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**Notice
under s66 of the
Commerce Act 1986
Application by Transpacific Industries
Group (NZ) Limited
to acquire
the Timaru/Oamaru solid waste
business of Enviro Waste Services
Limited**

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COMMERCE ACT 1986: BUSINESS ACQUISITION

SECTION 66: NOTICE SEEKING CLEARANCE

16 August 2007

The Registrar
Business Acquisitions and Authorisations
Commerce Commission
PO Box 2351
Wellington

Pursuant to s66(1) of the Commerce Act 1986 notice is hereby given seeking **clearance** of a proposed business acquisition.

Glossary

The following terms are used in this Notice.

<i>Blenheim/Nelson Application</i>	The application for clearance for the acquisition by TPI of the business and assets of ESL's solid waste collection businesses in Blenheim and Nelson dated 16 August 2007.
<i>Blenheim/Nelson Transaction</i>	The acquisition by TPI of the business and assets of ESL's solid waste collection businesses in Blenheim and Nelson, where required, subject to divestment undertakings as contemplated by the Blenheim/Nelson Application.
<i>CWS</i>	Canterbury Waste Services Limited
<i>Decision 604</i>	Decision of the Commerce Commission dated 30 May 2007 in relation to the application for clearance for TPI to acquire the South Island Assets and Businesses of Enviro Waste Services Limited and up to 50% of the shares in Manawatu Waste Limited.
<i>ESL</i>	Enviro Waste Services Limited.
<i>Ironbridge</i>	Ironbridge Capital Pty Limited and, where the context requires, Barra Bidco Limited being the company which purchased the shares in ESL from Fulton Hogan.
<i>Joint Venture Companies</i>	Pikes Point Transfer Station Limited, Canterbury Waste Services Limited and Midwest Disposals Limited.
<i>Original Notice</i>	The application for clearance for TPI to acquire the South Island Assets and Businesses of Enviro Waste Services Limited and up to 50% of the shares in Manawatu Waste Limited dated 14 December 2006.
<i>Timaru/Oamaru Transaction</i>	The acquisition of the business and assets of ESL's solid waste business in Timaru and Oamaru.
<i>Transpacific</i>	Transpacific Industries Group Limited, the listed Australian parent company of TPI.
<i>TPI</i>	Transpacific Industries Group (NZ) Limited.

PART I: TRANSACTION DETAILS

1. What is the business acquisition for which clearance is sought?

- 1.1 Clearance is sought for the acquisition, by Transpacific Industries Group (NZ) Limited (*TPI*) or a wholly owned subsidiary of TPI, of the business and assets of ESL's solid waste business in Timaru and Oamaru (*the Timaru/Oamaru Transaction*).
- 1.2 This application for clearance is made without prejudice to any argument or material which may be used in support of TPI's appeal against Decision 604.
- 1.3 For the reasons outlined in this application, TPI believes the Timaru/Oamaru Transaction will not have the effect, or likely effect, of substantially lessening competition in any market.
- 1.4 However, should the Commission not be satisfied that the Timaru/Oamaru Transaction will not have the effect, or likely effect, of substantially lessening competition in any market, but without prejudice to any argument or material which may be used in support of TPI's appeal against that conclusion, TPI is prepared to provide a divestment undertaking under section 69A of the Commerce Act on the terms set out in Schedule 2 of this Notice.
- 1.5 As the Commission is aware, at the date of the Original Notice ESL was wholly owned by Fulton Hogan. Fulton Hogan has since sold all of the shares in ESL to Barra Bidco Limited, a company ultimately wholly owned by Ironbridge Capital Pty Limited (*Ironbridge*).

Information previously provided

- 1.6 In preparing this Notice, TPI has not repeated information contained in the Original Notice or information subsequently provided to the Commission in the course of its investigation in relation to the Original Notice. TPI requests that the Commission take that information into account in its consideration of this Notice (in addition to the information provided in and accompanying this Notice).

2. Who is the person giving this notice?

2.1 This notice is given by:

Greg Campbell
Managing Director
Transpacific Industries Group (NZ) Limited
86 Lunn Avenue
Mt Wellington

Telephone: (09) 574 0880
Facsimile: (09) 274 5254

2.2 All correspondence and notices in respect of this Notice should be directed in the first instance to:

Chapman Tripp Sheffield Young
Level 35
ANZ Tower
23-29 Albert Street
Auckland

Telephone: (09) 357 9020
Facsimile: (09) 357 9099

Attention: Lindsey Jones
(09) 357 9020

Huw McKinlay
(09) 357 9254

3. Confidentiality

3.1 Do you wish to request a confidentiality order for the fact of the proposed acquisition?

No. Confidentiality is not required for the fact of the proposed acquisition.

3.2 Do you wish to request a confidentiality order for specific information contained in or attached to the notice? If so, for how long? Why?

- (a) Yes. Confidentiality is sought in respect of the information contained in this Notice which is set out in square brackets and shaded. That information is not included in the Public Copy of this notice.
- (b) Confidentiality is sought under section 100 of the Commerce Act 1986 and under section 9(2)(b) of the Official Information Act 1982 on the grounds that:
 - (i) the information is commercially sensitive and contains valuable information which is confidential to TPI, Ironbridge and ESL; and
 - (ii) disclosure of it is likely to give an unfair advantage to TPI and ESL's competitors and unreasonably prejudice their commercial positions.
- (c) TPI also requests that it is notified of any request made to the Commission under the Official Information Act for the confidential information, and that the Commission seeks TPI's views as to whether the information remains confidential and commercially sensitive at the time those requests are being considered.

