



COMMERCE COMMISSION

Decision Numbers 622, 623, 624 and 625

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

Transpacific Industries Group (NZ) Limited (TPI)

and

Ironbridge Capital Pty Limited (Ironbridge)

- The Commission:** Paula Rebstock
David Caygill
Peter Taylor
Denese Bates QC
- Summary of Application:** TPI has submitted four applications for clearance to acquire the businesses and assets of EnviroWaste Services Limited (EnviroWaste) in Nelson/Blenheim, Timaru/Oamaru, Dunedin and Christchurch from EnviroWaste's parent, Ironbridge.
- Determination:** Pursuant to section 66(3)(a) of the Commerce Act 1986, the Commerce Commission determines to give clearance to TPI for the each of the four acquisitions, subject to the Deed of Undertaking between TPI and the Commission dated 29 October 2007, which provides for TPI to divest certain businesses and assets.
- Date of Determination:** 31 October 2007

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EXECUTIVE SUMMARY

- E1. In August 2007, pursuant to s 66(1) of the Commerce Act 1986 (the Act), Transpacific Industries Group (NZ) Ltd (TPI) filed four separate applications with the Commerce Commission (the Commission) seeking clearance for TPI to acquire the following businesses and assets of EnviroWaste Services Ltd (EnviroWaste) from Ironbridge Capital Pty Limited (Ironbridge):
- EnviroWaste's solid waste collection businesses in Blenheim and Nelson;
 - EnviroWaste's solid waste businesses in Timaru and Oamaru;
 - EnviroWaste's solid waste collection business in Dunedin; and
 - EnviroWaste's solid waste collection business in Christchurch.
- E2. On 29 October 2007, TPI provided an undertaking that it would divest to EnviroWaste certain of the businesses and assets it would acquire, namely:
- the front-end-load bin solid waste collection businesses and assets in Nelson, Christchurch, Timaru and Dunedin; and
 - the privately contracted wheelie bin solid waste collection business in Dunedin.
- E3. The Commission accepted the undertaking under s 69A(1) of the Act. It considered whether TPI's applications with divestments would have, or would be likely to have, the effect of substantially lessening competition in any of the relevant markets.

Relevant Markets

- E4. The relevant markets for these applications are:
- 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 in Nelson, Christchurch and Dunedin ("wheelie bin collection markets");
 - local/regional markets for the provision of privately contracted collection of solid non-hazardous waste in front-end-loaded (FEL) bins from commercial customers in Nelson, Christchurch, Timaru/Oamaru and Dunedin ("FEL collection markets");
 - local/regional markets for the provision of privately contracted collection of solid non-hazardous waste by gantry in Nelson, Christchurch, Timaru/Oamaru and Dunedin ("gantry collection markets"); and
 - the national market for the provision of waste management services to multi-regional customers ("national customer market").

Competition Analysis

- E5. Divestment of EnviroWaste's FEL collection businesses in Nelson, Christchurch, Timaru and Dunedin; and its Dunedin wheelie bin collection business back to EnviroWaste will ensure that existing competition remains to constrain TPI in the factual scenario. Accordingly, the Commission concludes that the proposed acquisitions with the divestment undertaking will not have, nor will be likely to have, the effect of substantially lessening competition in any of the relevant local/regional waste collection markets.

- E6. Divestment of certain assets back to EnviroWaste enables EnviroWaste to continue to compete in the national customer market. By subcontracting a small amount of additional collection services and re-entering selected gantry collection markets, the Commission considers that EnviroWaste will continue to be a competitive constraint on TPI in the national customer market.
- E7. The Commission considers that in the factual, competition from the existing and divested waste businesses, together with that from potential entrants into the relevant waste markets, would constrain Transpacific Industries sufficiently so that there would not be a substantial lessening of competition to the detriment of consumers.

Overall Conclusions in Relation to the Acquisition

- E8. The Commission is satisfied that the proposed acquisition would not have the effect, nor the likely effect, of substantially lessening competition in the local markets in Nelson, Blenheim, Christchurch, Timaru, Oamaru and Dunedin for collection of solid waste in wheelie bins, front-end-loaded (FEL) bins and gantry bins (skips).
- E9. Nor would that effect or likely effect occur in the national market for the provision of waste management services to customers with businesses in more than one region throughout New Zealand.

Determination of Notice Seeking Clearance

- E10. Pursuant to section 66(3)(a) of the Commerce Act 1986, the Commerce Commission determines to give clearance to TPI for the each of the four acquisitions, subject to the Deed of Undertaking between TPI and the Commission dated 29 October 2007, which provides for TPI to divest certain businesses and assets.

THE PROPOSALS

1. Ironbridge Capital Pty Limited (Ironbridge) owns the shares of EnviroWaste Services Ltd (EnviroWaste). Transpacific Industries Group (NZ) Ltd (TPI) and Ironbridge have agreed that TPI, subject either to the Commission granting clearance or a “favourable Commission decision,” will acquire certain of the businesses and assets of EnviroWaste.
2. TPI lodged four Notices,¹ pursuant to s 66(1) of the Commerce Act 1986 (the Act), with the Commerce Commission (the Commission) seeking clearance for TPI to acquire the following businesses and assets from Ironbridge²:
 - EnviroWaste’s solid waste collection businesses in Blenheim and Nelson (the Blenheim/Nelson acquisition);
 - EnviroWaste’s solid waste businesses in Timaru and Oamaru (the Timaru/Oamaru acquisition);
 - EnviroWaste’s solid waste collection business in Dunedin (the Dunedin acquisition); and
 - EnviroWaste’s solid waste collection business in Christchurch (the Christchurch acquisition).³
3. These four applications were registered by the Commission on 16 August 2007, 17 August 2007, 22 August 2007 and 22 August 2007, respectively.
4. On 29 October 2007, TPI provided an undertaking that it would divest certain of the businesses and assets it would acquire to EnviroWaste. The business and assets to be divested are the front-end-load (FEL) waste collection businesses and assets in Nelson, Christchurch, Timaru and Dunedin and the wheelie bin waste collection business in Dunedin.
5. The divestment will be achieved by [

] The Commission is satisfied that this is an appropriate mechanism for the divestments and that the undertaking relates to assets or shares. Accordingly the Commission is able to accept the undertaking under s 69A(1) of the Act.

6. The four applications together encompass some of the businesses and assets that were included in TPI’s application for clearance made on 14 December 2006.⁴ The Commission declined to give clearance to that proposed acquisition on 30 May 2007. It published reasons for its Decision 604⁵ (for convenience simply Decision 604) which provide the background to these new applications. The Commission has necessarily relied to a significant extent on the evidence provided to it in relation to Decision 604 in dealing with these applications. Indeed, TPI itself requested the Commission to take

¹ In this Decision, the notices are termed the “applications.”

² In fact, from a wholly-owned subsidiary of Ironbridge called Barra Bidco Ltd.

³ Collectively “the acquisitions”.

⁴ TPI’s 14 December 2006 Notice sought clearance for it to acquire the South Island assets and businesses of EnviroWaste and up to 50% of the shares in Manawatu Waste.

⁵ Commerce Commission *Decision 604: Transpacific Industries Application for Clearance to Acquire the South Island Assets of EnviroWaste Services Ltd and up to 50% of the Shares of Manawatu Waste Ltd*.

account of the information TPI provided during the Commission's investigation of its previous application for clearance.

7. The Commission has also applied the analysis outlined in its reasons for Decision 604, in making its decision on these four applications. As a consequence these reasons for the current Decisions should be read together with the reasons for Decision 604.

