

## CAN PLAN RESPONSE TO NZCC SOI

### Public version

#### SOI THEORY OF HARM: UNILATERAL (GENERAL WASTE)

- 1 The Commission advances a theory of harm that, post-transaction, Can Plan might be unconstrained from materially raising prices to customers in postcodes 7020 (Richmond), 7011 (Stoke), 7010 (Nelson) **and/or** 7071 (East Nelson).<sup>1</sup>
- 2 We bold “and/or” because the Commission is considering whether each of those individual postcodes might be a separate Commerce Act market.<sup>2</sup> And, if each is a separate market, then the deal could, for instance, SLC in East Nelson postcode 7071 (where Can Plan serviced just [] customers in 2020)<sup>3</sup> but nowhere else in Nelson-Tasman where Can Plan operates.<sup>4</sup>
- 3 The reasons for the SOI’s hypothesis appear to be that:
  - 3.1 Betta Bins is Can Plan’s closest competitor and (the SOI implies) places significant competitive constraint on Can Plan that would be lost by this transaction. (Despite evidence showing that over the last three years Can Plan has []).<sup>5</sup>
  - 3.2 Can Plan will not be threatened by customers buying Smart’s services because “[Smart] does not have a significant presence in the geographic area of overlap”.<sup>6</sup> (Despite Smart offering [] waste collection services online to all households in Stoke, Richmond and parts of Nelson (like Tahunanui) and Smart also apparently serving Nelson customers that live outside of its online automatic address zone)<sup>7</sup>.
  - 3.3 Can Plan will not be threatened by customers buying Waste Management’s services because Waste Management’s customer share is “significantly smaller than the merged entity’s would be”.<sup>8</sup> (Despite Waste Management offering

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<sup>1</sup> SOI, [5.2].

<sup>2</sup> SOI, [37].

<sup>3</sup> Can Plan data, sent to the Commission on 27 January 2021. And, contrary to the SOI, Can Plan does not provide services to Cable Bay. It only services a fraction of postcode 7071 that borders Nelson (the Marybank to Todd Valley area).

<sup>4</sup> SOI, [37.2]. The SOI also discusses East Nelson separately from other postcodes at [47.1].

<sup>5</sup> Can Plan customer switching and price matching data, sent to the Commission on 4 February 2021.

<sup>6</sup> SOI, [49.1].

<sup>7</sup> Can Plan has seen, for instance, Smart wheelie bins in Nelson’s Motueka Street and Victory Square. And, on those observations, it is clear to Can Plan that Smart is able and willing to service Nelson customers.

<sup>8</sup> SOI, [49.2].

residential waste collection services to all households in Nelson, Stoke and Richmond).

- 3.4 Can Plan would not be threatened by Envirowaste entering the market because Can Plan knows that Envirowaste will be “daunted” by Stoke, Richmond and Nelson’s “route densities”.<sup>9</sup> (Despite Envirowaste serving commercial waste customers in Nelson-Tasman,<sup>10</sup> “the costs of targeting new [residential] customers” not being significant,<sup>11</sup> and that those route densities did not daunt Can Plan, Smart or Waste Management).
- 3.5 Can Plan’s acquisition of Betta Bins will be the catalyst for Can Plan to charge some addresses more than others.<sup>12</sup> (Despite Can Plan’s business being built off the back of Mr Boocock’s commitment to the local community,<sup>13</sup> and the company having no history of pricing discriminating on a postcode-by-postcode basis).<sup>14</sup>
- 3.6 Can Plan’s pricing will not be constrained by fear that TDC and/or NCC might move to rate-based waste collection services, like Tauranga City Council recently did for “accessibility and affordability” reasons. (Despite some third-parties telling the Commission that that same council power would dissuade them from entering the Nelson-Tasman market).<sup>15</sup>

## **CAN PLAN RESPONSE**

- 4 Can Plan says that the Commission’s unilateral theory of harm is not likely.
- 5 Respectfully, the SOI’s market definition does not match commercial reality. And the weight and importance the Commission gives to its market share analysis does not reflect the actual constraints that Can Plan faces now and post-transaction.<sup>16</sup>

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<sup>9</sup> SOI, [52.1].

<sup>10</sup> Including wheelie bins.

<sup>11</sup> SOI, [52.1.1].

<sup>12</sup> As set out above, the Commission’s micro focus on individual postcodes suggests that the regulator is considering the ability for Can Plan to price discriminate on a postcode-by-postcode basis.

<sup>13</sup> Chapman Tripp 5 March 2021 letter, [5]-[6].

<sup>14</sup> Chapman Tripp 5 March 2021 letter, [7.6(b)]. We note, for example, that Can Plan charges the same green waste prices to customers across the district, including into areas where Betta Bins is not present (like Brightwater, Wakefield and Mapua).