4 Who are the participants (i.e. the parties involved)?

4.1 The Applicant

Transpacific Industries Group (NZ) Limited

86 Lunn Avenue
Mt Wellington
Auckland

Telephone: (09) 574 0880
Facsimile: (09) 274 5254
Attention: Greg Campbell

4.2 The Target

Enviro Waste Services Limited

Level 2
345 Nielson Street
Onehunga
Auckland

Telephone: (09) 622 8458
Facsimile: (09) 636 3561
Attention: Gary Saunders

Ironbridge Capital Pty Limited

Level 27, PwC Tower
188 Quay Street
Auckland

Telephone: (09) 363 2972
Facsimile: (09) 363 2727
Attention: Kerry McIntosh

All correspondence and enquiries in relation to ESL and Ironbridge should be directed in the first instance to:

Russell McVeagh
Vero Centre
48 Shortland Street
Auckland

Telephone: (09) 367 8000
Facsimile: (09) 367 8163
Attention: Andrew Peterson

5 Who is interconnected to or associated with each participant?

- 5.1 A chart setting out the interconnected bodies corporate of Transpacific is set out in Appendix 2. (There have been some changes since the structure chart provided with the Original Notice, notably to reflect the acquisition of Cleanaway in Australia.)
- 5.2 TPI does not have any information about the interconnected bodies corporate of Ironbridge Capital Pty Limited, beyond that referenced in the Original Notice. TPI understands that Ironbridge's New Zealand investments are: Enviro Waste Services Ltd; Auckland Central Backpackers Holdings Ltd; Qualcare Group Holdings Ltd; and 70% of CanWest MediaWorks (NZ) Ltd.

6 Does any participant, or any interconnected body corporate thereof, already have a beneficial interest in, or is it beneficially entitled to, any shares or other pecuniary interest in another participant?

- 6.1 There has been no change to the information provided in section 6 of the Original Notice. Neither TPI nor any of its interconnected bodies corporate has any beneficial interest in shares or any other pecuniary interest in Ironbridge, ESL or any of their interconnected bodies corporate other than the Joint Venture Companies.
- 6.2 As far as TPI is aware, neither Ironbridge, ESL nor any of their interconnected bodies corporate have any beneficial interest in shares or any other pecuniary interest in TPI or any of its interconnected bodies corporate other than ESL's interest in the Joint Venture Companies. However, Transpacific, is a publicly listed company and it is possible that Ironbridge, ESL or one of their interconnected bodies corporate may have a beneficial interest in shares in Transpacific. TPI is not, however, aware of that being the case.

7 Identify any links, formal or informal, between any participant/s including interconnected bodies corporate and other persons identified at paragraph 5 and its/their existing competitors in each market.

- 7.1 Details of formal or informal links between the participants, including their interconnected bodies corporate and other persons identified at paragraph 5 and other competitors were provided in the Original Notice. Of those, the only ones that are relevant to the markets affected by this Notice are:
- waste disposal arrangements whereby ESL's collection competitors deposit waste at the transfer stations and landfill operated by ESL;
 - in Oamaru, TPI subcontracts collection for national accounts to Peter Murdoch Transport and Awamoa Bins; and
 - membership of the Waste Management Institute of New Zealand.

- 7.2 Since the Original Notice, Transpacific has acquired the solid waste business of Cleanaway in Australia. Cleanaway and ESL are parties to a joint venture, Enviroway Limited, which holds a collection contract with the Auckland City Council. This joint venture is confined to Auckland and does not affect the Timaru/Oamaru market.

8 Do any directors of the 'acquirer' also hold directorships in any other companies which are involved in the markets in which the target company operates?

- 8.1 No directors of Transpacific or TPI hold directorships in any other companies that operate in the markets in which ESL operates, other than in:
- the Joint Venture Companies or other joint venture companies identified in section 9 of the Original Notice;
 - All Brite Industries Limited; and
 - wholly owned subsidiaries of Transpacific.

9 What are the business activities of each participant?

Transpacific

- 9.1 The business activities of the wider Transpacific Group and of TPI in New Zealand were outlined in section 9 of the Original Notice so they are not repeated here. In relation to solid waste in New Zealand, TPI's businesses include:
- solid waste collection businesses in Northland, Auckland, Hamilton, Rotorua, Tauranga, Whakatane, Taupo, Gisborne, Hawke's Bay, New Plymouth, Palmerston North/Feilding, Wanganui, Kapiti, Wellington, Nelson, Christchurch, Timaru, Queenstown/Wanaka and Dunedin;
 - ownership interests in and/or operation under contract of refuse transfer stations in Southland, Canterbury, Horowhenua, Wanganui, Hawkes Bay, Waikato, Greater Auckland and Northland;
 - ownership interests in and/or operation under contract of landfills in Canterbury (Kate Valley), Horowhenua, Manawatu/Palmerston North (Bonny Glen), and Greater Auckland (Redvale); and
 - collection and processing of recyclable waste in Auckland, Gisborne, Hawkes Bay, Bay of Plenty, Palmerston North and Greater Wellington through its recently acquired, 80% owned subsidiary, All Brite Industries.
- 9.2 TPI owns the Redvale Landfill in Auckland and it has a 50% shareholding in Midwest Disposals Limited, which owns the Bonny Glen Landfill near Marton. It also has a 50% shareholding in Canterbury Waste Services Limited (CWS) which owns and operates a transfer station in central Christchurch; has a 50% shareholding in Transwaste Canterbury Limited (which owns the Kate Valley Landfill north of Christchurch) and manages and operates the Kate Valley landfill. [REDACTED].