PROCEDURE

8. Although TPI has filed four separate applications, the Commission advised TPI that while the applications required a separate decision for each, the applications would be considered together and decisions on all four would be given at the same time. There is an obvious overlap in the issues arising under each application.
9. Section 66(3) of the Act requires the Commission either to give a clearance or to decline to give a clearance to the acquisition referred to in a notice within 10 working days, unless the Commission and the person who gave notice agree to a longer period. Extensions of time to consider the four applications were agreed between the Commission and TPI and a decision on the four applications was made on 31 October 2007.
10. TPI sought confidentiality for specific information in the applications. Confidentiality orders under section 100 of the Act were made in respect of some of that information, extending for a period of 20 working days from the date of the Commission's decisions. When these orders expire, the provisions of the Official Information Act 1982 will apply.
11. The Commission's approach to analysing the acquisitions is based on principles set out in the Commission's Mergers and Acquisitions Guidelines.⁶

STATUTORY FRAMEWORK

12. 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 standard of proof that the Commission must apply in making its determination is the civil standard of the balance of probabilities.⁷
13. 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

⁶ Commerce Commission, *Mergers and Acquisitions Guidelines*, January 2004.

⁷ *Foodstuffs (Wellington) Cooperative Society Limited v Commerce Commission* (1992) 4 TCLR 713-722.

conditions than would be permitted if the inquiry were limited to the existence or otherwise of market power in the factual.⁸

14. 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.⁹ 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.
15. 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.
16. 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.

ANALYTICAL FRAMEWORK

17. 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).
18. 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.
19. When an applicant considers that it is appropriate to undertake to make a structural divestment as part of its application for clearance, s69A of the Act provides that the Commission may accept such undertakings in writing given by, or on behalf, of an

⁸ *Air New Zealand & Qantas Airways Ltd v Commerce Commission*, HC Auckland, CIV 2003 404 6590, Hansen J and K M Vautier, Para 42.

⁹ *Fisher & Paykel Limited v Commerce Commission* (1996) 2 NZLR 731, 758 and also *Port Nelson Limited v Commerce Commission* (1996) 3 NZLR 554.

applicant to dispose of assets or shares. An undertaking given to the Commission is deemed to form part of any clearance given by the Commission.¹⁰

20. In establishing the likely factual position with the acquisition, the Commission assumes an applicant will be under an obligation to divest the assets or shares which are the subject of the undertaking, on the terms offered by the applicant. The comparison between the factual and the counterfactual will test whether the divestment would, of itself, or in combination with other market conditions enable the Commission to be satisfied that there is no effect, or likely effect, of a substantial lessening of competition.
21. Divestments are to some extent uncertain as to their eventual impact on the market. If much rests on the divestment in terms of the future levels of competition in the relevant markets, the Commission must be satisfied that the divested business and assets will be capable of constraining the combined entity in the factual. If the divested business fails or is an ineffectual competitor, then a substantial lessening of competition may occur, and consumers will be harmed. Thus, it is important for the Commission to consider all the relevant risks associated with a divestment proposal.
22. In order to make this assessment, the Commission will consider:
 - composition risks that the scope of the divestiture package may be too constrained, or not appropriately configured, to attract a suitable purchaser, or may not allow a purchaser to operate effectively and viably in the market;
 - purchaser risks that a suitable purchaser is not available or that the applicant will dispose of the business and assets to a weak or otherwise inappropriate purchaser; and
 - asset risks that the competitive capability of a divestiture package will deteriorate prior to completion of divestment, for example, through loss of customers or key members of staff.
23. These risk assessments are made and taken into account when establishing the factual, and in the competition assessment.

THE PARTIES

24. A description of the parties relevant to these applications was provided in Decision 604 and readers are referred to that Decision at page three. The material changes to the descriptions of the parties since Decision 604 are:
 - 50% of the shares of Canterbury Waste Services Ltd, formerly owned by EnviroWaste, were acquired by TPI on 19 September 2007. Canterbury Waste Services is now wholly owned by TPI;
 - the Fairfield landfill near Dunedin and a refuse transfer station in Dunedin, formerly owned by EnviroWaste, were acquired by TPI on 30 September 2007; and
 - TPI has acquired 50% of the EnviroWay joint venture (which has local authority waste collection contracts in the greater Auckland region) as a result of TPI's Australian parent's acquisition of Cleanaway. EnviroWaste also owns 50% of EnviroWay.

¹⁰ Commerce Act, s69A(3).

INDUSTRY BACKGROUND

25. As already noted, Decision 604 provided detailed background to the waste industry. There have been no material changes to the industry since Decision 604. This has meant that the Commission has been able to draw on the extensive and relevant evidence provided to it as part of its Decision 604 investigation.

MARKET DEFINITION

26. TPI has submitted that, for the purposes of the applications, it accepts the Commission's market definitions in Decision 604. However, in the latter stages of this investigation, in a sudden reversal, TPI provided a report by Covec suggesting alternative market definitions, different from both those advanced by TPI in the Decision 604 investigation and those identified by the Commission (that is, local/regional wheelie bin, FEL bin and gantry bin waste collection markets and a national market for the provision of waste management services to multi-regional customers).

Local/Regional Collection Markets

27. In particular, TPI proposed that the Commission adopt a new set of local collection market definitions which would segment each of the waste collection markets in terms of "scheduled" and "unscheduled" waste collection services. TPI submitted that scheduled services are provided by wheelie bin and FEL operations and unscheduled services by FEL and gantry/huka¹¹ operations.
28. This is the first time that these market definitions have been put to the Commission. They appear to arise, in part, out of TPI's observation that between [] of its FEL customers in the relevant geographic markets are serviced on an unscheduled or on call basis. More specifically, that between [] of TPI's FEL customers "call-up" TPI to arrange collection of their waste each time their FEL bin is full. For this portion of FEL demand, TPI argues that similarly priced gantry services (which are predominantly on-call) are a relatively close substitute for FEL bins from both demand and supply sides of the market.
29. In Decision 604, the Commission identified separate (wheelie bin, FEL bin and gantry bin) waste collection markets for a number of reasons. Whether waste collection services were, or were not, scheduled was one of the factors the Commission considered. However, on the basis of a variety of other factors (including price and non-price factors), the Commission decided that separate wheelie bin, FEL and gantry waste collection product markets existed.
30. The Commission notes that non-price factors were especially important in deciding that there are separate wheelie bin, FEL bin and gantry bin markets. If non-price factors are important as they are here, price comparisons say little about the extent to which consumers will switch products in response to small price increases. In any event, the Commission is of the view that, on the facts, the degree of price comparability between the various collection services has been overstated by TPI. Data provided by EnviroWaste shows much less similarity between prices for different collection services in the South Island than does TPI's information. Moreover, TPI's own data

¹¹ For the remainder of these reasons the term gantry bins should be read to include gantry and huka bins.

and submissions, if interpreted correctly, emphasise the point that many customers must choose their type of collection service for non-price reasons.

31. The Commission considers that in proposing the new market definitions, TPI has failed to recognise the key market definition arguments made by the Commission in Decision 604 (in particular in paragraphs 152 – 159). To summarise briefly, the profitability of wheelie bin and FEL waste collection operations relies heavily on the network structure of the collection routes and the ability of trucks to collect from a large numbers of bins before requiring disposal at landfill or refuse transfer station. Gantry operations, however, do not rely in the same way on this network structure. Rather, gantry operations are customer dedicated in that each time a gantry bin is collected the gantry truck must visit a landfill or refuse transfer station for disposal. FEL customers classed as unscheduled by TPI do not have a dedicated service in this way. EnviroWaste, Manawatu Waste and JJ Richards have informed the Commission that the collection from unscheduled customers' bins must always slot into an existing scheduled customer collection run. As far as the Commission is aware, FEL trucks never collect only one on-call FEL customer's bin and then make a special single bin load trip to landfill or refuse station, in the gantry collection manner. So, in effect, the so called "unscheduled" collections are in reality part of a scheduled service.

