

Determination

Tennex Capital Limited and San-i-pak Limited [2016] NZCC 5

The Commission: Dr Mark Berry
Sue Begg
Anna Rawlings

Summary of application: An application from Tennex Capital Limited seeking clearance to acquire up to 100% of the medical and quarantine waste collection and treatment assets of San-i-pak Limited.

Determination: Under s 66(3)(b) of the Commerce Act 1986 the Commerce Commission declines to give clearance to the acquisition.

Date of determination: 29 February 2016

Confidential material in this report has been removed. Its location in the document is denoted by [].

CONTENTS

The proposed acquisition	4
Summary of the proposed acquisition	4
Our decision	4
Our framework	4
The substantial lessening of competition test	4
When a lessening of competition is substantial	5
When a substantial lessening of competition is likely	5
The clearance test	5
Key parties.....	6
Tennex Capital Limited (Tennex).....	6
San-i-pak Limited (San-i-pak)	6
Industry background	7
With and without scenarios	7
With the acquisition	7
Without the acquisition	7
How the acquisition could substantially lessen competition	13
Market definition.....	13
Tennex’s views of the relevant markets	13
Our view of the relevant markets	14
Competition analysis.....	15
Existing competition.....	16
Potential competition	21
Countervailing power.....	24
Determination on notice of clearance.....	28

The proposed acquisition

Summary of the proposed acquisition

1. On 21 October 2015, the Commerce Commission (the Commission) registered an application under s 66(1) of the Commerce Act 1986, for Tennex Capital Limited (or any interconnected body corporate of Tennex) (Tennex), to acquire up to 100% of the medical and quarantine waste collection and treatment assets of San-i-pak Limited (San-i-pak) (the application).

Our decision

2. The Commission declines to give clearance to the acquisition as it is not 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.

Our framework

3. Our approach to analysing the competition effects of the acquisition is based on the principles set out in our Mergers and Acquisitions Guidelines.¹

The substantial lessening of competition test

4. As required by the Commerce Act 1986, we assess acquisitions using the substantial lessening of competition test.
5. 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).² As we discuss later, there can be more than one likely scenario without the acquisition.
6. We make a pragmatic and commercial assessment of what is likely to occur in the future with and without the acquisition based on the information we obtain through our investigation and taking into account factors including market growth and technological changes.
7. A lessening of competition is generally the same as an increase in market power. Market power is the ability to raise price above the price that would exist in a competitive market (the 'competitive price'),³ or reduce non-price factors such as quality or service below competitive levels.
8. Determining the scope of the relevant market or markets can be an important tool in determining whether a substantial lessening of competition is likely.

¹ Commerce Commission, *Mergers and Acquisitions Guidelines*, July 2013.

² *Commerce Commission v Woolworths Limited* (2008) 12 TCLR 194 (CA) at [63].

³ Or below competitive levels in a merger between customers.

9. 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 Act, as a matter of fact and commercial common sense.⁴

When a lessening of competition is substantial

10. Only a lessening of competition that is substantial is prohibited. A lessening of competition will be substantial if it is real, of substance, or more than nominal.⁵ Some courts have used the word ‘material’ to describe a lessening of competition that is substantial.⁶ A substantial lessening of competition in a significant section of a market may, according to circumstances, be a substantial lessening of competition in a market.⁷
11. Consequently, there is no bright line that separates a lessening of competition that is substantial from one that is not. What is substantial is a matter of judgement and depends on the facts of each case. Ultimately, we assess whether competition will be substantially lessened by asking whether consumers in the relevant market(s) are likely to be adversely affected in a material way.

When a substantial lessening of competition is likely

12. A substantial lessening of competition is ‘likely’ if there is a real and substantial risk, or a real chance, that it will occur. This requires that a substantial lessening of competition is more than a possibility, but does not mean that the effect needs to be more likely than not to occur.⁸

The clearance test

13. We must clear an acquisition if we are satisfied that the acquisition would not be likely to substantially lessen competition in any market.⁹ If we are not satisfied – including if we are left in doubt – we must decline to clear the acquisition.¹⁰ It is

⁴ Section 3(1A). See also *Brambles v Commerce Commission* (2003) 10 TCLR 868 at [81].

⁵ *Woolworths & Ors v Commerce Commission* (2008) 8 NZBLC 102,128 (HC) at [127].

⁶ *Ibid* at [129].

⁷ As the Federal Court of Australia noted in *Dandy Power Equipment Pty Ltd & Anor v Mercury Marine Pty Ltd* (1982) 64 FLR 238, 260; 44 ALR 173, 192; ATPR 40-315, 43,888, cited with approval by McGechan J in *Commerce Commission v Port Nelson Ltd* (1995) 6 TCLR 406 at 435: “Although the words “substantially lessened in a market” refer generally to a market, it is the degree to which competition has been lessened which is critical, not the proportion of that lessening to the whole of the competition which exists in the total market. Thus a lessening in a significant section of the market, if a substantial lessening of otherwise active competition may, according to circumstances, be a substantial lessening of competition in a market”.

⁸ *Woolworths & Ors v Commerce Commission* (HC) above n5 at [111].

⁹ Section 66(1) of the Commerce Act 1986.