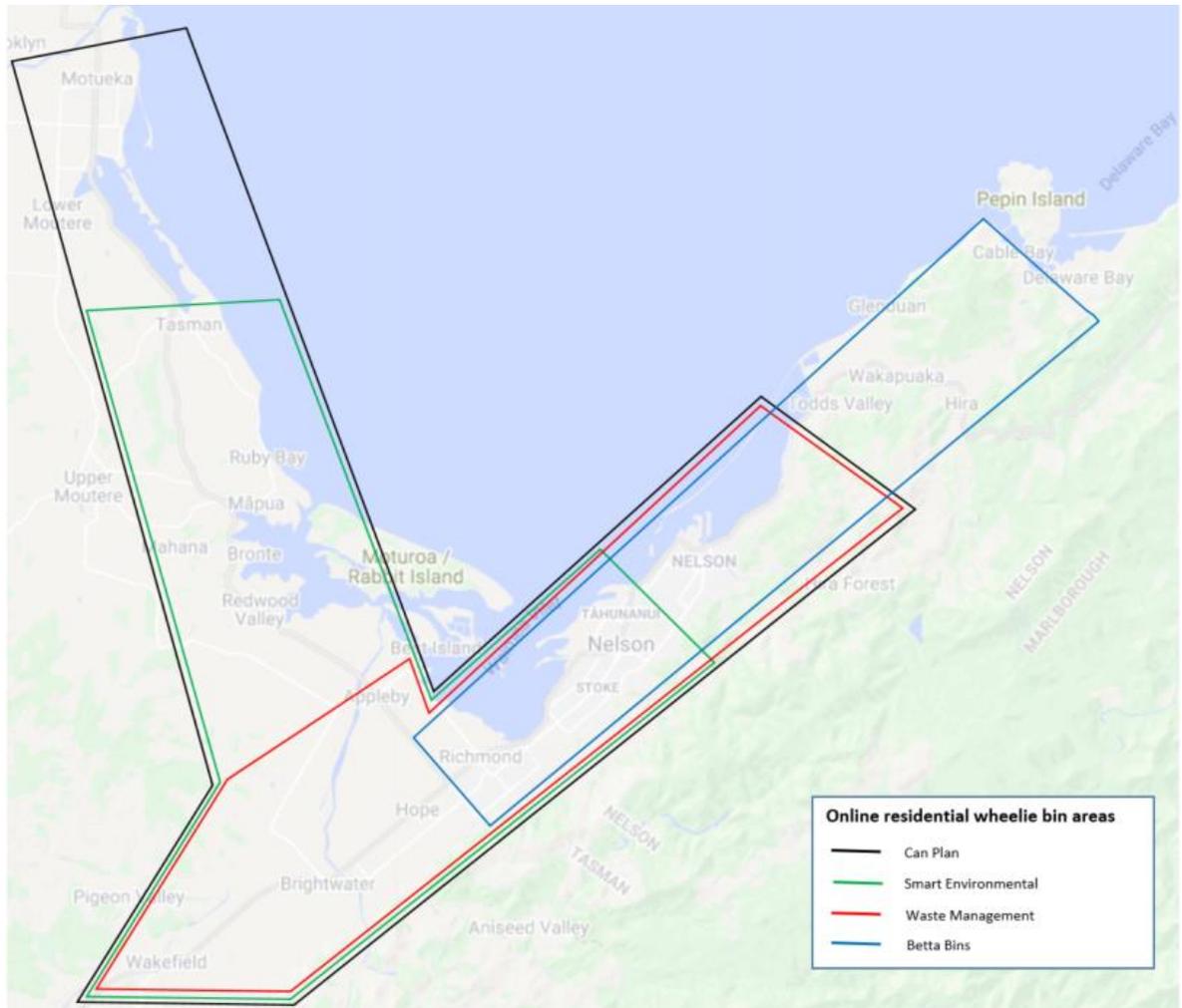
<sup>15</sup> SOI, [52.4].

<sup>16</sup> As the Commission’s Merger and Acquisition Guidelines say: “*In all cases, market share measures are insufficient in themselves to establish whether a merger is likely to have the effect of substantially lessening competition. Whether or not a merger is likely to substantially lessen competition depends on a full analysis of [a] range of factors*”.

6 We discuss each point in turn.

**The SOI's market definitions do not reflect commercial reality**

7 Can Plan, Smart, Betta Bins and Waste Management all offer residential waste collection services online in, at least,<sup>17</sup> the following Nelson-Tasman areas (comprising many different postcodes<sup>18</sup>):<sup>19</sup>



8 Any customer within those areas can buy those competing, functionally identical, wheelie bin services with just one online click.

9 And those companies offer their price to all customers across the region regardless of where they live. Which means that no firm presently price discriminates

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<sup>17</sup> As noted above, Can Plan has seen Smart wheelie bins being serviced Nelson areas that are outside of Smart's online automatic address zone. Smart's wheelie bins have, for instance, been spotted in Nelson's Motueka street and Victory Square. And it is clear to Can Plan that Smart is eager to continue expanding through Nelson.