32. As stated, market participants, other than TPI, were unanimous in their rejection of TPI's proposed market definitions for the reasons outlined above. For example, Manawatu Waste submitted that:
 - differentiation between "scheduled" and "unscheduled" services is totally artificial. In the case of Manawatu Waste's FEL operations in Palmerston North, approximately []% are scheduled and []% are unscheduled ("call-in"). Manawatu Waste's close-off time for unscheduled call-in empties is midday the day before collection is due. The "run sheet" developed for the day of collection includes both scheduled and unscheduled bin collections each entered into a truck run sheet in order to gain maximum collection efficiency. Therefore, the costs of providing a scheduled and a call-in service are the same;
 - any new entrant would be up against the same cost structure whether competing for scheduled or unscheduled FEL services, especially as three year customer contracts are in place for both scheduled and non scheduled FEL services;
 - there is no crossover between unscheduled FEL and gantry services; and
 - while Manawatu Waste is aware of sale and purchase agreements that differentiate between gantry and FEL (for example, that between [] and [] in 1999), Manawatu Waste is not aware of any transactions where companies have purchased "scheduled" or "unscheduled" parts of a business.

33. EnviroWaste submitted that what differentiates the FEL and wheelie bin waste collection business from gantry (and Huka) is not the presence of business with a regular lift frequency compared to on-call service, but the capability to make multiple lifts on the one route before tipping off. 'Scheduled' defines a multiple, sequential collection, as opposed to a dedicated trip. On-demand customers have set lead time cut-offs for lift requests and pay a premium to be added onto the schedule at relatively short notice, but they are certainly on the same schedule. This integration in an existing route means the time and kilometres (which drive EnviroWaste's cost base) remain at the FEL level rather than the Gantry level.

34. JJ Richards also confirmed that the same waste collection trucks collect both scheduled and on-call customers' wheelie and FEL bins on a regular collection route. If a customer contacts JJ Richards, and there is a scheduled collection route in the customer's area for that day, then its bin will be collected. If not, the customer must wait for collection until a scheduled collection route occurs in its area. What never happens is a dedicated collection of that customer's FEL bin.

National Customer Market

35. In its latest submissions, TPI now appears to recognise the existence of a separate national market for the provision of waste management services to multi-regional customers which the Commission identified as including services other than mere waste collection (for example, technical advice on collection methods, waste minimisation, maximisation of recyclables, single point billing and the provision of data on waste and recyclable's volumes). However, TPI disputes the components of the market suggested in Decision 604, arguing that these management service and administration components are functionally distinct from waste collection. In addition, TPI uses the terminology 'multi-site' rather than multi-regional arguing that while the demand at issue is often spread over distinct geographic markets, it need not be.
36. Even if TPI's submission that the various component parts of the national multi-regional customer market can be individually monopolised is correct, this argument misses the "one-stop shopping" nature of the national customer market defined in Decision 604. Even if the management services component is available from many suppliers (or through self-supply), and even if a few consumers buy different components from different suppliers, it can still be the case that a substantial number of consumers value purchasing all these components from a single supplier. One can think of many examples where this is the case. Supermarkets are one. Many items in supermarkets can and are individually sold and could be monopolised yet supermarkets do exist. The reason is that many consumers value bundled products or services. Indeed, the national customers spoken to during the Commission's Decision 604 investigation were unanimous that they valued and required a bundled service. None carried out self-supply. In the case of many of its national customers, this bundled service was EnviroWaste's innovation as a new entrant into the national customer market.
37. Finally, the Commission notes that the customers, that TPI has characterised as "multi-site customers in a single geographic region," will no doubt have an easier time co-ordinating with a single provider than a multi-regional customer present in multiple geographic regions. There is an important supply-side difference to be taken into account in identifying the relevant markets. While a local operator may have the ability to service multiple sites in that local area, it will not be able to service multiple site customers if those sites are located in different regions.
38. For the reasons outlined above as well as in the detailed reasons given in Decision 604, the Commission concludes that there are no grounds to deviate from the markets it identified in Decision 604. Therefore, the Commission is of the view that the relevant markets for these applications are:
- 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 in Nelson, Christchurch and Dunedin ("*wheelie bin collection markets*");

- local/regional markets for the provision of privately contracted collection of solid non-hazardous waste in front-end-loaded (FEL) bins from commercial customers in Nelson, Christchurch, Timaru/Oamaru and Dunedin ("*FEL collection markets*");
- local/regional markets for the provision of privately contracted collection of solid non-hazardous waste by gantry in Nelson, Christchurch, Timaru/Oamaru and Dunedin ("*gantry collection markets*"); and
- the national market for the provision of waste management services to multi-regional customers ("*national customer market*").

FACTUAL AND COUNTERFACTUAL

Introduction

39. 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).¹² The difference in competition between these two future scenarios is the expected competitive impact of the acquisition.

The Transaction

40. Ironbridge and TPI have entered into a Heads of Agreement providing that TPI will, subject to clearance or a favourable Commission decision, purchase all of the South Island businesses of EnviroWaste from Ironbridge. TPI has provided the Commission with an undertaking that it will divest some, but not all, of those assets back to EnviroWaste.
41. As stated, TPI has already purchased 50% of the shares of Canterbury Waste Services and EnviroWaste's Dunedin landfill and refuse transfer station, on the basis of a favourable Commission decision in Decision 604.
42. The net effect of TPI's purchases and divestments in the factual is shown in Table 1.

¹² *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 1:
Net Affect of TPI's Business and Asset Purchases and Divestments**

| Assets Acquired by TPI from EnviroWaste and Retained | Assets to be divested back to EnviroWaste |
|---|---|
| <ul style="list-style-type: none"> ▪ wheelie bin, FEL and gantry waste collection businesses and assets in Blenheim; ▪ wheelie bin and gantry waste collection businesses and assets in Nelson; | <ul style="list-style-type: none"> ▪ FEL waste collection business and assets in Nelson; |
| <ul style="list-style-type: none"> ▪ wheelie bin and gantry waste collection businesses and assets in Christchurch; | <ul style="list-style-type: none"> ▪ FEL waste collection business and assets in Christchurch |
| <ul style="list-style-type: none"> ▪ contract with Timaru District Council to collect municipal waste, to operate a refuse transfer station, a material recycling and a composting facility; ▪ contract with Waitaki District Council to collect municipal waste; ▪ gantry waste collection businesses and assets in Timaru and Oamaru.; | <ul style="list-style-type: none"> ▪ FEL waste collection business and assets in Timaru |
| <ul style="list-style-type: none"> ▪ contract with Dunedin City Council to collect municipal waste; and ▪ gantry waste collection business and assets in Dunedin. | <ul style="list-style-type: none"> ▪ wheelie bin and FEL waste collection businesses and assets in Dunedin |

Source: TPI Divestment Undertaking

The Nature of the Counterfactual

Relevant Heads of Agreement Provisions

43. In respect of the businesses of EnviroWaste for which TPI is unable to gain clearance or a favourable Commission decision, the Heads of Agreement provides that:

▪ [

]; and

▪ [

]

44. In Decision 604, the Commission described the likely counterfactual as one in which Ironbridge's subsidiary, EnviroWaste, retains the South Island assets because (a) [] or (b) because [

]. TPI and EnviroWaste would remain as competitors in the relevant markets. Such a counterfactual would be equivalent to the status quo.

45. The Commission considers that this is the most likely counterfactual which it should apply to analyse the acquisitions.¹³ No information provided by any party in this investigation suggests otherwise.