¹⁰ In *Commerce Commission v Woolworths Limited* (CA), above n2 at [98], the Court held that “the existence of a ‘doubt’ corresponds to a failure to exclude a real chance of a substantial lessening of competition”.

open to us to say: “We are not sure and therefore we are not satisfied that there will be no substantial lessening of competition”.¹¹

14. The burden of proof lies with Tennex, as the applicant, to satisfy us on the balance of probabilities that the acquisition is not likely to have the effect of substantially lessening competition.¹² The decision to grant or refuse a clearance is necessarily to be made on the basis of all the evidence.¹³ We will sometimes have before us conflicting evidence from different market participants and must determine what weight to give to the evidence of each party.¹⁴

Key parties

Tennex Capital Limited (Tennex)

15. Tennex is a privately owned New Zealand company. Through its subsidiary company, International Waste Limited (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.
16. IWL currently operates facilities for the treatment of medical and quarantine waste in Auckland, Wellington, Christchurch and Dunedin. IWL (directly and through a range of sub-contractors) collects medical and quarantine waste on a national basis for processing at its treatment facilities.
17. Until 2015, IWL had only one facility for the treatment of medical and quarantine waste in the South Island, being its plant in Dunedin. In early 2015, IWL installed a treatment plant in Christchurch. Before establishing this plant in Christchurch, IWL transported any medical and quarantine waste it collected in the upper South Island (including Canterbury) to Dunedin for treatment.¹⁵

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

18. San-i-pak is a privately owned New Zealand company that provides medical and quarantine waste collection, treatment and disposal services, as well as general waste services.
19. 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.

¹¹ *Commerce Commission v Woolworths Ltd* (CA) above n2 at [207(a)].

¹² *Commerce Commission v Southern Cross Medical Care Society* (2001) 10 TCLR 269 (CA) at [7] and *Commerce Commission v Woolworths Ltd* (CA) above n2 at [97].

¹³ *Commerce Commission v Woolworths Ltd* (CA) above n2 at [101].

¹⁴ *Brambles New Zealand Ltd v Commerce Commission* above n4 at [64].

¹⁵ []

Industry background

20. The acquisition relates to the collection, treatment and disposal of medical and quarantine waste.
21. Medical and quarantine waste is classified as hazardous waste material and is subject to strict regulatory and other requirements governing its containment, transportation, storage, treatment and disposal.¹⁶
22. Medical waste includes anatomical waste, blood, body parts and infected animal carcasses; disposables, including hypodermic needles, scalpels and syringes; soiled dressings and swabs; laboratory waste; and pharmaceutical and chemical waste.¹⁷ It is generated by a wide range of parties including hospitals, laboratories, pharmacies, dentists, universities, medical centres, vets and tattoo parlours. District Health Boards (DHBs) account for a significant portion of all medical waste.
23. Quarantine waste comprises the refuse originating from overseas flights landing at international airports and from ships arriving from overseas ports, as well as items potentially representing a biosecurity risk to New Zealand such as waste within a fruit fly exclusion zone. Quarantine waste must be handled and disposed of in accordance with standards specified by the Ministry for Primary Industries (MPI).¹⁸

With and without scenarios

24. To assess whether competition is likely to be substantially lessened in any market we compare the likely state of competition with the acquisition to the likely state of competition without the acquisition.¹⁹ As we discuss below, there can be more than one likely scenario without the acquisition.

With the acquisition

25. IWL and San-i-pak are the only parties in the South Island providing collection, treatment and disposal of medical and quarantine waste services. With the acquisition, IWL would (absent new entry) be the only supplier.²⁰

Without the acquisition

26. We have considered what is likely to happen to the medical and quarantine waste business of San-i-pak absent its sale to Tennex.
27. While not submitting that San-i-pak was a failing firm, Tennex submitted that there would be no material difference in competition both with the acquisition and without the acquisition. In essence, Tennex's submission is that the market cannot sustain both Tennex and San-i-pak.

¹⁶ Clearance application from Tennex (20 October 2015) at [6.3].

¹⁷ Ibid at [6.5].

¹⁸ Ibid at [6.6].

¹⁹ *Mergers and Acquisitions Guidelines* above n1 at [2.29].

²⁰ As discussed further later, a third party, Medismart (a division of Waste Management), also undertakes treatment of medical and quarantine waste in the North Island. In addition, Grey Hospital on the West Coast of the South Island self-supplies and operates an onsite incinerator to dispose of its medical waste.

[

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28. Tennex's submissions raise two broad issues.

28.1 Can we be satisfied that San-i-pak will exit the market if it is not acquired by Tennex? To put this in terms of the test described by the High Court in *Woolworths*, can we exclude the real chance that San-i-pak will continue to operate (whether under its current owners or under the ownership of a third-party after a sale)?

28.2 Even if we are satisfied that San-i-pak will exit the market (ie, there is no real chance it will continue), can we be satisfied that any loss of competition in the period before that exit occurs is not substantial?

Is there a real chance that San-i-pak will continue to operate absent the acquisition?

29. We acknowledge that San-i-pak's loss of the Canterbury DHB contract to IWL []. We also accept that it is possible San-i-pak may continue to lose customers to IWL and may eventually exit the market.²² This possibility may even be 'likely' in Commerce Act terms.

30. However, as the High Court in *Woolworths* noted there can be more than one likely scenario without the acquisition. This is because a scenario can be likely even if it has less than an even chance of occurring, provided there is a real chance of that scenario occurring. The High Court further said that where more than one without-the-acquisition scenario is 'likely', it is not a case of choosing the one without-the-acquisition scenario that has the greatest prospects of occurring. Each likely without-the-acquisition scenario identified is then considered as part of our assessment of whether a substantial lessening of competition would be likely to arise.

