEL collection are sufficiently near competitors that they will constrain TPI in FEL collection markets.

417. Nor does the Commission consider that wheelie bin collection provides near competition or a constraint on FEL prices. As noted at paragraph 142, TPI advised that it would charge about \$[ ] to collect waste from one 3m<sup>3</sup> FEL bin and \$[ ] to collect waste from twelve wheelie bins of 0.24m<sup>3</sup> volume (which equates to a 3m<sup>3</sup> volume). Even ignoring that 14% price difference, the difference in practicability between the 12 wheelie bin and the single FEL options from a consumer's viewpoint is clear. As Clean Earth stated:

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<sup>139</sup> Information provided by EnviroWaste.



Throughout the entire period we have operated (21 years) in all aspects of the business we have never had a front load customer taken over by a wheelie bin operator.

That is entirely consistent with the customer interviews outlined at paragraph 148. The Commission does not accept that wheelie bin and FEL collection are sufficiently near competitors that they will constrain TPI in FEL collection markets.

418. As to economies of density faced by an entrant, the Commission considers that TPI's models have been chosen to represent the favourable densities of an incumbent which has [ ] existing bins to collect. These range from [ ] and are shown in summary in Attachment 8. The Commission considers that Manawatu Waste's model at Attachment 9 and charted at Attachment 10 more realistically represents the position of a FEL entrant. Until that entrant achieves a density of below about 3.5 kilometres per lift, it will not be profitable. The Commission considers that economies of density do exist and that they are a barrier to entry into FEL markets.
419. Loss making entry into FEL collection markets accords with the evidence the Commission has obtained from existing and past entrants. It took [ ] before JJ Richard's FEL collection business in the most customer dense FEL collection market in New Zealand (in Auckland) became operationally profitable. The accumulated losses during that period will require [ ] years of operation to be recovered. JJ Richard has [ ] after a green-field entry into Hamilton. [ ]]. The FEL entry attempts of other smaller firms in Taupo and Hawkes Bay are described above.
420. An entrant into FEL collection markets must obtain economies of density similar to the incumbent operators to be successful. The Commission considers that a significant barrier to the achievement of those economies of density is the industry standard three year FEL customer collection contract containing automatic roll over and price matching provisions.
421. While TPI stated that some of its FEL collection contracts were in fact one year contracts and some of its customers did not have contracts at all, the Commission notes the evidence of JJ Richards, EnviroWaste and Manawatu Waste that most new contracts and most rolled over contracts are now of three years duration. As described above, the contracts have penalty provisions for customer non-performance, automatic roll over provisions in the absence of two month prior notice and a price matching clause.
422. Significantly, all parties, other than TPI, who had or were attempting to enter into, or expand in, FEL collection markets described the difficulty of obtaining new customers when they were contracted. An example has been given of TPI being unable to obtain [ ] work in Christchurch because of EnviroWaste's contract with the company, this in spite of TPI being lower priced and the company wishing to change supplier. Other examples are Manawatu Waste has been unable to obtain [ ] contracts in Palmerston North.

423. In the Commission's view, waste disposal is very much a non-core activity of most businesses. It is often the business's storeman, rather than an executive, who is responsible for waste disposal and for entering into waste disposal contracts. Moreover, it appears inherently unlikely that the majority of businesses would monitor their waste disposal contracts so closely that they would recognise in time that if they wish to change supplier they must first provide two months notice and secondly the ability to price match. Further, while TPI has claimed [ ] it seems unlikely to the Commission that a panel beating or motel business, for example, [ ] would risk the expense of court action against the resources of a large multinational company to break a contract in respect of such a non-core activity. While price matching can be pro-competitive, it does provide the opportunity for TPI, an incumbent supplier with the advantages of economies of scale and density, to selectively price discriminate against a fragile entrant.

### *Summary*

424. For the reasons given above, the Commission concludes that in the factual TPI will either be in a monopoly position or will not be constrained by existing or potential competitors from exerting market power in the FEL collection services market in relevant geographic areas where horizontal aggregation of market shares occurs. Therefore, the Commission is not satisfied on the evidence that has been provided to it, that the Acquisition will not have, or would not be likely to have, the effect of substantially lessening of competition in FEL collection markets in Taupo, Palmerston North, Horowhenua/Kapiti Coast, Nelson, Christchurch, Timaru/Oamaru and Dunedin.

## **Gantry/Huka Collection Markets**

### *Introduction*

425. Characteristics of these markets have been set out earlier in this Decision. For the present purposes, the Commission notes briefly that in contrast to FEL markets, and apart from in the Taupo market, there are a number of market participants in each of the relevant geographic gantry/huka markets, in addition to TPI, EnviroWaste or Manawatu Waste.
426. Gantry/Huka operations are less capital intensive than are FEL operations. The collection vehicles are in essence an ordinary flat deck truck fitted, at only moderate expense, with a gantry or winch to load respectively gantry or huka bins onto the truck. In addition, although gantry and huka bins are generally more expensive to manufacture than FEL bins (because they are larger and are required to have the strength to carry heavier loads than FEL bins), fewer bins are required per truck.
427. Gantry/Huka bins are the most common waste disposal application for business and residential consumers who have large volumes of bulky or heavy refuse. This may include high volume, but light, green waste or bulky and heavy construction waste. Collection of such bins is mostly irregular, for example, when the bin is filled

customers telephone the collection business for a pick up. As discussed, these bins are suitable for excavated material and concrete rubble.

428. The supply of gantry bins to waste customers may be on a term contract basis with provisions for payment for bin hire and for each collection, or it may be on the basis of a one-off contract with a lump sum payment. “Bookabin”<sup>140</sup>, a New Zealand web site, has recently been established to allow one-off type customers to access a national data base of gantry bin suppliers to order a bin on-line at, the web site claims, the most competitive price available from suppliers.
429. Huka bins are larger versions of gantry bins with volumes of up to 30m<sup>3</sup>. The prices of a suitable truck and bins are higher than for gantry operations. As a consequence there are many more gantry collection businesses than there are businesses providing Huka collection services. Huka services have the advantage of only slightly increased cartage costs for a much greater volume of waste.

#### *Market Shares*

430. There are six local/regional geographic markets for gantry/huka collection services in which the Acquisition will result in the aggregation of market shares. They are Taupo, Kapiti Coast/Horowhenua, Nelson, Christchurch, Timaru and Dunedin.
431. The estimated market shares for gantry/huka commercial collection services in the relevant geographic markets are shown in Table 12 below. The combined entity’s market shares are outside the Commission’s safe harbours in all geographic markets (although Christchurch is only marginally outside the safe harbour). In Taupo, the aggregation is such that it will create a monopoly market.

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<sup>140</sup> [www.bookabin.co.nz](http://www.bookabin.co.nz)

**Table 12: Estimated Market Shares in Gantry Collection Markets<sup>141</sup>**

<b>Geographic Market</b>	<b>Competitors</b>	<b>Market Share %</b>
Taupo	TPI	[ ]
	Manawatu Waste	[ ]
	<b><i>Combined Entity</i></b>	<b><i>[ ]</i></b>
	Others	[ ]
Kapiti/Horowhenua	TPI	[ ]
	Manawatu Waste	[ ]
	<b><i>Combined Entity</i></b>	<b><i>[ ]</i></b>
	Others	[ ]
Nelson	TPI	[ ]
	EnviroWaste	[ ]
	<b><i>Combined Entity</i></b>	<b><i>[ ]</i></b>
	Others	[ ]
Christchurch	TPI	[ ]
	EnviroWaste	[ ]
	<b><i>Combined Entity</i></b>	<b><i>[ ]</i></b>
	Others	[ ]
Timaru	TPI	[ ]
	EnviroWaste	[ ]
	<b><i>Combined Entity</i></b>	<b><i>[ ]</i></b>
	Others	[ ]
Dunedin	TPI	[ ]
	EnviroWaste	[ ]
	<b><i>Combined Entity</i></b>	<b><i>[ ]</i></b>
	Others	[ ]

*Existing Competition*

432. TPI submitted that gantry and FEL collection services are substitutable. TPI cited prices available to a Christchurch consumer requiring collection of 9m<sup>3</sup> per week of waste. These were annual charges of [ ] for two 4.5m<sup>3</sup> FEL bins emptied twice per week and [ ] for a 9m<sup>3</sup> gantry bin emptied once per week.
433. Manawatu Waste submitted that the economics of providing FEL collections differs significantly from that of providing gantry collections. Based on its current densities in Palmerston North, because of the greater collection efficiency (more volume per unit distance travelled including to disposal) the cost of providing FEL collection is [ ]% below that to provide gantry collections (for equal volumes of waste). Moreover, the density of gantry collection can never increase while every FEL bin added to a FEL collection route reduces Manawatu Waste's costs. If the Acquisition proceeds, Manawatu Waste estimated that the increased density in the

<sup>141</sup> Source: Information obtained by the Commission from TPI, Manawatu Waste, EnviroWaste, other small industry participant and local authorities, all collated by the Commission.

factual would provide TPI with a 50% cost saving for FEL collection over gantry collection (again for equal volumes of waste). On the basis of such a large cost and price differences, FEL collection can never constrain the price of gantry collection (or vice versa).

434. JJ Richards submitted that the gantry market was “hyper-competitive.” It was possible to make five telephone calls to gantry bin collectors, each time obtaining a lower quoted price.

*Potential Competition*

435. TPI submitted that entry into gantry collection markets was at a relatively low cost. The cost of a new truck together with [ ] gantry bins was about [ ]. That could be reduced to [ ] if a second hand truck, of which there are plenty available, was acceptable.

436. Manawatu Waste submitted that:

- there are many examples of entry by operators who have continued to operate successful businesses for some years. However, in Manawatu Waste’s view that statement only applies to the provision of gantry collection and not to the provision of wheelie bin and FEL collection;
- there are low barriers to entry into gantry collection markets. An entrant might only need 10 gantry bins and a truck. These costs were not sunk as both the truck and the bins could be sold if the entrant later wished to exit.

437. EnviroWaste, JJ Richards, Fulton Hogan all agreed that barriers to entry into this market were low.

*The Commission’s Conclusions*

438. The Commission accepts the arguments of TPI and other market participants that their gantry collection operations are constrained by existing competition or potential entry or expansion, even if high market aggregation is present.
439. There are much lower economies of density in gantry operations when compared to FEL operations. That is why the price of gantry collection is higher than that for FEL collection for equivalent volumes. No matter how many customers a collection company has, it must always travel from its base (or the previous drop off location) to pick up a full bin, then must travel to disposal at RTS or landfill, then travel back to base (or the next drop off location). This means a small participant in this market or an entrant with few customers is more able to compete with a large participant such as TPI in the factual.
440. In addition, although some business consumers with regular pickup of gantry bins do have three year contracts with suppliers, importantly there are alternative “one-off” collection customers (residents, builders, landscapers, for example) to enable a small participant to obtain a customer base of a size that allows profitable operation. The Commission notes the Bookabin web site as an avenue for small participants to obtain customers.

441. Furthermore, in contrast to FEL collection markets, for example, the Commission has obtained several examples of recent successful entry into various gantry markets.<sup>142</sup>
442. Therefore, because of the degree of existing competition, and the relative ease of entry into and expansion in, gantry markets, there do not appear to be any significant competition issues in any relevant gantry market. The Commission is therefore satisfied that the Acquisition will not have, or would not be likely to have, the effect of substantially lessening competition in all relevant gantry collection markets.

### **Refuse Transfer Station Markets**

#### *Introduction*

443. TPI submitted that the only areas affected by the Acquisition are Wanganui, Palmerston North and Horowhenua/Kapiti Coast regions. That is because:
- there are only two RTS's in Wanganui, both of which will be owned by TPI in the factual. In addition TPI will control the collection of a large proportion of the waste stream in Wanganui in the factual;
  - Manawatu Waste owns a RTS in Palmerston North. Midwest Disposals owns a RTS in Levin.
444. TPI also submitted that barriers to entry into RTS markets throughout the country are low and provided examples of a number of RTSs built in recent years.
445. Of the relevant geographic markets previously defined, the Commission considers that only in Wanganui, Horowhenua/Kapiti Coast and Christchurch is there aggregation of market shares.

