

## Statement of Unresolved Issues

Public version

### Can Plan/Nelmac

31 May 2021

#### Introduction

1. On 18 December 2020, the Commerce Commission registered an application (the Application) from Can Plan Nelson Limited (Can Plan) to acquire certain assets from the waste collection business of Nelmac Limited (Nelmac) in Nelson. The assets form part of Nelmac's 'Betta Bins' business (the Proposed Acquisition).<sup>1</sup>
2. To clear an application, the Commission must be satisfied that the acquisition will not have, or would not be likely to have, the effect of substantially lessening competition in a market in New Zealand.
3. Since registering the Application, we have published:
  - 3.1 a Statement of Preliminary Issues (SoPI) setting out the issues that we considered important, at the start of our investigation, in deciding whether or not to grant clearance;<sup>2</sup> and
  - 3.2 a Statement of Issues (Sol) setting out the potential competition issues that we had identified following our initial investigation.<sup>3</sup>
4. The SoPI and the Sol also provided background information about Can Plan and Nelmac (together, the Parties) and the waste industry in which they operate. These documents are available on our website, along with public versions of the submissions we received following publication of the SoPI and Sol.
5. This Statement of Unresolved Issues (SoUI) sets out the potential competition issues that have not been resolved to date and that we therefore continue to test. This is so that the Parties and other interested parties have an opportunity to comment and provide us with additional information.
6. In reaching the preliminary views set out in this SoUI, we have considered information provided by the Parties and other industry participants. We have not yet made any

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<sup>1</sup> A public version of the Application is available on our website at: [www.comcom.govt.nz/business-competition/mergers-and-acquisitions/clearances/clearances-register/](http://www.comcom.govt.nz/business-competition/mergers-and-acquisitions/clearances/clearances-register/).

<sup>2</sup> SoPI dated 22 January 2021 is available at [https://comcom.govt.nz/\\_data/assets/pdf\\_file/0028/232687/Statement-of-Preliminary-Issues-22-January-2021.pdf](https://comcom.govt.nz/_data/assets/pdf_file/0028/232687/Statement-of-Preliminary-Issues-22-January-2021.pdf).

<sup>3</sup> Sol dated 22 March 2021 is available at [https://comcom.govt.nz/\\_data/assets/pdf\\_file/0010/250300/Can-Plan-Limited-and-Nelmac-Limited-Statement-of-Issues-22-March-2021.pdf](https://comcom.govt.nz/_data/assets/pdf_file/0010/250300/Can-Plan-Limited-and-Nelmac-Limited-Statement-of-Issues-22-March-2021.pdf).

final decisions on the issues outlined below (or any other issues) and our views may change, and new competition issues may arise, as the investigation continues.

7. We welcome any further submissions and evidence that can be provided to address our concerns. Commission staff are also available to meet with parties to discuss any of the issues raised in the SoUI.

### **The concerns we continue to test**

8. The Parties supply general waste and green waste collection services to residents in Nelson-Tasman. The specific geographic area of competitive overlap between the Parties extends from Richmond in the west through Stoke and Nelson City to Cable Bay in the east (collectively Nelson/Stoke/Richmond).
9. On the basis of the information collected to date, we are currently not satisfied that the Proposed Acquisition will not have, or would not be likely to have, the effect of substantially lessening competition.
10. While we are still investigating and have made no final decisions, we continue to have concerns that the Proposed Acquisition would be likely to substantially lessen competition (SLC) due to horizontal unilateral effects resulting from a loss of competition in the supply of:
  - 10.1 residential general waste collection services (noting that the effect of the Proposed Acquisition likely varies across Nelson/Stoke/Richmond); and
  - 10.2 residential green waste collection services in which the Proposed Acquisition would result in a 'two to one' merger across Nelson/Stoke/Richmond.<sup>4</sup>
11. We note that we have not reached a final view on whether the geographic scope of the relevant general and green waste collection markets comprises the combined Nelson/Stoke/Richmond area, or only parts of it.
  - 11.1 If a broad Nelson/Stoke/Richmond market is defined, the issue is whether a loss of competition in part of this market equates to an SLC in the broader market.
  - 11.2 An alternative approach is to define more narrow markets, reflecting the differences in competitive conditions across Nelson/Stoke/Richmond. In this case, the Proposed Acquisition may raise greater competition concerns in one geographic market than in the other. If there are narrower markets than Nelson/Stoke/Richmond, we consider it likely that:
    - 11.2.1 there is a relevant geographic market that starts with Richmond in the west and extends towards (and likely into) Stoke, and potentially into, Nelson South; and

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<sup>4</sup> For further detail on the geographic boundaries of the markets relevant to the supply of these services and the Proposed Acquisition, see discussion on market definition starting at [27].

11.2.2 there is a second relevant geographic market that starts in Cable Bay in the east, extends into Nelson City and also extends towards, and potentially into, Stoke.

12. Our unresolved concerns with respect to the supply of the above services are that:

- 12.1 based on data provided to us by market participants, the Proposed Acquisition would result in significant aggregation and the merged entity having a high market share (estimated to be [ ]% of customers in Nelson, [ ]% in Stoke and [ ]% across Nelson/Stoke/Richmond);
- 12.2 absent the Proposed Acquisition (in the counterfactual), an alternative purchaser is likely to acquire the relevant Beta Bins assets resulting in significantly more competition than would be the case with the Proposed Acquisition (in the factual). We currently consider the most likely purchaser is [ ]. This scenario [ ]. There is also a potential counterfactual where Beta Bins is sold to [ ];
- 12.3 we currently consider that competition from existing competitors is unlikely to constrain the merged entity across all of Nelson/Stoke/Richmond. As Can Plan submits, Smart is a nationally well-resourced firm and [ ]. However, we are not satisfied that expansion by Smart is likely to occur on such a scale so as to constrain the merged entity and prevent an SLC across all of Nelson/Stoke/Richmond. [ ]. We consider Waste Management is unlikely to expand to any material degree in the supply of residential general waste collection services in Nelson/Stoke/Richmond. Waste Management [ ], either currently or in response to a hypothetical small, but significant, non-transitory increase in price (SSNIP);
- 12.4 we have assessed whether, in response to a price increase, entry by new competitors is likely to be sufficient in extent in a timely fashion to constrain the merged entity, satisfying what is termed the LET test. We currently consider that new entry by other suppliers into Nelson/Stoke/Richmond is not sufficiently likely to constrain the merged entity and prevent an SLC;<sup>5</sup>
- 12.5 although Can Plan and others have told us that the threat of the Nelson City Council (NCC) moving to a bag or wheelie bin rates-based waste collection model is a discipline on their pricing and also on in-market behaviour, the NCC (or the Tasman District Council (TDC), in the case of wheelie bins)<sup>6</sup>

<sup>5</sup> Commerce Commission, *Mergers and Acquisitions Guidelines* (July 2019) at [3.93]-[3.106].

<sup>6</sup> The TDC already runs a rates-based collection of general waste rubbish bags.

[  
];

- 12.6 general waste collection prices in Nelson/Stoke/Richmond go up regularly and to our knowledge the [ ]. A five per cent price increase may therefore be unlikely to prompt this;
- 12.7 the merged entity has the ability, and we are not satisfied that it would not have the incentive, to exercise market power by engaging in price discrimination post-acquisition. The merged entity is likely to have an incentive to charge customers who have no effective alternative waste collection supplier higher prices than customers in other areas where there is more competition. We consider that even if this behaviour poses reputational risks, the merged entity could manage that risk by making changes to the way customers interact with its website or other pricing information; and
- 12.8 the Proposed Acquisition is a ‘two to one’ merger in scheduled green waste collection services. Residential customers do not appear to have any effective out of market options for the volumes that scheduled green waste collection relates to, and given the lower value of the green waste market, our current view is that new entry for green waste collection is even less likely than for general waste collection.
13. We discuss these outstanding concerns in more detail below.