<sup>18</sup> Can Plan, for instance, serves customers that live in 15 different postcodes: 7005; 7010; 7011; 7020; 7022; 7025; 7071; 7073; 7081; 7091; 7095; 7096; 7120; 7173; 7175.

<sup>19</sup> Can Plan reiterates that waste companies also service areas outside their online automatic address zones. And also notes that Motueka Bin Hire, Scott's Bin Hire and Bin Go also provide wheelie bin services in Motueka.

postcode-by-postcode like the Commission's SOI hypothesises.<sup>20</sup> (And, as we explain below, this transaction is not going to be the catalyst for such drastic change).

- 10 Can Plan prices in that non-discriminatory manner because it faces strong competition across the region, the barriers to market entry and expansion are very low, local councils could change to rates-based waste collection at any time for "affordability" reasons,<sup>21</sup> and customer loyalty is the backbone of Can Plan's business. We expand below.

### ***Strong competition across the region***

#### *Smart*

- 11 Can Plan repeats that Smart is its closest competitor and, by far, the biggest competitive threat to its business today and post-merger.<sup>22</sup>
- 12 The SOI disregards Smart on the basis that it does not, apparently, have a "significant presence in the geographic area of overlap".<sup>23</sup>
- 13 Respectfully, we cannot reconcile that preliminary finding with the fact that:
  - 13.1 Smart holds the Tasman District Council recycling contract which it services using tri-combi trucks that collect both private waste and council recycling.
  - 13.2 Those dual-purpose trucks,<sup>24</sup> partly subsidised by the TDC recycling contract, sees Smart offer online residential wheelie services [].<sup>25</sup> Including online to all households in Richmond, Stoke and Tahunanui, and, as Can Plan has observed, into other parts of Nelson.

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<sup>20</sup> The Commission's SOI suggests that there's evidence of commercial customers being price discriminated based on location, by saying "price discrimination is possible because waste is collected from customers' addresses, so commercial and residential customers can usually be distinguished from each other", [30.1].

That assertion, respectfully, misstates where the difference between residential and commercial customers lies. Any price differences between those customer groups is not because of their addresses. Rather, commercial customers buy more tailored waste collection services than residential customers and that custom offering can come at a higher price. Indeed, that reality is why waste companies ask commercial customers to enquire directly about their needs, rather than a "one click" purchase option like residential customers.

<sup>21</sup> Just like Tauranga City Council.

<sup>22</sup> Can Plan clearance application, at [119]. Chapman Tripp 5 March 2021 letter, [7].

<sup>23</sup> SOI, [49.1].

<sup>24</sup> Which would likely be the type of truck used by Smart if it was successful in bidding for future Nelson City Council recycling contracts (or a joint TDC/NCC recycling contract).

<sup>25</sup> Indeed, []. Chapman Tripp 5 March 2021 letter, [7.4].

- 13.3 Indeed, approximately []% of Can Plan’s current residential customer base could go online right now and switch to Smart’s cheaper wheelie bins.<sup>26</sup>
- 13.4 The other ~[]% would be prompted to call Smart’s local office about supply.<sup>27</sup> Can Plan does not know whether Smart then services those customers, but given Smart’s aggressive expansion activity, Can Plan cannot afford to assume that Smart won’t go into these areas.<sup>28</sup> And, indeed, Can Plan has spotted Smart bins in parts of Nelson that are not captured by Smart’s online automatic address zone.<sup>29</sup>
- 13.5 That Smart expansion threat was further cemented in recent weeks when Can Plan spotted this new (possible refurbished) Smart automatic sideloader truck being assembled in Stoke:<sup>30</sup>



14 [].<sup>31</sup> [],<sup>32</sup> []: []

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<sup>26</sup> Approximately [] of Can Plan’s [] customers live in postcodes that Smart currently services. Can Plan data, sent to the Commission on 27 January 2021.

<sup>27</sup> Smart’s website gives a conflicting message on whether its services are available to customers in Nelson. But directs residents to call Smart’s local representative. Chapman Tripp 5 March 2021 letter, [7.2].

<sup>28</sup> Chapman Tripp 5 March 2021 letter, [7.2].

<sup>29</sup> For instance, in Nelson’s Motueka Street and Victory Square area.

<sup>30</sup> Mr Boocock took this photo on 11 March 2021 at Heslops Mechanics in Stoke (<https://www.heslops.co.nz/>).

<sup>31</sup> [].

<sup>32</sup> []. Clearance application, [121.1].

15 It follows that Can Plan is constrained by the fear of losing more potential or existing customers to Smart's [ ].

#### *Waste Management*

16 Like Smart, the SOI dismisses Waste Management as a competitive constraint now and in the future on the basis that Waste Management is "significantly smaller than the merged entity's would be".<sup>33</sup>

17 The Commission's analysis, though, overlooks that Waste Management offers the same residential wheelie bin services as Can Plan to all households in Richmond, Stoke and Nelson.