31. It follows from this, that to accept Tennex's submission that without the acquisition San-i-pak will exit the market requires Tennex and San-i-Pak to demonstrate that there is no real chance of San-i-Pak remaining in the market absent the acquisition.

²¹ Application above n16 at 4-5 and 26-29, letter from Matthews Law (on behalf of Tennex) to the Commerce Commission (17 December 2015), letter from Matthews Law (on behalf of Tennex) to the Commerce Commission (19 February 2016) and Commerce Commission meeting with Tennex (25 February 2016).

²² For example, Tennex submitted that, []. Letter from Tennex (19 February 2016) above n21. As noted later, San-i-pak advised that, []. E-mail from Mitchell Mackersy (on behalf of San-i-pak) to the Commerce Commission (22 December 2015).

32. San-i-pak’s submissions []²³
San-i-pak, in particular, submitted that:

32.1 []^{24 25}

32.2 []²⁶

32.3 []²⁷

32.4 []²⁸

33. We accept that the current owners wish to exit the business. However, notwithstanding submissions that we have received from Tennex and San-i-pak, evidence we have gathered does not support the conclusion that there is no real chance that San-i-pak would continue to operate. Specifically:

33.1 []
29 30 31 32];

²³ E-mail from Mitchell Mackersy (on behalf of San-i-pak) to the Commerce Commission (6 November 2015) and e-mail from San-i-pak above n22.

²⁴ San-i-pak advised that [] E-mail from Mitchell Mackersy (on behalf of San-i-pak) to the Commerce Commission (11 November 2015).

²⁵ []

²⁶ San-i-pak submitted that [] E-mail from San-i-pak above n22.

²⁷ E-mail from San-i-pak (6 November 2015) above n23.

²⁸ E-mail from San-i-pak (6 November 2015) above n23, Commerce Commission interview with San-i-pak (27 November 2015) and e-mail from San-i-pak above n22.

²⁹ Interview with San-i-pak above n28.

³⁰ [] E-mail from San-i-pak above n24.

³¹ []

33.2 [];³³

33.3 [];³⁴

33.4 [];³⁵

33.5 []³⁶
San-i-pak is contracted to provide services to Christchurch International Airport until [] and the Port of Lyttelton until [];^{37 38}

33.6 [];³⁹
and

33.7 [].⁴⁰

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[] Meeting with Tennex above n21.

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[] E-mail from San-i-pak (6 November 2015) above n23.

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E-mail from San-i-pak (6 November 2015) above n23.

35

E-mail from San-i-pak (6 November 2015) above n23 and interview with San-i-pak above n28.

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Interview with San-i-pak above n28.

34. Further, there are potentially a range of purchasers for San-i-pak. San-i-pak stated that
[

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35. The feedback we have received from the market indicates that bona fide third-parties are interested in acquiring San-i-pak. Although not all parties spoken to expressed an interest in, or willingness to, acquire San-i-pak.

35.1 [

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35.2 [

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35.3 Envirowaste advised that
[

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⁴¹ E-mail from San-i-pak (6 November 2015) above n23, interview with San-i-pak above n28 and e-mail from San-i-pak above n22.

⁴² []

⁴³

[

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⁴⁴ [

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⁴⁵ [

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⁴⁶

[

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⁴⁷ E-mail from Mitchell Mackersy (on behalf of San-i-pak) to the Commerce Commission (7 December 2015).
⁴⁸ Commerce Commission interview with Envirowaste (26 November 2015).

35.4 Waste Management advised that
 []⁴⁹
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35.5 Our discussions with customers suggest that they are less likely to purchase San-i-pak. Port of Lyttelton advised that
 []⁵¹ Christchurch
 International Airport advised that
 []⁵²
 Canterbury DHB advised that
 []⁵³

- 36. For all of these reasons we cannot exclude the real chance that San-i-pak would continue to operate in the market independent of Tennex, whether under its current ownership, as a subsidiary of a third-party or with its assets owned by a third-party.
- 37. Therefore, we have considered whether competition is substantially lessened in the without-the-acquisition scenario where San-i-pak continues to operate independently as this without-the-acquisition scenario gives rise to the most acute competition concerns.⁵⁴ In doing so, we note that irrespective of whether San-i-pak’s current owners retain the business or sell the business to a third-party, the competitive effect would be the same: the services offered by San-i-pak would continue to be made available independent of Tennex in competition with IWL.

Acquisition has an impact even if there is no real chance that San-i-pak will continue

- 38. Although our decision does not turn on this point given our view that we cannot exclude the real chance that San-i-pak continues in the market, even if we are wrong, we are not satisfied that any loss of competition from the acquisition would not be substantial. This is discussed in more detail in the competition section.
- 39. The reason we make this point here is that implicit in the submissions from Tennex and San-i-pak is the idea that
 []

⁴⁹ E-mail from Waste Management to the Commerce Commission (10 December 2015).
⁵⁰ []

⁵¹ Commerce Commission interview with Port of Lyttelton (26 November 2015).

⁵² Commerce Commission interview with Christchurch International Airport (27 November 2015).

⁵³ Commerce Commission interview with Canterbury DHB and Health Alliance (8 December 2015).

