

## Statement of Preliminary Issues

### Tennex Capital Limited / San-i-pak Limited

10 November 2015

#### Introduction

1. Tennex Capital Limited (Tennex, or the Applicant) is proposing to acquire the medical and quarantine waste business of San-i-pak Limited (San-i-pak).
2. On 21 October 2015, the Commerce Commission registered an application from Tennex seeking clearance for the proposed acquisition.<sup>1</sup>
3. The Commission will give clearance if it is satisfied that the acquisition will not have or would not be likely to have, the effect of substantially lessening competition in a market in New Zealand.
4. This Statement of Preliminary Issues outlines the key competition issues we currently consider to be important in deciding whether or not to grant clearance.<sup>2</sup>
5. We invite interested parties to provide comments on the likely competitive effects of the proposed acquisition. We request that parties who wish to make a submission do so by **20 November 2015**.

#### The parties

6. Though its subsidiary, International Waste (IWL), Tennex provides medical and quarantine waste collection, treatment and disposal services, as well as services in respect of the disposal and recycling of other products such as fluorescent tubes. IWL operates facilities for the treatment of medical and quarantine waste in Auckland, Wellington, Christchurch and Dunedin. IWL collects medical and quarantine waste on a national basis for processing at its treatment facilities.
7. San-i-pak provides medical and quarantine waste collection, treatment and disposal services, as well as general waste services. San-i-pak operates a single facility for the treatment of medical and quarantine waste in Christchurch. San-i-pak collects medical and quarantine waste primarily in the greater Canterbury region.
8. IWL and San-i-pak are the only parties that currently undertake treatment of medical and quarantine waste in the South Island.<sup>3</sup>

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<sup>1</sup> The public version of the application is available on our website at:  
<http://www.comcom.govt.nz/business-competition/mergers-and-acquisitions/clearances/clearances-register/detail/875>

<sup>2</sup> The issues highlighted in this statement are based on the information available at the time of publication and may change as our assessment of the application for clearance progresses. Therefore, the issues highlighted in this statement are not binding on us.

<sup>3</sup> A third party, Medismart, also undertakes treatment of medical and quarantine waste in the North Island.

## Our framework

9. Our approach to analysing the competition effects of the proposed acquisition is based on the principles set out in our Mergers and Acquisitions Guidelines.<sup>4</sup> As required by the Commerce Act 1986, we assess mergers using the substantial lessening of competition test.
10. We determine whether an acquisition is likely to substantially lessen competition in a market by comparing the likely state of competition if the acquisition proceeds (the scenario with the acquisition, often referred to as the factual), with the likely state of competition if the acquisition does not proceed (the scenario without the acquisition, often referred to as the counterfactual).<sup>5</sup>
11. We define markets in the way that we consider best isolates the key competition issues that arise from the acquisition. In many cases this may not require us to precisely define the boundaries of a market. A relevant market is ultimately determined, in the words of the Commerce Act, as a matter of fact and commercial common sense.<sup>6</sup>
12. We compare the extent of competition in each relevant market both with and without the acquisition. This allows us to assess the degree by which the proposed acquisition might lessen competition. If the lessening is likely to be substantial, we will not give clearance to the proposed acquisition. When making that assessment, we consider, among other matters:
  - 12.1 existing competition – the degree to which existing competitors compete;
  - 12.2 potential competition – the extent to which existing competitors would expand their sales or new competitors would enter the market and compete effectively if prices were increased; and
  - 12.3 the countervailing market power of buyers – the potential for a business to be sufficiently constrained by purchaser’s ability to exert substantial influence on negotiations.

## Market definition

13. In its application, Tennex took the same approach to market definition as adopted in our previous medical and quarantine waste decision.<sup>7</sup> It defined markets as follows:
  - 13.1 the market for the collection of medical and quarantine waste in the South Island; and
  - 13.2 the market for the treatment of medical and quarantine waste in the South Island.

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<sup>4</sup> Commerce Commission, *Mergers and Acquisitions Guidelines*, July 2013. Available on our website at [www.comcom.govt.nz](http://www.comcom.govt.nz)

<sup>5</sup> *Commerce Commission v Woolworths Limited* (2008) 12 TCLR 194 (CA) at [63].