### **The issues we are no longer actively investigating**

14. On the basis of the information we have gathered to date, we are no longer considering whether the Proposed Acquisition is likely to result in an SLC due to:
- 14.1 horizontal unilateral effects in waste/recycling collection services to commercial/industrial customers in Nelson-Tasman. This is because Waste Management and EnviroWaste are the main players in these markets and the Proposed Acquisition creates minimal overlap in this area;
- 14.2 horizontal unilateral effects in residential recycling collection services in Nelson-Tasman, given Nelmac currently holds the NCC contract to collect recycling in Nelson,<sup>7</sup> and Can Plan has no existing involvement in the collection of recycling in the Nelson-Tasman region;
- 14.3 coordinated effects in any Nelson-Tasman markets for residential general waste or green waste collection services, as we do not consider that the Proposed Acquisition would materially increase the potential for coordination compared with the counterfactual; and

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<sup>7</sup> The Application at [4] and Commerce Commission interview with the NCC (10 February 2021).

- 14.4 conglomerate effects as we consider that the Proposed Acquisition would be unlikely to enable the merged entity to leverage power from one market into another (eg, by bundling or tying its general and green waste collection services).

## Process and timeline

15. We have agreed an extension with Can Plan until **30 July 2021** from the initial 40 working day statutory timeframe in which to decide on the Application.
16. We would like to receive submissions and supporting evidence from the Parties and other interested parties on the issues raised in this SoUI. We request responses by close of business on **22 June 2021**, including a public version of any submission made. Please read the instructions for making a submission, which can be found on page 36 of this document.
17. All submissions received will be published on our website with appropriate redactions. All parties will have the opportunity to cross-submit on the public versions of submissions from other parties by close of business on **29 June 2021**.
18. If you would like to make a submission but face difficulties in doing so within the timeframe, please ensure that you register your interest with the Commission at [registrar@comcom.govt.nz](mailto:registrar@comcom.govt.nz) so that we can work with you to accommodate your needs where possible.

## The Parties

### Can Plan

19. Can Plan is a family-owned company which collects waste from small (typically residential) customers that use its wheelie bins and bags.<sup>8</sup> It also provides a fortnightly green waste collection service.<sup>9</sup> Can Plan provides these services in the Nelson-Tasman region (including Nelson City, Stoke, Richmond, Māpua, Brightwater, Wakefield and Motueka).

### Nelmac and Betta Bins

20. Betta Bins is the waste collection division of Nelmac, which is owned by the NCC. Betta Bins collects waste from residential customers that use its bags and wheelie bins.<sup>10</sup> Like Can Plan, Betta Bins provides a fortnightly green waste collection service.

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<sup>8</sup> Can Plan also collects waste from (typically commercial) customers that use larger bins and provides a skip hire service.

<sup>9</sup> According to the Application, green waste is collected fortnightly as this tends to be less voluminous than general waste.

<sup>10</sup> Betta Bins also offers large bin collection services for commercial customers.

21. Betta Bins only serves customers located in the area encompassing Richmond, Stoke, Nelson City and to Cable Bay in the east.<sup>11</sup>

### **Background to the collection of residential waste in Nelson-Tasman**

22. Our investigation is currently focused on how the Proposed Acquisition is likely to affect competition in the provision of waste collection services for residential customers in Nelson/Stoke/Richmond. This section provides some background information on those services and residential waste collection services in the Nelson-Tasman region more generally.
23. Residential customers in Nelson-Tasman can buy and use waste collection services in several ways.
- 23.1 They can buy branded “prepaid” rubbish bags (typically 65L) from council offices and retail outlets, which are then collected by the relevant supplier when put out on collection day.<sup>12</sup>
- 23.2 They can rent wheelie bins (typically 120L or 240L in size) from a supplier on a monthly basis or for longer periods (eg, up to 12 months). The price paid covers both the rental of the bin and regular collection by the supplier during the rental period.<sup>13</sup>
- 23.3 They can purchase wheelie bins up-front and then pay for each collection individually by buying bin tags or bin liners and putting their bin out with a tag or liner on collection days as frequently as needed.
24. The NCC does not run any rates-based collection of general waste.<sup>14</sup> Waste collection services for residential customers in the Nelson region are operated entirely by private collection companies (such as the Parties) on a user-pays basis. Residents within the NCC area (including Nelson and Stoke) can purchase bags from Can Plan or Betta Bins and put these out for collection.
25. The TDC runs a rates-based collection of general waste rubbish bags and recycling in the Tasman region, which extends into Richmond.<sup>15</sup> However, residents in Richmond can also purchase bags from Can Plan or Betta Bins, and put these out for collection by the relevant supplier, as an alternative to putting out TDC bags.

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<sup>11</sup> Betta Bins has previously operated in other areas, including into Tasman as far as Brightwater in the west and towards Māpua. E-mail from Nelmac to the Commerce Commission (24 February 2021). We do not consider that Betta Bins is a potential entrant into other parts of the Tasman region, so the Proposed Acquisition is unlikely to have any effects outside of Nelson/Stoke/Richmond.

<sup>12</sup> These can also be ordered online directly from some suppliers.

<sup>13</sup> Green waste collection services are typically paid for in this way.

<sup>14</sup> However, the NCC operates rates-based recycling services, and it currently contracts with Nelmac to provide this service. The term of this contract is due to expire in 2023.

<sup>15</sup> The TDC currently contracts with Smart Environmental to provide these services.

26. Where residents in Nelson/Stoke/Richmond choose to rent or purchase wheelie bins for waste, they can choose to have a general waste bin and/or a green waste bin. The parties that currently offer wheelie bin collection services to residents in Nelson-Tasman include Can Plan, Betta Bins, Waste Management and Smart.

### **The relevant markets**

27. We define markets in the way that we consider best isolates the key competition issues that arise from a merger. In many cases this may not require us to precisely define the boundaries of a market. What matters is that we consider all relevant competitive constraints, and the extent of those constraints. For that reason, we also consider products and services that fall outside the market, but which would still impose some degree of competitive constraint on the merged entity.
28. When defining relevant markets, we consider whether, in response to a small price increase in the relevant products:
- 28.1 sufficient customers could/would switch to alternative products or locations (known as 'demand-side' substitution) so that the price increase is unprofitable; and
- 28.2 firms could/would switch production to the products or supply locations in question without incurring significant costs (known as 'supply-side' substitution).
29. We have not reached any final views on any of the relevant markets in this case. However, based on the information we have collected to date, we consider that:
- 29.1 general waste collection and green waste collection services are in separate product markets; and
- 29.2 the geographic scope of the relevant markets is likely narrower than Nelson-Tasman.
30. As noted above, there are two ways that geographic markets could be defined in this case. At its broadest, we consider that the geographic scope of the general and green waste markets relevant to our assessment of the Proposed Acquisition reflects the area of overlap between the Parties (ie, Nelson/Stoke/Richmond). While this is one option for defining geographic markets in this case, a second option is to define the geographic scope of the relevant markets more narrowly. We consider that there are differences in competitive conditions across Nelson/Stoke/Richmond, meaning that it may be more appropriate to define two distinct geographic markets for each of general and green waste. While the exact boundary between these two narrower geographic markets is unclear, we note that:
- 30.1 the first geographic market starts with Richmond in the west and extends towards (and likely into) Stoke, and potentially into, Nelson South; and

30.2 the second geographic market starts in Cable Bay in the east, extends into Nelson City and also extends towards, and potentially into, Stoke.

31. We set out our reasons for the above views in turn below.

### **General waste and green waste are in separate markets**

32. In the Application, Can Plan submitted that green waste and general waste collection are in the same market, submitting that both customers and suppliers can easily substitute between the services.<sup>16</sup>

33. In our Sol, we noted that we were still investigating whether green waste and general waste collection were in separate product markets.<sup>17</sup> After further analysis, and taking into account the following factors, we think it is appropriate to define separate markets for general waste and green waste collection.

33.1 In isolation, our approach to product-market definition suggests that general and green waste may be able to be considered together due to supply-side substitutability, since suppliers can use the same trucks and bins to collect either type of waste.

33.2 However, we consider separate markets are appropriate because there are limits to supply-side substitutability and the conditions of competition for green and general waste are sufficiently different. Green waste collection may be subject to more out of market constraints than general waste collection.<sup>18</sup> Also, even though green waste can be collected with the same trucks and bins used for general waste, it has to be collected on separate runs. Due to low green waste customer numbers, it may be harder for suppliers to build profitable green waste collection routes.