⁵⁴ As the High Court in *Woolworths* noted, where there is more than one real and substantial without-the-acquisition scenario, it is not a case of choosing the one without-the-acquisition scenario that we think has the greatest prospects of occurring.

].

40. [] We are not satisfied that this difference in competition would not be substantial.

How the acquisition could substantially lessen competition

41. Our assessment of the proposed acquisition has focussed on the effects that could result from the removal of San-i-pak and the competitive constraint that it provides on IWL. This has involved us considering whether the merged entity would be able to profitably increase prices and/or lower quality post-acquisition.

Market definition

42. Market definition is a tool that helps identify and assess the close competitive constraints the merged entity would face. Determining the relevant market requires us to judge whether, for example, two products are sufficiently close substitutes as a matter of fact and commercial common sense to fall within the same market.
43. We define markets in the way that best isolates the key competition issues that arise from an acquisition.⁵⁵ In many cases this may not require us to precisely define the boundaries of a market. What matters is that we consider all relevant competitive constraints, and the extent of those constraints. For that reason, we also consider products and services which fall outside the market but which still impose some degree of competitive constraint on the merged entity.

Tennex's views of the relevant markets

44. In its application, Tennex took the same approach to market definition as adopted in a previous medical and quarantine waste decision of the Commission.⁵⁶ Tennex adopted markets for:⁵⁷
- 44.1 the collection of medical and quarantine waste in the South Island; and
- 44.2 the treatment of medical and quarantine waste in the South Island.

⁵⁵ *Mergers and Acquisitions Guidelines* above n1 at [3.10-3.12].

⁵⁶ Medical Waste Group Ltd and San-i-pak (NZ) Ltd (Commerce Commission Decision 386, 15 March 2000).

⁵⁷ Application above n16 at [6.38-6.40].

Our view of the relevant markets

45. Our assessment of market definition has focused on two main areas for each of larger and smaller customers:
- 45.1 whether it is still appropriate to define the South Island as a separate market to the North Island; and
 - 45.2 whether it is still appropriate to define a market for the collection of medical and quarantine waste separate to the treatment of that waste, or whether instead there is a single market for the collection, treatment and disposal of that waste.
46. For the reasons set out below, we have assessed the proposed acquisition using the markets previously defined in Decision 386.
47. We note that the precise market definition is not critical to our determination in this case. Our determination to decline to give clearance would remain unchanged even if we adopted narrower geographic or functional markets. We still would not have been satisfied that the acquisition would be unlikely to substantially lessen competition.
48. We consider that the South Island is still the appropriate geographic dimension of the market, although, we note that the market may be geographically differentiated in that a supplier based in Christchurch would be a closer competitor for a Christchurch based business than one based in Dunedin. This is because:
- 48.1 while San-i-pak currently only collects waste in the greater Canterbury region, this has not always been the case, [] and there is the potential for San-i-pak to treat waste from across the entire South Island;
 - 48.2 before IWL established its plant in Christchurch, it was competing for customer contracts in the upper South Island (including Canterbury) and transporting any medical and quarantine waste it collected there to Dunedin for treatment;⁵⁸ and
 - 48.3 any waste collected in the South Island is not transported to the North Island for treatment (or vice versa).⁵⁹

⁵⁸ Tennex submitted that having its own plant in Christchurch has better positioned IWL to service customers located there. Application above n16 at [3.18]. Tennex further submitted that, []. IWL document responding to request for information, attached to e-mail from Matthews Law (on behalf of Tennex) to the Commerce Commission (6 November 2015) at 10.

⁵⁹ Waste Management advised that []. E-mail from Waste Management above n49.

49. In Decision 386, the Commission defined separate collection and treatment markets because some industry participants only operated collection services. In this case, our investigation has revealed that there continues to be medical and quarantine waste collected by third-parties in the South Island. While the volumes of waste collected by third-parties is currently minimal and collected solely on a sub-contract basis for IWL or San-i-pak, should the merged entity attempt to raise the price of waste collection, customers could switch to such third-parties for the collection of their waste. For the purposes of considering the competitive effects of the proposed acquisition, we have therefore defined separate functional markets for the collection and treatment (including disposal) of medical and quarantine waste.
50. There is evidence that suppliers price discriminate between larger customers that issue tenders and smaller customers that are quoted a list price.⁶⁰ There is a substantial difference in volume collected for treatment and the price paid by each of these customer groups. The options available to each of these customer groups for the supply of waste services may differ (eg, large customers may have the ability to self-supply) and as such we consider them separately where relevant.
51. The competition analysis set out next is solely for the market for the treatment and disposal of medical and quarantine waste in the South Island. We have not seen the need to set out separate detailed competition analysis for the collection of medical and quarantine waste in the South Island, due to our concerns around the impact of the proposed acquisition on the treatment market.

Competition analysis

52. As described earlier in these reasons, we consider that there is a real chance that San-i-pak would continue to operate absent the acquisition. Given that conclusion, in this section we assess whether we are satisfied that there are sufficient constraints to prevent a substantial lessening of competition with the acquisition.
53. Tennex submitted that any perceived lessening of competition in the short term (while San-i-pak remains in the market) would not be substantial because (amongst other things):⁶¹
- 53.1 San-i-pak does not act as a material constraint on IWL in respect of national customers;
- 53.2 smaller customers account for a small percentage of total market sales (such that any price increase to smaller customers would not substantially lessen competition);
- 53.3 []; and

⁶⁰ Typically, the price that IWL and San-i-pak quote to customer is a single price that covers the costs of collection, treatment and disposal of waste. However, prices charged to customers located outside of Christchurch and Dunedin may be higher, due to the addition of transport costs.