ESL

- 9.3 Enviro Waste's assets currently include:
- solid waste collection businesses in Auckland, Tauranga, Hamilton, Nelson, Blenheim, Christchurch, Timaru, Oamaru and Dunedin;
 - a 50% shareholding in Manawatu Waste, which has assets including solid waste collection businesses in Taupo, Wanganui, Palmerston North and Horowhenua/Kapiti, interests in transfer stations in the central North Island and a 50% interest in Midwest Disposals Limited;
 - a 50% shareholding in CWS;
 - contracts in relation to transfer stations, a resource recovery centre and the landfill, all in Timaru; and

- a landfill (Fairfield) and transfer station in Dunedin.

Potential changes to business activities of the participants

- 9.4 As the Commission is aware, TPI also has agreements with Ironbridge to acquire:
- (a) the shares held by ESL in CWS (giving TPI 100% of the shares in CWS);
 - (b) the Dunedin landfill and transfer station owned by ESL and Tartan Industries Limited;
 - (c) ESL's collection businesses in Blenheim/Nelson, Christchurch and Dunedin; and
 - (d) 50% of the shares held by ESL in Manawatu Waste Limited.
- 9.5 Based on the Commission's analysis, as outlined in Decision 604, TPI proposes (subject to approval from the Overseas Investment Commission) to proceed with the acquisition of the shares in CWS and the acquisition of the Dunedin landfill and transfer station. For the purposes of this Notice, TPI suggests that the Commission treat TPI ownership of CWS and the Dunedin landfill and transfer station as part of the background against which it assesses the Timaru/Oamaru Transaction.
- 9.6 In addition, TPI has filed, or will be filing, clearance applications in relation to some or all of the businesses or shares referred to in paragraph 9.4(c) and (d) (the *Other Transactions*).
- If the Commission grants clearance for the Blenheim/Nelson Transaction, the Commission is asked to consider the Timaru/Oamaru Transaction against the background that the Blenheim/Nelson Transaction will proceed as permitted by the clearance (but that TPI will not have completed, or will not complete (except to the extent clearance is given subsequent to a decision on this Notice), the balance of the Other Transactions).
 - If the Commission declines to grant clearance for the Blenheim/Nelson Transaction, the Commission is asked to consider the Timaru/Oamaru Transaction against the background that TPI has not completed, and will not complete (except to the extent clearance is given subsequent to a decision on this Notice), any of the Other Transactions.

10 What are the reasons for the proposal and the intentions in respect of the acquired or merged business?

10.1 In Decision 604 the Commission declined to grant clearance for TPI to acquire all of ESL South Island solid waste businesses and up to 50% of the shares in Manawatu Waste Limited. Pending the outcome of its appeal on Decision 604, TPI wishes to acquire those of ESL's businesses and assets for which the Commission is prepared to grant clearances, whether with or without divestment undertakings. TPI is filing a series of clearance applications in relation to ESL assets and businesses and necessarily reserves its rights to appeal against refusal of any of those applications. When the Commission has determined the current applications, TPI will settle the scope of the appeal (or appeals) that it will pursue to hearing.

10.2 As outlined in the Original Notice, Transpacific's business strategy is to expand in New Zealand through organic growth and targeted acquisitions. The Timaru/Oamaru Transaction is consistent with this strategy.

10.3 [REDACTED].

PART II: IDENTIFICATION OF MARKETS AFFECTED

Horizontal Aggregation

11 Are there any markets in which there would be an aggregation of business activities as a result of the proposed acquisition?

MARKET DEFINITION

Commerce Commission views to date

11.1 In Decision 604, the Commission determined the following markets as relevant to its investigation into the Original Notice:

- (e) local/regional markets for the provision of local authorities' contracts for public kerbside collection of solid non-hazardous waste (*"local authority collection contract market"*);
- (f) local/regional markets for the provision of privately contracted collection of solid non-hazardous waste in wheelie bins (including refuse bags and drums) from households and small commercial customers (*"wheelie bin collection market"*);
- (g) local/regional markets for the provision of privately contracted collection of solid non-hazardous waste in front-end-loaded bins from commercial customers (*"FEL collection market"*);
- (h) local/regional markets for the provision of privately contracted collection of solid non-hazardous waste by gantry and huka bins (*"gantry collection market"*);
- (i) local markets for refuse transfer stations (*"RTS market"*);
- (j) regional markets for disposal of solid non-hazardous waste at landfills (*"landfill market"*); and
- (k) the national market for the provision of waste management services to multi-regional customers (*"national multi-regional customers waste management market"*).