**Table 13: RTSs Affected by Horizontal Aggregation**

Wanganui	One RTS owned by TPI and one by Manawatu Waste
Horowhenua/Kapiti Coast	One RTS in Levin owned by Midwest Disposals and three small RTSs in Foxton, Shannon and Otaki owned by local authorities but operated by TPI
Christchurch	One RTS owned by CWS and three by Meta NZ

446. In Kapiti Coast/Horowhenua, TPI will increase its share in Midwest Disposals which owns the Levin RTS. In Christchurch, TPI will increase its shares of CWS which owns Parkhurst Road RTS. Midwest Disposals and CWS are both joint ventures between TPI one hand, and Manawatu Waste/EnviroWaste on the other hand and as such are considered by the Commission to be one head in the two markets in both the factual and the counterfactual. The Commission, therefore, does not consider these two geographic markets further in the competition analysis of horizontal aggregation effects in the local markets for RTSs.

<sup>142</sup> Duffy Skips (Dunedin), Cleanaway in Invercargill and Tribro into Huka bins in various centres throughout New Zealand.

447. Therefore, there will be aggregation of market shares only in the Wanganui geographic market for the provision of RTS services.

*Market Shares*

448. Manawatu Waste and TPI each have approximately a 50% market share in the Wanganui RTS market. The Acquisition will result in the combined entity controlling 100% of the local market for RTSs in Wanganui.

*Competition Analysis*

449. The Commission notes that in the factual there will be no competition and no constraint on TPI from existing competition.

450. TPI submitted that the Commission had concluded in Decision 355 that “barriers to entry into transfer stations are reasonably low” (paragraph 102 of the Decision), and that still applied. It noted the Commission’s statement in para 100 of the Decision that:

entry into this market is not conditional upon the entrant being vertically integrated with a landfill disposal business. A well located transfer station which can command a large and stable volume of waste is likely to be able to negotiate favourable access prices to a landfill, providing that there are competing landfills to which its waste could be sent. However, private landfill operators often see a strategic advantage in being vertically integrated with transfer stations.

451. The Commission considers that, eight years on and having regard to market developments during that time, in this case barriers to entry may arise as a result of:

- economies of scale and scope associated with the operation of a RTS in Wanganui. It is always necessary for the RTS operator to attract sufficient waste volumes;
- sunk costs associated with the construction of a new RTS; and
- regulatory requirements such as resource consent conditions, health and safety rules, and vapour discharge permits.

452. In addition, and most importantly, the Commission notes that the conclusions reached in Decision 355 may not apply in the Wanganui geographic market. TPI in the factual will be fully vertically integrated at all functional levels of the market, and will control about [ ]% of all waste collected in the Wanganui geographic market. The vertical integration effects of the Acquisition will enable the combined entity to exert its market power in the local market for RTSs. Vertical integration issues are discussed later on in this report.

453. Given the absence of existing competition, sunk costs involved in the construction of a new RTS, and the ability of the combined entity to act in a predatory manner, the Commission is of the view that there will be no constraint from existing or potential competition in the local market for RTSs in Wanganui.

*Constraint from Disposal at Landfills*

454. Waste collection companies and waste generators are sometimes able to by-pass RTSs and deliver waste directly to landfill for disposal. In such cases, landfills will compete with RTSs and constrain the RTS operators from increasing prices.
455. The Commission notes that the waste collected in Wanganui is disposed of either at the two RTSs in Wanganui or at the Bonny Glen landfill, which is about 30km from Wanganui. In the factual TPI will control access to all three disposal sites. It is, therefore, the Commission's view that disposal at landfills will not constrain the combined entity from increasing the prices in the local market for RTSs in Wanganui.

*Conclusion on Refuse Transfer Station Markets*

456. [

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457. Absent, divestment of a RTS, an existing Bonny Glen disposal contract, and a substantial proportion of the Wanganui waste stream, the Commission is not satisfied on the evidence that has been provided to it, that the Acquisition will not have, or would not be likely to have, the effect of substantially lessening competition in the RTS market in Wanganui. In respect of other relevant RTS markets, the Commission is satisfied that the Acquisition will not have, or would not be likely to have, the effect of substantially lessening competition.

**Landfill Disposal Markets**

458. The Acquisition will not result in any aggregation of market shares, other than TPI increasing control of the joint ventures with Manawatu Waste and EnviroWaste which own and operate Bonny Glen and Kate Valley landfills. Because of this, and because TPI and either Manawatu Waste or EnviroWaste are considered as one head in the market in both the factual and the counterfactual, the Commission is therefore satisfied that the Acquisition will not have, or would not be likely to have, the effect of substantially lessening competition in all relevant landfill disposal markets.



## **The National Market For The Provision Of Waste Management Services To Multi-Regional Customers**

### *Introduction*

459. EnviroWaste and TPI informed the Commission that they provide refuse and recyclable collection management services to companies that operate from multiple sites throughout New Zealand. TPI and EnviroWaste provide the following services in this market to the companies listed in Attachments 11 and 12:
- advice on the correct types, number and frequency of collection of bins for solid waste and for recyclables for each of their sites throughout New Zealand;
  - advice about, and monitoring of, waste minimisation programmes;
  - regular reports on volumes of waste to disposal and volumes of recyclables at each site;
  - collection of waste and disposal of same; and
  - collection, processing and sale of recyclables.
460. Multisite customers (see below) informed the Commission that they wish, for cost and convenience reasons, to be able to contract with preferably one (or in some cases both) of TPI and EnviroWaste for a waste collection service which covers all their national sites. By doing so they seek cost savings by avoiding transactions with a multitude of waste collection contractors at each of their sites throughout New Zealand. They expect to receive a single waste management invoice which details waste volume, recyclable volumes and charges for each of their sites.
461. Many large New Zealand companies now regard waste minimisation as a mark of good corporate citizenship. National contracts with a large waste management firm provide a better opportunity for properly organised waste recycling programmes.

### *Submissions Received*

462. TPI provided a list of its approximately [ ] national multi-site customers that it supplies in this market (Attachment 10).
463. TPI submitted that:
- there are a large number of companies with branches in multiple regions that do not have “national purchasing arrangements” for waste collection. TPI provided a list of about 60 such companies. Its argument is that purchasing waste collection services on a national basis is optional for such companies, not necessary;
  - there is no national market for collection of waste from multi-site customers – collection markets are local/region markets even for customer with branches in multiple locations;
  - if there is such a market the major firms involved have countervailing buying power which would constrain TPI in the factual;

- while TPI has a contract for waste disposal from [ ] sites, it carries out this by subcontracts in 18 of those sites (other examples were provided by TPI). It stated that this demonstrates that a physical presence in a region is not essential and the service can be managed without the manager conducting the services itself. That means that EnviroWaste in the factual, entrepreneurs in general, waste brokers, expense reduction analysts, recyclable collection specialists could all organise national collection contracts using collection companies local to each site of the relevant national company;
- waste brokers such as Australian company, Thiess, would soon make an appearance in New Zealand markets and such companies would constrain TPI; and
- in any event waste collected from national firms represents only a small proportion of New Zealand's solid waste collection

464. Manawatu Waste submitted that:

- national businesses typically run a tender process to determine their waste provider. Manawatu Waste understands that TPI and EnviroWaste have historically been the only two bidders for these contracts. In areas where the two companies do not have businesses, they have arranged sub-contractors to carry out the collection work. The number of such contracts has increased in recent years;
- Manawatu Waste has only ever bid for such contracts in association with EnviroWaste. It does not have the geographic spread to allow it to tender in its own right, despite being the third largest provider of waste services in New Zealand. The transaction costs to stitch together the nationwide subcontracts necessary, if Manawatu Waste was to tender in its own right, are too large. The same would apply to EnviroWaste if the Acquisition proceeds and EnviroWaste is left only with businesses north of Taupo.

465. EnviroWaste provided a list of its national multi-site customers that it supplies in this market (Attachment 11). It submitted that:

- while waste brokers are emerging internationally, the waste volumes and contract sizes that New Zealand has compared, for example, to Australia are unlikely to interest a waste broker;
- The Warehouse has offered a national contract for one company to supply a complete waste service (including volume data from each site) to all its sites [ ]]. Without two companies in the market, The Warehouse would not be able play one off against the other and achieve this strategy;
- EnviroWaste provides national services for Goodman Fielder and South Island services for Foodstuffs. It offered [ ]% savings on those companies' previous waste disposal costs. The savings were possible: by rationalising the customers' bins and other equipment to ensure what was in place was appropriate for the customers' individual waste streams and volumes; by

ensuring that bins were emptied the correct number of times and when they were filled; and by the introduction of recycling and sale of recyclables together with other waste minimisation techniques to offset waste collection and disposal costs. Without competition between TPI and EnviroWaste such cost savings to waste services consumers would be lost;

- if the Acquisition proceeds it will be difficult for EnviroWaste to provide a national contract service because customers with sites south of Taupo would have to be serviced by sub-contractors and there would be no margin in this for EnviroWaste. The only reason EnviroWaste can provide such a service at present is because it has the next best thing to national coverage with its businesses together with Manawatu Waste;
  - In addition to those parties EnviroWaste already supplies in this market, it has recently provided prices to [ ].
  - EnviroWaste has recently obtained the contract to provide waste services to [ ] of Fonterra's sites. TPI reduced its previous prices by [ ]% but EnviroWaste quoted a [ ]% reduction, obtained through recycling and efficiencies in equipment and transport arrangements. If the Acquisition proceeds, this type of competition will be lost.
466. Foodstuffs South Island submitted that it had entered into a collection contract for all its South Island wholesale and retail sites. EnviroWaste and TPI responded. EnviroWaste was able to offer a [ ]% cost reduction from Foodstuff's previous costs of about [ ]. TPI and EnviroWaste were the only two companies with sufficient expertise to meet Foodstuff's requirements.
467. Goodman Fielder submitted that:
- it has a contract with EnviroWaste to collect waste and recyclables from its 25 sites nationwide. The sites in Nelson, Christchurch, Oamaru, Dunedin and Palmerston North would be affected if the Acquisition proceeds;
  - it chose EnviroWaste because of its pro-active audits of waste streams at Goodman Fielder sites followed by use of new bins and systems to improve recycling;
  - competition in the counterfactual between TPI and EnviroWaste is likely to reduce Goodman Fielder "Meadow Fresh" site waste costs by [ ]%. [ ];
  - its total waste costs are about [ ] with [ ];
  - [ ]

] Goodman Fielder therefore opposes the Acquisition as it will lose the benefits of competition for a national service.

468. Fonterra submitted that:

- it had tendered for a national contract but eventually decided to split that into two with TPI collecting from [ ] sites and EnviroWaste from [ ]. [ ];
- originally Fonterra employed [ ] different waste collection companies and that cost it [ ]. By use of national contracts and increased recycling it has reduced that cost to [ ]. At the sites serviced by EnviroWaste the cost has been reduced by [ ]% and at those sites serviced by TPI by [ ]%. These are significant cost savings;
- [ ]

];

and

- it would be very difficult for it to set up and administer individual collection contracts in the absence of EnviroWaste's constraint on TPI. It considered that there would be a difficulty in obtaining the level of reporting it currently receives from TPI and EnviroWaste. Its waste management is more than just removal of waste. It has recycling and diversion initiatives in place that require monthly meetings and elaborate reporting mechanisms. A move to smaller waste collectors would be to the detriment of its eco-efficiency initiatives that have taken some time to put in place.

469. The Warehouse submitted that;

- it has TPI as its current waste provider to about [ ] sites (including The Warehouse Stationery). Its spend on landfill alone under its TPI contract (which excludes the [ ] Warehouse Stationery sites) was about [ ] per annum;
- prior to the national contract fragmented local contracts were in place. The national contract provided reporting on environmental impacts, reporting on individual stores waste and recycling performance. A national contract had allowed The Warehouse to reduce its waste management costs by [ ]% below the cost of local supply; and
- if EnviroWaste did not exist in the South Island, The Warehouse's ability to tender either on a national basis or on an individual island basis would be severely compromised.