The Nature of the Factuals

46. The Commission has to determine the likely factual positions assuming the acquisitions proceed. After considering TPI's applications and submissions and other evidence, the Commission advised TPI that there were competition concerns arising from the acquisitions.
47. On 29 October 2007, TPI undertook to divest the FEL waste collection businesses and assets in Nelson, Christchurch, Timaru and Dunedin and the wheelie bin waste collection business and assets in Dunedin. A copy of the Deed of Undertaking is attached as Appendix 1.
48. The divestments are part of the applications for clearance and are deemed to form part of any clearance given by the Commission. Therefore, the Commission has taken account of the undertaking when it formed its view as to the likely factual scenarios.
49. In establishing the factuals, the Commission considers the likely state of the relevant markets subsequent to the proposed acquisitions and divestments. That will require an assessment of the likely positions in:
- wheelie, FEL and gantry bin waste collection markets in Nelson/Blenheim, Christchurch, Timaru/Oamaru and Dunedin; and
 - the national customer market.
50. Where much rests upon the divestment the Commission must be satisfied that the divested business will be capable of constraining TPI in the factual so that there will be no effect or likely effect of substantially lessening of competition with respect to the counterfactual.
51. To make this assessment, the Commission has regard to the composition risk, purchaser risk and asset risk to the future level of competition in the relevant markets. The risk framework is used to assess whether the divestment undertaking is viable and likely, and therefore, how it is incorporated as part of the factual scenario.

Composition Risks

52. Composition risks may arise if the divestment package is not appropriately configured to attract a suitable purchaser or does not include all the components integral to providing the relevant waste collection services. The Commission must consider these matters in the context of the four South Island regional FEL waste collection markets, in the Dunedin wheelie bin waste collection market and in the national customer market.¹⁴
53. TPI submitted that:

¹³ For further discussion of the provisions and effect of the Heads of Agreement see paragraphs 236 to 246 of Decision 604.

¹⁴ The Commission's analysis in this case showed that, as in Decision 604, the markets in which the acquisitions absent divestments would result in high aggregations of market shares - all FEL waste collection markets in the South Island, the Dunedin wheelie bin waste collection market and the national customer market - are also characterized by high barriers to entry and the absence of likely constraint on TPI post acquisition. TPI offered the divestments in order to alleviate the concerns in these markets.

- the proposed divestment contemplates divestment of the infrastructure of the existing business including premises, employees, systems and sales contracts less those specified assets which TPI will retain;
 - there have been expressions of interest in acquiring all of the divested assets from [] including EnviroWaste, the existing owner of the businesses and assets.¹⁵ That should provide the Commission with comfort that interested parties are satisfied that the divestments can be successfully operated as businesses with appropriate returns; and
 - accordingly, there is no composition risk.
54. []
-].
55. In respect of the national customer market, the Commission notes that EnviroWaste will initially lose its ability to supply:
- gantry waste collection in each relevant region;
 - wheelie bin waste collection businesses in Nelson, Blenheim, Christchurch and Oamaru; and
 - FEL waste collection business in Blenheim.
56. While this will initially prevent EnviroWaste from providing the breadth of service necessary to compete in the national customer market the Commission does not consider the absence of these components to be a high risk to competition in the national customer market in the factual. That is because:
- as noted in Decision 604, in the Commission’s view barriers to entry into gantry collection businesses are low. EnviroWaste is under no restraint of trade obligations so that it would easily be able to re-enter those markets;
 - other than in Christchurch, the ability to provide a wheelie bin collection service is of minor importance in providing a national customer service – FEL and gantry are the usual collection methods. In Christchurch EnviroWaste has sufficient national customer market wheelie bin customers to justify its re-entry; and
 - while EnviroWaste will have to service its national customers in Blenheim and Oamaru either from its Nelson and Timaru bases or by sub-contracting, the customers in those regions are a small part of relatively large national waste management contracts.
57. The Commission considers that the initial absence of the businesses listed above from EnviroWaste’s portfolio will not provide a material composition risk to competition in the national customer market.
58. Accordingly, the Commission is satisfied that the divestment undertaking is of a form that enables the relevant businesses to be operated by EnviroWaste as successful South Island regional and national waste collection businesses, should the acquisitions proceed.

¹⁵ And also expressions of interest were received from [] businesses and assets and [] businesses and assets.

Purchaser Risks

59. TPI has existing sale and purchase agreements with Ironbridge which provide for the transfer of all EnviroWaste's South Island businesses and assets to TPI (as provided for in the Heads of Agreement between the two). These sale and purchase agreements were provided to the Commission during its investigation that led to Decision 604.
60. TPI has now advised the Commission that it has agreed with Ironbridge that the existing sale and purchase agreements will be varied to exclude the assets to be divested under TPI's Deed of Undertaking. That new agreement is conditional on Commission clearance and [
-]
61. As noted at paragraph 53, TPI also obtained expressions of interest in purchasing all the divested assets from a number of other parties. While in the Commission's view EnviroWaste, the existing owner of the businesses and assets to be divested and the only competitor to TPI in the national customer market would clearly, in terms of the benefit to competition, be the preferred purchaser, the others are potential backstops.
62. The Commission is satisfied that there is no purchaser risk in this case.

Asset Risks

63. Given that under the undertaking TPI will never actually own or operate the relevant businesses and assets, the Commission is satisfied there is no asset risk in this case.

The National Customer Market - an Additional Component of the Factual

64. In Decision 604, the Commission had concerns that if EnviroWaste did not have national coverage of its own waste collection operations, it would be unable to compete in the national customer market and this would have the effect, or likely effect, of substantially lessening of competition in that market.
65. In a footnote to paragraph 489 of Decision 604, the Commission noted:
- 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.
66. TPI has submitted that the Commission should consider its four applications to acquire the South Island businesses and assets of EnviroWaste in a specific regional order: Nelson/Blenheim; Timaru/Oamaru; Dunedin and Christchurch. That is, when considering the Nelson/Blenheim acquisition, the Commission should ignore the other three applications from TPI it has before it, and treat the factual as if it were a stand-alone acquisition. TPI submits that when the Commission considers the Timaru/Oamaru application next, it should ignore the Dunedin and Christchurch applications from TPI and treat the factual as containing whatever conclusion the Commission has reached in relation to the Nelson/Blenheim business and assets, and so on for Dunedin and so on for Christchurch.
67. In the Commission's view, the four acquisitions are so related that the Commission is required to consider the simultaneous effect of all four on EnviroWaste's future ability to provide national coverage and to compete with TPI in the national customer market.

68. Therefore, the Commission's approach will be to analyse the effect of all four applications on the national customer market together and reach a decision whether they would have the effect, or likely effect of substantially lessening competition. If that effect or likely effect exists, the Commission will then consider whether, if any or all of the applications were considered individually, the position would change. The Commission considers that this approach will best elucidate the most likely factual scenario and the competition issues in respect of the national customer market.

Conclusion on Factuals

69. The Commission is satisfied that the divestments are viable and likely. Accordingly, the Commission is of the view that, for the purposes of the analysis, the appropriate factual scenarios are:

Nelson/Blenheim Region

- TPI would acquire EnviroWaste's wheelie bin, and gantry waste collection businesses and assets in the region;
- EnviroWaste would retain its FEL waste collection business and assets and its staff, offices and other infrastructural assets. EnviroWaste would remain as the main competitor to TPI in the local FEL bin waste collection market;
- Can Plan Ltd and Nelmac Ltd would remain as substantial competitors in the local wheelie bin collection market with Can Plan Ltd having the greatest market share;
- Can Plan would be a single very small fringe competitor in the local FEL collection market;
- Can Plan and others would remain as competitors in the local gantry collection market although TPI would have a very high market share; and
- TPI would obtain EnviroWaste's entire Blenheim waste collection business but there will be no aggregation of market shares because of TPI's current absence from those markets in the counterfactual.