34. We invite further submissions on this issue.

### **Likely two separate geographic markets within Nelson/Stoke/Richmond**

35. As noted above, and in our Sol, the Parties overlap in the supply of general waste and green waste collection services to residents in Nelson/Stoke/Richmond. The specific geographic area of competitive overlap between the Parties extends from Richmond in the west through Stoke and Nelson City to Cable Bay in the east (postcodes 7020, 7011, 7010 and 7071 from west to east). This area is shown in Figure 1 below.<sup>19</sup>

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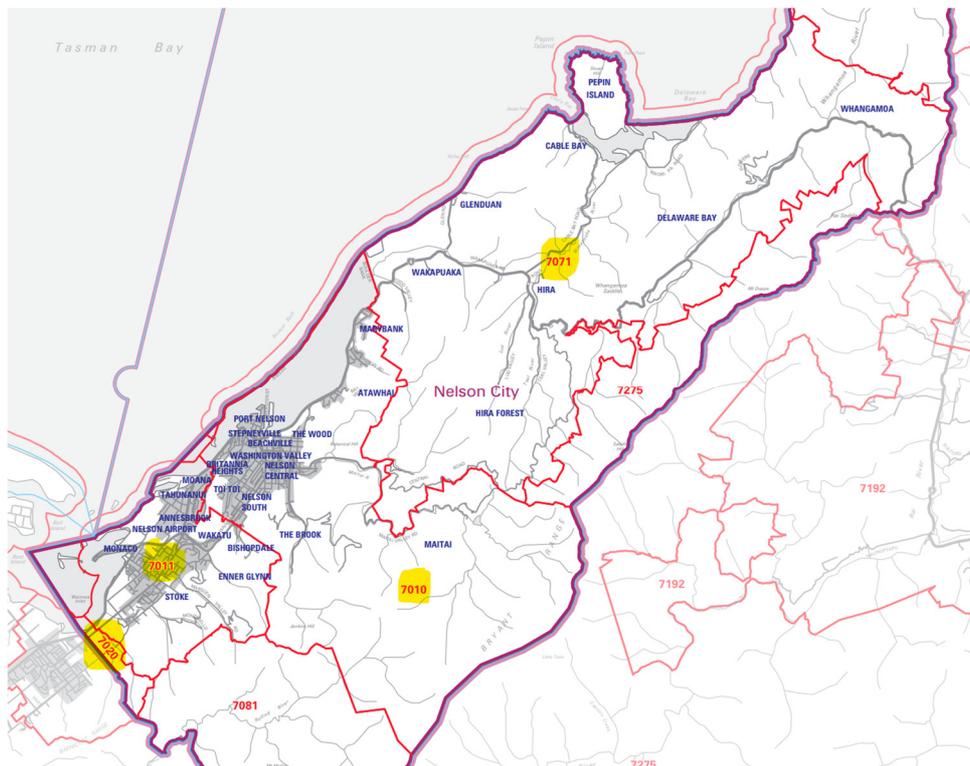
<sup>16</sup> The Application at [101].

<sup>17</sup> Commerce Commission's Sol (22 March 2021) at [32].

<sup>18</sup> For example, in response to a price increase for green waste some customers might use some of their waste in their gardens (as mulch or compost) or put some of it into their general waste. But equivalent options are not available to customers facing a price increase for general waste. We discuss these out of market constraints further as part of our green waste competition analysis.

<sup>19</sup> Commerce Commission's Sol (22 March 2021) at [34] onwards.

**Figure 1: Map of overlap postcodes (highlighted yellow)<sup>20</sup>**



36. In the Sol, we said we were still considering the most appropriate geographic market definitions for residential general and green waste. However, in our discussion of unilateral effects, we presented evidence that the Parties' rivals may be less competitively effective in the areas where the Parties overlap than in other parts of the Nelson-Tasman region. We also noted that rivals may find expansion or entry particularly difficult in Nelson.<sup>21</sup>

#### *The Parties' submissions*

37. In the Application, Can Plan submitted that there is a single Nelson-Tasman market for all relevant products.<sup>22</sup> In particular, Can Plan argued that:<sup>23</sup>

Consumers commonly buy residential and commercial waste services from suppliers that are based outside of their district council. For instance: Nelson-based Can Plan, Waste Management, Betta Bins and EnviroWaste serve customers in Richmond; and Tasman-based Smart services customers in Stoke and Nelson.

38. Can Plan further submitted that current suppliers each serve different total catchment areas. Can Plan's graphic, reproduced below as Figure 2, shows four suppliers serving Richmond and Stoke, but fewer parties serving Nelson.<sup>24</sup>

<sup>20</sup> Source: New Zealand Post Nelson City postcode map available at: <https://www.nzpost.co.nz/sites/nz/files/uploads/shared/postcodemaps/nelson-city.pdf>.

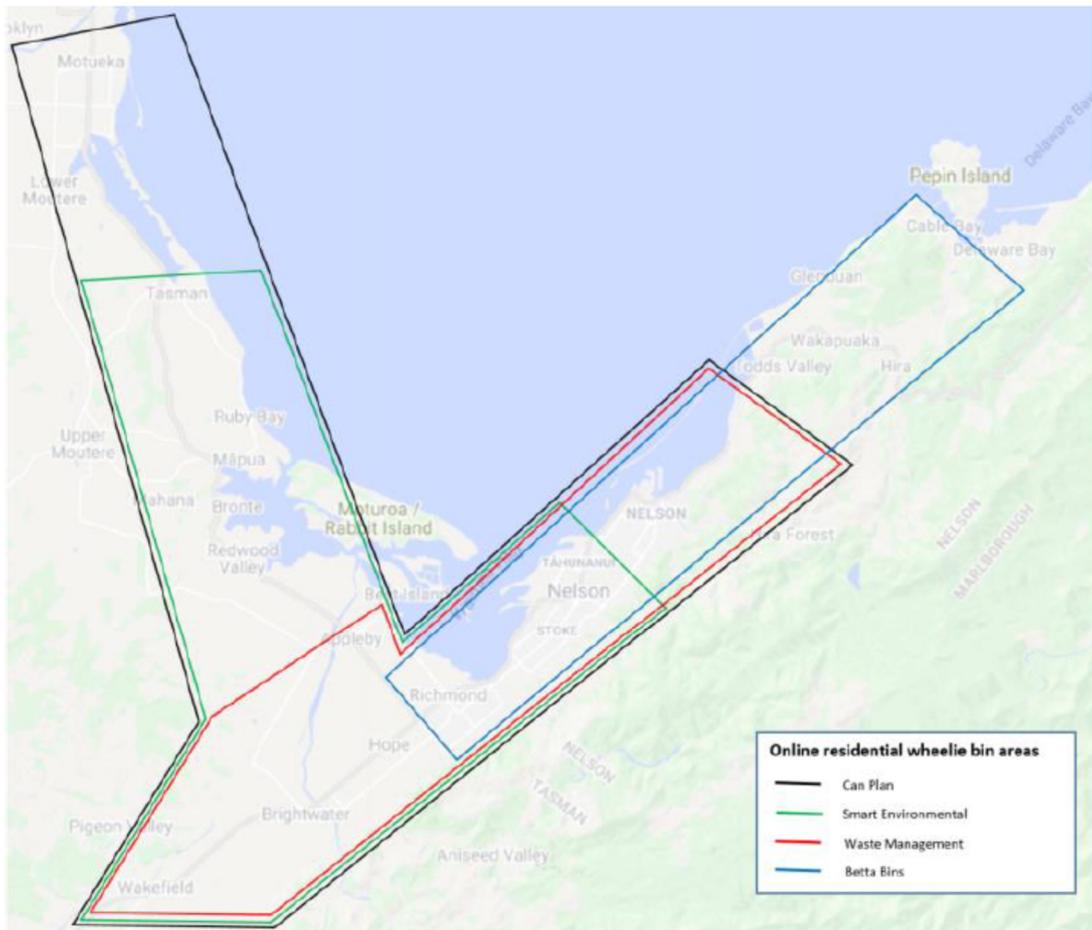
<sup>21</sup> Commerce Commission's Sol (22 March 2021) at [47] onwards.

<sup>22</sup> The Application at [91] onwards.

<sup>23</sup> Ibid at [92].

<sup>24</sup> Can Plan's submission on the Commission's Sol (7 April 2021) at [7].