18 Any resident in those areas can go onto Waste Management's website and buy its residential waste collection services online if they are unhappy with Can Plan's services and pricing now and post-transaction.<sup>34</sup> Indeed, Waste Management's online catchment area covers ~[ ]% of Can Plan's existing customers.<sup>35</sup>

19 The fact that few customers may have taken up that offer does not mean that Waste Management's presence does not constrain Can Plan.

20 To the contrary, the looming presence of Waste Management across the market directly constrains Can Plan from implementing the type of 5-10% non-transitory price increases that the Commission theorises. If Can Plan were to attempt such a price increase it would only make Waste Management's services significantly more attractive for the vast proportion of Can Plan's customers.

#### ***Constraint from entry & expansion***

21 As set out above, Smart and Waste Management already offer residential wheelie bin services in Richmond (7020), Stoke (7011) and Nelson (7010), which makes one or both of those companies available to ~[ ]% of Can Plan's existing customers.<sup>36</sup>

22 And, in offering those services, Smart and Waste Management were not "daunted" by those areas' "route densities";<sup>37</sup> just as Mr Boocock was not daunted by those routes when he started Can Plan by himself in the 1990s (at a time when Nelson-Tasman was less densely populated).

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<sup>33</sup> SOI, [52].

<sup>34</sup> Can Plan's customers are not locked into contracts which beholden them to price changes.

<sup>35</sup> Can Plan data, sent to the Commission on 27 January 2021.

<sup>36</sup> Can Plan data, sent to the Commission on 27 January 2021.

<sup>37</sup> The Fair Trading Act 1986, of course, prohibits suppliers from advertising services that they cannot, or do not intend to, deliver.

- 23 Those commercial decisions by significant private equity-owned companies, and an entrepreneurial Nelsonian are, of course, consistent with the Commission's *Transpacific* decision which held that: "barriers to entry and expansion arising from economies of density and scale are not likely to be high in [Nelson]".<sup>38</sup>
- 24 And there is zero barrier to Smart and Waste Management expanding their customer numbers in Nelson-Tasman by advertising, accepting and delivering the services that they already offer to the market.
- 25 Given those facts, we now turn to the constraint that Can Plan faces from new market entry by Envirowaste, the risk of the council(s) sponsoring entry through rates-based waste collection contracts and then separately discuss expansion into the SOI-focused postcode 7071 (East Nelson).

*Constraint by Envirowaste entry*

- 26 In addition to Smart and Waste Management's existing constraint on Can Plan, the merged entity will also be constrained by the threat of new entry by Envirowaste.
- 27 Just as Smart and Waste Management have proven, should market opportunities arise, Envirowaste could quickly and easily establish a residential wheelie bin business to complement its commercial waste management services in Richmond, Stoke and Nelson.
- 28 Can Plan agrees with the SOI that "the main costs of entry ... may not be prohibitive".<sup>39</sup> The costs of new vehicles (like Smart's refurbished sideloader above), licensing, bins, bags and crews are not significant, especially for a global player like Envirowaste.<sup>40</sup> (Consistently, Envirowaste operates private residential waste collection services in other regions around New Zealand too, such as Whanganui and Dunedin).<sup>41</sup>
- 29 And, as Waste Management proves, there is little risk for large multinational companies to invest in that equipment (including by sourcing it from elsewhere in New Zealand) and offer a Richmond to Nelson residential wheelie bin service without an established residential customer base. That reality is because (a) they are already well-established in Nelson-Tasman serving commercial customers; and (b) if

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<sup>38</sup> *Transpacific Industries Group (NZ) Limited and Ironbridge Capital Pty Limited*, Decisions 622, 623, 624 and 625, [25].

<sup>39</sup> SOI, [50].

<sup>40</sup> Envirowaste is owned by CK Infrastructure Holdings Limited, a global infrastructure company with diversified investments across the UK, Europe, New Zealand, Canada, the USA, Hong Kong and China.

<sup>41</sup> Can Plan clearance application, [145].

their investment doesn't pan out, then they can redeploy the assets to other waste management markets.

30 And it is those low barriers to entry that constrain Can Plan's pricing today and post-transaction. The company knows that if it gives Smart, Waste Management and Envirowaste an opportunity to eat into its customer base like, for instance a non-transitory price increase, then those companies will take that opportunity. Those three companies have not grown their significant national position by letting locally-owned businesses like Can Plan stand in their way and that ever-present threat looms large over all Can Plan decisions.

31 That reality is why, for instance, Can Plan writes to its customer base any time that it is forced to increase prices (typically due to significant TDC/NCC landfill price hikes).<sup>42</sup> If Can Plan did not explain those actions, then it would risk marginalising its loyal customer base which would see them turn to those national companies already present in Nelson.

*Council sponsored entry/expansion*

32 At this point we also note the SOI comment that "some market participants have stated that the potential for NCC to move to a rates-based contract for kerbside waste collection is a strong disincentive for entry or expansion".<sup>43</sup>

33 That council power is a very strong constraint on Can Plan too.

34 Can Plan would not risk putting Nelsonians offside by unjustifiably raising waste collection prices after buying the council's own business unit. Indeed, the ability for the council to move to rates-based waste collection looms particularly large over local businesses whose principals' livelihoods depend entirely on the success of their company.