⁶¹ Application above n16 at 6.

- 53.4 large customers have a high degree of countervailing power that would constrain IWL post-acquisition.
54. The evidence before us does not support Tennex's submissions. We are not satisfied that the acquisition will not substantially lessen competition (either in the scenario where San-i-pak continues or the scenario where it exits).
- 54.1 IWL and San-i-pak are the only parties in the South Island currently providing treatment and disposal of medical and quarantine waste services. With the acquisition, IWL would (absent new entry) be the only supplier (ie, the market would go from being a duopoly to a monopoly).
- 54.2 Smaller customers that pay list prices and which have no alternatives to a merged IWL/San-i-pak are likely to face at least a [] price increase post-acquisition []. Despite the fact that smaller customers make up only a small portion of the market, a price increase to smaller customers of this magnitude would be substantial.
- 54.3 We are not satisfied that new entry into the South Island market for the treatment and disposal of medical and quarantine waste services is likely, of sufficient extent and would occur in a timely enough way to constrain the merged entity.
- 54.4 We are not satisfied that, faced with a price increase, large customers have sufficient countervailing power or incentive to use what power they have in order to constrain the merged entity and offset a substantial loss of competition given that they would have few strong alternative options to a merged IWL/San-i-pak or it would be costly to self-supply.

Existing competition

55. IWL and San-i-pak are the only parties in the South Island currently providing treatment and disposal of medical and quarantine waste services; they provide a material competitive constraint on each other. There are no other existing competitors that provide a strong and effective constraint. The proposed acquisition would result in a substantial loss of existing competition in the treatment and disposal of medical and quarantine waste services in the South Island.

Competition for large customer contracts

56. Large regional customers⁶² and national customers⁶³ usually tender term contracts for medical and quarantine waste services. IWL and San-i-pak are competitors or potential competitors for these contracts (San-i-pak in the South Island only).

⁶² The key South Island-specific contracts are those for DHBs, international airports and seaports. In the case of Canterbury, it is Canterbury DHB, Christchurch International Airport and the Port of Lyttelton.

⁶³ For example, [].

57. Where national customers choose to deal with a single supplier across New Zealand, IWL (as the only party with national presence) holds the contract. Although San-i-pak may not compete for such contracts at present, its presence in the South Island means that it exists as an alternative option for IWL’s national customers with locations in the South Island (eg, if those customers were to tender North and South Island contracts separately or if they were to contract with a North Island supplier that sub-contracted to San-i-pak in the South Island) and its presence may constrain IWL’s pricing to such customers.^{64 65}

58. Evidence indicates that San-i-pak competes with IWL for contracts tendered by South Island-specific customers (both within Canterbury and outside of Canterbury). While San-i-pak currently only treats waste that has been collected around Canterbury, this has not always been the case and there is the potential for San-i-pak to treat waste from across the entire South Island (eg, where San-i-pak wins a contract outside of Canterbury or is sub-contracted by a third-party collector to treat some waste).⁶⁶

59. The prices paid by large customers are different to the prices that smaller customers pay. Evidence from some recent tenders of large contracts shows competition between IWL and San-i-pak driving down prices offered to large customers in Canterbury.⁶⁷

59.1 In the last tender of the Canterbury DHB contract (conducted by Health Benefits⁶⁸ as part of a tender of all DHB contracts), IWL offered a price of \$[] per kg compared to San-i-pak’s bid of \$[] per kg and won the Canterbury DHB contract from San-i-pak with effect from 1 July 2014.⁶⁹ We note that
[
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59.2 When the Christchurch International Airport contract was tendered in 2014, IWL offered a price of \$[] per kg ([]) compared to San-i-pak’s bid of \$[] per kg, with San-i-pak retaining the

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⁶⁵ []

⁶⁶ When San-i-pak held the Canterbury DHB contract, it collected waste from as far north as Kaikoura under that contract, transporting that waste to Christchurch for treatment. In addition, []

⁶⁷ As noted earlier, the prices charged cover the collection, treatment and disposal of waste.

⁶⁸ After contracts were awarded by Health Benefits, Health Alliance took over management of contract.

⁶⁹ IWL advised that

[] Commerce Commission interview with

Tennex (9 December 2015).

⁷⁰ []

contract. []^{71 72}

60. Evidence from Tennex itself supports our view that customers are benefiting from competition between IWL and San-i-pak in the form of lower prices. Tennex stated that, []⁷³ In addition, Tennex advised that []⁷⁴

61. For the remaining terms of their existing supply contracts, large customers (depending on the provisions in their contracts) may be protected from price increases post-acquisition.⁷⁵ However, at the expiry of those contracts, we are not satisfied that the merged entity would face sufficient competition for those contracts to constrain it from raising prices.⁷⁶

62. In contrast, evidence indicates that, without the acquisition, large customers would continue to benefit from competition between IWL and San-i-pak. For example, as noted earlier, IWL []⁷⁷ []⁷⁸ []

Competition for smaller customers

63. Smaller customers do not have written term contracts for medical and quarantine waste services. Typically, such customers do not appear to negotiate prices with suppliers and instead are simply quoted a list price on a take it or leave it basis.^{79 80 81}

⁷¹ E-mail from Christchurch International Airport to the Commerce Commission (30 November 2015).