**Figure 2: Catchment areas of suppliers**



39. However, Can Plan submitted that all areas across the Nelson-Tasman region face the same conditions of competition, and that all suppliers are constrained to price uniformly across the region.<sup>25</sup> Can Plan also argued that its rivals face the same constraints.<sup>26</sup>
40. Nelmac largely supports Can Plan’s arguments. Nelmac has submitted that:<sup>27</sup>
- 40.1 Richmond, Stoke and most of Nelson are in the same geographic market which, in its view, may extend across the Nelson-Tasman region;
  - 40.2 however, the furthest reaches of Nelson city to the north and east (up to and including Cable Bay) may be in a separate market served only by Betta Bins. Nelmac submits that this area, which largely coincides with postcode 7071, is sparsely populated and contains only around 700 homes.

<sup>25</sup> Ibid at [10].

<sup>26</sup> Ibid at [9]. In support of its argument that competition is uniformly strong across the region, including in Nelson, Can Plan also submitted a graphic [redacted]. Can Plan’s submission on the Commission’s Sol (7 April 2021) at [14]. This graphic is reproduced as Figure A1 in **Confidential Attachment A**.

<sup>27</sup> Nelmac’s submission on the Commission’s Sol (9 April 2021) at [9].

*Our preliminary assessment*

41. Based on the information we have collected to date, we consider that the geographic scope of the relevant markets is likely to be narrower than Nelson-Tasman.
42. We consider that geographic markets may be defined in two potential ways this case.
  - 42.1 At its broadest, we consider that the geographic scope of the general and green waste markets relevant to our assessment of the Proposed Acquisition reflects the area of overlap between the Parties (ie, Nelson/Stoke/Richmond).<sup>28</sup>
  - 42.2 An alternative approach is to define the geographic scope of the relevant markets more narrowly, as we discuss below.
43. The evidence before us indicates there are differences in competitive conditions across Nelson/Stoke/Richmond.<sup>29</sup> For example, competitive conditions in Nelson appear to differ significantly from competitive conditions in Richmond, where rivals may provide an effective constraint. We consider that currently and in future, even in response to moderate price increases post-acquisition, fewer suppliers rivaling the Parties are likely to operate and constrain the merged entity in Nelson than in Richmond. While it is impractical to estimate the exact boundary line or geographic point where competitive conditions change, we consider that this constraint is likely to diminish significantly as one progresses east away from Richmond and gets closer to Nelson.
44. Given the above, we consider that it may be more appropriate to define two distinct geographic markets for each of general and green waste. While the exact boundary between these two narrower geographic markets is unclear and we have not reached any conclusions on this point, we note that:
  - 44.1 the first geographic market starts with Richmond in the west and extends towards (and likely into) Stoke, and maybe even into Nelson South; and
  - 44.2 the second geographic market starts in Cable Bay in the east, extends into Nelson City and also extends towards (and potentially into) Stoke.

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<sup>28</sup> This broad market definition is consistent with previous decisions of the Commission in the waste sector where we have similarly defined the geographic market based on the area of overlap of the merging parties. In particular, in *Transpacific Industries/Ironbridge Capital* we defined a Nelson market for the collection of general waste in wheelie bins. *Transpacific Industries Group (NZ) Limited and Ironbridge Capital Pty Limited* (Commerce Commission Decisions 622-625, 31 October 2007). We note that the boundaries of any markets in Nelson were not examined in detail in that case, as that merger did not raise significant concerns in the collection of residential general waste (due to the presence of Can Plan and Betta Bins).

<sup>29</sup> In our competition assessment, we discuss in detail the evidence and our views on the competitive conditions that exist in Nelson/Stoke/Richmond, including the differences across the area.

45. We are still considering the broad and narrow options for defining the geographic markets in this case. However, it may be that it is not necessary to reach a definitive view on the boundaries of any geographic markets across Nelson/Stoke/Richmond. This is because, regardless of whether we define any geographic markets narrowly or broadly, we are able to consider any differences in the extent of competitive constraints across Nelson/Stoke/Richmond as part of our competition analysis. Our concerns about the Proposed Acquisition may also not be affected by the precise boundaries of any geographic markets.<sup>30</sup>
46. While we have collected data by postcode within Nelson/Stoke/Richmond and refer to this in our competition assessment, we do not consider that we need to define any geographic markets more narrowly by postcode. We consider that doing so would not materially assist our analysis.
47. We invite submissions on the above issues, in particular the geographic scope of the relevant markets.

### **With and without scenarios**

48. Assessing whether an SLC is likely requires us to:
- 48.1 compare the likely state of competition if the Proposed Acquisition proceeds (the scenario with the acquisition, often referred to as the factual) with the likely state of competition if it does not (the scenario without the acquisition, often referred to as the counterfactual); and to
- 48.2 determine whether competition is likely to be substantially lessened by comparing those scenarios.
49. With the Proposed Acquisition, Can Plan would acquire assets from Nelmac, including the Betta Bins residential general and green waste collection businesses.
50. Without the Proposed Acquisition, Can Plan submitted that Betta Bins would be sold to the next preferred bidder.<sup>31</sup> Nelmac submitted that absent the sale of Betta Bins to Can Plan, Nelmac [ ].<sup>32</sup>
51. [ ]<sup>33</sup>

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<sup>30</sup> While we disagree with the Parties that the geographic scope of the relevant markets is not as broad as Nelson-Tasman, if we are wrong on this point we do not consider it would materially affect our analysis or conclusions with respect to the Proposed Acquisition. In a wider Nelson-Tasman market, there would not be any materially different constraints on the merged entity.

<sup>31</sup> The Application at [87].

<sup>32</sup> Nelmac's submission on the Commission's Sol (9 April 2021) at [10.3.2].

<sup>33</sup> Ibid at [ ].

51.1 [ ]

51.2 [ ]

52. On the basis of the information collected to date, we consider that the most likely counterfactual is the sale of Betta Bins to another waste collection service provider, most likely [ ].<sup>34</sup>

### Summary of our competition concerns: horizontal unilateral effects

53. Horizontal unilateral effects arise when a firm merges with or acquires a competitor that would otherwise provide a significant competitive constraint (particularly relative to remaining competitors) such that a market participant can profitably increase prices above (and/or reduce quality below) the level that would prevail without the merger.
54. At this stage, we are not satisfied that the Proposed Acquisition would not be likely to result in an SLC in the supply of residential waste collection services in Nelson/Stoke/Richmond (noting that the effect of the Proposed Acquisition likely varies across Nelson/Stoke/Richmond).
55. Our concerns are:
- 55.1 the loss of competition from the Proposed Acquisition, which would combine the two main suppliers of residential general waste collection services in Nelson and potentially also in Stoke, and two of the major suppliers in Richmond. It would also combine the only two parties collecting green waste from residential customers in Nelson/Stoke/Richmond;
- 55.2 that remaining existing competitors, Smart and Waste Management, are unlikely to provide a sufficient constraint on the merged entity across the entirety of Nelson/Stoke/Richmond, as it appears unlikely that they would have the capacity and incentive to expand to sufficiently constrain the merged entity in all areas;
- 55.3 we consider that new entry by other suppliers into Nelson/Stoke/Richmond is not sufficiently likely to constrain the merged entity and prevent an SLC. While we have identified [ ] that might enter Nelson-Tasman in the future, we are not satisfied that the likelihood of this new entry would meet the LET test;

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<sup>34</sup> We note that [ ]. However, we cannot exclude the real chance that Betta Bins could be sold to an alternative purchaser. This is because [ ] as noted in **Confidential Attachment B**.

55.4 while Can Plan submits that the threat of the NCC and the TDC going to a full bag and wheelie bin rates-based waste collection is a constraint on its pricing and its behaviour, the evidence from the [ ];

55.5 while customers have alternatives for disposing of green waste, these out of market constraints are not sufficient to prevent an SLC in the collection of green waste; and

55.6 while price discrimination may pose reputational risks, we are not satisfied that the merged entity would not have the incentive to engage in price discrimination post-acquisition (and consider that the merged entity could manage the risks associated with doing so). The merged entity is likely to have an incentive to charge customers who have no effective alternative waste collection supplier higher prices than customers in other areas where there is more competition.