35 That stark reality was pressed home in recent weeks when Tauranga City Council moved to rates-based waste collection model to "make reducing waste easier, *more accessible and more affordable* for the community as a whole".<sup>44</sup>

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<sup>42</sup> Can Plan provided the Commission with examples of those letters on 27 January 2021. And see **Schedule A** for the NCC and TDC fees over the last ten years.

And we note, for comparison, that Can Plan's green bins have remained about the same price over the last eight years because, unlike council-owned landfills, commercial green waste composting facilities have not significantly increased their tipping fees year-on-year. (Can Plan's 240L green bins were priced at \$65 for six months when it entered the market in 2013 and now they are \$71 (which is in line with inflation over that period)).

<sup>43</sup> SOI, [52.4].

<sup>44</sup> Tauranga City Council, as reported by the *NZ Herald*: [https://www.nzherald.co.nz/business/news/article.cfm?c\\_id=3&objectid=12427249](https://www.nzherald.co.nz/business/news/article.cfm?c_id=3&objectid=12427249). (Emphasis added).

36 That Tauranga contract was awarded to Envirowaste and stripped local Tauranga waste collection company, *Kleena Bins*, of its \$3m value. Or in *Kleena Bins*' owner's own words:<sup>45</sup>

*"Two or three years ago I had a business that was potentially worth three or \$4m and now I've got a business that's basically nothing. That's my retirement plan down the gurgler. It's a bit like somebody's stolen \$3m off me and I can't do anything about it."*

37 And Can Plan risks finding itself in the same position as *Kleena Bins* if it does not provide wheelie bin services that NCC and/or TDC deem accessible, affordable and/or environmentally focused.

*Expansion into postcode 7071*

38 The SOI is also exploring an SLC in a market that consists of just postcode 7071. And, in doing so, asks for submissions on entry or expansion into that possible market.

39 Respectfully, the Commission seems to be mistaken. Unlike *Betta Bins*, Can Plan does not provide residential wheelie bin services to Cable Bay or,<sup>46</sup> in fact, in much of postcode 7071 at all. As the data shows,<sup>47</sup> in 2020, Can Plan serviced just [] customers in that postcode, and they were all on the fringe of postcode 7010 (near Marybank and the Todd Valley area where Waste Management also competes).<sup>48</sup>

40 Can Plan accepts the views in the SOI that postcode 7071 up to Cable Bay might not be large enough to promote new entry and expansion on top of *Betta Bins*. But that reality is unrelated to the transaction and instead reflects the rural expanse of East Nelson.

***The loyalty constraint***

41 The Commission's focus on postcodes 7010, 7011 and/or 7020 being separate markets means that for an SLC to be likely, the transaction would have to be the catalyst for Can Plan to start charging Richmond, Stoke and Nelson customers more than Can Plan's customers in other areas where *Betta Bins* has no presence (like, say, Mapua, Wakefield, Brightwater or Motueka).

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<sup>45</sup> [https://www.nzherald.co.nz/business/news/article.cfm?c\\_id=3&objectid=12427249](https://www.nzherald.co.nz/business/news/article.cfm?c_id=3&objectid=12427249).

<sup>46</sup> We note that the Commission specifically mentions "the area extending to Cable Bay" at SOI, [5.1].

<sup>47</sup> Can Plan data, sent to the Commission on 27 January 2021. (Based on 2020 figures, with the figure even smaller in 2018 and 2019).

<sup>48</sup> It follows that much of the SOI's "figure 1" map does not show the "overlap areas".

- 42 In addition to the constraints outlined above, Can Plan has no incentive to price discriminate against certain Nelson-Tasman households and not others. Such a strategy would lead to a significant loss of goodwill in the community that Can Plan has worked incredibly hard to establish.
- 43 Can Plan works hard to retain its local distinction by:
- 43.1 Donating free wheelie bins to all local kindergartens;<sup>49</sup>
- 43.2 Providing close support to local waste reduction initiatives. As Karen Driver of Envision submitted to the Commission: "*Can Plan is a locally owned and community minded business so will try new systems, offer new solutions to customers. They have also been very helpful in supporting the local drive to divert waste from events*".<sup>50</sup>
- 43.3 Sponsoring local community events and organisations, for instance:
- (a) Nelson Marlborough Rescue Helicopter Trust House (through Mike Greer Homes);
  - (b) Autism NZ;
  - (c) Heart Kids NZ / Kids Day Out Variety Show;
  - (d) Brain Injured Children Trust;
  - (e) Nelson College for Boys;
  - (f) Heart Foundation;
  - (g) Nelson Volleyball;
  - (h) Nelson Scout Jamboree;
  - (i) Nelson Lions Club;
  - (j) Nelson Weet-Bix TRYathlon;
  - (k) Nelson Theatre Royal (Can Plan is an Emerald Sponsor);
  - (l) Dawnbreakers, a family Snapper Cup Event;

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<sup>49</sup> Which comprises 12 kindergartens and 10 playcentres.