*The Commission's Conclusions*

470. As already noted, on the evidence before it, and particularly having regard to the views of the national customers, the Commission does not accept TPI's argument that:
- there is no national market for the provision of waste collection and other services to national firms with multiple sites throughout the country; and
  - the market for collection of such firms' waste is a local/regional market as for other collection product markets.
471. This issue is discussed in the market definition section of this report where, for the reasons stated, the Commission concludes that the provision of waste management services for multi-site (national) customers constitutes a separate product market from other collection product markets. Moreover because waste collection management services are provided to multi-site customers who generate waste in various regions throughout New Zealand the market should be considered to be national in geographic scope.
472. Many businesses wish, for commercial and other reasons, to be regarded as "good corporate" and/or "green" citizens. It is easier for businesses to achieve necessary waste minimization and waste recycling programmes if they use the services of either TPI or EnviroWaste as their national waste manager. In this respect, from businesses' points of view, a national waste management service is a higher quality service than mere local waste collection and disposal. Because of this, in the Commission's view, if TPI wished to increase national waste management service prices in the factual, it would not be constrained by an amalgamation of local providers.
473. The Commission notes that EnviroWaste and TPI are the only participants in this market. TPI has the largest market share providing services to about [ ] national companies compared to EnviroWaste's [ ] such customers. As noted, the Commission was informed by Fonterra that significantly, EnviroWaste's entry into the market has constrained TPI's pricing to Fonterra. Fonterra said that by exposing TPI and EnviroWaste to competition from each other, it was able to substantially reduce the cost of waste services.
474. It is significant that each of the four major national customers interviewed (Foodstuffs South Island, Goodman Fielder, Fonterra and The Warehouse) were concerned that the competition in this market would vanish in the factual as, other than TPI, EnviroWaste was the only nationally located waste collector that had the ability to provide national services.
475. TPI, made aware of the issue arising in this market by the Commission, submitted that there were alternatives to TPI and EnviroWaste. TPI suggested that a company such as Thiess would be likely to enter New Zealand markets and could arrange a national waste collection service in competition with TPI and others in the factual.

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476. [ ]<sup>143</sup> [

]. As a result, the Commission does not consider it likely that waste brokers will become a feature of New Zealand waste markets in the next two years.

477. TPI also submitted that EnviroWaste in the factual could remain in this market as a competitor by providing the collection services in the region it continued to operate in (north of Taupo) and organise other collection companies to carry out the national firms' collection work south of Taupo, where it would no longer have a presence.

478. The Commission understands that [

]. However, while there is no restraint of trade that would prevent EnviroWaste from re-entering other regions in the South Island, EnviroWaste informed the Commission that if the Acquisition proceeds [

]. It noted that other major collection companies such as Metrowaste and Manawatu Waste, which operate limited zones of New Zealand (north of Taupo in the case of Metrowaste and in the southern part of the North Island in the case of Manawatu Waste), do not provide a national service to multi-site customers. EnviroWaste's view on this issue is obviously highly relevant.

479. Further, EnviroWaste currently has the ability to utilise the services of its 50%-owned joint venture subsidiary, Manawatu Waste, to provide national waste management services to those business sites located in Manawatu Waste's area of operations. However, the Commission considers that [ ] and, more importantly, the presence of its competitor, TPI, on the board of Manawatu Waste in the factual, would limit that ability for EnviroWaste to use Manawatu Waste as a subcontractor when it was competing with TPI for a national waste management service contract. That is also EnviroWaste's view.

480. Nor does the Commission accept TPI's argument that multiple small collection contractors collecting from each regional site are an adequate substitute for a national waste management service of the standard provided by TPI and EnviroWaste. In recent times, the attractions for multi-site companies of a single national contract are:

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<sup>143</sup> "Broking" generally describes an activity whereby the broker approaches various service or product suppliers and negotiates the best outcome for the broker's client from the multiple suppliers.

- the cost savings that EnviroWaste, and latterly after competition in this market developed, TPI, are able to offer businesses due to efficiencies they are able to bring to their customers;
  - the reduced transaction costs arising from the ease of contract administration that a single point of contract and a single invoice bring;
  - consistent reporting across all sites of waste and recyclable volumes produced;
  - the provision of advice by either EnviroWaste or TPI about waste minimisation and strategies to promote recycling activities,
481. The Commission acknowledges that a firm with national operations could negotiate a contract for collection services in every market in which it operates. However, the relevant question is whether it would be cost effective to do so, such that this would provide an alternative to national supply from TPI and constrain that firm's pricing as a result. If a price negotiated on a national basis is substantially below the price that could be negotiated by contracting with numerous suppliers on a local basis, then competition from a collection of local providers would not constrain a national price. The evidence gathered by the Commission from The Warehouse, Goodman Fielder, Fonterra and Foodstuffs South Island shows that national prices are substantially below prices available from a collection of local suppliers. The four major multi-site companies interviewed emphasised that they did not wish to lose these advantages by reverting to individual waste collectors for each of their sites.

*De Minimus Argument*

482. TPI suggested that in any event this market was tiny (and by implication the competition issue was *de minimus*). After reviewing the evidence provided by TPI and EnviroWaste on this point, the Commission's view is that the present size of this market is about \$[ ] million dollars per annum. That is likely to be about [ ]% of the total markets for the collection of waste by private wheelie bin, FEL and gantry in New Zealand (waste collected by local authorities is excluded from the ratio).
483. The Commission notes that if the competition issues in this market were to be considered *de minimus* because of the size of the market, that would exclude many markets in New Zealand from the application of competition law. For example, the competition issues arising in many of the regional waste collection markets relevant to TPI's application for clearance would be excluded from analysis.
484. Moreover, this is a market which has on its supply and demand sides, significant national companies. EnviroWaste's entry into the market has seen companies (such as Foodstuffs and Goodman Fielder) supplied nationally for the first time.
485. The Commission notes finally that, unlike other jurisdictions, New Zealand does not have a threshold regime above which mandatory notification is required and the Commission must nevertheless consider clearance applications, if submitted, irrespective of their size.

486. Therefore the Commission considers that this is a significant and growing market and that TPI's *de minimus* argument is neither relevant nor valid.

### **Conclusion**

487. The Commission considers that the Acquisition will result in the elimination of EnviroWaste, a vigorous and effective competitor in this national market. Until recently TPI was the only provider of national waste management services. EnviroWaste entered this market aggressively by providing, not only waste collection services to national multi-regional firms at very competitive prices, but also:

- rationalisation of businesses' waste generation and waste collection procedures;
- promotion of recycling within businesses; and
- data services in respect of waste generated and recyclables collected.

488. National customers of EnviroWaste informed the Commission that prior to the entry of EnviroWaste into this market, they found it difficult to induce TPI to provide those additional services but that has now changed. In the view of the Commission, the elimination of EnviroWaste is likely to result in a change from two competitors to one in this market and the removal of a vigorous and effective recent entrant. The Commission considers that will lead to a significant lessening of competition in this market.

489. Therefore, the Commission is not satisfied that the Acquisition – which would remove EnviroWaste from all of the South Island waste markets and eliminate its ability to service national customers in the central North Island through Manawatu Waste – will not have, or would not be likely to have, the effect of substantially lessening competition in this market.<sup>144</sup>

### **Summary of Conclusions on Unilateral Power in Wheelie Bin and FEL Collection, RTS, and National Multi-regional Customer Markets**

490. Due to TPI's substantial market share in the factual, compared to the counterfactual, and the lack of effective constraint from existing and potential competition, the Commission considers that the Acquisition, when compared to the counterfactual, will provide TPI, with the ability to exercise unilateral market power in the markets listed below:

- Wheelie Bin Waste Collection Markets in:
  - Wanganui;
  - Palmerston North; and

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<sup>144</sup> The Commission notes that it may be that some limited acquisitions of some of the relevant assets/businesses might not affect EnviroWaste's ability to provide national supply – if it were not to operate in only some discrete geographic markets. But as the Application related to the Acquisition as defined – namely all of EnviroWaste's South Island assets and businesses and part of its shareholding in Manawatu Waste – it has not been necessary, nor appropriate, for the Commission to consider whether smaller and discrete acquisitions would have the same effect in this market.



- Dunedin.
  - FEL Waste Collection Markets in:
    - Taupo;
    - Palmerston North;
    - Horowhenua/Kapiti Coast;
    - Nelson;
    - Christchurch;
    - Timaru; and
    - Dunedin.
  - RTS market in Wanganui; and
  - the National Multi-regional Customer Market
491. The Commission considers that the Acquisition will provide TPI with the ability to exercise unilateral market power, on a substantial basis, to the detriment of wheelie bin, and FEL and RTS customers in the above-mentioned regions.
492. As well as increasing the scope for unilateral market power, an acquisition may lead to a change in market circumstances such that either co-ordination between the remaining businesses is made more likely in the factual, or the effectiveness of existing coordination in the counterfactual is enhanced. These issues are considered below.

## **CO-ORDINATED MARKET POWER**

### **Introduction**

493. When assessing the scope for co-ordination the Commission evaluates the likely post-acquisition structural and behavioural characteristics of the relevant market or markets to test whether the potential for co-ordination would be materially enhanced by the acquisition. The intention is to assess the likelihood that certain types of behaviour will occur, and whether these would be likely to result in the effect, or likely effect, of a substantial lessening of competition. In broad terms, effective co-ordination can be thought of as requiring three ingredients: collusion, detection and retaliation.<sup>145</sup>
494. Collusion involves businesses in a market either each individually coming to a mutually profitable expectation as to co-ordination (tacit collusion), or together reaching agreement over co-ordination (explicit collusion).
495. There are several features of market structure and behaviour that the Commission considers in assessing the likelihood of collusive behaviour, such as: high seller concentration; undifferentiated products; static production technology; slow speed of new entry; characteristics of buyers; and a lack of fringe competitors.

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<sup>145</sup> Commerce Commission, Mergers and Acquisitions Guidelines, p33. See also Decision 559 NZDG/Sonic.

496. To successfully collude, parties to the arrangement must be able to detect defection and respond swiftly. The Commission considers that the ability of competitors to detect deviation is likely to be enhanced where the following market conditions, amongst others, apply: high seller concentration; frequent sales; cost similarities between businesses; multi-market contact; and price transparency.
497. Deviations from the terms of co-ordination need not only to be quickly detected by the other suppliers, but also the deviating firm needs to be faced with a credible threat of being punished by the other firm. The threat of retaliation increases the cost of deviating, thereby reducing the short-term profit to be gained by the business from deviating, and helping to preserve the co-ordination.

### **The Applicant's View**

498. TPI's submitted that the only change in the factual was an increase in concentration, but that in any event there was not a high concentration of sellers in most areas<sup>146</sup>. TPI concluded that the waste collection market is not susceptible to collusion, and that even if it were, there would be little scope for detection of deviation. Given the large number of waste collection operators in most areas, and the low barriers to entry into this market, TPI considered that the Proposed Transaction is unlikely to give rise to coordinated market power.

### **Landfill and RTS**

499. The Commission considers that the Landfill and RTS markets are characterised by high seller concentration, an undifferentiated product, relatively static production technology and a slow speed of new entry. As such these markets are at high risk of collusion. However, there are no geographic markets in which the risk of collusion in the factual is greater than that already faced under the counter factual.

### **Local Authority Contracts**

500. The Commission considers that the local authority contracts markets generally involve a low seller concentration, in some cases a number of fringe competitors, and some countervailing power on behalf of the local authority. In three recent South Island tenders, the local authorities received between five and eleven tenders.<sup>147</sup> The Commission recognises that incentives may change when there is one less competitor in the market, and that co-ordination may be easier with fewer players. However, the Commission considers that the risk of collusion in the factual is not significantly greater than that already faced under the counter factual.

### **National Market for Waste Management Services**

501. The Commission considers that the factual would result in TPI being the only existing participant in this market. The Commission's investigation has not uncovered any potential new entrants into this market. On that basis, there is no scope for the exercise of co-ordinated market power.

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<sup>146</sup>Table 5 of the Application.

<sup>147</sup> Blenheim, Christchurch and Oamaru.

## **Gantry**

502. The Commission considers that Gantry markets involve an undifferentiated product and relatively static production technology. However, Gantry markets generally involve a low seller concentration and low barriers to entry. As such, these markets involve a relatively low risk of collusion, and the risk of collusion in the factual is not significantly greater than that already faced under the counter factual.

## **Wheelie Bin and Front End Load**

503. The Commission considers that, based on the information provided to it as set out in earlier sections of the decision, the Wheelie Bin and FEL markets generally involve high seller concentration, an undifferentiated product, relatively static production technology and relatively slow speed of new entry. As such these markets are at high risk of collusion.