56. We explore these points further below in subsequent sections, discussing general waste and green waste markets separately.

### **General waste collection services**

57. For the reasons set out below, we are currently not satisfied that the Proposed Acquisition would not be likely to result in an SLC in the supply of residential general waste collection services in Nelson/Stoke/Richmond (noting that the effect of the Proposed Acquisition likely varies across Nelson/Stoke/Richmond).

### **The loss of competition with the Proposed Acquisition**

58. Can Plan has submitted that Betta Bins is not a market disruptor or a significant competitive presence in the supply of residential general waste collection services in Nelson-Tasman, arguing that Smart is Can Plan's closest competitor, to whom [ ].<sup>35</sup> The Parties also submitted that historic and current market shares are not indicative of the state of the market or the competition that exists (and by implication the competition that would be lost with the Proposed Acquisition).<sup>36</sup>

59. All the qualitative and quantitative evidence gathered throughout our investigation has confirmed that Can Plan is currently the largest supplier of residential waste collection services in Nelson/Stoke/Richmond, by a significant margin. We estimate that Can Plan's residential customers across Nelson/Stoke/Richmond are around [ ], with an estimated [ ]% of these being wheelie bin customers. Can Plan

<sup>35</sup> Can Plan's submission on the Commission's Sol (7 April 2021) at [11], [14] and [68].

<sup>36</sup> Can Plan's submission on the Commission's Sol (7 April 2021) at [5], [10] and [52]-[56] and Nelmac's submission on the Commission's Sol (9 April 2021) at [11.3] and [11.5].

currently has an estimated market share of [ ]% across Nelson/Stoke/Richmond.<sup>37</sup> With the Proposed Acquisition, Can Plan would further increase its market share and further entrench its position in the relevant markets.

60. Betta Bins currently has an estimated [ ] customers in Nelson/Stoke/Richmond. In contrast to Can Plan, only an estimated [ ]% of Betta Bins' customers are wheelie bin customers ([ ]% are bag customers). However, our assessment of the impact of the loss of Betta Bins has considered not just the current constraint that Betta Bins provides (under its ownership by Nelmac), but also the competition that that would be lost with the Proposed Acquisition compared to a counterfactual where Betta Bins is owned by another waste collection service supplier, most likely [ ].
61. For the reasons set out below, we are currently not satisfied that the loss of Betta Bins would not be detrimental to competition in the supply of residential general waste collection services in Nelson/Stoke/Richmond.

*The constraint currently provided (and provided to date) by Betta Bins that would be lost*

62. Across the entirety of Nelson/Stoke/Richmond, Betta Bins has a market share of [ ]% and is the second largest supplier. In Nelson, Betta Bins has a significantly higher market share and likely provides a greater existing constraint on Can Plan than in other parts of Nelson/Stoke/Richmond. In this regard, we note that:
- 62.1 between them, Can Plan and Betta Bins have almost all of customers in postcode 7071 to the north and east of Nelson, which is consistent with the Parties' own submissions (given the largely rural nature of the postcode). With the Proposed Acquisition, there would be substantial aggregation in this part of Nelson, with the merged entity having an estimated market share of [ ]%, compared to the [ ]% share that Can Plan has currently;
- 62.2 a large portion of Betta Bins' customers ([ ]%) are located in postcode 7010 (Nelson City), where it is the main competitor to Can Plan. With the Proposed Acquisition, there would be significant aggregation in Nelson City, with the merged entity having an estimated market share of [ ]%, compared to the [ ]% share that Can Plan has currently;
- 62.3 Betta Bins also has a significant number of customers in postcode 7011 (Stoke), where it is currently a major competitor to Can Plan. With the Proposed Acquisition, there would be lower, but not immaterial aggregation in Stoke, with the merged entity having an estimated market share of [ ]%, compared to the [ ]% share that Can Plan has currently; and
- 62.4 Betta Bins has a small number of customers in postcode 7020 (Richmond), where Smart is Can Plan's closest competitor, as opposed to Betta Bins. The aggregation with the Proposed Acquisition in Richmond would be low, with

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<sup>37</sup> Market share data is set out in Tables A1 and A2 in **Confidential Attachment A**. We note that for Can Plan and Betta Bins, the data also includes green waste collection.

the merged entity having an estimated market share of [ ]%, compared to the [ ]% share that Can Plan has currently.

63. As part of our assessment of the constraint provided by Betta Bins, we have also examined qualitative and quantitative information on customer switching and price matching. Can Plan provided us with data on the instances in which it had price matched competitors in the last three years. Can Plan also provided us with data on the suppliers to whom it has lost wheelie bin customers in the last three years (where customers told Can Plan who they were switching to).<sup>38</sup>
64. Since 2010, Can Plan has offered a “Best Service, Best Price Guarantee” to customers. Prior to 2010, Can Plan also had a “match any competitor’s price” policy.<sup>39</sup> Can Plan advised that it increased its advertising of its Best Service, Best Price Guarantee in response to Smart’s pricing in the market (in particular Smart’s discount offers for the first 12 months), rather than in response to competition from Betta Bins.<sup>40</sup> Can Plan also told us that ten years ago, Betta Bins offered special price deals via Grab One, but no longer does so. Can Plan did not cite price as a reason that it wins customers off Betta Bins currently, and told us that customers switch from Betta Bins to Can Plan seeking better service.<sup>41</sup>
65. Until 2018, Nelmac advised that  
[  
  
  
] .<sup>42</sup>
66. Switching data provided to us by Can Plan did not include any data on the number of customers switching from Betta Bins to Can Plan (or vice versa).<sup>43</sup> Nelmac was unable to provide us any switching data. Given this, we do not have any evidence to say with any certainty how frequently residents may switch between the Parties.
67. Notwithstanding the above information from the Parties, evidence indicates that Betta Bins does constrain the pricing of Can Plan to some extent. The price matching data we have seen shows that  
[  
  
  
] .

<sup>38</sup> This data is set out in Table A3 in **Confidential Attachment A** and is supplemented by Figure A1.

<sup>39</sup> <https://canplan.co.nz/pages/ourstory.aspx>.

<sup>40</sup> Commerce Commission interview with Can Plan (21 April 2021). We note that Can Plan’s price matching response only applies to individual customers who request it direct from Can Plan, rather than leading to an across-the-board reduction in the prices it advertises or offers to customers generally.

<sup>41</sup> Commerce Commission interview with Can Plan (21 April 2021).

<sup>42</sup> E-mail from Nelmac to the Commerce Commission (5 February 2021).

<sup>43</sup> [ ]

68. We have also examined trends in customer numbers. Data provided by Betta Bins indicates that across Nelson/Stoke/Richmond between 2018 and 2020, it grew its number of wheelie bin customers by [ ]% and its bag customers by [ ]%. In terms of wheelie bin customers, Betta Bins [ ]. The fact that Betta Bins' customer numbers have grown is further evidence of the loss of competition that would occur with the Proposed Acquisition.
69. During our investigation we received a number of submissions from residents in Nelson-Tasman. Some of these submissions raised concerns about the loss of competition with the Proposed Acquisition and what this would mean for the prices Can Plan charges for waste collection services.<sup>44</sup>

*The constraint that would be lost from Betta Bins under new ownership in the counterfactual*

70. Notwithstanding the constraint and competition that Betta Bins has provided on Can Plan to date, what is most relevant to our assessment of the competition that would be lost with the Proposed Acquisition (in the factual) is how competition in the factual compares to that in a counterfactual where Betta Bins is owned by another waste collection service supplier, most likely [ ]. This is because, if a new owner of Betta Bins were to operate the business more aggressively than Nelmac is currently, then the competition lost with the Proposed Acquisition is likely to be greater.
71. [ ] would be likely to operate Betta Bins more aggressively than Nelmac does currently, including by likely [ ]. This could similarly be the case where Betta Bins is owned by another waste collection service supplier.
72. The acquisition of Betta Bins would make [ ]. This is likely to mean that Can Plan would face substantially increased competition for customers [ ], in the counterfactual than it would with the Proposed Acquisition, to the benefit of residents in those areas.
73. We invite submissions on the above points and other matters relevant to our assessment of the loss of competition with the Proposed Acquisition.