<sup>50</sup> Commerce Commission document: "Submissions on the Can Plan / Nelmac Clearance Application".

- (m) Transform/Salvation Army Annual Charity Christmas Challenge;
- (n) Jingle Bells 2020;<sup>51</sup>
- (o) Mahana School Fair;
- (p) Appleby School Silent Auction;
- (q) Richmond School Silent Auction;
- (r) *Day of the Dead* at Founders Park;
- (s) Nelson Truck Show;
- (t) Annual Truffle Fundraiser; and
- (u) Nelson Youth Theatre.

44 In addition to the brand exposure from those initiatives, Can Plan benefits from locals promoting Can Plan's services to their friends and family.<sup>52</sup> Those word-of-mouth promotions (which have real commercial value to Can Plan) would quickly and swiftly stop if Can Plan engaged in the type of local price discrimination that the Commission theorises.

45 Moreover, Can Plan's skip and commercial businesses (which comprise approximately []% of Can Plan's revenues) would suffer too from that negative publicity.<sup>53</sup> Customers that have, in the past, used Can Plan loyally for all their waste needs would quickly drop that loyalty and buy skip and commercial services from Smart, Waste Management and Envirowaste if Can Plan started charging some households more than others.

46 That loss of goodwill would be permanent and significant.<sup>54</sup> And would also risk triggering TDC and NCC to implement rates-based waste collection services because, in the words of Tauranga City Council, such price discrimination would not make waste collection services "more accessible and more affordable for the community as a whole".<sup>55</sup>

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<sup>51</sup> This event was rained off but Can Plan still delivered and removed all bins etc.

<sup>52</sup> As one submitter told the Commission: "If Nelmac are going to sell Bet[t]a Bins I would much rather it be sold to a locally owned and operated company".

<sup>53</sup> Can Plan data provided with the clearance application.

<sup>54</sup> Both for Can Plan the business, and the Boococks' standing as locals in the Nelson community.

<sup>55</sup> Tauranga City Council, as reported by the *NZ Herald*:  
[https://www.nzherald.co.nz/business/news/article.cfm?c\\_id=3&objectid=12427249](https://www.nzherald.co.nz/business/news/article.cfm?c_id=3&objectid=12427249).

47 Consistently, in recently finding that Cardrona would not price discriminate against local Wanaka skiers the Commission held that:<sup>56</sup>

*Even if the merged entity has the ability to price discriminate against Wanaka locals, we consider it unlikely that it would have the incentive to do so. This is because, as noted above, such a strategy would likely impose additional costs on customers which would increase the likelihood of some non-local skiers choosing another ski field. In addition, a strategy of price-discriminating against locals would also potentially lead to a loss of goodwill in the local community. The value of local goodwill, while difficult to estimate with a high degree of accuracy, is likely to be considerable.*

48 Respectfully, a similar conclusion ought to be made here. (In addition to the fact that, unlike Wanaka skiers and snowboarders, local Tasman and Nelson households will be able to buy waste collection services from at least two other resident providers (Smart and Waste Management)).

#### **The Commission's market shares tell a limited picture**

49 Based on the observed industry dynamics above, Can Plan considers that it's appropriate to define a Nelson-Tasman general waste market.

50 Any narrower "postcode-by-postcode" market would be artificial. All waste management companies offer, or are free to offer, services in a variety of postcodes across the region. There are no discernible differences between postcodes 7010, 7011 and 7020 that would make it appropriate to define separate geographic markets as a matter of fact and commercial common sense.<sup>57</sup>

51 That said, even if the Commission is minded to define a Richmond-Stoke-Nelson market,<sup>58</sup> then the transaction is a "4→3" with Can Plan continuing to be constrained by:

51.1 Smart and Waste Management;

51.2 the threat of Envirowaste serving residential customers; and

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<sup>56</sup> *Cardrona Alpine Resort Limited and Treble Cone Investments Limited [2019] NZCC 24, [78].*

<sup>57</sup> The only possible exception is postcode 7071. But, as we outline above, Can Plan only serves a fraction of that postcode (those [] customers close to the postcode 7010 boundary).

<sup>58</sup> Which Can Plan says is, respectfully, too narrow too given that there's no obvious reasons to exclude, for instance, Hope, Brightwater, Wakefield and Appleby from the competition analysis.

51.3 TDC and/or NCC's ability to move to rates-based waste collection at any time.<sup>59</sup>

52 And it's against that background that we respectfully say that the Commission's historical market share analysis tells a limited picture about present-day competition, including who customers can switch to if they are unhappy with Can Plan's services and prices now and post-transaction.