### *Wheelie Bin and Front End Load: North Island*

504. The Commission has already concluded that there will be little competition between TPI and Manawatu Waste under the factual. However, to the extent that there is any competition between TPI and Manawatu Waste under the factual, the Commission considers that TPI's ownership of 50% of Manawatu Waste could result in an increase in both the opportunity and incentive for TPI and Manawatu Waste to exercise co-ordinated market power. In particular, the Commission notes that TPI and Manawatu have asymmetrical areas of strength in many geographic markets, which might lend itself to market sharing.
505. In a number of North Island markets, there will be no or minimal direct competitors under the factual.<sup>148</sup> The Commission's investigation has not uncovered any evidence that collusion would be likely with any potential new entrants into these markets. On that basis, the Commission concludes there is no increased scope for the exercise of co-ordinated market power.
506. The Commission has already concluded that there will not be a substantial lessening of competition in the Horowhenua/Kapiti Wheelie Bin market due to horizontal aggregation. The Commission notes the lower seller concentration and existence of fringe competitors in that market. On that basis, the Commission concludes that there is insufficient evidence to raise concern as to the increased scope for the exercise of co-ordinated market power.

### *Wheelie Bin and Front End Load: South Island*

507. As with the North Island, in a large number of South Island markets, there will be no or minimal direct competitors under the counter-factual.<sup>149</sup> The Commission's investigation has not uncovered any evidence that collusion would be likely with any potential new entrants into these markets. On that basis, the Commission concludes there is no increased scope for the exercise of co-ordinated market power.

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<sup>148</sup> Taupo, New Plymouth, Wanganui and Palmerston North.

<sup>149</sup> Timaru and Dunedin.

508. The Commission has already concluded that there will not be a substantial lessening of competition in the Nelson Wheelie Bin market due to horizontal aggregation, but that Can Plan will not constrain TPI in the FEL market under the counter-factual. In the case of the Wheelie bin market, the counter-factual would involve a high seller concentration with only few fringe competitors. In the FEL market TPI would have nearly [ ]% market share and only one likely emerging competitor. [ ] informed the Commission that in respect of the FEL market [ ].
509. Similarly, in Christchurch the Commission has already concluded that there will not be a substantial lessening of competition in the Wheelie Bin market due to horizontal aggregation, but that Mastagard will not constrain TPI in the FEL market under the counter-factual. While the Wheelie bin market would involve a lower seller concentration than in Nelson, [ ]

].

#### *Wheelie Bin and Front End Load: Conclusion*

510. For the purposes of this investigation, it is unnecessary for the Commission to reach a finding on whether tacit or explicit collusion is more likely under the factual in some wheelie bin and FEL markets, as the application is declined in any event on other grounds. However, on the facts which have emerged during this investigation, the Commission has a number of coordinated market power concerns. [ ]

[ ] In any future clearance application the Commission is likely to further investigate these concerns in more depth.

511. Having made no finding on whether tacit or explicit collusion is more likely under the factual, the Commission does not consider the detection and/or retaliation characteristics of these markets.

#### **Conclusion on Co-ordinated Market Power**

512. The Commission makes no finding as to whether any increased likelihood of co-ordinated market power in some discrete markets will, or will not, have the effect (or likely effect) of substantially lessening competition in a relevant market. A finding has been unnecessary for present purposes.

### **VERTICAL INTEGRATION**

#### **Introduction**

513. Vertical acquisitions are those that involve the combining of businesses operating at different functional market levels in the production of a particular good or service. Where a vertical acquisition also has horizontal implications, the Commission considers each aspect of the acquisition in its own right.

514. In general, the vertical aspects of acquisitions are unlikely to result in a substantial lessening of competition in a market unless market power exists at one of the affected functional levels. Where such a situation is found to exist, the Commission considers whether the acquisition would strengthen that horizontal position, or have vertical effects in upstream or downstream markets, and whether that change would lead to the creation, enhancement or facilitation of the exercise of market power. It is to be emphasised that it is the creation of the potential for the merged entity to exercise market power that is the focus of this vertical integration analysis, and not whether or not the market power would actually be exercised by the merged entity.
515. In this case, competition concerns from the vertical aspects are likely to be related to the control of essential facilities by the vertically integrated downstream firm. If a vertically integrated firm increases its market share and holds a strong position in downstream markets the three fundamental criteria of the essential facility doctrine are likely to be met:
- the facility is controlled by a firm that holds a strong position in the downstream markets;
  - competing firms lack a realistic ability to reproduce the facility;
  - access (direct or indirect) to the facility is necessary in order to compete in the related downstream markets.
516. The Commission has considered whether TPI would act in a predatory manner in the factual as a result of increased vertical integration. That is, is there the potential for TPI to sacrifice short term collection profits in order to wound collection rivals with a view to recouping increased long term profits following the rivals' exits? The Commission's investigation has not uncovered sufficient empirical evidence to allow it to conclude that the potential for TPI to adopt such a predation strategy is more likely than not. However, the Commission leaves open the issue as to whether, on different facts, a predation strategy arising from increased vertical integration may be feasible and rational.
517. A related concern also includes the possibility of a vertical price-cost squeeze. A vertical price-cost squeeze occurs when a vertically integrated firm with market power in the provision of an input essential to the production of a final product reduces the margin between the price of the input and the price of the final product. A price-cost squeeze is anticompetitive when the vertically integrated firm squeezes the margins of its downstream competitors such that an equally efficient competitor in the downstream market is unable to remain viable or to earn a normal profit. Such a price-cost squeeze may foreclose competition in the downstream market.
518. Specifically, a vertically integrated firm with market power can squeeze its rivals by raising the input price while leaving the retail price unchanged. The increase in the upstream price raises all downstream producers' cost, but this does not affect the effective/real margin of the integrated firm; the firm is effectively cross-subsidizing its downstream operations from its upstream operations.

519. Some economists have criticized the market leverage argument and maintained that the vertical leveraging of market power is not an economically rational strategy.<sup>150</sup> This is because there is only “one monopoly profit” to be earned. An upstream monopolist cannot generate higher profits by leveraging its market power downstream, because if the downstream market is competitive (as assumed), there are no additional profits to be extracted, except at the cost of sacrificing upstream profits.
520. However, this line of argument relies on the assumption of perfect competition with costless entry (and exit) in the downstream market that, when relaxed, can make a price-cost squeeze profitable for the integrated firm.<sup>151</sup> Furthermore, it also ignores dynamic and reputational effects.
521. Solid waste passes through a number of functional levels organised in a vertical sequence. As discussed in the market definition section, the Commission has identified three functional levels of the solid non-hazardous waste market: collection, RTS and landfill. Since the prices charged at landfill or RTS will be reflected in waste collection prices, the Commission considers that collection is the downstream market and disposal (at either landfill or RTS) is the upstream market for present purposes.
522. In Decision 355, the Commission considered that industry participants’ claims that a vertically integrated waste business would be able to price discriminate in favour of its collection operations and against those of rival operators, were plausible. However, nothing turned on vertical effects in that case so that the Commission did not reach any firm view on the issue.
523. In the course of this investigation, industry participants have again raised concerns about the ability of a vertically integrated waste business to exercise increased market power. These concerns appear heightened by regard to the changes in the industry since Decision 355, including industry consolidation and integration in waste collection and disposal markets. The Commission has considered it necessary to analyse the potential for TPI to take advantage of vertical integration between its collection and RTS and/or disposal operations in the factual, to act in a manner designed to foreclose competition at the collection functional level, post-Acquisition.

### **The Parties’ Submissions**

524. TPI submitted that the Acquisition will give rise to vertical effects in:
- New Plymouth where Manawatu Waste owns a RTS and operates a landfill, and TPI has a collection business;
  - Taupo where TPI and Manawatu Waste have collection businesses and Manawatu Waste operates a landfill and RTSs;

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<sup>150</sup> See Bork (1995).

<sup>151</sup> For instance, King and Maddock (1999), show that if the downstream market is not perfectly competitive (with firms competing à la Cournot), and the downstream product is homogenous, then the vertically integrated firm, has always an incentive to increase the input price, as its profits increase with it.

- the lower North Island waste catchment area for the Bonny Glen landfill. In that broad region: TPI and Manawatu Waste have collection businesses; TPI owns a RTS in Wanganui and manages RTSs in Horowhenua; Manawatu Waste owns RTSs in Wanganui and Palmerston North; and the two, through Midwest Disposals, jointly own an RTS in Levin and the Bonny Glen landfill (together with Colmar Holdings);
- Canterbury where in that broad region: TPI and EnviroWaste have collection businesses; TPI operates RTSs; and the two, jointly through CWS, own a RTS, half of Kate Valley landfill, and operate the Kate Valley landfill;
- Timaru where TPI and EnviroWaste have collection businesses and EnviroWaste has a local authority contract to operate RTSs, materials recovery facilities and a landfill; and
- Dunedin where TPI and EnviroWaste have collection businesses and EnviroWaste owns a RTS and a landfill.

525. TPI further submitted that:

- the Acquisition would not give rise to foreclosure of competitors at any of the vertical levels of the market, and would not increase barriers to entry or give rise to any access concerns;
- if it attempted to deny a competitor access to a RTS post-acquisition, or grant access only on discriminatory terms, collection competitors could build their own transfer station. There are relatively low barriers to the establishment of new RTSs. That is illustrated by the numbers of additional RTSs that have been opened recently;
- in Taupo, Manawatu Waste merely operates the landfill. It does not have decision-making powers as to disposal rates, access rights or the disposal destination of the waste;
- there are a series of third-party owned transfer stations in the Manawatu region, including Council owned stations in Ashurst, Feilding, Shannon and Foxton, and the Cairns transfer station in Palmerston North, and that waste collectors in the region all have access to independent disposal facilities;<sup>152</sup>
- in relation to waste collection in the catchment area of Bonny Glen landfill, aggregation of TPI and Manawatu Waste's collection tonnes in the factual is unlikely to have vertical effects relative to the counterfactual because TPI and Manawatu Waste already jointly own the Bonny Glen landfill, and have already committed most of their waste from the region to this landfill;
- in relation to the Kate Valley landfill, CWS has some influence over disposal rates and access at the Kate Valley landfill, but that influence exists in the counterfactual and will not be increased post-acquisition;
- in response to the Commission's concerns in relation to the potential for predation in the factual, there are not significant barriers to entry in waste

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<sup>152</sup> Submission from TPI, to the Commerce Commission on 5 March 2007, paragraph 41.

collection so that predation is unlikely, otherwise the hoped for greater profit will be eliminated by new entry.<sup>153</sup>

- while there are differing views on the cost advantage that higher collection route densities confer, if indeed those cost saving are large, then predation by a large player is less likely. In that case, the firm with significant cost savings would not need to cut prices below cost in order to win market share. Doing so would be unnecessarily costly; and
- there is only one monopoly profit in a value chain. If prices are marked up excessively there is less demand for the bottleneck service and consequently less monopoly profit.

526. Manawatu Waste submitted that:

- post-merger TPI would be a vertically integrated monopolist, or close to it, in several regional markets. This position may provide it with the incentive and ability to restrict any remaining competition in, or deter entry into, collections markets. TPI would be able to lower its collection price below cost sacrificing profits in the short-run but eliminating competition and earning higher profits in the long run. It would have that ability because of the monopoly profits it obtained from its landfills;
- post-acquisition TPI may be able to charge a competitor a higher price at the Bonny Glen landfill than it charges itself, squeezing the margin available to an entrant between the upstream (landfill) and the downstream (collection) prices.<sup>154</sup> Moreover, other than a large transfer station owned and operated by Cairns, all other transfer stations in the Manawatu/Rangitikei/Horowhenua region do not have capacity, and are not designed, to accept refuse in excess of current levels. That means that collectors in the area will not be able to increase the level of waste disposed of at those RTSs if, post-acquisition, the combined entity sought to raise its competitor's costs by increasing prices at the Bonny Glen landfill;<sup>155</sup>
- there are no alternative landfills to Bonny Glen for general disposal of waste in the large region it services. Hokio landfill owned by the Horowhenua District Council is limited to accepting waste from Midwest's RTS in Levin and (soon to be built) Kapiti Coast. Moreover, the other alternative, Pahiatua landfill, is currently exceeding its consented volumes;
- in relation to TPI's position in New Plymouth in the factual:

Under its agreement with the New Plymouth District Council, [

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<sup>153</sup> A submission from TPI's consultant economist emphasised that vertical integration with a landfill does not make a predation strategy (which is only rational without entry barriers) any more attractive.