11.2 TPI does not agree with the Commission's conclusions in respect of the collection market to the extent the Commission found separate product markets for privately contracted collection of solid non-hazardous waste in different types of bins – ie separate markets for collection of waste in gantry and huka bins, the collection of waste in FEL bins and the collection of waste in wheelie bins. Nor does TPI agree with the Commission's conclusion that there is a separate market for the provision of waste management services to multi-regional customers.

11.3 However, for the purposes of this Notice, and without prejudice to its appeal of Decision 604, TPI has adopted the above market definitions.

TPI and ESL solid waste activities in Timaru and Oamaru

11.4 The following tables identify the solid waste activities of TPI and ESL in Timaru and Oamaru.

Table 1: TPI and ESL solid waste activities in Timaru

Activity	TPI	ESL
Landfill disposal services	No	Yes
Transfer station ownership/operation	No	Yes
Operation of recycling facilities	No	Yes
Local authority collection contract	No	Yes
Waste Collection: wheelie bin	No	Yes
Waste Collection: FEL bins	Yes	Yes
Waste Collection: gantry	Yes	Yes

Table 2: TPI and ESL solid waste activities in Oamaru

Activity	TPI	ESL
Landfill disposal services	No	No
Transfer station ownership/operation	No	No
Operation of recycling facilities	No	No
Local authority collection contract	No	Yes
Waste Collection: wheelie bin	No	Yes
Waste Collection: FEL bins	No	Yes
Waste Collection: gantry	No	Yes

“Markets” relevant to Timaru and Oamaru

11.5 Having regard to the activities of TPI and ESL in the Timaru and Oamaru areas and adopting the Commerce Commission’s market definitions, the following markets will be relevant for this Notice:

- the local authority collection contract markets in Timaru and Oamaru;
- the FEL collection market in Timaru;
- the gantry collection market in Timaru; and
- the national multi-regional customers waste management services market.

Differentiated Product Markets

12 Please indicate whether the products in each market identified in question 11 are standardised (buyers make their purchases largely on the basis of price) or differentiated (buyers make their purchases largely on the basis of product characteristics as well as price).

- 12.1 In Decision 604, the Commission provided a summary at Table 3 (page 31) of the different “service characteristics” of the different modes of collection and commented on scheduled and non scheduled waste collection services. TPI does not consider that the differences identified by the Commission are such to warrant a conclusion that there are separate markets for collection in different bin types. TPI instead considers that the relevant collection markets are geographically distinct but contain several products differentiated by bin type.
- 12.2 As previously noted to the Commission, the collection of waste involves a diverse range of customers, waste with differing characteristics, and differing volumes that could be collected at different frequencies from locations with different physical characteristics. Putting a dividing line between collection of waste in FEL bins, gantry bins and wheelie bins does not take account of these features.
- 12.3 However, for the purposes of this Notice, TPI has adopted the Commission’s market definitions so further comment on product differentiation is not required.

13 For differentiated product markets:

- Please indicate the principal characteristics of products that cause them to be differentiated one from another.**
- To what extent does product differentiation lead firms to tailor and market their products to particular buyer groups or market niches?**
- Of the various products in the market, which are close substitutes for the products of the proposed combined entity? - which are more distant substitutes?**
- Given the level of product differentiation, to what extent do you consider that the merged entity would be constrained in its actions by the presence of other suppliers in the market(s) affected?**

Not Applicable

14 Vertical integration

- 14.1 ESL operates at several functional levels of the solid waste market in Timaru. TPI operates only at the collection level of the market. In Decision 604, the Commission concluded:

"EnviroWaste has contracted with the Timaru District Council for the operation of the council kerbside collection, RTS, material recovery facility and landfill. In this situation, where waste services at all three functional levels of the market are contracted for by the council, local authority involvement has shaped the solid waste markets. EnviroWaste, although a vertically integrated operator, has no control over access and pricing terms at any of the three functional levels and, therefore, is restricted in its ability to act in a discriminatory manner against its competitors.

The Commission considers that this situation would continue post-acquisition, and concludes that the vertical integration effects from the Acquisition are unlikely to raise further competition concerns in Timaru, within the Commission's two year timeframe." [paras 618 & 619]

- 14.2 TPI agrees with the Commission's conclusion and accordingly makes no further comment on vertical integration in Timaru.

15 In respect of each market identified in question 11 identify briefly:

- all proposed acquisitions of assets of a business or shares involving either participant (or any interconnected body corporate thereof) notified to the Commission in the last three years and, in each case,**
 - **the outcome of the notification (e.g. cleared, authorised, declined, withdrawn)**
 - **whether the proposed acquisition has occurred.**
- any other acquisition of assets of a business or shares which either participant (or any interconnected body corporate) has undertaken in the last three years.**

TPI

- 15.1 TPI has undertaken a number of acquisitions in the New Zealand market over the last three years. A number of these were advised to the Commission in the context of the Commission's investigation into the merger of TPI and Waste Management in mid 2006 and further transactions undertaken in the period to 14 December 2006 were set out in the Original Notice. Since then:

- (a) Transpacific has undertaken a number of acquisitions in Australia but the only transaction affecting the New Zealand market has been the acquisition of the solid waste business of Cleanaway; and
- (b) TPI has acquired the following businesses:

- Corrosion Control, an industrial sand blasting and coatings business located in Kawerau;
- Mullan & Noy (by way of a joint venture with the existing owner, Stevensons) – a manufacturer of bins and aerators (for use in waste water treatment ponds); also runs a machine shop machining parts for large commercial businesses;
- East West Waste Limited which operates a solid waste collection business in Northland from its base in Kerikeri. (Until this acquisition, TPI did not operate in the same geographic area as East West Waste.)