Christchurch Region

- TPI would acquire EnviroWaste's wheelie bin, and gantry waste collection businesses and assets in the region;
- EnviroWaste would retain its FEL waste collection business and assets and its staff, offices and other infrastructural assets. EnviroWaste would remain as the main competitor to TPI in the local FEL bin waste collection market;
- EnviroWaste will have strong incentives to re-enter the wheelie bin collection market, particularly in order to service its national customers in the region;
- Mastagard Ltd, a substantial participant in the local wheelie bin collection market, and several other fringe competitors would remain. TPI's market share in wheelie bin collection markets would be about 75%;
- the numbers of private contracted wheelie bins in Christchurch would be severely reduced as a result of the introduction of the Christchurch City Council's rates-funded two or three wheelie bin recyclables and waste collection regime;

- Mastagard Ltd would be a small fringe competitor in the local FEL collection market; and
- Mastagard Ltd, Phil-a-Skip Ltd and other smaller firms would remain as competitors in the local gantry collection market.

Timaru/Oamaru Region

- TPI would acquire EnviroWaste's Timaru District Council waste collection and recycling contracts and its gantry waste collection businesses and assets in the region;
- TPI would acquire the Waitaki District Council's municipal waste collection contract;
- EnviroWaste would retain its FEL waste collection business and assets and its staff, offices and other infrastructural assets. EnviroWaste would remain as the main competitor to TPI in the local FEL bin waste collection market;
- EnviroWaste will have strong incentives to re-enter the gantry bin collection market, particularly in order to service its national customers in the region;
- Timaru District Council's rates funded three wheelie bin waste and recyclables collection system would mean that the local privately funded wheelie bin collection market would remain small. Garbo Ltd would be a small competitor in that market;
- Garbo Ltd would be a single very small fringe competitor in the local FEL collection market;
- Garbo Ltd and other smaller firms would remain as competitors in the local gantry collection market; and
- as stated in the reasons for Decision 604, the Commission considers that Timaru and Oamaru are in the same geographic market.

Dunedin Region

- TPI would acquire EnviroWaste's gantry waste collection businesses and assets in the region;
- TPI would acquire the Dunedin City Council's municipal waste collection contract;
- EnviroWaste would retain its FEL and wheelie bin waste collection business and assets and its staff, offices and other infrastructural assets. EnviroWaste would remain as the main competitor to TPI in the local FEL bin waste collection market;
- EnviroWaste will have strong incentives to re-enter the gantry bin waste collection market, particularly in order to service its national customers in the region;
- fringe competitors would remain in the local wheelie bin and gantry bin markets;

National Customer Market

- TPI and EnviroWaste would remain as competitors in the national customer market;
- TPI would be required to carry out less sub-contracting in the South Island in order to provide services to national or multi-regional customers; and
- EnviroWaste would be required to carry out a small amount of additional sub-contracting of FEL bin, wheelie bin and gantry bin collection to provide services to national or multi-regional customers.

COMPETITION ANALYSIS LOCAL MARKETS**Decision 604**

70. In Decision 604, the Commission considered in some detail the impact on waste markets of an acquisition of the relevant assets. That application was, however, wider in scope than the current applications covering, as a single acquisition, all the South Island businesses of EnviroWaste and up to half of the shares in Manawatu Waste. The Commission took account of various factors and concluded in Decision No. 604 that it was not satisfied that the proposed acquisition would not have the effect, or likely effect, of a substantial lessening of competition in several markets. Accordingly, the Commission made a determination declining to give a clearance for the proposed acquisition.
71. In the current applications, TPI relies on the information it previously provided in the Decision 604 investigation together with the new information and arguments provided in and accompanying the current applications for clearance.
72. Likewise, the Commission has relied on its analysis and reasons for Decision 604 in reaching its conclusions as regards the current applications (together with the new analysis and conclusions in these reasons).

Gantry Collection Markets in Nelson, Blenheim, Christchurch, Timaru/Oamaru and Dunedin

73. TPI has not undertaken to divest the gantry bin businesses and assets in any region. There will be aggregation of market shares in each region except Blenheim where TPI does not have a presence in the counterfactual. The relevant market shares in the factuals would be: Nelson – []%; Christchurch – []%; Timaru/Oamaru – []%; and Dunedin – []%.
74. In Decision 604 the Commission accepted that gantry collection operations in local/regional markets would be constrained by existing competition or potential entry or expansion, even if high aggregation of market shares is present.
75. There are much lower economies of density in gantry operations when compared to FEL bin or wheelie bin waste collection. That is why the price of gantry collection is higher than that for FEL collection for equivalent volumes or weights of waste. 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.

76. 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.
77. The Commission also considers that EnviroWaste will have strong incentives to re-enter the Timaru and Dunedin gantry collection markets in order to service substantial national market customers it has in those locations.
78. 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 acquisitions will not have the effect, or likely effect, of substantially lessening competition in all relevant gantry collection markets.

Wheelie Bin Collection Markets in Nelson, Blenheim, Christchurch, Timaru/Oamaru and Dunedin

79. TPI has undertaken to divest the wheelie bin businesses only in Dunedin (where the factual would be identical to the counterfactual in this market). Apart from that market, there will be aggregation of wheelie bin market shares in each region except Blenheim and Oamaru (where TPI does not have a presence in the counterfactual). There are very few private wheelie bins in Timaru due to the Timaru District Council’s rates-funded three wheelie bin recyclables/waste collection system. The relevant market shares in the factuials would be: Nelson – []% and Christchurch – []%.
80. In Decision 604 the Commission considered that Nelson and Christchurch would be regions where there would be a reasonably strong third presence in these markets in the factuials. 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.
81. The Commission also determined in Decision 604 that the third participant in the Christchurch wheelie bin market, 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 constraint on TPI in the factual.
82. The Commission also notes that EnviroWaste will have strong incentives to re-enter this market in Christchurch as it collects waste from sufficient wheelie bins of its national market customers to justify a small wheelie bin operation.
83. For these reasons the Commission concludes that TPI will be constrained by existing competitors from exercising market power in the factual in wheelie bin collection markets in Nelson and Christchurch.

FEL collection markets in Nelson, Blenheim, Christchurch, Timaru/Oamaru and Dunedin

84. TPI has undertaken to divest the FEL bin collection businesses Nelson, Christchurch, Timaru and Dunedin. In these markets the factuals would be identical to the counterfactual. There will be no aggregation of FEL bin market shares at all.
85. TPI does not have a presence in the counterfactual in Blenheim and there is no FEL collection in Oamaru.
86. For these reasons, the Commission concludes that TPI will be constrained by existing competitors from exercising market power in the factual in all relevant FEL bin collection markets.

Conclusion on Local/Regional Waste Collection Markets

87. Divestment of EnviroWaste's FEL collection businesses in Nelson, Christchurch, Timaru and Dunedin, and its Dunedin wheelie bin collection business back to EnviroWaste will ensure that existing competition remains to constrain TPI in the factual scenario. Accordingly, the Commission concludes that the proposed acquisitions with divestment undertaking will not have, or will be unlikely to have, the effect of substantially lessening competition in any of the relevant local/regional waste collection markets.
88. While divestments will alleviate competition concerns in local/regional waste collection markets, the effect of the proposed acquisitions on the national market for the provision of waste management services to multi-regional customers still has to be considered. This is examined next.