<sup>6</sup> Section 3(1A). See also *Brambles v Commerce Commission* (2003) 10 TCLR 868 at [81].

<sup>7</sup> *Medical Waste Group Ltd and San-i-pak (NZ) Ltd* (Commerce Commission Decision 386, 15 March 2000).

14. As part of our investigation, we will consider whether it is still appropriate to define a market for the collection of medical and quarantine waste separate to the treatment (and disposal) of that waste. In terms of geographic dimension of the markets, we will also consider whether it is still appropriate to define the South Island as a separate market to the North Island.

### **Preliminary issues**

15. We will investigate whether the proposed acquisition is likely to substantially lessen competition in the relevant markets by focusing on the unilateral effects that might result from this acquisition. In particular, we will consider:
  - 15.1 what is likely to happen to the medical and quarantine waste business of San-i-pak absent its sale to Tennex;
  - 15.2 the closeness of competition between the merging parties;
  - 15.3 the extent to which other suppliers currently compete to collect medical and quarantine waste;
  - 15.4 the ability and incentive for new suppliers to enter the market for the treatment of medical and quarantine waste; and
  - 15.5 the ability of customers to exert substantial influence on the price the merged entity charges and on other terms.

### **With and without the acquisition**

16. Tennex submitted that San-i-pak is not yet a failing firm, but the status quo is not sustainable without the acquisition. It further submitted that there would be no material difference in competition both with the acquisition and without the acquisition.
17. We will consider what is likely to happen to the medical and quarantine waste business of San-i-pak absent its sale to Tennex.

### **Competition between Tennex and San-i-pak**

18. Tennex submitted that San-i-pak does not act as a material constraint in respect of national customers, implying that it only competes for regional customers near Christchurch.
19. We will consider the closeness of competition between the merging parties, including the extent to which they compete for customer contracts that come up for tender.

### **Existing competition from other suppliers in collection services**

20. While IWL and San-i-pak are the only parties that currently undertake treatment of medical and quarantine waste in the South Island, Tennex submitted that other suppliers compete to collect medical and quarantine waste in the South Island.

21. We will consider the extent to which other suppliers currently compete with the merging parties in the collection of medical and quarantine waste in the South Island, and whether they would effectively constrain the merged entity from raising its prices above the competitive level, or reducing the quality of its services.

#### **Potential competition in treatment services**

22. Tennex submitted that, without sponsorship from a DHB, Greenfields entry was unlikely due to the small market size. Tennex further submitted that there is a real threat of a DHB sponsoring new entry if incentivised.
23. We will assess whether entry by new suppliers offering medical and quarantine waste treatment services in the South Island is likely, of sufficient extent and would occur in a timely fashion to prevent a substantial lessening of competition. This will include considering the likelihood of expansion by parties currently supplying treatment services in the North Island and collection services in the South Island.

#### **Countervailing power**

24. Tennex submitted that large customers have a high degree of countervailing power that will constrain the merged entity.
25. We will consider whether customers will be able to sufficiently constrain the merged entity from profitably increasing prices or reducing the quality of its services.

#### **Next steps in our investigation**

26. The Commission is currently aiming to make a final decision on whether or not to give clearance to the merger by **24 December 2015**. However, this date may change as our investigation progresses.<sup>8</sup>
27. As part of our investigation, we will be identifying and contacting parties we consider will be able to help us assess the preliminary issues identified above.

#### **Making a submission**

28. If you wish to make a submission, please send it to us at [registrar@comcom.govt.nz](mailto:registrar@comcom.govt.nz) with the reference Tennex/San-i-pak in the subject line of your email, or by mail to The Registrar, PO Box 2351, Wellington 6140. Please do so by close of business **20 November 2015**.
29. All information we receive is subject to the Official Information Act 1982 (OIA), under which there is a principle of availability. We recognise, however, that there may be good reason to withhold certain information contained in a submission under the OIA. For example, if disclosure would unreasonably prejudice the supplier or subject of the information. In assessing the confidentiality of information contained in submissions for the purposes of publication on our website, we intend to apply an approach that is consistent with the OIA.

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<sup>8</sup> The Commission maintains a clearance register on our website at <http://www.comcom.govt.nz/clearances-register/> where we update any changes to our deadlines and provide relevant documents.