ESL

15.2 As far as TPI is aware, ESL has not undertaken any business or share acquisitions since the date of the Original Notice.

Ironbridge

15.3 As far as TPI is aware, the only acquisition by Ironbridge since the Original Notice is the acquisition of shares in CanWest MediaWorks (NZ) Limited. Ironbridge has since made a full takeover offer.

**THE FOLLOWING SECTIONS ADDRESS PARTS III, IV AND V:
CONSTRAINTS ON MARKET POWER BY EXISTING AND POTENTIAL
COMPETITION AND OTHER POTENTIAL CONSTRAINTS IN RELATION TO
EACH OF THE IDENTIFIED PRODUCT MARKETS**

16. Collection markets

Introduction

16.1 As outlined above, the Timaru/Oamaru Transaction will affect the following markets (as defined by the Commission in Decision 604):

- the local authority collection contract market in Timaru/Oamaru;
- the FEL collection market in Timaru;
- the gantry collection market in Timaru; and
- the national multi-regional customers waste management market.

Oamaru

16.2 TPI has no collection activities in Oamaru. The Timaru/Oamaru Transaction will not therefore give rise to any aggregation in the Oamaru area. Accordingly no further comment is made in relation to Oamaru.

Timaru

Market shares

16.3 As outlined in the Original Notice, TPI considered it was not able to accurately determine market shares for the solid waste collection market because of the range of waste that is collected: unsorted household refuse, sludge, unsorted business refuse, residential recyclables, municipal waste, glass, scrap metal, plastics, sawdust, cardboard, paper, C&D waste, greenwaste etc.

16.4 In Decision 604, the Commission reached a conclusion with regard to market shares in the various collection markets¹ stating at footnotes 115, 118 and 141 that its source was “information obtained by the Commission from TPI, Manawatu Waste, Enviro Waste and other small industry participants and local authorities.” TPI is not in a position to obtain information from most of those sources, in particular its competitors,² and while it can obtain information from some local authorities, the information is not generally broken down in waste collected by bin type. Since the Commission’s conclusions on market share in each of its separate collection markets are confidential, TPI cannot comment.

16.5 In this Notice, TPI does not attempt to estimate market shares of the more narrowly defined markets adopted by the Commission. The Commission has already reached its own conclusions in this regard in Decision 604. TPI expects, however, that its post-transaction share of waste collected in the Timaru FEL and gantry markets will be outside the Commission’s market share safe-harbours.

¹ Tables 10,11 and 12 at pages 79, 91 and 106 of Decision 604.

² There is no indication as to the basis on which the market shares were calculated, but TPI assumes they have been calculated on a per tonne basis rather than numbers of bins.

Timaru local authority collection contract market

- 16.6 In relation to the Timaru local authority collection contract market, the Commission concluded in Decision 604:

“The Commission considers it likely that EnviroWaste will still be a potential bidder in the next tender round even though they may not have any assets in the area.

The Commission considers that the Acquisition is unlikely to have the effect, or likely effect of substantially lessening competition in this market in Timaru given that the size and value of the contract is likely to attract a number of potential bidders in the next tender round including EnviroWaste.” [paras 332 & 333]

- 16.7 TPI agrees with the Commission’s conclusion and accordingly makes no further comment on the Timaru local authority collection contract market.

Timaru gantry collection market

- 16.8 The Commission concluded in Decision 604:

“...because of the degree of existing competition, and the relative ease of entry into and expansion in, gantry markets, there do not appear to be any significant competition issues in any relevant gantry market. The Commission is therefore satisfied that the Acquisition will not have, or would not be likely to have, the effect of substantially lessening competition in all relevant gantry collection markets.” [para 442]

- 16.9 TPI agrees that the acquisition by TPI of ESL’s gantry collection business in Timaru will not give rise to a substantial lessening of competition in the Timaru gantry collection market. Accordingly, TPI makes no further comment in relation to the gantry market.

FEL collection in Timaru

Unilateral effects

- 16.10 In Decision 604, the Commission concluded that the transaction would result in a substantial lessening of competition in all regions, including in Timaru, for the following reasons:

- economies of density are a barrier to entry;
- the industry standard three year FEL customer collection contract containing automatic roll over and price matching provisions is a significant barrier to the achievement of those economies of density;
- examples of existing competition and entry at the margin will be too ineffectual to constrain TPI; and
- gantry and wheelie bins do not provide near competition or a constraint on FEL prices.

Economies of density

- 16.11 The Commission did not accept that TPI’s financial models of an FEL operation correspond to the real life situation faced by an entrant in FEL collection. [para 409]. It concluded that:

- TPI's models were chosen to represent the favourable densities of an incumbent which has a specified number] of existing bins to collect and that until the new entrant achieves a density of below about 3.5 kilometres per lift, it will not be profitable [para 418]; and
- an entrant into FEL collection markets must obtain economies of density similar to the incumbent operators to be successful [para 420].