53 Instead, that market share data captures who customers have chosen to use in the past. Decisions that can date back twenty years given that customers tend to stick to those choices for a long time.<sup>60</sup>

54 And the evidence on record suggests that it is that customer stickiness – and not current or future competition between Can Plan and Betta Bins – that is reflected in the Commission's market share analysis. Specifically, and contrary to the inferences the SOI draws from its historical market share data:

54.1 Can Plan data shows that, over the last three years, it has []:<sup>61</sup> []

54.2 Smart [] than both Can Plan and Betta Bins;

54.3 large national waste management companies are winning council waste contracts across New Zealand, and not local businesses like Can Plan and Betta Bins;<sup>62</sup> and

54.4 [].

55 The reality is that many residential waste customers, including Betta Bins' customers, are sticky. [].<sup>63</sup>

56 But that commercial rationale and customer stickiness is unrelated to competition between Can Plan and Betta Bins.

57 Can Plan reiterates that it is the threat of new or unhappy customers choosing Smart, Waste Management or Envirowaste, or customers voicing their displeasure

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<sup>59</sup> To the extent that such rates-based collection services would require TDC and NCC collaboration, we've seen those councils joining forces to combine landfill services and there's been talk of the councils merging recycling services in 2023.

<sup>60</sup> As one submitter told the Commission: "I support Can Plans proposal as they provide an excellent service. We have been with them for 20 years and they have never failed to collect".

<sup>61</sup> [].

<sup>62</sup> For instance, Hamilton City Council, Tauranga and Timaru councils recently selected Envirowaste for their respective residential waste collection contracts. And Hamilton City Council chose Waste Management.

<sup>63</sup> For instance, [].

about waste services to the council, that constrains Can Plan's pricing today and into the future. This transaction will not change that reality.

**SOI THEORY OF HARM: UNILATERAL (COMMERCIAL AND GREEN WASTE)**

- 58 Can Plan agrees with the Commission's apparent preliminary view that the transaction does not substantially lessen competition for commercial and green waste services.<sup>64</sup>
- 59 In addition to the green waste constraints the SOI identifies,<sup>65</sup> Can Plan notes that the barriers to a new entrant offering green waste services are very low.
- 60 A new entrant would just need to:
- 60.1 buy a second-hand rear compactor (which can be bought online for anywhere between \$5,000 and \$100,000);
  - 60.2 buy wheelie bins for about \$60 each;
  - 60.3 advertise;
  - 60.4 answer calls and take orders; and
  - 60.5 collect the garden waste and take it to an RRC or green waste facility to be composted.
- 61 Indeed, Can Plan only started offering green waste collection services in 2013 and [].
- 62 And, consistent with those low barriers to entry and the loyalty constraint above, Can Plan charges all green waste customers across the Nelson-Tasman region the same amount, including, for instance, green waste customers in Mapua, Wakefield and Brightwater.<sup>66</sup>
- 63 Given that Can Plan has no market power in either general waste or green waste, the conglomerate effects mentioned in the SOI are not likely.<sup>67</sup>

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<sup>64</sup> SOI, [6].

<sup>65</sup> SOI, [57].

<sup>66</sup> Which are, of course, areas where Beta Bins green waste services are not available.

<sup>67</sup> SOI, [68]-[70].

## **SOI THEORY OF HARM: COORDINATED EFFECTS**

64 The Commission is yet to be satisfied that the proposed transaction will not result in a substantial lessening of competition through coordinated effects.<sup>68</sup>

65 Specifically, the Commission is still testing whether: (a) the market is prone to coordination; and (b) whether the removal of Betta Bins from the market will change that reality by allowing existing suppliers to coordinate their behaviour much more easily.

66 We deal with each of those points in turn.

### **The market is not prone to coordination**

67 The evidence on record does not support a finding that this market is prone to coordination.

67.1 The market consists of at least four firms of different sizes and very different cost structures:

- (a) Can Plan is a Nelson family-owned business that only provides private general waste services (and not residential recycling);
- (b) Smart Environmental is a national private-equity owned company that provides council-contracted recycling and private general waste services;
- (c) Waste Management is a multinational Chinese-owned business with assets in excess of US\$30bn that provides private general waste services; and
- (d) Betta Bins is a Nelson City Council-owned business that provides council-contracted recycling and general waste services.

67.2 There is no absence of vigorous market competition. As set out above, Smart offers online residential wheelie services [ ].<sup>69</sup>

67.3 The four firms do not interact through industry organisations or repeated transactions. And there is no supply chain co-dependency between the firms at all.

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<sup>68</sup> SOI, [62].

<sup>69</sup> [ ]. Chapman Tripp 5 March 2021 letter.

67.4 The firms are not interrelated through association or cross-partial ownership.

67.5 The firms cannot readily observe each other's market shares. Indeed, the Commission has only provided approximate market shares due to "various issues with all parties' data".<sup>70</sup> And, respectfully, the Commission's suggestion that market shares are transparent because bins are "clearly branded and are placed on the street for collection" is not viable in practice. Neither Can Plan's owners, nor its drivers, have the time or resources to routinely document the streets of Richmond, Stoke and Nelson, on various collection days, to calculate market shares.