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⁷³ Interview with Tennex above n69.

⁷⁴ IWL document above n58 at 3.

⁷⁵ As submitted by Tennex. See application above n16 at 6.

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[]

⁷⁷ Letter from Tennex (19 February 2016) above n21.

⁷⁸ E-mail from San-i-pak above n22.

⁷⁹ Interview with Tennex above n69 and interview with San-i-pak above n28.

⁸⁰ Tennex commented that smaller customers []⁸¹. Interview with Tennex above n69.

[]

64. Smaller customers in Canterbury currently have the choice of two suppliers, IWL and San-i-pak. While IWL faces competition from San-i-pak to supply services to smaller customers in Canterbury, evidence indicates that competition for these customers may not be vigorous currently (and has not changed materially since IWL installed its Christchurch plant). This is likely to change without the acquisition.

64.1 San-i-pak advised that,
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64.2 Tennex commented that []⁸³
[

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65. Evidence indicates that, with the acquisition, smaller customers would generally have no alternatives to a merged IWL/San-i-pak. Moreover, in response to a price increase, smaller customers may not have the ability to reduce their volume of medical and quarantine waste or seek alternative means of disposal for such waste (ie, react to a price increase).

66. Table 1 sets out IWL and San-i-pak’s base (list) prices for smaller customers.

Table 1: List prices for smaller customers

Supplier	Medical waste	Quarantine waste
IWL	[\$] per kg	[\$] per kg
San-i-pak	[\$] per kg	[\$] per kg

Source: IWL and San-i-pak

67. IWL’s list prices set out in Table 1 are the prices it charges smaller customers in each of Auckland, Wellington, Christchurch and Dunedin (ie, it is a national price list).⁸⁵

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⁸¹ Tennex advised that
[

]. Interview with Tennex above n69.

⁸² Interview with San-i-pak above n28.

⁸³ Interview with Tennex above n69.

⁸⁴ [], attached to e-mail from Matthews Law (on behalf of Tennex) to the Commerce Commission (6 November 2015).

⁸⁵ Prices charged outside of these cities may be higher, due to the addition of transport costs.

68. Tennex submitted that post-acquisition IWL would not change its pricing to smaller customers because maintaining separate price lists would be inefficient.^{86 87} But, Tennex further submitted that any increase in price to smaller customers would not substantially lessen competition in the market, given the small portion of the market that they represent.⁸⁸
69. Given Tennex's submission, we consider it likely that the smaller customers that currently use San-i-pak would face at least a [] price increase post-acquisition ([]). Despite the fact that smaller customers make up only a small portion of the market, a price increase to smaller customers of this magnitude would be substantial.
70. In comparison, prices to smaller customers may be more competitive without the acquisition, where San-i-pak remains as an independent competitor, even in the short term. This is because, as Table 1 shows, []
[]. We conclude this on balance even acknowledging Tennex's comment that []
[]^{89 90}.

Competition from other suppliers

71. There are no other suppliers competing to treat medical and quarantine waste in the South Island. We understand that some customers with small volumes of medical waste may contract with general waste companies like Waste Management and Envirowaste to handle their medical waste along with their general waste and recycling.⁹¹ However, Waste Management and Envirowaste sub-contract entirely the treatment and disposal of any such medical waste (as well as the collection of that waste) in the South Island to IWL and San-i-pak (being the only parties with the facilities to process this waste).⁹² Waste Management and Envirowaste are not competing against IWL or San-i-pak for the treatment of such waste.

⁸⁶ Application above n16 at [7.34].

⁸⁷ Tennex advised that [] Interview with Tennex above n69.

⁸⁸ Application above n16 at 6.

⁸⁹ E-mail from Matthews Law (on behalf of Tennex) to the Commerce Commission (17 December 2015).

⁹⁰ Tennex advised that []

[]. E-mail from Tennex above n89.

⁹¹ This is generally because the customer wants the convenience of contracting with single supplier and receiving a single bill for all waste services.

⁹²

[]

Potential competition

72. In this section we consider whether new competitors would enter and effectively compete with the merged entity if prices increased.⁹³ The threat of entry must be sufficient to constrain market power. This requires entry to be likely, sufficient in extent, and timely (referred to as the 'LET test').⁹⁴
73. For the reasons set out below, we are not satisfied that entry is likely, of sufficient extent and would occur in a timely fashion in the future to prevent a substantial lessening of competition.

Conditions of entry and expansion

74. The likely effectiveness of entry and expansion is determined by the nature and effect of the aggregate conditions of entry and expansion into the relevant market. The conditions of entry and expansion can take a variety of forms, including structural, regulatory and strategic conditions.⁹⁵
75. We consider that securing a large customer contract is a key condition of entry into this market. This is because entry is unlikely to occur unless expected profits are positive. The fixed costs of entry (in terms of investment in a treatment plant), means that firms are unwilling to enter unless they are likely to have a sufficient volume of work to justify that investment. The only way that an entrant could secure such volume in a timely manner would be to win a large customer contract.
76. Tennex submitted that, besides securing sufficient customer volumes, entry is easy and barriers to entry are low. It submitted that treatment plants can cost from \$[] up and can be ordered, consented and installed within 3-6 months.⁹⁶ Tennex further submitted that there is a second-hand market for the plant, meaning that their initial costs are not entirely sunk.⁹⁷
77. In Decision 386, the Commission considered in detail the conditions of entry in terms of the collection, treatment and disposal of medical and quarantine waste in the South Island.⁹⁸ The Commission identified a number of conditions of entry, the most important being access (through customer contracts) to sufficient volumes of waste in a timely fashion to make entry viable. Overall, the Commission considered that conditions of entry were high. We have not identified any significant changes in the industry that alter our assessment of the conditions of entry.
78. Waste Management advised that [].⁹⁹

⁹³ *Mergers and Acquisitions Guidelines* above n1 at [3.91].

