

5. MERGER OF WASTE MANAGEMENT NEW ZEALAND LTD WITH TRANSPACIFIC INDUSTRIES GROUP LTD

General Manager responsible:	General Manager City Environment
Officer responsible:	City Water and Waste Manager DDI 941 6231
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PURPOSE OF REPORT

1. The purpose of this report is to advise the Committee on the request by Waste Management NZ to shareholder councils to consent to its proposed merger with Transpacific Industries Group Limited.

BACKGROUND

2. In March 2006 the directors of Waste Management NZ Limited and Transpacific Industries Group Limited announced that they had agreed to propose a merger of the two companies. Some weeks later, the merger was accepted by shareholders.
3. On 21 April 2006 the managing director of Waste Management NZ Limited wrote to the councils that have an interest in Transwaste Canterbury Limited the operator of the Kate Valley land fill. A copy of the letter is attached (Attachment A), together with a copy of a letter that Waste Management NZ Limited sent to Transwaste Canterbury Limited (Attachment B). As the Canterbury Landfill Joint Committee has delegated powers from its member councils for all landfill related matters the Committee, and not the individual member councils, it should reply to Waste Management NZ in this instance.
4. The essence of the matter, and the reason for Waste Management NZ Limited formally notifying the councils of the merger, is that the constitution of Transwaste Canterbury Limited provides for a situation where either Waste Management NZ Limited or Envirowaste Services Limited (ESL) decides to reduce its shareholding in the Company. Clause 12.19 of the constitution states:

“Where WMNZ and/or ESL, without the prior approval of the Councils, cease to hold in aggregate at least 51% of the shares in Canterbury Waste Services Limited, the Councils may give written notice to Canterbury Waste Services Limited deeming Canterbury Waste Services Limited to have given a transfer notice pursuant to clause 12.1 and the provisions of clause 12 shall apply accordingly.”
5. Canterbury Waste Services Limited is a 50% shareholder of Transwaste Canterbury Limited, with the other shares held by the participating councils. Waste Management NZ Limited and Envirowaste Services Limited jointly own Canterbury Waste Services Limited.
6. The issue to be addressed is that on the face of it, Waste Management NZ Limited no longer holds shares in Canterbury Waste Services Limited, thereby triggering clause 12.19 and the pre-emptive rights provisions on transfers of shares set out in clause 12 of the Transwaste Canterbury Limited constitution. This would mean that Waste Management NZ Limited would be required to offer its shares for sale to the participating councils before offering them to any other entity.
7. The point of Waste Management NZ Limited's letter of 21 April 2006 was that the merger of that Company and Transpacific Industries Group Limited could be construed as a “deemed transfer” as that term is defined in clause 12.19 of Transwaste Canterbury Limited's constitution. If this was the case, then Waste Management N Z Limited would be unable to retain its shares in Canterbury Waste Services Limited without offering these first to the other shareholders. Waste Management NZ Limited was of the view that the merger was an amalgamation under the Companies Act 1993, meaning that both entities remain in existence. There would be no “deemed transfer”.

8. The Legal Services Unit of the Christchurch City Council agreed with Waste Management NZ Limited's assessment of the effect of the merger and believed it did not trigger clause 12.19. The Council consulted its external legal advisor, Simpson Grierson, and that firm's view also is that no pre-emptive rights would be triggered as a consequence of the proposed amalgamation. The firm noted that the better view is that there is no change in the identity in the shareholder, given the "continuance" rules applicable to New Zealand amalgamations. A copy of Simpson Grierson's letter of 17 May 2006 is also attached (Attachment C).
9. The conclusion reached is that the merger of Waste Management NZ Limited and Transpacific Industries Group Limited is an amalgamation under the Companies Act and not a sale or transfer of shares triggering the pre-emptive rights provisions in the Transwaste Canterbury Limited constitution. Waste Management NZ Limited will continue to own its shares in Canterbury Waste Services Limited although the name of the company may be changed to reflect the merger.
10. Waste Management NZ Limited have asked the participating councils to agree that its amalgamation with Transpacific Industries Group Limited is not a "deemed transfer" caught by clause 12.19. The committee may decide that it is better for the councils to preserve their rights under the Transwaste Canterbury Limited constitution and rely on the "continuance" rules applicable to New Zealand amalgamations, rather than specifically endorse the position as stated by Waste Management NZ Limited.

STAFF RECOMMENDATION

It is recommended that the Committee advise Waste Management NZ Limited that whilst the Committee is of the view that the amalgamation does not trigger the pre-emptive rights provisions contained in Transwaste Canterbury Ltd's constitution, the Committee would prefer that the position remain subject to the operation of New Zealand law rather than possibly restrict its rights by formally agreeing that the pre-emptive rights provisions do not apply.