67.6 [ ].<sup>71</sup>

**Betta Bins is not a market disrupter or significant competitive presence**

68 Betta Bins is not a disrupter or significant competitive presence whose market absence will make coordination more likely, more complete or more sustainable.

69 We explain that position in the unilateral section above.

70 We must, though, correct the SOI's statement at [67] that: "... within the area of overlap it appears that the merged entity could have a very high share of customers, however markets are defined. Therefore, focusing on just that area, coordinated effects may be unlikely".

71 The substance of that statement is that coordinated effects may be unlikely because Can Plan and Betta Bins face no competition in the overlap areas, based solely on the Commission's market share analysis.

72 Market shares, however, cannot be the start and end of the competition analysis.<sup>72</sup>

73 Instead, we respectfully repeat the evidence outlined in this submission which supports Can Plan's view that it is significantly constrained by Smart (its closest competitor), other national waste management companies, low entry barriers and the councils' ability to shift to rates-based waste collection services at any time.

74 Can Plan would welcome the opportunity to discuss these constraints further with the Commission.

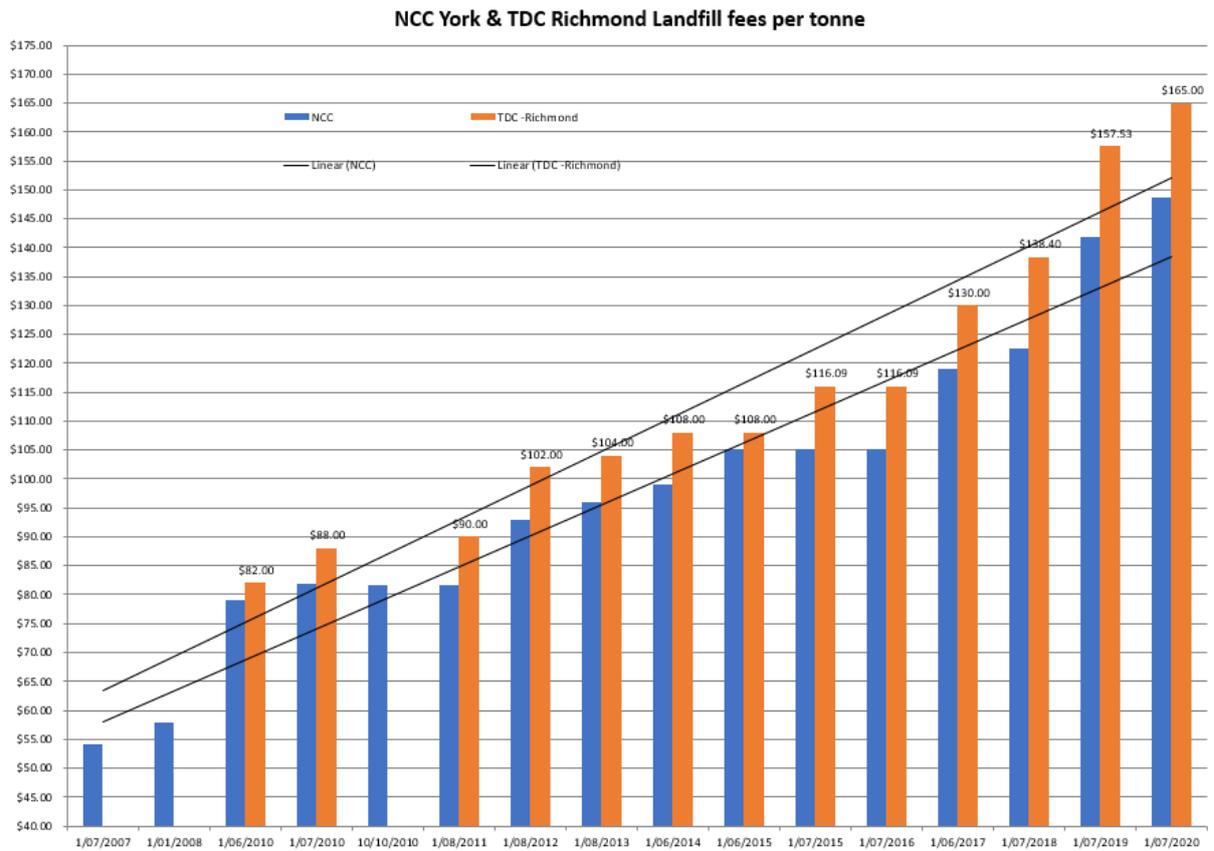
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<sup>70</sup> SOI, n32.

<sup>71</sup> Betta Bins financials provided with the Can Plan clearance application.

<sup>72</sup> As the Commission's Merger and Acquisition Guidelines say: "*In all cases, market share measures are insufficient in themselves to establish whether a merger is likely to have the effect of substantially lessening competition. Whether or not a merger is likely to substantially lessen competition depends on a full analysis of [a] range of factors*".

## SCHEDULE A: NCC AND TDC TIP FEE INCREASES<sup>73</sup>



<sup>73</sup> Can Plan data provided to the Commission, 27 January 2021.