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<sup>44</sup> Public versions of these submissions are available at [https://comcom.govt.nz/data/assets/pdf\\_file/0020/243803/Submissions-on-Can-Plan-Nelson-Limited-and-Nelmac-Limited-Statement-of-Preliminary-Issues-February-2021.pdf](https://comcom.govt.nz/data/assets/pdf_file/0020/243803/Submissions-on-Can-Plan-Nelson-Limited-and-Nelmac-Limited-Statement-of-Preliminary-Issues-February-2021.pdf) and [https://comcom.govt.nz/data/assets/pdf\\_file/0025/252682/Anonymous-Submission-on-the-Statement-of-Issues-3-April-2021.pdf](https://comcom.govt.nz/data/assets/pdf_file/0025/252682/Anonymous-Submission-on-the-Statement-of-Issues-3-April-2021.pdf).

### **Constraint from existing competition (Smart and Waste Management)**

74. In respect of the level of competitive constraint provided by the Parties' rivals, Can Plan submits that:
- 74.1 Smart is Can Plan's closest competitor in the Nelson-Tasman area.<sup>45</sup> Smart actively targets Can Plan's customers,<sup>46</sup> and the fact that Smart has a national presence means it can quickly and easily expand;<sup>47</sup> and
- 74.2 Waste Management is a national waste collection business and is a significant competitor in Nelson-Tasman, which could quickly and easily expand.<sup>48</sup>
75. The Parties further submitted that historic and current market shares reflect customer stickiness and are not indicative of the state of the market or the competition that exists or the constraints that Can Plan faces from Smart and Waste Management. The Parties noted that many residential customers are sticky with customers remaining with their chosen supplier for a long time, market shares only capture decisions that customers have made in the past (when Can Plan and Nelmac were the only suppliers), and do not reflect strong competition across the Nelson-Tasman region. The Parties consider that there are no barriers to Smart and Waste Management expanding in Nelson-Tasman.<sup>49</sup>
76. For the reasons set out below, we are currently not satisfied that Smart and Waste Management would be able to expand to sufficiently constrain the merged entity and prevent an SLC in the relevant markets.

#### *Smart*

77. While Smart is a price aggressive competitor that Can Plan is price matching across Nelson/Stoke/Richmond and adjacent areas, based on the reasons and evidence set out below, we are currently not satisfied that expansion by Smart is likely on its own to be sufficient to prevent an SLC across the entirety of Nelson/Stoke/Richmond.
78. With respect to the constraint provided by Smart, Can Plan told us that:

78.1 [

];<sup>50</sup>

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<sup>45</sup> The Application at [119]; Chapman Tripp letter (5 March 2021) at [7] and Can Plan's submission on the Commission's Sol (7 April 2021) at [11]-[14].

<sup>46</sup> The Application at [120].

<sup>47</sup> The Application at [124], Chapman Tripp letter (5 March 2021) at [7.7] and Can Plan response to Sol (7 April 2021) at [30].

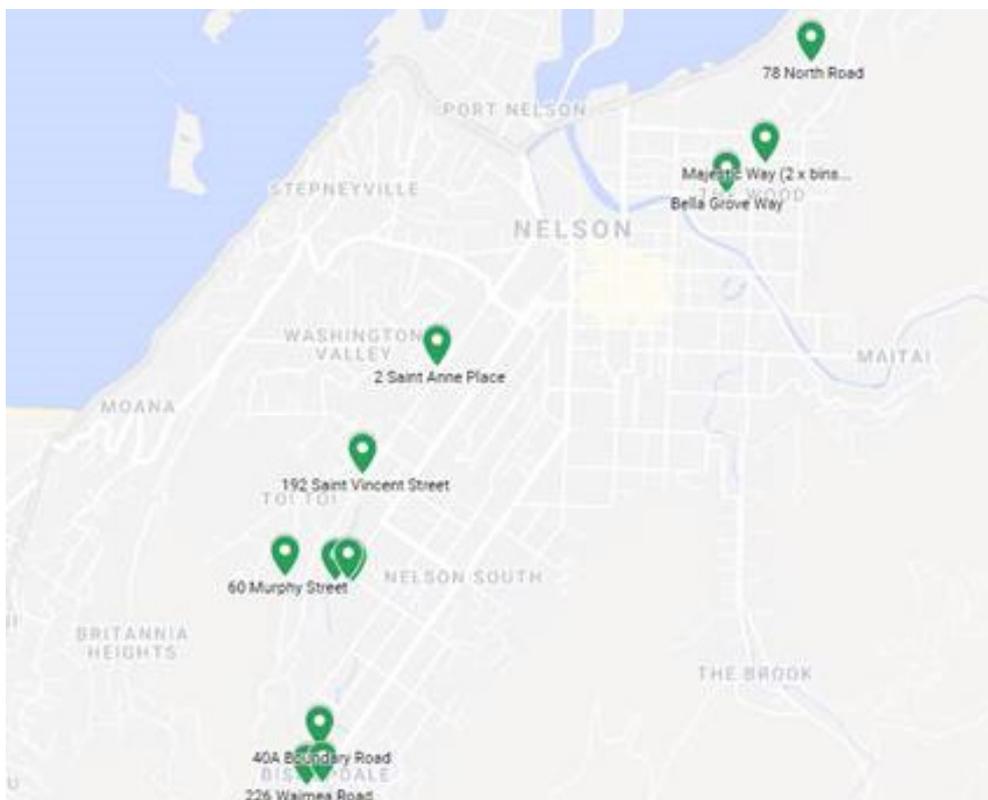
<sup>48</sup> The Application at [58], [143]; Chapman Tripp letter (5 March 2021) at [8] and Can Plan Submission on the Commission's Sol (7 April 2021) at [16]-[24] and [29]-[30].

<sup>49</sup> Can Plan's submission on the Commission's Sol (7 April 2021) at [5], [10] and [52]-[56] and Nelmac's submission on the Commission's Sol (9 April 2021) at [11.3] and [11.5].

<sup>50</sup> Commerce Commission interview with Can Plan (21 April 2021).

- 78.2 Smart circulates flyers in Richmond, Stoke, Brightwater and Motueka, but Can Plan does not know if Smart has done so in Nelson;<sup>51</sup>
- 78.3 Can Plan has seen Smart wheelie bins/trucks on several streets within Nelson, but we note that more of the streets cited to us are in Nelson South than in Nelson City. Can Plan provided us with photos of Smart wheelie bins on streets and a map showing the location of these bins (set out as Figure 3);<sup>52</sup> and

**Figure 3: Location of Smart bins observed in Nelson**



- 78.1 when Can Plan notifies price increases to its customers (due to an increase in landfill and other costs), it sees its customers being targeted by Smart with advertising flyer drops, but without any change in Smart's pricing.<sup>53</sup> It is unclear from the information we currently have the extent to which Can Plan has lost customers as a direct result of Smart's response to Can Plan's price increases, or the extent to which Can Plan has price matched Smart to retain customers in such circumstances.

<sup>51</sup> Ibid.

<sup>52</sup> Ibid and e-mail from Can Plan to the Commerce Commission (5 May 2021).

<sup>53</sup> Commerce Commission interview with Can Plan (21 April 2021).

79. Smart currently has an estimated [ ] customers across Nelson/Stoke/Richmond, significantly less than that of Can Plan and Betta Bins. An estimated [ ]% of Smart’s customers are wheelie bin customers (with [ ]% being TDC bag customers in Richmond). Across the entirety of Nelson/Stoke/Richmond, Smart has a market share of [ ]%.<sup>54</sup> However, Smart’s market share varies substantially across different parts of Nelson/Stoke/Richmond. In this regard, we note that:

79.1 the majority ([ ]%) of Smart’s customers are in postcode 7020 (Richmond), where Smart has the TDC contract to collect rubbish bags (and recycling). This is in turn reflected in Smart’s market share in Richmond, which we estimate to be [ ]% and likely reflects the competitive constraint that Smart provides in Richmond;

79.2 after Richmond, Smart’s largest presence is currently in postcode 7011 (Stoke), where it has [ ] customers and a [ ]% market share. Because Stoke is adjacent to Richmond, it is an area that Smart [ ]. Compared to Nelson, Stoke may be an area that Smart can more easily expand into and in which Smart may provide a greater degree of competitive constraint;

79.3 Smart has a very small market share in postcode 7010 (Nelson City) currently, of less than [ ]%; and

79.4 Smart has no presence at all (ie, no customers) in postcode 7071 to the north and east of Nelson.

80. In assessing the competitive constraint Smart is likely to provide on the merged entity, we have taken into account customer switching and price matching data provided by Can Plan. This data shows that [ ] (which is consistent with the Parties’ submissions that Smart is a strong competitor).<sup>55</sup> However, we note that the data (while incomplete) also shows that:<sup>56</sup>

80.1 [ ];

<sup>54</sup> For data cited here and in sub-paragraphs below, see Tables A1 and A2 in **Confidential Attachment A**.