COMPETITION ANALYSIS NATIONAL CUSTOMER MARKET

Introduction

89. In Decision 604, the Commission defined a product market for the provision of waste management services to multi-regional (national) customers ("*national customers waste management market*"). The Commission considered that the Acquisition would result in the elimination of EnviroWaste, a vigorous and effective competitor in the national customer market. The Commission was not satisfied that the Acquisition would not have the effect, or likely effect, of substantially lessening competition in the national customer market.
90. TPI submitted that EnviroWaste's ability to compete in the national customer market will not be affected by the four applications. Briefly TPI argues that:
 - the South Island accounts for only a small portion of the revenues derived from national customers;
 - EnviroWaste can in the factual use subcontractors to continue to supply services to national customers, particularly when it already sub-contracts in other geographic markets; and
 - the loss of margin from further sub-contracting in the factual would not be significant enough to prevent EnviroWaste from competing in the national customer market.

91. TPI also argues that in the factual it would be constrained by the countervailing power of the national (multi-regional) customers. Also, that given there is no restraint of trade provision in the relevant agreement, if EnviroWaste found that sub-contracting did impede its ability to compete, then there would be no barrier to it re-entering local markets.

Market Characteristics

Market Size

92. The national customer market has only emerged in recent years as a result of customers starting to demand national waste contracts and EnviroWaste targeting such customers' business. Prior to that, TPI was the sole provider of national waste collection services and did not actively provide customers with the additional advisory and administrative services. Rather, as it has stated, it preferred individual local supply contracts.
93. At the time of Decision 604, there were [] customers on national waste contracts. TPI had [] customers and an []% market share (based on customer numbers). EnviroWaste had [] customers and a []% share of the market.
94. Since Decision 604, EnviroWaste's national customer market business has []. In contrast, TPI has [] business. As a result, EnviroWaste has strengthened its position in the national customer market, increasing its market share based on customer numbers to []%. Indeed, the Commission estimates that EnviroWaste's expected annual revenue from its national customers has grown by more than []%. However, TPI continues to have a significant share of the market. In terms of revenues, EnviroWaste has a []% share of the market. Table 2 details the size of the national customer market and estimated market shares.

**Table 2:
Size of and Market Shares in the National Customer Market**

| | TPI | EnviroWaste | Total |
|-----------|-------------------|---------------------------------|--------------|
| Customers | [] ([]%) | [] ([]%) | [] |
| Revenues | [\$[]m ([]%) | [\$[]m ¹⁶ ([]%) | [\$[]m |

Source: Industry Participants

95. Currently, there are a number of other multi-regional (or national) customers not on such contracts. These customers instead contract separately with waste companies in each region. In Decision 604, TPI identified about [] such customers. With increasing attention being given to waste minimisation, such companies may desire national contracts in the future. Information given to the Commission indicates that in recent months a few of these companies have already made moves towards having national contracts.
96. Parties anticipate that the national customer market will become increasingly significant. Manawatu Waste (which participates in the national customer market through its EnviroWaste associate) estimates that up to []% of its FEL revenues could

¹⁶ Includes Manawatu Waste's revenues from the national contracts that it has in conjunction with EnviroWaste.

in the future be tendered through national contracts (compared to []% at present). EnviroWaste has estimated the total potential value of the national customer market to be \$[]m (up to three times the value of the current national contracts held by TPI and EnviroWaste).

97. Overall, the national customer market appears to be in its infancy and has the potential to grow significantly in the next few years.

Significance of South Island

98. TPI has argued that the South Island accounts for only a small portion of the revenues derived from national customers. It has further submitted that it expects the South Island to account for an even smaller portion in the future “as more business moves North”. Based on this information, TPI suggests that the applications are therefore unlikely to “*substantially*” lessen competition in the national customer market. With its Auckland base, EnviroWaste will be well placed to continue competing in the national customer market.
99. However, TPI’s submissions are based on the profile of TPI’s business and its national customers. EnviroWaste’s profile is quite different to TPI, with the South Island contributing a significantly higher share of EnviroWaste’s revenues from national customers. This distinction is highlighted in Table 3.

**Table 3:
Proportion that South Island National Contract Revenues are of
TPI, EnviroWaste and Total National Contract Revenues**

| | TPI | | EnviroWaste | | Total | |
|--|-------------|--------|-------------|--------|-------------|--------|
| | % | \$ | % | \$ | % | \$ |
| Nelson / Blenheim | []% | \$[] | []% | \$[] | []% | \$[] |
| Christchurch | []% | \$[] | []% | \$[] | []% | \$[] |
| Timaru / Oamaru | []% | \$[] | []% | \$[] | []% | \$[] |
| Dunedin | []% | \$[] | []% | \$[] | []% | \$[] |
| Total for 4 South Island branches at question | []% | \$[] | []% | \$[] | []% | \$[] |
| Total National Customer Market | 100% | \$[]m | 100% | \$[]m | 100% | \$[]m |

Source: Industry Participants

100. Table 3 shows that in contrast to TPI, South Island revenues are a substantial portion of EnviroWaste’s revenues from national contracts. If EnviroWaste no longer owns all or some of these South Island branches, then its ability to provide services to its national customers could be seriously affected.
101. However, the figures in Table 3 merely reflect the national contracts currently held by the two parties. A number of EnviroWaste’s contracts (e.g., []) relate to the business of companies that are predominately or entirely located in the South Island. TPI, in comparison, currently tends to have contracts with companies that are predominately or entirely located in the North Island (e.g., []) or which have outlets nationwide, but given population density, have a high proportion of their

business located in the North Island (e.g., [] which has [] stores in the North Island, compared to [] in the South Island).

102. A large proportion of the [] multi-regional (or national) customers identified as not on national contracts in Decision 604 are retail or service companies that have outlets nationwide, but given population density, have a high proportion of their business located in the North Island. Collection services will still need to be provided throughout the South Island, however. Notwithstanding, the North Island may become increasingly more significant in terms of the national customer market in the future.

Constraint from Competition

Introduction

103. Despite TPI’s high market share in the national customer market, the evidence in Decision 604 is that EnviroWaste currently provides a significant constraint on TPI in that market. Customers have experienced, amongst other things, significant price competition between TPI and EnviroWaste. The cost savings experienced by customers are the result of that strong competition.
104. In the factual, with divestment of selected assets back to EnviroWaste (as outlined in Table 1), EnviroWaste will still have a presence in both the North and South Island, but on reduced scale. However, in order to continue competing in the national customer market in the factual, EnviroWaste may be required to increase the extent of its sub-contracting in the South Island and/or re-enter some local/regional collection markets.
105. To determine whether or not EnviroWaste’s ability to compete and provide services to national customers in the future in the factual is “*substantially*” affected by the applications (and thus what constraint EnviroWaste will be on TPI) the Commission has examined the feasibility of further sub-contracting or re-entry such that competition would not be substantially lessened in the national customer market.

Use of Sub-Contractors Currently

106. Neither TPI nor EnviroWaste have a complete national presence. In order to provide waste collection services to national customers they both have to use sub-contractors in some areas. Table 4 summarises the regions in which TPI and EnviroWaste currently sub-contract.

**Table 4:
Key Areas Where Sub-Contracting is Necessary in Respect of
National Contracts, Currently and in the Counterfactual**

| | TPI | EnviroWaste |
|--------------|--|--|
| North Island | Wairarapa | Northland, Gisborne, Hawkes Bay, Taranaki, Wairarapa, Wellington |
| South Island | Ashburton, West Coast, Central Otago, Southland, Marlborough, Oamaru | Ashburton, West Coast, Central Otago, Southland |

Source: Industry Participants

107. In the North Island, EnviroWaste has less presence than TPI and has to sub-contract in six areas, compared to just one area for TPI. EnviroWaste’s coverage in the North

Island is enhanced considerably through its 50%-owned joint venture subsidiary, Manawatu Waste. For the purposes of considering the effect of the four applications on the national customer market, it is assumed that EnviroWaste has a presence in Manawatu Waste's area of operations (namely, Taupo, Manawatu / Palmerston North, Wanganui and Horowhenua / Kapiti).