16.12 A response to the Commission's comments in relation to TPI's models and further modelling of FEL entry will be provided in a separate paper from Covex Limited. Refer also the comments in Schedule 1 of this Notice.

"Standard industry contract"

16.13 The Commission concluded that a significant barrier to the achievement of economies of density is the industry standard three year FEL customer collection contract containing automatic roll over and price matching provisions. [para 420] The Commission also stated that the contracts have penalty provisions for customer non-performance, automatic roll over provisions in the absence of two month prior notice and a price matching clause. [para 421] For the reasons outlined to the Commission in the context of the Original Application, TPI does not agree with the Commission's position that provisions of these contracts constitute a barrier to new entrants obtaining customers.

16.14 In any case, TPI's view is that there is a sufficient number of customers that are not on 3 year contracts to provide a potential customer base to new entrants in the event TPI were, in the factual, to attempt to raise its prices. [redacted] of TPI's FEL customers in Timaru are not on contracts with three year terms as illustrated in the following table.

**CONFIDENTIAL Table 3: FEL contracts
Timaru**

Contract type	Number	% of customers
[redacted]	[redacted]	[redacted]
[redacted]	[redacted]	[redacted]
[redacted]	[redacted]	[redacted]
[redacted]	[redacted]	[redacted]
[redacted] ³	[redacted]	[redacted]
[redacted]	[redacted]	[redacted]
Total FEL customers	[redacted] ⁴	100

16.15 Even where customers are on three year contracts, in the next 12 months approximately one third of those contracts will be available for a new entrant

3

[redacted]

⁴ This figure differs from the figure provided to the Commission in the context of the Original Application as there has been some tidying up of TPI's database in the meantime.

to contest – in addition to the uncontracted customers, those on contracts of 12 months or less and more than half of the customers on 18/24 months contracts. Within the Commission's two year time frame, it is likely that over [] of the total contracts will have been available for a new entrant to contest.

Existing competition and entry at the margin

16.16 The Commission considered that the examples of existing competition and entry at the margin will be too ineffectual to constrain TPI in the factual [para 415]. In relation to Timaru, the Commission concluded that Garbo is not likely to constrain TPI from increasing prices or reducing service in the factual [para 412].

16.17 In response, TPI notes:

- (a) Garbo was recently chosen to provide services (3m³ FEL bin) to [] after TPI had been asked to submit a quote for those services;
- (b) While TPI services [] in other South Island locations, Garbo retains this service in Timaru. TPI has recently approached local management at [], but has not been able to secure the work at these sites;
- (c) the proximity of the transfer station and landfill from the centre of Timaru (around 4.5 kilometres) means that, to the extent they are relevant, there will be less impact from savings from route density.

16.18 TPI disagrees with the Commission's conclusion that Garbo is unlikely to constrain TPI from increasing prices or reducing service. TPI submits that Garbo can be a real and effective constraint on its pricing in the factual scenario. The existing size of Garbo's FEL business is not determinative of its prospects in a changed environment. The relevant questions therefore do not concern Garbo's current intentions, but the incentives it would face if TPI, having acquired ESL's business, were to increase its FEL prices. A market with an apparent choice of only one player in TPI will be incentivised to encourage new entry or the expansion of an existing player such as Garbo to keep TPI "honest". The prospect of losing market share to Garbo would thereby constrain TPI's ability to increase prices in the factual. Having invested in market share through acquisition, TPI would be reluctant to lose it through a myopic pricing strategy.

16.19 Furthermore, Garbo has the advantage of being a "local player" with considerable goodwill in the Timaru market. TPI considers that it is this local goodwill allows Garbo to retain customers in Timaru such as [] that TPI services elsewhere in the South Island.

16.20 TPI's view is that:

- Garbo has around [REDACTED]; and
- Garbo is well placed to expand its FEL operations.

Gantry and wheelie bins as constraints

16.21 The Commission concluded that gantry and wheelie bins do not provide near competition or a constraint on FEL prices. [paras 416 & 417]. TPI considers there is a greater degree of substitutability in price terms than the Commission has recognised. A separate paper from Covec Limited will be provided in this regard.

16.22 In summary, TPI maintains that:

- economies of density are not a barrier to entry in Timaru;
- the Timaru market is not characterised by significant numbers of customers being tied into three year contracts; and
- in Timaru, there is no reason why Garbo could not be a constraint on TPI in the factual.

Co-ordination effects

16.23 In the event the Commission should alter its conclusion in relation to the FEL market in Timaru and find that the Timaru/Oamaru Transaction would not enable TPI to exercise unilateral market power, the Commission should not be concerned that the Timaru/Oamaru Transaction would increase the scope for co-ordinated market power in the FEL market in Timaru. Although the number of providers of FEL services would reduce from three to two, the two firms would have very different scales, and will therefore have different objectives. New entrants or an expanding existing supplier (eg Garbo) would be hungry for market share and as a consequence co-ordination effects are unlikely.