<sup>55</sup> As noted earlier, this data is set out in Table A3 in **Confidential Attachment A**.

<sup>56</sup>

[ ]

80.2 [ ]; and

80.3 the data (when compared to data on estimated customer numbers) also suggests the rate of customer churn in the relevant markets may be low and that the proportion of customers that benefit from Can Plan's price matching policy may also be low (both less than [ ]%). This supports the Parties' own submissions that customers are sticky, which may be a barrier to expansion.

81. In addition to the above data, Can Plan submitted a graphic [ ].<sup>57</sup> We note that if postcode boundaries were overlaid on this graphic, the evidence that it presents with respect to Smart is broadly consistent with the customer switching and price matching data provided by Can Plan and the points noted above. However, the graphic also shows:

81.1 [ ];

81.2 [ ]; and

81.3 [ ].

82. When asked about Can Plan's price-matching behaviour, Smart told us that [ ]. In Smart's view, [ ].<sup>58</sup> Smart advised that [ ].<sup>59</sup>

83. The market share, price matching and customer switching evidence above suggests there are differences in competitive conditions, and that the constraint provided by Smart is not uniform, across Nelson/Stoke/Richmond. Current competitive conditions in Nelson appear to differ significantly from the competitive conditions in

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<sup>57</sup> Can Plan's submission on the Commission's Sol (7 April 2021) at [14]. This graphic is reproduced as Figure A1 in **Confidential Attachment A**. We note that the data on which the graphic is based may include more up to date customer switching and price matching data than what we received earlier this year.

<sup>58</sup> Commerce Commission interview with Smart (25 February 2021).

<sup>59</sup> Commerce Commission interview with Smart (25 February 2021), e-mail from Smart to the Commerce Commission (20 April 2021) and e-mail from Smart to the Commerce Commission (17 February 2021).

Richmond, where evidence suggests the constraint provided by Smart is materially greater. Outside of Richmond and particularly in Nelson, Can Plan's price-matching of Smart may represent a response to intermittent competition there and, plausibly, also strategic behaviour to dissuade expansion into an area with different competitive conditions. Based on this evidence, we do not consider that Smart is currently a strong constraint across all of Nelson/Stoke/Richmond.

84. We have also examined trends in customer numbers. Data provided by Smart shows that across Nelson/Stoke/Richmond between 2018 and 2020, it has grown its number of wheelie bin customers significantly (by [ ]%).

[

] This growth in Smart's customer numbers is reflective of how aggressively Smart has looked to compete and grow in recent years, but we note that [ ].

85. We acknowledge that Can Plan sees Smart as a threat and as a supplier that is likely to expand. We have considered whether Smart may provide greater constraint in the future, including if it were to expand further. In particular, we have tested whether, in response to moderate price increases post-acquisition, Smart would be likely to expand sufficiently and profitably, so as to constrain the merged entity across all of Nelson/Stoke/Richmond.

86. Currently we are not satisfied that expansion by Smart is likely to occur on such a scale as to constrain the merged entity and prevent an SLC across the entirety of Nelson/Stoke/Richmond. Post-acquisition Can Plan would have a very high market share in parts of Nelson/Stoke/Richmond. In response to moderate price increases, we consider that Smart may be able to expand profitably and constrain the merged entity, but only in some parts of Nelson/Stoke/Richmond (because [ ], in accordance with the evidence from Smart set out below).

87. Smart is nationally well-resourced, and [

].<sup>60</sup>

We consider that Smart is most likely to expand and provide a greater constraint on the merged entity within and close to its existing collection routes (concentrated in Richmond and, to a lesser degree, Stoke), from which it can more easily expand. Outside of these areas (or the areas adjacent to them), Smart is less likely to expand, as it is likely to face difficulties in attracting a sufficient number of customers and targeting an area with enough customers to establish a new residential waste collection run to make expansion profitable, even in response to a SSNIP.

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<sup>60</sup> Commerce Commission interview with Smart (27 January 2021).

88. The relevant evidence from Smart that supports the above is summarised below.<sup>61</sup>

88.1 [ ]<sup>62</sup>

88.2 [ ]<sup>63</sup>

88.3 [ ]<sup>64</sup>

88.4 In the majority of postcode 7010 (Nelson City), including the majority of the locations marked in Figure 3, Smart’s service shows as unavailable on its website. A mobile phone number and e-mail address is provided for potential customers to contact Smart. Smart advised [ ]<sup>65</sup>

88.5 [ ], even in response to a SSNIP.<sup>66</sup>

88.6 [ ].<sup>67</sup> When asked if it would use its new truck to expand its residential services further, Smart said [ ]<sup>68</sup>

88.7 [ ]

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<sup>61</sup> In **Confidential Attachment B**, we set out a more detailed summary of the evidence we have gathered from Smart on expansion.

<sup>62</sup> Commerce Commission interview with Smart (25 February 2021) and e-mail from Smart to the Commerce Commission (17 February 2021). We note that Smart’s [ ]

<sup>63</sup> Commerce Commission interview with Smart (25 February 2021) and e-mail from Smart to the Commerce Commission (17 February 2021).

<sup>64</sup> Commerce Commission interview with Smart (25 February 2021).

<sup>65</sup> E-mail from Smart to the Commerce Commission (20 April 2021).

<sup>66</sup> Commerce Commission interview with Smart (25 February 2021).

<sup>67</sup> Ibid.

<sup>68</sup> E-mail from Smart to the Commerce Commission (20 April 2021).

].<sup>69</sup> Post-acquisition, the pool of customers that Smart could expect to win may decline. It is possible that Smart may decide to change its pricing or expansion strategy if it decides that it cannot win more customers and market share.

89. We invite submissions on the competitive constraint likely to be provided by Smart post-acquisition.

#### *Waste Management*

90. Waste Management currently has [ ] customers in Nelson/Stoke/Richmond (which are all wheelie bin customers) and is the smallest of the existing suppliers. Waste Management has an estimated market share of [ ]% across the entirety of Nelson/Stoke/Richmond. Like Smart, Waste Management has no presence at all in postcode 7071 to the north and east of Nelson. Waste Management's presence in each of postcodes 7010 (Nelson City), 7011 (Stoke) and 7020 (Richmond) is fairly similar and we estimate that Waste Management has a market share of [ ]% in each postcode.<sup>70</sup>
91. For the reasons discussed below, we consider that Waste Management is unlikely to expand to any material degree in the supply of residential general waste collection services in Nelson/Stoke/Richmond. The constraint currently provided by Waste Management is also unlikely to be sufficient to prevent an SLC.
92. In terms of the constraint currently provided by Waste Management, we note that Waste Management's website suggests that it offers residential waste collection services across all of Nelson City, Stoke and Richmond at prices comparable to Can Plan. However, this overstates the current competitiveness of Waste Management and the constraint it currently provides.
- 92.1 Waste Management only offers wheelie bin waste collection services. It is not competing with Can Plan, Betta Bins and Smart for customers that opt to use rubbish bags for general waste.
- 92.2 Once the special price deals offered by other suppliers are taken into account, Waste Management's wheelie bin pricing is likely to be materially higher than the pricing of those other suppliers.  
[ ]<sup>71</sup> Can Plan said Waste Management used to drop promotional flyers to houses, but no longer does so,<sup>72</sup>

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<sup>69</sup> Ibid. Smart's win and loss data for 2021 is set out in Table A4 in **Confidential Attachment A**.

[ ]

<sup>70</sup> For data cited here, see Tables A1 and A2 in **Confidential Attachment A**.

<sup>71</sup> E-mail from Waste Management to the Commerce Commission (28 April 2021).