108. EnviroWaste would have to sub-contract in all of the North Island areas identified in Table 4 to supply a customer with nationwide presence. However, to provide services to its existing multi-regional contracts, EnviroWaste does not currently need to sub-contract in all of these areas. EnviroWaste is only sub-contracting in Taranaki, Hawkes Bay and Wellington at present.¹⁷
109. In the South Island, both TPI and EnviroWaste have to sub-contract in Ashburton, on the West Coast, in Central Otago, and in Southland. Unlike EnviroWaste, TPI has to also sub-contract in Marlborough (Blenheim and Kaikoura) and Oamaru.
110. In some areas where TPI does have a presence, it still utilises sub-contractors to supply services outside of main urban centres (this sub-contracting has been excluded from Table 4). In the South Island, TPI has a presence in both Nelson and Timaru, but still sub-contracts services in outlying Motueka and Temuka. There are similar examples in the North Island, e.g., in Northland, where TPI still sub-contracts in Kaikohe, Kaitaia, Kerikeri and Paihia.
111. Table 5 details the amount of sub-contracting currently undertaken by TPI and EnviroWaste in respect of national contracts.

**Table 5:
Amount of Sub-Contracting in Respect of National Contracts Currently**

| | TPI | EnviroWaste |
|--|-------|-------------|
| Extent of Sub-Contracting | | |
| Sub-Contracted Revenues | \$[] | \$[] |
| % of National Contract Revenues Sub-contracted | []% | []% |
| % Split of Sub-contracting North v South Island | | |
| North Island | []% | []% |
| South Island | []% | []% |

Source: Industry Participants

112. Overall, TPI has a greater presence throughout the country than EnviroWaste or any other competitor. This is reflected in the fact that TPI only has to contract []% of its national contract business currently, compared to EnviroWaste's []%.
113. The split of sub-contracting between the North and South Island shown in Table 5 further highlights the difference between the operations of TPI and EnviroWaste. As a result of EnviroWaste's significantly reduced local presence in the North Island, almost

¹⁷ [

all ([]%) of its sub-contracting is undertaken in the North Island. In contrast, TPI does slightly less than [] of its sub-contracting in the South Island.

114. The Commission considers that given the difficulties and costs associated with subcontracting (which will be explained throughout the remainder of this section), TPI's greater coverage in the North Island relative to EnviroWaste gives it a comparative advantage in servicing North Island orientated national customers. EnviroWaste, therefore, has a comparative advantage in servicing South Island orientated national customers. This at least partially explains why EnviroWaste's current national customers are more South Island orientated than those of TPI. EnviroWaste's relative success in attracting this type of customer, or any decision it may have made to target this type of customer, would be a perfectly rational response by EnviroWaste in order to minimise its difficulties with subcontracting. Indeed, the fact that EnviroWaste's national customers are more South Island orientated than TPI's is exactly the outcome one would expect if there were significant costs associated with subcontracting and EnviroWaste had relatively poor coverage in the North Island, other things being equal.

Feasibility of Further Sub-Contracting or Re-Entry

115. As evidenced by the fact the both TPI and EnviroWaste already sub-contract collection in certain areas, sub-contracting is clearly feasible in these circumstances. EnviroWaste currently sub-contracts []% of its national contract business. The question the Commission turns to first is to what extent could EnviroWaste further sub-contract the collection aspects of these contracts before its competitiveness and competition in the national customer market is "*substantially*" lessened. The likelihood and impact of re-entry if then examined.

Sub-Contracting

116. In comparison to Table 4 and Table 5, Table 6 summarises the regions in which TPI and EnviroWaste may have to sub-contract (to supply national contracts) in the factual with divestment of certain assets back to EnviroWaste.

**Table 6:
Areas Where Sub-Contracting May be Necessary in Respect of
National Contracts in the Factual**

| | TPI | EnviroWaste |
|--------------|---|---|
| North Island | Wairarapa | Northland, Gisborne, Hawkes Bay, Taranaki, Wairarapa, Wellington |
| South Island | Ashburton, West Coast, Central Otago, Southland | Ashburton, West Coast, Central Otago, Southland, Blenheim, Oamaru (in entirety) Wheelie bin and gantry collection in Nelson, Christchurch and Timaru Gantry collection in Dunedin |

Source: Industry Participants

117. Table 6 is the worst case scenario which assumes no re-entry into local/regional waste collection markets by EnviroWaste. In the factual, absent any re-entry, EnviroWaste would at worst be required to subcontract []% of its national business compared to only []% in the counterfactual.

118. TPI has submitted that in the factual, even if EnviroWaste were to make no margin in the additional South Island areas where it would need to sub-contract, it would nonetheless obtain a margin from providing services in other areas or markets where it would have a presence. Overall, it could still make a margin on national contracts.
119. Evidence is that margins are generally significantly higher when collection services are provided by TPI or EnviroWaste itself as opposed to via sub-contractors. EnviroWaste would lose these higher margins in the factual. The question is whether or not it would have a real or substantial effect on its ability to compete in the market.

Re-Entry

120. EnviroWaste's lost margins and additional costs associated with further sub-contracting in the factual would increase its total costs of servicing national contracts. The increase in costs that EnviroWaste would face in the factual to service some national customers is likely to incentivise it to re-enter some local/regional waste collection markets, where economic.
121. Given the Commission's views in Decision 604 regarding low barriers to entry into gantry collection markets, EnviroWaste (as already discussed) could in the factual readily re-enter one or more of the local/regional gantry collection markets. Gantry markets that EnviroWaste is most likely to re-enter are Timaru and Dunedin where gantry collection is []% of its national customer market collection business. In re-entering those two gantry markets, EnviroWaste's the extent of sub-contracting that EnviroWaste would have to do in the factual would reduce by more than half to []%, an increase of []% on sub-contracting in the counterfactual.
122. If EnviroWaste were to also re-enter the gantry collection markets in Christchurch and Nelson, and wheelie bin collection market in Christchurch, then the extent of sub-contracting required in the factual would further reduce. EnviroWaste would have to sub-contract only []% of its national customer market business, an increase of just []% on the counterfactual. The majority of this portion (94%) pertains to Blenheim.

Conclusion

123. The Commission considers that in the factual EnviroWaste, by further subcontracting some collection services and re-entering selected gantry collection markets, will continue to be a competitive constraint on TPI in the national customer market.
124. Given that TPI will continue to be constrained by EnviroWaste in the factual, the Commission has not found it necessary to consider constraint from countervailing power.

Conclusion on the National Customer Market

125. In the factual scenario, with divestment of certain assets back to EnviroWaste, EnviroWaste will continue to be a constraint on TPI.
126. Accordingly, the Commission concludes that the proposed acquisitions with divestment undertaking will not have, or will be unlikely to have, the effect of substantially lessening competition in the national customer market.

COORDINATED MARKET POWER IN LOCAL REGIONAL AND NATIONAL CUSTOMER MARKETS

127. In its reasons for Decision 604 the Commission made no finding as to whether any increased likelihood of co-ordinated market power in some discrete markets would, or would not, have the effect (or likely effect) of substantially lessening competition in a relevant market. However, the Commission expressed some concern in relation to some wheelie bin and FEL collection markets.
128. With respect to the FEL markets relevant to the current applications, the factual and counterfactual will be the same as FEL assets will be divested back to EnviroWaste.¹⁸ Similarly, the factual and counterfactual will be largely the same in the national market for waste management services as, with its FEL businesses (and wheelie bin business in Dunedin) divested back to it, EnviroWaste will most likely continue to compete for and service its national customers in a similar way as it does now.
129. With respect to wheelie bin markets in Nelson and Christchurch¹⁹, TPI submitted that the only change between the factual and the counterfactual relevant to assessing co-ordinated market power issues would be an increase in seller concentration by one in each market respectively. The Commission considers that in both cases there will be a sufficiently large number of competitors still present in the factual, with sufficiently different incentives, cost structures and size such that the scope for co-ordinated market power would not be materially enhanced in the factual as compared to the counterfactual.
130. Therefore, the Commission concludes that any increased likelihood of co-ordinated market power in the factual will not have the effect, or likely effect, of substantially lessening competition in a relevant market.