17. National multi-regional customers waste management service market

Introduction

- 17.1 In Decision 604 the Commission concluded that there was a separate national market for the provision of waste management services to multi-regional customers [para 222] and that the acquisition by TPI of ESL's South Island collection businesses and up to 50% of the shares in Manawatu Waste would lead to a significant lessening of competition in this market [para 488].
- 17.2 TPI does not concur with the Commission's view. A separate paper addressing competition in this market (without conceding market definition) is attached as Appendix 1 and forms part of this Notice (the *National Customers Paper*).
- 17.3 In addition, TPI notes that the Commission did not conclude in Decision 604 whether certain individual businesses could be purchased by TPI due to the structure of the clearance application (which sought clearance for *all* of the South Island assets of ESL). However, in a footnote to paragraph 489 (footnote 144) the Commission stated:

"The Commission notes that it may be that some limited acquisitions of some of the relevant assets/businesses might not affect Enviro Waste'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 Enviro Waste'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."

- 17.4 Without prejudice to the arguments put in the National Customers Paper, TPI makes the following comments specifically with regard to Timaru and Oamaru.

Timaru/Oamaru

- 17.5 If it is correct that ESL needs branches outside of Auckland, Hamilton and Taupo in order to service "national customers" and that there is no competition for these customers other than that between TPI and ESL, it is TPI's view that ESL's ability to service the customers would not be adversely affected if it did not have branches in Timaru or Oamaru.⁵ The reasons are outlined below.

⁵ In this Notice, the Commission is asked to consider the Timaru/Oamaru Transaction against the background set out in paragraph 9.6.

17.6 In the context of the Original Notice, TPI provided a list of “national accounts” where TPI is contracted to provide waste collection services for all or a number of those customers’ outlets around New Zealand. At the Commission’s request, TPI identified those which accounted for revenues over \$5,000 per month. Of those customers only [] are serviced by TPI in Timaru

17.7 TPI has assessed the revenue from its “national customers” which is attributable to Timaru and/or Oamaru collection operations. These are set out in Table 4 below.

CONFIDENTIAL Table 4: “National customers” with branches in Timaru/Oamaru

Customer	Timaru		Oamaru		Service type
	Annual Revenue	% of total revenue from that customer	Annual Revenue	% of total revenue from that customer	
[]	[]	[]			[]
[] ⁶	[]	[]			[]
[]	[]	[]			[]
[]	[]	[]	[]	[]	[]
[]	[]	[]			[]
[]	[] ⁷	[]	[]	[]	[]
[]	[]	[]			[]
[]	[]	[]			[]
[]	[]	[]			[]
[]	[]	[]	[]	[]	[]

17.8 As illustrated above, TPI’s revenues for “national customers” in Timaru/Oamaru are small. They account for only [] of TPI’s total revenues from “national customers”.

17.9 Assuming the above contribution to revenue from the Timaru/Oamaru operations of national customers is typical of all “national customers”, TPI submits that using subcontractors in Timaru/Oamaru would not result in a

⁶ ESL services this account as TPI does not provide wheelie bin services in Timaru.

⁷ This account is billed locally, rather than through TPI’s central billing system.

loss of margin that would be significant enough to prevent ESL continuing to compete for national customers.

17.10 If TPI were to acquire ESL's Timaru FEL business, TPI would continue to be constrained in its pricing for large customers in Timaru that have operations elsewhere by:

- the threat of losing other work for those large customers to ESL's operations in Auckland, Hamilton and Tauranga (and anywhere else it may open branches) or through subcontracting arrangements with Manawatu Waste or others;
- other competitors (as outlined in the National Customers Paper), using Garbo (for example) as a subcontractor.

17.11 As the Commission is aware, TPI does not have a branch in Oamaru and services its "national customers" through the use of subcontractors. TPI's subcontractors in Oamaru are Peter Murdoch Transport and Awamoa Bins.

Divestment

17.12 If the Commission does not accept TPI's submissions that the Timaru/Oamaru Transaction will not result in a substantial lessening of competition in the FEL market in Timaru and the "national multi-regional customers waste management market" TPI submits (on a without prejudice basis as outlined in paragraph 1.4 above) that the Timaru/Oamaru Transaction together with the divestment undertaking set out in Schedule 2 should satisfy the Commission's concerns.

THIS NOTICE is given by Greg Campbell on behalf of Transpacific Industries Group (NZ) Limited (*TPI*).

I confirm that:

- all information specified by the Commission has been supplied;
- all information known to TPI which is relevant to the consideration of this Notice has been supplied;
- all information supplied is correct as at the date of this Notice.

I undertake to advise the Commission immediately of any material change in circumstances relating to the Notice.

Dated this day of August 2007.

Signed by Transpacific Industries Group (NZ) Limited:

Managing Director

I am an officer of Transpacific Industries Group (NZ) Limited and am duly authorised to make this Notice.

Schedule 1: Comments on constraint from potential competition

Economies of scale and route density

- 1 In relation to economies of scale and route density, the following comments from Decision 604 are noted:

"However, if those submissions are correct, the question arises as to why TPI, Manawatu Waste and Envirowaste currently have such high market shares in all of the geographic wheelie bin/refuse bag collection markets under study... but one...