⁹⁴ *Mergers and Acquisitions Guidelines* above n1 at [3.96].

⁹⁵ *Ibid* at [3.108].

⁹⁶ Application above n16 at 6.

⁹⁷ *Ibid* at [7.59].

⁹⁸ Medical Waste Group Ltd and San-i-pak above n56 at 28-37.

⁹⁹ E-mail from Waste Management above n49.

79. IWL itself only established a plant in Christchurch after it won the Canterbury DHB contract from San-i-pak. IWL submitted that the Canterbury DHB contract underwrote the installation of its Christchurch plant.¹⁰⁰
80. Evidence indicates that IWL's figure of \$[] is on the low side of costs that an entrant might incur. IWL itself spent \$[] on the Christchurch treatment plant that it installed in early 2015.
[]¹⁰¹
[]¹⁰²

Whether the LET test is met

81. The possibility of entry is insufficient to constrain the merged entity. Entry must be likely, sufficient in extent, and timely before it could constrain the merged entity and prevent a substantial lessening of competition.¹⁰³
82. Tennex submitted that, given the low margins and small market size, greenfield entry is unlikely without sponsorship by a large customer such as a DHB.¹⁰⁴ It submitted that []¹⁰⁵ Tennex submitted that parties such as Waste Management and Envirowaste could easily enter the market, if incentivised.¹⁰⁶
83. We are not satisfied that, if the merged entity increased prices by an amount that constituted a substantial lessening of competition, entry would meet the LET test. We consider that prices would have to increase very significantly before entry became likely.
84. We accept Tennex's submission that entry is unlikely absent sponsorship by a large customer. However, for a large customer to be able to successfully sponsor entry there would have to be parties that are interested in entering the market and interested in supplying that customer on terms that are at least as, if not more, favourable (to the customer) than those offered by the merged entity. Based on the evidence before us, we are not satisfied that such parties would exist in the event

¹⁰⁰ Application above n16 at [3.18].

¹⁰¹ [], attached to e-mail from Matthews Law (on behalf of Tennex) to the Commerce Commission (6 November 2015).

¹⁰² [], attached to e-mail from Matthews Law (on behalf of Tennex) to the Commerce Commission (6 November 2015).

¹⁰³ *Mergers and Acquisitions Guidelines* above n1 at [3.96].

¹⁰⁴ Application above n16 at 6.

¹⁰⁵ *Ibid* at 6.

¹⁰⁶ *Ibid* at [7.41].

that a large customer wanted to sponsor entry in response to a price increase representing a substantial lessening of competition.¹⁰⁷

85. There also remains a question as to whether any sponsored entry, were it to occur, would happen in a timely fashion to address a substantial lessening of competition for smaller customers given the term of large customer contracts.
86. We have particularly considered the two companies active in adjacent general waste markets – Waste Management (which, as noted below, exited the South Island medical and quarantine waste market in 2006) and Envirowaste.
87. Waste Management operates a medical and quarantine waste facility in Auckland only.¹⁰⁸ As Waste Management is already present in the market for the collection, treatment and disposal of medical and quarantine waste in the North Island, we consider that it may be best-placed to enter the South Island market. However, based on the evidence before us, we are not satisfied that entry by Waste Management is likely, of sufficient extent and would occur in a timely fashion in the future to prevent a substantial lessening of competition.
88. Waste Management advised that [].¹⁰⁹ As noted above, []¹¹⁰ Waste Management commented that []¹¹¹ Waste Management further advised that []¹¹²
89. Notwithstanding the above, Waste Management advised that []¹¹³ ¹¹⁴ However, Waste Management stated that

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[]

¹⁰⁸ Until October 2006, Waste Management also operated medical and quarantine waste treatment plants in Wellington, Christchurch and Dunedin, when it sold its business in these regions to Tennex.

¹⁰⁹ E-mail from Waste Management above n49.

¹¹⁰ Waste Management advised that [] E-mail from Waste Management above n49.

¹¹¹ E-mail from Waste Management to the Commerce Commission (3 December 2015).

¹¹² Ibid.

¹¹³ E-mail from Waste Management above n49.

¹¹⁴

[]

[].¹¹⁵ We are not satisfied that entry by Waste Management is likely in the face of a price increase reflecting a substantial lessening of competition.¹¹⁶

90. We are similarly not satisfied that entry by Envirowaste (a supplier of general waste and recycling services) is likely, of sufficient extent and would occur in a timely fashion in the future to prevent a substantial lessening of competition. Envirowaste advised that

[].¹¹⁷

91. We identified no other parties with plans to, or which we consider likely to, enter the market.
92. We consider the question of countervailing power in the next section, including whether, in response to an increase in price and/or decrease in quality by the merged entity post-acquisition, large customers are likely to be incentivised to sponsor entry.