<sup>154</sup> Submission from Buddle Findlay, acting on behalf of Manawatu Waste, to the Commerce Commission on 2 February 2007, paragraph 24.

<sup>155</sup> Submission from Buddle Findlay, acting on behalf of Manawatu Waste, to the Commerce Commission on 16 March 2007, paragraph 55.



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- a rational potential entrant would be aware of potential deleterious vertical effects in the factual; and
- in its area of operations there is rivalry between itself and TPI (and others) in collection markets. That is because there is a balance of power in landfill ownership at Bonny Glen. All significant players are charged the same landfill fee. If the Acquisition proceeds, there will be a change in that balance. If one person owns a landfill and one owns the corresponding collection business, that is a countervailing power situation. It is where one party is a significant waste collector and controls the only landfill that problems will arise. That will be the situation at Bonny Glen in the factual.

527. The Christchurch City Council submitted that:

- TPI's view of vertical integration as the Christchurch City Council understood it – that the presence of smaller non-vertical players at each level was sufficient to alleviate vertical concerns – was incorrect. The Christchurch City Council observed that it is only at the lowest end of the collections market that it could be argued that small operators exist. In all other respects, vertical integration in the solid waste collection, transfer station, transportation and disposal markets in Canterbury will be such that there will be no likely operator able to compete in those markets;
- if TPI acquires the Canterbury businesses of EnviroWaste, then not only would TPI manage the Kate Valley operation, but it would also own 50% of that asset and all of the business carting waste into the landfill;
- gate prices at regional RTSs reflect the costs of disposing of the waste at Kate Valley. This cost is set by TWC. Transportation costs are negotiated by CWS and TWC. Access to the Kate Valley landfill is determined by TWC;
- without the restraining influence of a major competitor on the boards of CWS and TWC, TPI has the opportunity to exert even greater influence on the operation of both companies;
- whilst the boards of TPI, EnviroWaste, CWS and TWC remain cross-linked, all companies are in a position to exert a degree of influence over each other. Should EnviroWaste be removed from that structure TPI would be the only commercial entity represented on the board of TWC. Christchurch City Council states that this would allow TPI too much influence on decisions made by TWC; and
- the loss of EnviroWaste from CWS will result in a substantial lessening of competition in that there will be no constraining influence from another commercial operator on TPI's approach to matters such as gate charges and services.

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<sup>156</sup> Submission from Buddle Findlay, acting on behalf of Manawatu Waste, to the Commerce Commission on 2 February 2007, paragraph 27.

528. EnviroWaste submitted that:

- discriminatory prices for landfill access had the potential to be a barrier to an entrant into collection markets. It said that if TPI owns 75% of Midwest (and Colmar in EnviroWaste's view will not own part of Manawatu Waste in the factual), it will dictate the price at Bonny Glen landfill. That, according to EnviroWaste would preclude anybody else from entering the markets serviced by Bonny Glen and would lead to increased prices to consumers;
- in EnviroWaste's South Island regions the vertical effects are currently balanced by:
  - alternative landfills being available; or
  - local authority controlled landfills (including Kate Valley where the ownership structure precludes vertical integration-based competitive advantage); and
- in this regard the vertical integration threat is more theoretical at present, in the South Island areas in which EnviroWaste operates.

529. Horowhenua District Council submitted that there was no market power arising from Midwest Disposals's ownership of an RTS in Levin. [

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530. [ ] submitted that EnviroWaste, operator of the Timaru landfill, used that position to obtain a significant access advantage over its competitors. EnviroWaste permitted its collection business much longer landfill access hours than it granted to [ ].

### **Other Jurisdictions**

531. In a report on competition in solid waste management, the OECD stated:

Recent competition cases in the waste management industry have involved concerns about concentration (in both the collection and disposal sectors) and access to essential facilities. In both cases the competition authorities imposed (divestment) conditions which relieved the competitive impact.<sup>157</sup>

532. The Canadian Competition Tribunal has also considered vertical integration.<sup>158</sup> The Tribunal rejected the Commissioner's allegation that, absent market power in disposal, vertical integration could result in a substantial lessening of competition in disposal (not the case in relation to the Acquisition, where market power in disposal is a characteristic in some markets). However, the Tribunal accepted the possibility of a vertically integrated operator effectively applying a "price squeeze" in the collection market.

<sup>157</sup> OECD, *Competition in Local Services: Solid Waste Management*, 4 August 2000 at paragraph 2.3.1.

<sup>158</sup> *Canadian Waste Services Holdings Inc. et al. v. Commissioner of Competition* (2001 Comp. Trib. 3).

## The Commission's Conclusions

### *Potential for Competition Concerns to Arise from Vertical Integration*

533. The Commission considers that the vertical integration effects of the Acquisition could potentially raise a number of competition concerns, including foreclosure of entry and access concerns. Ownership of a landfill, or some cases a RTS, potentially allows a vertically integrated waste firm to apply a price-cost squeeze to its collection competitors. It might, for example, seek to reduce its collection rivals' ability to compete by discriminating between the disposal charges for its own operations and those of its collection competitors.
534. In geographic markets where disposal is available only at a RTS, a collector's price to its customers must allow for the RTS charge, together with the collector's own costs. The RTS price includes both an RTS and a landfill component.
535. As an example, suppose that there is only one RTS and one landfill in a relevant geographic market, and that no direct access to the landfill by collectors is permitted. Suppose also, that the following prices are applied at each functional level for one tonne of solid non-hazardous waste: \$50 for collection, \$30 for RTS, and \$70 for landfill. If this geographic collection market is competitive and there is no vertical integration (each function is provided by different operators), the collector would charge its customer \$150, and pay \$100 to the RTS operator.
536. However, if an operator with a substantial share in the collection downstream market acquires the RTS, the newly vertically integrated operator could use its market power at the RTS level to squeeze competitors at the collection level. This could be achieved as follows:
- the vertically integrated incumbent could raise its RTS charge by \$10 to \$40, and simultaneously reduce its own collection price by \$10 from \$50 to \$40. Although the total price paid by its customers would stay the same, and the vertically integrated operator would recover its lower collection charge in its higher RTS charge, the rival collectors would have to incorporate the new rate of \$40 in order to keep their total price to the customer at \$150. If collection costs are actually \$50, then the incumbent's collection competitors would be forced out of business; or
  - the vertically integrated incumbent could apply a volume discount at its RTS, for which only its collector would have sufficient volume of waste to qualify. For example, it could leave the RTS charge at \$30 for large volumes, and have a price of \$40 for small volumes. These volume discounts would also provide the incumbent with a means to price-cost squeeze its rivals at the collection level.
537. This scenario is not merely a theoretical or speculative one. [

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 538. [ ]

Otherwise the competitors would have to exit the market. Such a scenario in the factual may lead to TPI raising collection prices by 5% and simultaneously squeezing the competitors out of the market. This is an example of how a price-cost squeeze could operate.

539. [ ]

540. EnviroWaste suggested that at present where TPI and EnviroWaste pay similar discounted landfill charges, consumers benefit. However, if there were to be one vertically integrated service provider that could internally discount landfill charges to its own collection business (as would be the case in the factual), existing competitors or entrants would be subjected to this kind of price-cost squeeze. Importantly, EnviroWaste, an experienced and integrated national operator in collection and disposal emphasised:

To consistently deliver the best (collection) rates for end users, there need to be (at least) two operators with sufficient density and a consistent cost base to compete on price.

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<sup>159</sup> [ ].  
<sup>160</sup> [ ].  
<sup>161</sup> [ ].

*Summary*

541. The Commission concludes that there is the potential for competition concerns to arise from vertical integration as a result of the Acquisition. The above discussion relates to the potential for vertical effects arising from the Acquisition to raise competition concerns as a result of TPI applying a price-cost squeeze in wheelie bin and FEL collection markets. Such a price-cost squeeze strategy is possible where TPI holds a significant market position in those collection markets, barriers to entry are high, and TPI owns and/or controls the only realistic disposal option for rival collectors.
542. In respect of the potential for TPI to act in a predatory manner in the factual as a result of increased vertical integration the Commission's investigation has not uncovered sufficient empirical evidence to allow it to conclude that the potential for TPI to adopt such a predation strategy is more likely than not. However, the Commission leaves open the issue as to whether, on different facts, a predation strategy arising from increased vertical integration may be feasible and rational.
543. The Commission now must assess each geographic market in which vertical integration occurs, individually. The Commission has identified the following geographic markets where vertical integration occurs as a result of the Acquisition: Taupo, New Plymouth, Wanganui, Palmerston North, Horowhenua/Kapiti Coast, Christchurch, Timaru and Dunedin. Each is considered below. In particular, the potential for the application of a price-cost squeeze in the factual remains and that is now examined market by market.

*Taupo*

544. In Taupo, Manawatu Waste has a contract to operate RTSs in the District on behalf of the Taupo District Council. Clearly, post-acquisition the combined entity would hold a very strong position in all types of collection (almost [ ]% in each collection market).
545. However, the Taupo District Council has advised the Commission that it sets the disposal prices at its landfill. Manawatu Waste is merely the operator of the landfill, and does not have decision-making power as to disposal rates or access rights.
546. As a result, the Commission considers that the Acquisition would not have any effect on any waste collector's ability to access the landfill and concludes that the vertical integration effects from the Acquisition would be unlikely to raise further competition concerns in the downstream markets for collection services in Taupo.

*New Plymouth*

547. In New Plymouth TPI has a [ ]% market share in both wheelie bin and FEL waste collection markets and a large market share in gantry collection. It is by far the large waste collector in the region.
548. Manawatu Waste, which would be half owned by TPI in the factual, operates the New Plymouth District Council's RTS (the Colson Road RTS). Manawatu Waste has the ability to set the RTS disposal charge independently of the New Plymouth

District Council The New Plymouth District Council's other small RTS (the Waitara RTS) is operated by a waste collector, Just Rubbish, and located in Waitara, 15 kilometres outside New Plymouth City. Manawatu Waste also operates the Colson Road landfill on behalf of the New Plymouth District Council.

549. The opening hours for accessing the Waitara RTS are limited.<sup>162</sup> Colson Road RTS is open all day, seven days per week. At present, the limited opening hours, limited waste capacity and to some extent the extra distance from the New Plymouth city centre, suggest that the Waitara RTS is, absent the special circumstances described below, not a suitable substitute for the Colson Road RTS.
550. There is no general public access to the Colson Road landfill. Collectors in New Plymouth may dispose of their collected waste at the landfill. However, the New Plymouth District Council applies a minimum volume charge corresponding to the cost of disposing of a volume of five tonnes of waste (or three tonnes if the waste is compacted on-truck). Existing waste collectors (or potential entrants) which compete with TPI would be required to use the Colson Road RTS (controlled by TPI in the factual but not in the counterfactual) for disposal unless their vehicles were able to collect five tonnes or more per collection trip.
551. TPI operates the New Plymouth District Council's kerbside collection contract and, as stated, holds about [ ]% market share in both wheelie bin collection and in FEL collection. It also has [ ]% market share in gantry collection in New Plymouth. TPI clearly has a very strong position in wheelie bin and FEL collection markets. Manawatu Waste does not operate in the collection level in New Plymouth.
552. There are two main rivals to TPI in the FEL collection markets in New Plymouth, Just Rubbish and Silver Drum Hire. The latter is also the only rival to TPI in the wheelie bin collection market. The Acquisition is likely to affect each of these companies in a different manner.
553. Just Rubbish, based in Waitara, provides FEL collection in New Plymouth (and operates the Waitara RTS). This collector informed the Commission that even though it operates the Waitara RTS, it uses that RTS for the compaction of waste to a minimum weight of three tonnes, prior to its transfer to the Colson Road landfill. It stated that New Plymouth District Council's current gate price of \$85 at the Waitara RTS is much higher than the Colson Road landfill charge of \$46. [ ]
- [ ]. The Commission notes again that absent these special circumstances, the Waitara RTS could not be considered as a substitute for the Colson Road RTS.
554. [ ], based in New Plymouth, provides wheelie bin and FEL collections in New Plymouth. This collector informed the Commission that the volume of wheelie bin waste it collects is sufficient to overcome the New Plymouth District Council's minimum volume charge at the Colson Road landfill, and thus allow it to by-pass Manawatu Waste's Colson Road RTS. On the other hand, [ ]

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<sup>162</sup> Sunday, Monday, Wednesday and Friday from 1pm to 4pm as well as Saturday from 12pm to 4pm.