THE COMMISSION'S OVERALL CONCLUSIONS ON THE APPLICATIONS

Nelson/Blenheim

131. With divestment of FEL assets back to EnviroWaste, Commission is satisfied that the proposed acquisition will not have, nor would be likely to have, the effect of substantially lessening competition in any of the local/regional waste collection markets in Nelson and Blenheim.
132. The Commission is also satisfied that the proposed acquisition with divestment undertaking will not have, nor would be likely to have, the effect of substantially lessening competition in the national customer market.

Christchurch

133. With divestment of FEL assets back to EnviroWaste, Commission is satisfied that the proposed acquisition will not have, nor would be likely to have, the effect of substantially lessening competition in any of the local/regional waste collection markets in Christchurch.

¹⁸ With the exception of the Blenheim FEL market where TPI will be the only provider of these services in the factual. In the counterfactual EnviroWaste was the only provider of FEL services, hence the acquisition obviously does not increase the scope for co-ordinated market power in the Blenheim FEL market.

¹⁹ It is not necessary to discuss wheelie bin markets in Timaru, Oamaru or Blenheim as TPI does not presently have wheelie bin businesses there. Nor is it necessary to discuss the wheelie bin market in Dunedin as these assets will be divested back to EnviroWaste.

134. The Commission is also satisfied that the proposed acquisition with divestment undertaking will not have, nor would be likely to have, the effect of substantially lessening competition in the national customer market.

Timaru/Oamaru

135. With divestment of FEL assets back to EnviroWaste, Commission is satisfied that the proposed acquisition will not have, nor would be likely to have, the effect of substantially lessening competition in any of the local/regional waste collection markets in Timaru/Oamaru.
136. The Commission is also satisfied that the proposed acquisition with divestment undertaking will not have, nor would be likely to have, the effect of substantially lessening competition in the national customer market.

Dunedin

137. With divestment of FEL and wheelie bin assets back to EnviroWaste, Commission is satisfied that the proposed acquisition will not have, nor would be likely to have, the effect of substantially lessening competition in any of the local/regional waste collection markets in Dunedin.
138. The Commission is also satisfied that the proposed acquisition with divestment undertaking will not have, nor would be likely to have, the effect of substantially lessening competition in the national customer market.

DETERMINATION ON NOTICE SEEKING CLEARANCE

139. Pursuant to section 66(3)(a) of the Commerce Act 1986, the Commerce Commission determines to give clearance to TPI for the each of the four acquisitions, subject to the Deed of Undertaking between TPI and the Commission dated 29 October 2007, which provides for TPI to divest certain businesses and assets.

Dated this 31 October 2007

Paula Rebstock
Chair
Commerce Commission

APPENDIX 1**Divestment Undertaking**

Date: 29th October 2007

PARTIES

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

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

BACKGROUND

- A On 16 August 2007 TPI gave notice to the Commission pursuant to section 66(1) of the Commerce Act 1986 (the Act) seeking clearance for the proposed acquisition by TPI of the solid waste collection business of Enviro Waste Services Limited (ESL) in Blenheim and Nelson, Timaru and Oamaru, Christchurch and Dunedin (the Clearance Applications).
- B TPI offers the Commission the divestment undertakings in the form of this deed, pursuant to section 69A of the Act.

BY THIS DEED TPI undertakes to the Commission as follows:

1 DEFINED TERMS AND CONSTRUCTION

1.1 In this Deed:

Approved Purchaser means Enviro Waste Services Limited;

Blenheim Business means the solid waste collection business in Blenheim owned and operated by ESL;

Bulk Waste Containers means all gantry bins, skips and other bulk waste containers used in the collection of solid waste, other than front end load bins;

Businesses means the solid waste collection businesses owned and operated by ESL in Nelson, Timaru, Christchurch and Dunedin and the assets and personnel associated with those businesses which are acquired by TPI under the ESL Sale Agreements, but not including the Specified Assets;

ESL Sale Agreements means the agreements between Barra Topco II Limited, Barra Bidco Limited, Transpacific Industries Group (NZ) Limited and Enviro Waste Services Limited dated 10 April 2007 relating to the sale and purchases of the Businesses;

Oamaru Business means the solid waste collection business in Oamaru owned and operated by ESL;

Specified Assets means:

- (a) in relation to each of the Businesses, all Bulk Waste Containers, vehicles and associated equipment and personnel employed by ESL, used in the collection of Bulk Waste Containers and all contracts with customers for the collection of waste in Bulk Waste Containers;
- (b) all existing contracts with Councils whether for the collection of municipal waste or otherwise, including:
 - the municipal waste collection contracts with Dunedin City Council and the Waitaki District Council; and
 - all contracts with Timaru District Council for the collection, composting and recycling of municipal waste, the operation of a materials recycling recovery facility and the operation of transfer stations and landfills;
- (c) in relation to Nelson, Timaru and Christchurch, all wheelie bins, vehicles and associated equipment and personnel employed by ESL, used for the collection of wheelie bins and all contracts with customers for the collection of waste in wheelie bins;
- (d) all other assets of the Businesses (including vehicles, equipment and contracts) which are not required for the operation by the Approved Purchaser of the following businesses as going concerns:
 - solid waste collection in the Regions using front end load vehicles and bins; and
 - private residential solid waste collection using wheelie bins in Dunedin,

and, for the avoidance of doubt, the Blenheim Business and the Oamaru Business.

Regions means Nelson, Timaru, Christchurch and Dunedin;

Transfer Date means the date of completion of the ESL Sale Agreements.

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

- (a) headings appear as a matter of convenience and do not affect the construction of this deed;
- (b) references to "including" and other similar words are not to be treated as words of limitation;

- (c) the singular includes the plural and vice versa; and
- (d) a reference to a person includes reference to a natural person, corporation sole, a company or other body corporate and an unincorporated body of persons.

2 COVENANTS

Sale of the Businesses

- 1.3 Subject to completion of the ESL Sale Agreements, and no later than the Transfer Date, TPI will sell or procure the sale of the Businesses to an Approved Purchaser to enable the Approved Purchaser to immediately operate the business of the collection of solid non-hazardous waste in front end load vehicles in the Regions and the collection of solid non-hazardous waste in wheelie bins in Dunedin.
- 1.4 The divestment of the Businesses shall be an unreserved divestment of all of the legal and equitable interests and rights held by or on behalf of TPI in the Businesses.

Notification

- 1.5 TPI will advise the Commission of the completion of the sale of the Businesses.

3 MISCELLANEOUS

Binding and enforceable

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


Governing law

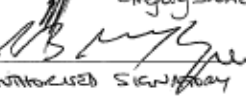
- 3.2 This deed is governed by New Zealand law and the parties accept the exclusive jurisdiction of the New Zealand Courts.

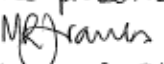
Counterparts

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

Executed by
 Transpacific Industries Group (NZ) Limited

Director  Gregory Shane Campbell

Robert Brent McKenzie  McKenzie
 Director

in the presence of:

 MARION RUTH FRANCIS
 Solicitor
 Auckland