Countervailing power

93. A merged entity's ability to increase prices profitably may be constrained by the countervailing power of customers.¹¹⁸ Countervailing power goes beyond the ability of a customer to switch to other suppliers. A customer's size and importance is not sufficient in itself to amount to countervailing power. Countervailing power exists when a customer possesses a special ability to substantially influence the price the merged entity charges.¹¹⁹ It must be sufficient to prevent a substantial lessening of competition.
94. Tennex submitted that over []% of medical and quarantine waste in the upper South Island (including Canterbury) is produced by a small number of large sophisticated customers (DHBs, private hospitals, international airports and

¹¹⁵ E-mail from Waste Management to the Commerce Commission (17 December 2015).

¹¹⁶

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¹¹⁷ Interview with Envirowaste above n48.

¹¹⁸ *Mergers and Acquisitions Guidelines* above n1 at [3.113].

¹¹⁹ For examples of the types of characteristics that may give rise to countervailing power see *Mergers and Acquisitions Guidelines* above n1 at [3.115].

seaports), which have a high degree of countervailing power that will constrain the merged entity.¹²⁰ Tennex submitted that large customers could:

94.1 sponsor new entry;¹²¹

94.2 self-supply;¹²² and/or

94.3 in the case of DHBs, elect to organise waste disposal for smaller medical customers, so that those smaller customers benefited from the volume discounts offered to DHBs.¹²³

95. A few large customers would account for a large share of the merged entity's sales. However, the acquisition would lead to a reduction in the number of suppliers from two to one, which would shift the bargaining power towards the merged entity. We have therefore considered whether large customers have the means to impose sufficient countervailing power to offset that shift in bargaining power.

96. We are not satisfied that the countervailing power of large customers would be sufficient to offset the loss in competition from the acquisition and subsequent shift in bargaining power.

97. Evidence indicates that, in response to a price increase, some large customers may look to see whether they could sponsor new entry, but that customers are unsure as to whether parties would be interested in entering and, if so, on what terms.¹²⁴ Other evidence indicates that due to the critical nature of services supplied by IWL and San-i-pak, quality and continuity of service may mean that some customers may simply accept price increases, unless they were substantial. We are also not satisfied that there would be a party interested in entering [].

97.1 Health Alliance (which tenders DHB contracts on behalf of all DHBs) advised that []

].^{125 126}

¹²⁰ Application above n16 at [7.38].

¹²¹ Tennex submitted that []. Application above n16 at 6.

¹²² Tennex submitted that some customers have self-supplied in the past (operating incinerators) and have the ability to recommence self-supply using lower cost autoclave technology, if incentivised. However, it also submitted that it considered it more likely that DHBs would sponsor new entry than self-supply. Application above n16 at [7.39].

¹²³ Tennex submitted that DHBs are increasingly organising waste disposal for smaller medical customers that ultimately receive funding from the Government or DHBs. Application above n16 at 6.

¹²⁴ The evidence on the interest that parties have in entering was discussed under potential competition.

¹²⁵ Interview with Canterbury DHB and Health Alliance above n53.

97.2 Christchurch International Airport advised that
[

].¹²⁷

97.3 Port of Lyttelton advised that
[

].¹²⁸

98. We have found no evidence to indicate that large customers would be likely to self-supply and establish their own waste treatment facilities. In addition to the evidence below, Tennex acknowledged that

[].¹²⁹

98.1 Canterbury DHB advised that
[

].¹³⁰

98.2 Christchurch International Airport advised that
[].¹³¹

98.3 Port of Lyttelton advised that
[

].¹³²

99. In terms of Tennex’s submission that DHBs are increasingly organising disposal for smaller medical customers, we have found no evidence to indicate that any such moves by DHBs (were they to occur in the future) would extend to encompassing smaller customers for which the DHBs are not responsible to protect them from price increases post-acquisition. Canterbury DHB advised that
[

¹²⁶ []

¹²⁷ Interview with Christchurch International Airport above n52.

¹²⁸ Interview with Port of Lyttelton above n51.

¹²⁹ Interview with Tennex above n69.

¹³⁰ Interview with Canterbury DHB and Health Alliance above n53.

¹³¹ Interview with Christchurch International Airport above n52.

¹³² Interview with Port of Lyttelton above n51.

].¹³³

100. Further to the above, even if large customers were able to substantially influence the price that the merged entity charges them by credibly threatening to take actions like sponsoring new entry or self-supplying, this market is characterised by price discrimination and so customers with alternatives to the merged entity may not face a price increase. However, where large customers simply threaten (as opposed to actually sponsor new entry), this would still leave smaller customers that pay the list price, vulnerable to a price increase. Tennex's comment that smaller customers [],¹³⁴ coupled with the fact that [], makes a price increase to smaller customers post-acquisition more likely and profitable.

¹³³ Interview with Canterbury DHB and Health Alliance above n53.

¹³⁴ Interview with Tennex above n69.

Determination on notice of clearance

102. The Commission is not 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.
103. Under s 66(3)(b) of the Commerce Act 1986 the Commerce Commission determines to decline to give clearance to Tennex Capital Limited (or any interconnected body corporate of Tennex), to acquire up to 100% of the medical and quarantine waste collection and treatment assets of San-i-pak Limited.

Dated this 29th day of February 2016

Dr Mark Berry
Chairman