FEL customers do not generate sufficient volume to overcome the landfill minimum volume charge. That means that [ ] has no option other than to dispose of that FEL waste at the Colson Road RTS. This collector informed the Commission that the gate price it pays Manawatu Waste at the RTS has recently increased to [ ] per tonne. It claimed that if, post-acquisition, TPI were to increase the gate price by 10%, [ ] would have to increase its FEL collection prices, and that would be likely to result in its customers switching to TPI.

555. The Commission notes that Manawatu Waste controls the disposal prices at its Colson Road RTS (but not at the landfill). However, the Commission understands that Manawatu Waste [

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556. The Commission considers that on the information available to it the Acquisition would provide TPI - vertically integrated in collection and RTS ownership in the factual - with incentives to raise prices at the Colson Road RTS to the detriment of new entrants and/or existing competitors in wheelie bin and FEL collection markets. It would have this ability first because, as the Commission has concluded, the Waitara RTS is not a suitable substitute. Secondly, the 'minimum volume charge' at the Colson Road landfill acts as a barrier to some existing collectors and new entrants in the collection markets who must use the RTS, currently at a disposal price of [ ] per tonne, and cannot access the landfill at \$46 per tonne of waste.

557. To further test the ability of TPI to foreclose new entrants and existing competitors in the factual, by setting discriminatory prices at the Colson Road RTS, the Commission obtained the following information from the New Plymouth District Council:

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558. TPI submitted that if it were to attempt to deny access to the RTS post-acquisition to a competitor, or grant access only on discriminatory terms, collection competitors could build their own transfer station. However, even though the entry into the RTS market is not conditional upon the entrant being vertically integrated with the landfill operations, the likelihood and the extent of such entry is dependant on the ability of the new RTS to command a large and stable volume of waste from

the collection markets. Since TPI controls a significant volume of waste stream in New Plymouth, corresponding to all of the New Plymouth District Council's kerbside collection and more than [ ]% of the privately contracted collection, the remaining volume of waste would be shared between the Waitara RTS and the hypothetical new RTS, as well as with the Colson Road landfill (for a minimum volume of five tonnes of waste). The Commission, therefore, considers that it is unlikely that any existing competitor would build an RTS in response to a price increase within the Commission's two year timeframe, due to the low volume of waste stream that such competitor would be able to secure for its new RTS.

559. For the reasons given above, the Commission considers that the vertical integration arising from the Acquisition creates the potential for TPI to enhance its market power in the wheelie bin and FEL collection downstream markets in New Plymouth. The Commission, therefore, is not satisfied that the vertical effects from the Acquisition will not have, or would not be likely to have, the effect of substantially lessening competition in the wheelie bin and FEL collection markets in New Plymouth.

#### *Wanganui*

560. In Wanganui, both the TPI and Manawatu Waste each own a RTS. Horizontal aggregation would thus occur at this functional level in the factual. The waste stream from these RTSs is transported by truck to Bonny Glen landfill, jointly owned by the two companies through Midwest Disposals. Waste collectors in Wanganui markets have the choice of disposing of their waste at either of the RTSs, or directly at the Bonny Glen landfill. Bonny Glen is the only landfill in the Wanganui market.
561. As part of its acquisition of up to 50% of Manawatu Waste, TPI would be likely to acquire greater influence over Midwest Disposals (see diagram 1 for structure). As stated Midwest Disposals owns Bonny Glen landfill. The Commission considers that as a result of the Acquisition TPI will effectively control 75% of Midwest Disposals, in comparison to its half ownership with Manawatu Waste in the counterfactual. This arises as a result of its existing 50% direct shareholding in that company along with, post-Acquisition, a 50% share in Manawatu Waste. [

]. TPI and Ironbridge (through its subsidiary EnviroWaste) would be joint owners of the company.

562. Both TPI and Manawatu Waste pointed to various provisions in Midwest Disposals Constitution which they say supported their respective cases. TPI, in arguing that there would be no difference between the factual and the counterfactual as to its ability to influence Bonny Glen's landfill prices relies, in particular, on a provision [ ]. Manawatu Waste, however, relies on a provision of the Constitution that [



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563. It is, however, unnecessary for the Commission to decide in order to resolve the point. In the end, standing back, the Commission considers that, whatever the particular provisions of the Constitution, TPI will, as a result of the Acquisition, have a majority ownership interest in, and through its 75% representation on its Board of Directors, control of Midwest Disposals.
564. In this respect, the Commission does not consider that TPI's submission, that other landfills in the region provide constraint on disposal pricing at Bonny Glen, is correct. Horowhenua District Council's landfill has limited capacity to take out-of-district waste and it is already committed to taking a large quantity of waste from Kapiti Coast region when its own landfill closes this year. That action has already resulted in political discomfort for the Horowhenua District Council. [

] The Paihatua landfill is currently exceeding its consented quantities as a result of Cairns Bins's disposals at the landfill. TPI has mounted a local advertising campaign pointing out this fact, no doubt, with a view to eliminating Cairns Bins Paihatua disposal option and driving Cairns Bins to disposal at Bonny Glen at higher prices.

565. The Commission has found that post-acquisition the combined entity would hold around [ ]% market share in the wheelie bin collection, [ ]% in the FEL collection, and [ ]% in gantry collection in Wanganui. The combined entity would thus have a monopoly in downstream markets for wheelie bin and FEL collection.
566. [

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567. [

] Moreover, for the same reasons, the Commission does not consider that it would be feasible for a competing collector to build its own RTS. In addition, any new entrant in the local market for RTSs would have no other option than to direct the waste stream to the Bonny Glenn landfill, which is controlled by its two major competitors. The same conditions would apply to the RTS which TPI proposes to divest.

568. At present, both TPI and Manawatu Waste are owners (through the Midwest Disposals joint venture) of Bonny Glen landfill. The Commission considers that a price-cost squeeze strategy is likely to be feasible and rational for the combined entity in the Wanganui markets for wheelie bin and FEL collection. That could occur by Midwest Disposals limiting access to, or applying discriminatory pricing at, Bonny Glen landfill.

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<sup>163</sup> As required by section 69A(1) of the Act

569. The Commission notes that the discrimination against third party competitors is equally possible in both the factual and the counterfactual (that is, the Midwest Disposals's owners already have that incentive). In fact, the combined entity's FEL and wheelie bin share is [ ] percent, which is consistent with the view that no non-owner of the landfill could be successful in wheelie bins or FEL because of the possibility of being squeezed. However, in the counterfactual, there will be competition between TPI and Manawatu Waste in wheelie bin collection markets, while, in the factual, that competition is lost. Because of the potential price-cost squeeze concern at Bonny Glen landfill and/or the RTS, the Commission would expect less new entry and/or more likely exit of existing competitors in the wheelie bin collection market. Therefore, in the wheelie bin collection market, there is likely to be more competition in the counterfactual than in the factual, so that wheelie bin collection prices would be expected to increase. With respect to the FEL collection market, the threat of entry from Manawatu Waste into the FEL collection market is likely to constrain TPI from increasing FEL collection prices in the counterfactual, while this threat is removed in the factual.
570. The Commission considers that the merged entity could possibly face the threat of new entry. At some point, high enough collection prices would make it profitable to enter in wheelie bin and FEL collection markets, in spite of high barriers to entry into these product markets, but that threat can be removed, or significantly reduced, by the real concern a potential entrant would face from a price-cost squeeze. For that reason, vertical links together with the horizontal aggregation in disposal operations are likely to raise prices more than horizontal aggregation alone.
571. To illustrate these effects, suppose that as a result of competition between TPI and Manawatu Waste in wheelie bins, the price for wheelie bins is \$10. If they merge, they could raise price (say, to \$12). But that price might be below the monopoly price if entry would be induced at prices below the monopoly level. If entry can be prevented through a price-cost squeeze strategy, however, TPI and Manawatu Waste in the factual could raise wheelie bin prices to the monopoly level (say \$13). In this scenario, divestment of a RTS does not resolve the vertical integration concerns (even if the divested RTS is somehow viable) as long as the merged entity could set discriminatory landfill prices (e.g., it could discriminate against the divested RTS by raising landfill prices to both RTSs).
572. Therefore, the Commission considers that, because of these vertical effects (and also as a result of the [ ]% horizontal aggregation of market share in the Wanganui RTS market), the Acquisition would provide the combined entity with the potential to enhance its market power in wheelie bin and FEL collection markets in Wanganui. That will occur whether or not TPI divests its RTS. For such a divestment to be effective, there must be sufficient collection tonnage available to ensure its commercial viability.
573. For the reasons given above, the Commission considers that the vertical integration arising from the Acquisition creates the potential for TPI to enhance its market power in the wheelie bin and FEL collection downstream markets in Wanganui. The Commission, therefore, is not satisfied that the vertical effects from the

Acquisition will not have, or would not be likely to have, the effect of substantially lessening competition in the wheelie bin and FEL collection markets in Wanganui.

*Palmerston North*

574. In Palmerston North, Manawatu Waste owns a RTS and competes with another RTS owned by Cairns. The Commission notes that post-acquisition the combined entity would hold around [ ]% market share in the wheelie bin collection, [ ]% in the FEL collection, and [ ]% in gantry collection in this geographic market. The Commission considers that the combined entity would hold a very strong position in the downstream markets for wheelie bin and FEL collection.
575. The waste stream from the RTS owned by Manawatu Waste is transported to Bonny Glen landfill. The waste stream from the RTS owned by Cairns is transported to the landfills owned by the Tararua District Council, which are consented to 2010. Cairns informed the Commission that it chose that option because the disposal price offered at the Bonny Glen landfill was [ ] per tonne plus an escalation formula, while Tararua District Council offered the disposal rate of [ ] per tonne. Transport distances to the two landfills are about the same. A further landfill in the general area is that of the Horowhenua District Council, which has arranged to accept [ ] tonnes per annum of waste from the Kapiti Coast area from late 2007. Horowhenua District Council informed the Commission that it would be likely to accept waste into its landfill from those regions where a suitable waste minimisation policy is in place.
576. TPI submitted that there are a series of third-party owned transfer stations in the Manawatu region, including Council owned stations in Ashurst, Feilding, Shannon and Foxton, and the Cairns transfer station in Palmerston North, and that waste collectors in the region all have access to independent disposal facilities.<sup>164</sup>
577. The Commission accepts that there are sufficient alternatives to TPI and Manawatu Waste's disposal sites (for both RTS and landfill disposal) such that the vertical integration effects from the Acquisition are unlikely to raise further competition concerns in the downstream collection markets in Palmerston North, within the Commission's two year timeframe. Further, any ability for TPI and Manawatu Waste to discriminate in respect of access to Bonny Glen landfill remains the same in the factual and counterfactual.

*Horowhenua/Kapiti Coast*

578. In Horowhenua/Kapiti Coast, TPI operates the Foxton, Shannon and Otaki RTSs on behalf of the local authorities owners.<sup>165</sup> Midwest Disposals owns and operates a RTS in Levin, and it also operates the Horowhenua District Council's landfill at Levin.
579. The Commission notes that post-acquisition the combined entity would hold about [ ]% market share in the wheelie bin collection, [ ]% in FEL collection, and [ ]% in gantry collection in this geographic market. The Commission considers that

<sup>164</sup> Submission from TPI, to the Commerce Commission on 5 March 2007, paragraph 41

<sup>165</sup> Horowhenua and Kapiti Coast District Councils.

the combined entity would hold a very strong position in downstream markets for wheelie bin and FEL collection services.