That this has happened suggests to the Commission that (apart from Nelson and Horowhenua/Kapiti regions) the relevant user pays wheelie bin/refuse bag collection markets are examples of markets in which, while it is relatively easy to purchase the necessary equipment and begin trading, it is difficult for entrants or existing competitors to expand to such level of scale or density that they are able to effectively compete with the major market participants. That accords with the views of a number of small participants interviewed who indicated that it is not the cost of the truck, bins and other items that must be purchased that is the barrier to entry. Rather, it is the ability to generate scale and density by obtaining a sufficiently large customer base." [paras 362 & 363]

The Commission does not accept that TPI's financial models of an FEL operation correspond to the real life situation faced by an entrant in FEL collection. The Commission considers that if the healthy profits, modelled by TPI, were so easily obtainable by entering FEL collection markets, there would have been much more entry into FEL collection markets than has actually occurred. [para 409]

- 2 With regard to the above, the following comments of the Court of Appeal in *Southern Cross*⁸ are noted:

"...the crucial point is rather whether there would be any significant barriers to entry or expansion if Southern Cross started to act in a supra-competitive manner [para 42]

"the Commission's premise that there has been little, if any expansion or entry into the market in the past, a premise which the updating material somewhat undermines, does not in our view justify the inference that supra-competitive pricing by the merged entity would also be met by little, if any entry or expansion" para 87]

"We have therefore come to the conclusion that the historical position does not support an inference of significant barriers to expansion" [para 89]

⁸ *Commerce Commission v Southern Cross Medical Care Society* (2001) 10 TCLR 269

"It is not, however, sufficient to point simply to economies of scale to establish a barrier to entry or expansion. In the absence of a natural monopoly, or significant sunk costs, or other like advantages, the incumbent is unlikely to be insufficiently constrained." [para 91]

"For these various reasons, we do not accept the soundness of the Commission's view that the reluctance it perceived on the part of other market participants to expand without having the economies of scale enjoyed by Southern Cross and despite the potential for economies of scope, was evidence of a significant barrier to expansion." [para 92]

- 3 While, obviously, it is recognised that health insurance and waste collection are very different functions and that the test under section 47 has changed from one of "dominance" to "substantial lessening of competition", and the Commission's approach to merger analysis has changed as a consequence, the above comments from *Southern Cross* are pertinent to the analysis of entry conditions. In particular, in Decision 604 the Commission appears to have **reduced** the 'per empty' revenues in its modelling (refer para 359) rather than assuming an increase in the per empty rates.

Schedule 2: Divestment Undertaking

Date:

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 [] 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 business of Enviro Waste Services Limited (*ESL*) in Timaru and Oamaru (the *Clearance Application*).
- B In the event that the Commission concluded that the Clearance Application could not be granted on its own terms without divestment undertakings, TPI offered the Commission the divestment undertakings in the form of this deed, pursuant to section 69A of the Act, but without prejudice to any argument or material which may be used in support of an appeal by TPI against any determination by the Commission on the Clearance Application.

BY THIS DEED the parties agree as follows:

1 DEFINED TERMS AND CONSTRUCTION

1.1 In this Deed:

Completion means the date on which the sale and purchase contemplated in the ESL Sale Agreement is completed;

Divestment Date means the [] from Completion;

ESL Sale Agreement means the "Sale of Business Agreement – Timaru" between Barra Topco II Limited, Barra Bidco Limited, Transpacific Industries Group (NZ) Limited and Enviro Waste Services Limited dated [] 2007;

FEL Assets means the front end load trucks and front end load bins owned or leased by Enviro Waste Services Limited and which are used in the collection of solid non-hazardous waste from customers in the Territory;

FEL Contracts means the contracts between Enviro Waste Services Limited and customers in the Territory for the collection of solid non-hazardous waste in front end load bins using front end load trucks;

FEL Divestment Assets means the FEL Assets and the FEL Contracts;

FEL Purchaser means such purchaser or purchasers as the Commission may consider is or are able to operate the business of the collection of solid non-hazardous waste in FEL bins from commercial customers in the Territory and which is or are not an interconnected body corporate (as defined by section 2(7) of the Act) or an associated person (as defined by section 47(3) of the Act) of TPI;

Territory means Timaru District.

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

Documents: a reference to any document, including this deed, includes a reference to that document as amended or replaced from time to time;

Headings: headings appear as a matter of convenience and do not affect the construction of this deed;

Negative Obligations: a reference to a prohibition against doing any thing includes a reference to not permitting, suffering or causing that thing to be done.

2 COVENANTS

Divestment

2.1 Subject to Completion, and no later than the Divestment Date, TPI will sell or procure the sale of the FEL Assets and the assignment or novation of the FEL Contracts to the FEL Purchaser to enable the FEL Purchaser to immediately operate the business of the collection of solid non-hazardous waste in FEL bins from commercial customers in the Territory.

2.2 The divestment of the FEL Divestment Assets shall be an unreserved divestment of all of the legal and equitable interests and rights held by or on behalf of TPI in the FEL Divestment Assets.

Conduct pending divestment

2.3 TPI will use reasonable endeavours to operate the FEL Divestment Assets as viable business assets and maintain them in as good a state of operating condition and repair as they are in at Completion (subject to reasonable wear and tear arising in the course of normal and proper use).

Notification

- 2.4 TPI will advise the Commission of the completion of the divestment of the FEL Divestment Assets to the FEL Purchaser.

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.

3.2 Governing law

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

3.3 Counterparts

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.