580. TPI submitted that aggregation of TPI/Manawatu Waste collection tonnes is unlikely to have vertical effects relative to the counterfactual as TPI and Manawatu Waste already jointly own Bonny Glen landfill, and have committed their waste from the region to this landfill, except from the Levin RTS. This is currently committed to the Horowhenua District Council's landfill at Levin, but absent that arrangement it would be transported to Bonny Glen landfill.
581. The Horowhenua District Council informed the Commission that waste collectors in its region dispose of their waste at Midwest Disposals RTS. However, it affirmed that both Bonny Glen landfill and the Levin landfill compete for the waste stream from the Kapiti Coast district. The Horowhenua District Council also considered that Midwest Disposals had no ability currently to exert market power through its ownership of the RTS in Levin.
582. The Commission considers that the vertical integration effects from the Acquisition are unlikely to raise further competition concerns in the downstream collection markets in Horowhenua/Kapiti Coast, within the Commission's two year timeframe.

#### *Christchurch*

583. In Christchurch, CWS is a joint venture between TPI and EnviroWaste. CWS owns a RTS and 50% of the shares in TWC, the owner of the Kate Valley regional landfill. There are three other RTSs in Christchurch owned by the Christchurch City Council and operated by Meta NZ Ltd (Meta) since 2005. Meta's RTSs compete directly with CWS's RTS. The waste stream from the CWS and Meta RTSs is transported to the Kate Valley landfill. The Kate Valley landfill is the only landfill in the Christchurch geographic market. It is owned through Transwaste Canterbury (TWC) in equal shares by the Joint Committee and CWS. CWS manages and operates the Kate Valley landfill, and has an exclusive contract for the transportation of solid waste from the Canterbury region to the landfill.
584. The Commission notes that post-acquisition the combined entity would hold market shares of about [ ]% in wheelie bin waste collection, [ ]% in FEL waste collection, and [ ]% in gantry waste collection in the Christchurch geographic market. Clearly, TPI would hold a very strong position in the downstream wheelie bin and FEL waste collection markets.
585. The information provided to the Commission shows that the waste disposal charge at the RTSs in the Christchurch market is composed of three different elements (the figures cited are for Meta's RTSs):
- landfill fee (this charge covers the capital and operational costs of the Kate Valley landfill), currently \$[ ];
  - waste transportation charge (this charge covers the cost of transporting the waste from all RTSs to the Kate Valley landfill), currently \$[ ];

- RTS charge (this charge covers capital and operational costs of a RTS), currently \$[ ]].
586. The Commission understands that TWC's board of directors<sup>166</sup> decides each year on the appropriate basis for determining each cost component. The information provided to the Commission and summarised in Table 14 indicates the level and the cost composition of the disposal charge for waste that passes through Meta's RTSs in Christchurch for the three years 2005/06 to 2007/08.

**Table 14: Disposal Charge at Meta's RTSs in Christchurch, 2005/06 to 2007/08**

	2005/06	2006/07	2007/08
Landfill fee	[ ]	[ ]	[ ]
Waste transportation charge	[ ]	[ ]	[ ]
RTS charge (Meta NZ)	[ ]	[ ]	[ ]
<b>TOTAL disposal charge</b>	<b>\$125.00</b>	<b>\$130.00</b>	<b>\$140.50</b>

587. The Commission notes that the overall charge has increased by [ ]% over the past two years, but that the increase in disposal charge has not been shared evenly across all three cost components. For example, the landfill charge has increased by [ ]% over the period, the contribution for Meta's RTS charges decreased by [ ]%, and the transportation cost increased by [ ]%.
588. The Commission considers that if TPI through the Acquisition, were to gain control over landfill pricing at Kate Valley, it could gain the potential to discriminate against competing RTSs and waste collectors, and to effectively apply a price-cost squeeze at either level. If, for example, post-acquisition, gate prices at the Kate Valley landfill were increased to all RTSs (including those of Meta and TPI), Meta's RTSs would absorb or pass on the entire amount as a cost increase, whereas for TPI's RTS(s), half of the increase would be an internal transfer and so to that extent need not be absorbed or passed on in a higher charge. Because TPI owns half of TWC, half of the increase is a transfer payment between TPI's RTS and TPI's 50% shareholding in TWC. This situation would create the potential for TPI to apply a price-cost squeeze strategy in downstream collection markets.
589. However, for such vertical integration issues to arise there would have to be both the *ability* to control landfill pricing, as well as the *incentive* to do so. As will become apparent, in this case it is the analysis of the former issue that is the critical one.
590. First, however, in relation to the issue of incentives, the incentive to do so would be influenced by market shares. The Commission notes that TPI and EnviroWaste have different market shares in the downstream collection markets in Christchurch:
- wheelie bin collection – TPI [ ]%, EnviroWaste [ ]%;
  - FEL collection – TPI [ ]%, EnviroWaste [ ]%, and
  - gantry collection – TPI [ ]%, EnviroWaste [ ]%.

<sup>166</sup> Eight directors, four appointed by CWS and four appointed by the Joint Committee.

591. In aggregate, across these three privately contracted collection markets, TPI has ownership of about [ ]% of the waste stream, while EnviroWaste has [ ]%. The presence of such a large difference in their market positions downstream suggests that their incentives to influence upstream prices at the Kate Valley landfill are likely to be different too.
592. The Commission has modelled the operation of price-cost squeezes under the factual and counterfactual in Christchurch and the results, in terms of changes of net revenues for the various parties, are shown in Table 15. The Commission's model uses numbers that seem broadly supportable, and assumes hypothetically that the landfill price is increased by 10% while TPI's collection price, and hence all other competitor's collection prices, do not change.
593. The effect is to apply a price-cost squeeze onto the other collectors who are not vertically integrated. This is because the other collectors have to pay the higher landfill charge, but are not able to raise their collection prices to compensate, because they would then lose market share to TPI and EnviroWaste in the counterfactual and to TPI in the factual. As a result, the Commission's model shows that their net revenue is reduced by 26%. It is assumed that this will cause them to exit because they cannot compete with the cost disadvantage they face, leaving the collection markets to the vertically integrated operators.
594. In contrast, the two vertically integrated operators, TPI and EnviroWaste would benefit from a share of the increased profits from the higher landfill revenues initially, and then subsequently benefit further from the exit of the other operators. EnviroWaste benefits more than TPI because of its higher percentage share in the landfill ownership [ ] than its share in collection markets [ ], whereas TPI is much more exposed on the collection side with its aggregated [ ]% share.
595. In the model, under the counterfactual, TPI actually suffers a decline in net revenue of 7.69% initially, but ultimately gains an increase of 11.59% when the other operators exit the market.<sup>167</sup>
596. In the factual the profitability of the price-cost squeeze strategy by TPI, now the sole vertically integrated operator, becomes more attractive. First, the initial impact is for a smaller decrease in net revenue of only 2.99%. Subsequently when the other operators exit, it obtains the entire volume of the privately contracted collection markets and 50% of the revenue from the landfill. As a result, a 10% price increase at the landfill increases TPI's revenue by 21.24%, as compared to the 11.59% in the counterfactual.
597. All of this suggests to the Commission that TPI's incentive to introduce a price-cost squeeze strategy by increasing landfill prices is likely to be greater in the factual, with the Acquisition completed, than in the counterfactual when EnviroWaste would remain as an independent competitor.

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<sup>167</sup> The Commission used the same assumptions as before, but also assumed that: 100% of the other operators exited the market in response to a 10% increase in landfill prices; in the counterfactual, that TPI and EnviroWaste each obtained 50% of the other operators' revenue; and in the factual, that TPI obtained the other operators' revenue.

598. Finally, under all four scenarios the local authority owners of the Joint Committee would receive a 26% increase in revenue as a result of a 10% price increase at landfill.

**Table 15 Summary of Modelled Changes in Net Revenues with and without the Acquisition**

		<b>TPI</b>	<b>EnviroWaste</b>	<b>Councils</b>
Without the Acquisition	Initial impact (no exit of others)	-7.69%	4.95%	26%
	Final impact (with exit of others)	11.59%	37.55%	26%
With the Acquisition	Initial impact (no exit of others)	-2.99%	N/A	26%
	Final impact (with exit of others)	21.24%	N/A	26%

599. Therefore, on the basis of this modelling, the Commission considers that TPI will have a greater *incentive* to influence the level of disposal charges in Christchurch in the factual than in the counterfactual.

600. On the second important issue – the ability to *control* landfill pricing - the Commission considers that, on the evidence that has emerged, vertical concerns in Christchurch turn on whether TPI’s influence would be increased in the factual to the point where it would have the ability to exercise control over landfill pricing. That is an issue of fact.

601. TPI agreed that CWS has some influence over disposal rates and access at the Kate Valley landfill, but considered that the influence exists already and would not be increased post-Acquisition. However, the Christchurch City Council submitted that this influence would be significantly increased in the factual. Christchurch City Council submitted that:

- the cost of disposing of waste at Kate Valley is set by TWC;
- access to Kate Valley is set by TWC; and
- without the restraining influence of EnviroWaste on the boards of CWS and TWC, TPI would have the opportunity to exert greater influence on the operation of both companies.

602. The Commission places some weight on the evidence of the Christchurch City Council as a shareholder in TWC with knowledge of its operations and structure. However, the Christchurch City Council did not provide specifics of how, and to what extent, TPI would have a greater ability to influence the decisions of TWC in the factual. Further, the Christchurch City Council at no stage submitted that the level of influence would provide TPI, through CWS, with control over landfill pricing.

603. TPI noted in response that:

- CWS would have no greater influence over the TWC board than at present where the 8 directors, in the absence of a casting vote, must agree. The governance framework for TWC would not be altered by the Acquisition; and
- it was not aware of any evidence supporting the suggestion that EnviroWaste and TPI had disagreed in their voting in the past, such that one shareholder constrained the other. Further, it noted that EnviroWaste had not voted (and would not vote) against its own interests by voting against the interests of CWS.

604. The Christchurch City Council submitted in response that:<sup>168</sup>

It remains the Council's view that, along with the other interests that TPI already has or which it might acquire, the fact that Canterbury Waste Services Limited (CWS) has the ability to decide which elements of the landfill and transport operations should be subcontracted and contestable by other operators provides TPI with an advantage over other participants in the solid waste markets.

If TPI were to acquire EnviroWaste's shares in CWS, it will mean that TPI will be free to set a level of service and gate charges that will enhance its business in the collections, transportation and disposal markets, without the restraining influence of EnviroWaste's interests in those markets.

Currently both EnviroWaste and TPI are involved in any decisions that are made with regard to sub-contracting some of the transportation of waste to the Kate Valley landfill. The need to consider the interests of its joint venture partner, as well as its own, means that there is a restraining influence imposed on TPI.

The Council reiterates its view that transportation costs may be subject to the influence of TPI's interest in the collection, processing and disposal markets for solid waste rather than the effect of competition in each of those markets. The vertical integration that TPI would achieve with the acquisition of EnviroWaste's South Island assets and businesses could mean that one company would have the opportunity to "manage" services and charges in one market to assist it in another. Transportation costs are set by TWC but, obviously, CWS (potentially TPI only) will be in a position to influence the level of those costs.

605. However, other parties involved in TWC also commented in ways contrary to the Christchurch City Council's submission:

- EnviroWaste, the other CWS shareholder and with obvious knowledge of the functioning of CWS's board and the structure of its operations, noted that vertical integration concerns in Christchurch were "theoretical at present" and that vertical integration was balanced by "council controlled landfills (including Kate Valley where the ownership structure precludes integration-based competitive advantage);"<sup>169</sup> and
- Waimakariri District Council, one of the councils ultimately represented in TWC, was not concerned about the potential aggregation in CWS. As it explained, at the time TWC was formed, the Canterbury local authorities wanted a commercial partner and it did not matter then, and does not matter now, whether it was TPI or a 50 – 50 joint venture between TPI and

<sup>168</sup> Submission from the Christchurch City Council, dated 15 March 2007.

<sup>169</sup> E-mail, 25 May 2007



EnviroWaste. Therefore, the Waimakariri District Council did not consider that the Acquisition would have any vertical effects in the region.

606. Mr Dennis O'Rourke, former chairman of TWC and director of Meta Ltd, noted that:

- the TWC board consists of 8 directors, and as the Chair does not have a casting vote, the parties need to agree; and
- the local authorities and CWS representatives had argued over the price setting for some time, with councils seeking a lower gate price while CWS sought a higher one.<sup>170</sup>

607. When directly asked by Commission staff whether he considered that the Acquisition would increase CWS's power, Mr O'Rourke responded:

[

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608. The Commission notes, however, that in the counterfactual, the control of EnviroWaste has moved to Ironbridge, an overseas private equity investor, which would be deciding on the voting strategy to be adopted by EnviroWaste's directors on TWC. The past approach of EnviroWaste under the control of Fulton Hogan, to which Mr O'Rourke's comments were directed, is not, therefore, the appropriate counterfactual. Even if Mr O'Rourke is accurate in his description of EnviroWaste as a moderating influence in respect of landfill price increases (and it is difficult to understand why EnviroWaste and its then, Fulton Hogan, parent would forgo any potential revenue increase from Kate Valley landfill fees), in the Commission's view the situation in the counterfactual will not be the same as described by Mr O'Rourke. [

]. The Commission considers that on these facts, the influence of the CWS directors in the counterfactual is likely to closely approximate that of TPI in the factual.

#### Conclusions on Christchurch

609. The potential for a vertical acquisition to have the effect of substantially lessening competition in a market, through the vertically integrated firm being able to use its market power at one level to foreclose competition at another, depends upon both its *incentive* and its *ability* to do so. The Commission has considered whether a price-cost squeeze might be more likely following the Acquisition, where the landfill price could be increased with no change in the collection charge, such that

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<sup>170</sup> Meeting, 13 December 2006

smaller non-vertically integrated operators might be forced to exit. The Commission's modelling suggests that TPI is likely to have an *incentive* to engage in such a strategy even without the Acquisition, and that that incentive would likely be enhanced by the Acquisition. This is because its share of the extra landfill profits would increase from 25 to 50%, and it would stand to gain all, rather than a part, of the market shares currently held by the smaller operators.

610. However, the question remains whether TPI would have the greater ability to introduce such a strategy post-Acquisition. The evidence in support of this contention is limited primarily to the Christchurch City Council submission that TPI would have an increased degree of influence at the Board of TWC (and thereby increased influence on landfill pricing at Kate Valley). The Commission acknowledges there is a potential risk that this increased vertical integration could result in a substantial lessening of competition in Christchurch wheelie bin markets, absent EnviroWaste's shareholding in TWC in the factual. It does not, however, accept the extent of the risk or concerns as outlined by Christchurch City Council. The Commission has carefully considered all the evidence on this issue. On the weight of evidence – which largely contradicts the Christchurch City Council submission – the Commission considers that, on balance (and having regard to the required standard of proof – ie the balance of probabilities), this risk will not be likely to result in a substantial lessening of competition in these markets.
611. As noted, in the counterfactual, the management and governance of EnviroWaste would be under the control of Ironbridge. In short, as stated the Commission considers that under an Ironbridge regime, the strategies of CWS's directors on the board of TWC will be very similar in the factual and the counterfactual.
612. Even if, however, Ironbridge were to continue to manage its shareholding of CWS in the way Fulton Hogan has done in the past, it is notable that there have been price increases in the past two years that have been agreed to by the representatives of TPI, EnviroWaste and the Joint Committee. Nothing, therefore, would likely change. If anything, the Commission considers that under Ironbridge's ownership this trend is likely to continue, if not increase, in the counterfactual.
613. Importantly, in both the factual and the counterfactual, TWC would be equally controlled by the Canterbury local authorities and respectively, either one or two commercial entities. The Commission would expect that in both scenarios the commercial half of TWC would seek to maximise its profits, by raising prices to the fullest possible extent. Therefore the Acquisition does not change anything.
614. However, as outlined above, the issue in this case is whether TPI, through CWS, would have control over landfill pricing. Given:
- that TWC will remain a 50/50 joint venture (TPI would not acquire control);
  - the voting rights; and
  - the absence of a casting vote by the chair,

the Commission cannot conclude on the facts of this investigation that either TPI in the factual (or even TPI and Ironbridge in counter-factual), would have the ability to control landfill pricing.

615. Moreover, the local authorities do appear, on the evidence of Mr O'Rourke, to have in the past exercised some restraint on CWS's efforts to increase landfill prices at the Kate Valley landfill. Given the strength of the Christchurch City Council's concerns, the Commission expects that this will not diminish in the factual. The local authorities will continue to have joint control of TWC in the factual and the Christchurch City Council is clearly alert to the risk of the exercise of market power arising from vertical integration should TPI, through CWS, gain a greater influence over landfill pricing.
616. On these facts, the Commission concludes that it is unlikely that TPI in the factual would have a significantly greater ability than in the counterfactual to put in place discriminatory access terms or increased gate prices at the Kate Valley landfill. As a consequence, the Commission concludes that the vertical integration effects from the Acquisition are unlikely to raise further competition concerns in the downstream markets for wheelie bin and FEL collection services in Christchurch of sufficient magnitude to constitute a substantial lessening of competition.
617. However, the Commission wishes to note that the facts that have emerged during this investigation leave it with concerns over the ability of integrated landfill owners, including TPI, to engage in anticompetitive behaviour. In any future clearance application or investigation of an acquisition, the Commission is likely to test these concerns further.

#### *Timaru*

618. EnviroWaste has contracted with the Timaru District Council for the operation of the council kerbside collection, RTS, material recovery facility and landfill. In this situation, where waste services at all three functional levels of the market are contracted for by the council, local authority involvement has shaped the solid waste markets. EnviroWaste, although a vertically integrated operator, has no control over access and pricing terms at any of the three functional levels and, therefore, is restricted in its ability to act in a discriminatory manner against its competitors.
619. The Commission considers that this situation would continue post-acquisition,<sup>171</sup> and concludes that the vertical integration effects from the Acquisition are unlikely to raise further competition concerns in Timaru, within the Commission's two year timeframe.

#### *Dunedin*

620. EnviroWaste owns a RTS in Dunedin, that competes for waste stream with two Dunedin City Council RTSs. There are two landfills in Dunedin, one owned by the Dunedin City Council and the other by EnviroWaste. The landfills have respectively about [ ] and [ ] years life remaining. TPI does not own a RTS or landfill in Dunedin.
621. Given this competition between RTSs and landfills, the Commission concludes that the vertical integration effects from the Acquisition are unlikely to raise further

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<sup>171</sup> The contract has 14 years to run.

competition concerns in the downstream collection markets in Dunedin, within the Commission's two year timeframe.

### **Conclusion on vertical integration**

622. The Commission concludes that further competition concerns are likely to arise from vertical integration in New Plymouth and Wanganui through the creation of the potential for TPI to enhance its market power in the wheelie bin and FEL collection markets. Therefore, the Commission is not satisfied, on the evidence that has been provided to it, that the Acquisition will not have, or would not be likely to have, the effect of substantially lessening competition in wheelie bin and FEL collection markets in New Plymouth and Wanganui.

### **THE COMMISSION'S OVERALL CONCLUSIONS ON THE APPLICATION**

623. Because of the number of combinations of product and geographic markets that have required analysis in this Decision, the Commission has provided a summary of its findings in respect of each market in Table A in the Executive Summary.

624. The Commission is not satisfied that the acquisition of the South Island assets and businesses of EnviroWaste Services and up to 50% of the shares in Manawatu Waste will not have, or would not be likely to have, the effect of substantially lessening competition in:

- wheelie bin/refuse bag waste collection markets in Wanganui, Palmerston North and Dunedin;
- FEL waste collection markets in Taupo, Palmerston North, and Horowhenua/Kapiti Coast; Nelson, Christchurch, Timaru/Oamaru and Dunedin;
- the RTS market in Wanganui;
- the national multi-regional customer waste management market (partially as a result of the acquisition of the assets and businesses of EnviroWaste in the South Island and partially as a result of the acquisition of 50% of the shares of Manawatu Waste); and
- wheelie bin/refuse bag and FEL collection markets in New Plymouth and Wanganui due to vertical effects.

**DETERMINATION OF NOTICE SEEKING CLEARANCE**

625. Pursuant to section 66(3)(b) of the Commerce Act 1986, the Commission determines to decline to give clearance for the acquisition by Transpacific Industries Group (NZ) Ltd (or a wholly-owned subsidiary) of:

- the South Island assets and businesses of EnviroWaste Services Ltd; and
- up to 50% of the shares in Manawatu Waste Ltd.

Dated this 30th day of May 2007

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Paula Rebstock  
Chair  
Commerce Commission

Attachment 1: TPI Model #1:

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Attachment 2: TPI Model #1 with Two Parameters Altered for Sensitivity Analysis

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Attachment 3: TPI Model #2

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Attachment 4: TPI Model #2 with Two Parameters Altered for Sensitivity Analysis

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Attachment 5: Manawatu Waste Model #3 and #4

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Attachment 6: TPI Model #5

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Attachment 7: TPI Model #5 with Two Parameters Altered for Sensitivity Analysis

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**ATTACHMENT 8: TPI SUMMARY OF ITS MODELS WITH VARYING ROUTE DENSITY [ ]**

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Attachment 9: Manawatu Waste Front End Load Model

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**ATTACHMENT 10: MANAWATU WASTE'S MODEL CHARTED**

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**ATTACHMENT 11**

**TPI's "national accounts"**

\*Asterisked items indicate customers where TPI sub-contracts to local collectors in regions where it is not represented. For other customers, TPI may not necessarily have the collection contract for the customers' sites in all regions.

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**ATTACHMENT 12 – ENVIROWASTE NATIONAL ACCOUNT LIST [**

**]**

**ATTACHMENT 13: NUMBER OF CUSTOMERS OF TPI, MANAWATU WASTE AND ENVIROWASTE [**

**]**

**Attachment 14: Relevant Market Shares in the North Island (tonnes per month)**

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**Attachment 15: Relevant Market Shares in the South Island (tonnes per month)**

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**ATTACHMENT 16: ILLUSTRATIONS OF GANTRY BINS AND TRUCKS**



**ATTACHMENT 17: ILLUSTRATIONS OF HUKA BINS AND TRUCKS**



**ATTACHMENT 18: ILLUSTRATIONS OF SIDE LOADING WHEELIE BIN TRUCKS**





**ATTACHMENT 19: ILLUSTRATIONS OF FRONT END LOAD TRUCKS**



**ATTACHMENT 20: ILLUSTRATIONS OF REAR END LOADED TRUCKS**



**ATTACHMENT 21: ILLUSTRATION OF 4.5m<sup>3</sup> FEL BIN**



**ATTACHMENT 22**

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**ATTACHMENT 23: PARTIES INTERVIEWED AND/OR PROVIDING WRITTEN SUBMISSIONS TO THE COMMISSION****Participants in the Waste/Recycling Industry**

- TPI
- EnviroWaste
- Metrowaste
- Streetsmart
- JJ Richards
- Onyx
- Manawatu Waste
- META
- Paper Reclaim
- Eazi Bins
- Just Rubbish
- Silver Drum Hire
- Heydon Priest
- Egmont Refuse & Recycling
- Ingrams Bin Hire
- J.A.B Enterprises
- Trashpak
- Dave Hoskins Carriers
- Compost Management
- Rangitikei Waste Disposal
- Rangitikei Wheelie Bins
- Rangitikei Hire Bin Services
- Cairns Bins
- Lakeland Porta Bins
- Clean Earth
- Owyak Waste Ltd
- Levin Container Rubbish
- Can Plan
- Nelmac
- Phil a Skip
- Mastagard
- Timaru Bins
- Tidy Bin Services
- McCullum Sweeping
- Garbo Rubbish Removals
- Cleanway
- Duffy's Skip Services
- Sita
- Visy
- Wanless Wastecorp
- Cleanaway
- Thiess

**Attachment 23 continued****Local Authorities**

- Auckland City Council
- Rodney District Council
- Papakura City Council
- Waitakere City Council
- Franklin District Council
- Manakau City Council
- North Shore City Council
- New Plymouth District Council
- Taupo District Council
- Palmerston North City Council
- Levin City Council
- Manawatu District Council
- Kapiti District Council
- Horowhenua District Council
- Wellington City Council
- Nelson City Council
- Tasman District Council
- Christchurch City Council
- Waimakariri District Council
- Selwyn District Council
- Hurunui District Council
- Timaru District Council
- Dunedin City Council
- Clutha District Council

**Others**

- Fulton Hogan
- Fonterra
- Ironbridge
- The Warehouse
- Goodman Fielder
- Foodstuffs
- Ministry for the Environment