<sup>72</sup> Commerce Commission interview with Can Plan (21 April 2021).

suggesting that it has seen a decline in competitive constraint from Waste Management.

92.3 Waste Management commented to us that [redacted],<sup>73</sup> and we note that data it provided to us shows that between 2018 and 2020 the number of customers that Waste Management had across Nelson/Stoke/Richmond [redacted].<sup>74</sup>

92.4 [redacted] ]<sup>75</sup>

93. Further evidence from Waste Management relevant to the constraint it provides and on the likelihood of it expanding is summarised below.<sup>76</sup>

93.1 [redacted] ]<sup>77</sup>

93.2 [redacted] ]<sup>78</sup>

93.3 [redacted] ]<sup>79</sup>

93.4 [redacted] ]<sup>80</sup>

93.5 [redacted]

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<sup>73</sup> Commerce Commission interview with Waste Management (8 January 2021).  
<sup>74</sup> E-mail from Waste Management to the Commerce Commission (24 February 2021).  
<sup>75</sup> E-mail from Waste Management to the Commerce Commission (28 April 2021).  
<sup>76</sup> In **Confidential Attachment B**, we set out a more detailed summary of the evidence we have gathered from Waste Management on expansion.  
<sup>77</sup> E-mail from Waste Management to the Commerce Commission (28 April 2021).  
<sup>78</sup> Commerce Commission interview with Waste Management (1 April 2021).  
<sup>79</sup> E-mail from Waste Management to the Commerce Commission (28 April 2021).  
<sup>80</sup> Commerce Commission interview with Waste Management (1 April 2021).

93.6 [

].<sup>82</sup>

94. We invite submissions on the competitive constraint likely to be provided by Waste Management post-acquisition.

**The constraint from entry does not satisfy the LET test**

95. In assessing whether the Proposed Acquisition would be likely to have the effect of substantially lessening competition, we have also assessed whether, if prices increase and/or quality decreases, new competitors would enter and effectively compete with the merged entity. The mere possibility of entry is insufficient for us to conclude that it would constrain the merged entity.<sup>83</sup> We assess whether entry by new competitors is likely to be sufficient in extent in a timely fashion to constrain the merged entity and prevent an SLC. This is referred to as the 'LET test'.<sup>84</sup>
96. In the Application and in its response to our Sol, Can Plan submitted that EnviroWaste could quickly and easily begin supplying wheelie bins/bags in Nelson-Tasman.<sup>85</sup> Additionally, Can Plan submitted in the Application that new competitors (eg, Low Cost Bins) could easily enter the Nelson-Tasman area to constrain the merged entity post-acquisition.<sup>86</sup>
97. Nelmac submitted that:<sup>87</sup>
- 97.1 barriers to entry/expansion are limited/not likely to be high in the urban areas of Stoke/Richmond/Nelson for well-resourced parties such as Waste Management, EnviroWaste and Smart;

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<sup>81</sup> E-mail from Waste Management to the Commerce Commission (28 April 2021).

<sup>82</sup> Commerce Commission interview with Waste Management (1 April 2021).

[

]

<sup>83</sup> *Mergers and Acquisitions Guidelines* above n5 at [3.98].

<sup>84</sup> *Ibid* at [3.96].

<sup>85</sup> The Application at [143] and Can Plan's submission on the Commission's Sol (7 April 2021) at [26-27].

<sup>86</sup> The Application at [143] and [146-7].

<sup>87</sup> Nelmac's submission on the Commission's Sol (9 April 2021) at [9.5], [11.14] and [11.20]-[11.31].

- 97.2 it is highly likely that the north and east of Nelson (areas with low population density), will continue to be served by one supplier, as entry into this area is likely to be less attractive; and
- 97.3 route density is only daunting for new entrants or expanding firms if margins on collection are low.
98. However, on the evidence currently before us, we are not satisfied that competition from new entry in Nelson/Stoke/Richmond will be sufficient to constrain the merged entity and prevent an SLC. We consider that the conditions of entry are moderate to high. We currently consider that new entry by other suppliers into Nelson/Stoke/Richmond is not sufficiently likely to constrain the merged entity.

#### *Conditions of entry*

99. The expected profitability of entry depends on the costs and risks associated with entry. Such conditions can reduce the likelihood, extent and/or timeliness of entry, and are relevant to the LET test.<sup>88</sup>
100. For the reasons set out below, we consider that the conditions of entry are moderate to high.
101. We acknowledge that some of the costs of entry may not be prohibitive. For example, the costs of vehicles, licensing, wheelie bins, bags and personnel may be moderate compared to the total revenues available across Nelson/Stoke/Richmond. There are also no barriers in terms of access to landfills in Nelson-Tasman, as these are owned and operated jointly by the NCC and the TDC.
102. However, in our view, other factors make new entry (and expansion) difficult, costly and risky compared to the market opportunities available. New entrants are likely to face barriers in competing to win customers and market share off existing suppliers with economies of scale and very low incremental costs. We note the Parties' own submissions that customers are sticky (supported by data on low levels of customer switching), which may also be a barrier to entry. There may also be strategic barriers to new entry, including due to price matching by existing suppliers (eg, Can Plan's "Best Service, Best Price Guarantee").

#### *LET test assessment*

103. For the reasons set out below, we consider that new entry by other suppliers into Nelson/Stoke/Richmond is not sufficiently likely to constrain the merged entity and prevent an SLC. While we have identified [ ] that might enter Nelson-Tasman in the future, we are not satisfied that the likelihood of new entry would meet the LET test. This is because we have not identified any parties who have undertaken any evaluation or planning around entry into Nelson/Stoke/Richmond, which is relevant to our assessment of whether new entry is likely and also whether entry might occur in a timely fashion.

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<sup>88</sup> *Mergers and Acquisitions Guidelines* above n5 at [3.107].

104. We interviewed a number of waste companies to understand whether they might be potential new entrants into Nelson/Stoke/Richmond (including in response to a price rise post-acquisition). The parties we interviewed included some waste companies operating in Nelson-Tasman, but not currently offering residential general waste collection services in Nelson/Stoke/Richmond and waste companies operating in other regions of New Zealand (both companies operating across multiple regions and within a single region). In summary, the evidence from these parties is as follows:<sup>89</sup>

104.1 EnviroWaste

[  
 ],<sup>90</sup>

104.2 JJ Richards (a multi-regional waste company like Waste Management and EnviroWaste)

[  
 ],<sup>91</sup>

104.3 Northland Waste/Low Cost Bins

[  
 ],<sup>92</sup>

104.4 Earthcare Environmental [  
 ],<sup>93</sup>

104.5 Motueka Bin Hire (a family-owned business that provides wheelie bin and skip collection services in Motueka and the surrounding area)

[  
 ],<sup>94</sup> and

104.6 Total Waste Solutions (a family-owned Canterbury waste business)

[  
 ],<sup>95</sup>

105. We have been told that for many parties, the threat of councils moving to a rates-based system discourages, and has an impact on the likelihood of, them entering (ie, it is a barrier to entry). As discussed below, we are still considering whether we can have a combined constraint of a threat of entry and the threat of moving to a rates-based collection service, or whether these constraints are mutually exclusive.

106. We invite submissions on the constraint likely to be provided by potential new entry.

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<sup>89</sup> In **Confidential Attachment B**, we set out a more detailed summary of the evidence we have gathered from third parties on entry.

<sup>90</sup> Commerce Commission interview with EnviroWaste (3 March 2021).

<sup>91</sup> Commerce Commission interview with JJ Richards (15 April 2021).

<sup>92</sup> Commerce Commission interview with Northland Waste ((14 April 2021).

<sup>93</sup> Commerce Commission interview with Earthcare Environmental (22 April 2021).

<sup>94</sup> Commerce Commission interview with Motueka Bin Hire (20 April 2021).

<sup>95</sup> Commerce Commission interview with Total Waste Solutions (19 April 2021).

### Constraint from the threat of councils moving to rates-based collection contracts

107. The Parties have argued that all competitors face a strong constraint from the potential for the NCC and the TDC to move to a rates-based waste collection model, and the merged entity would continue to face this constraint post-acquisition.<sup>96</sup> Can Plan has submitted that the NCC and/or the TDC could change to rates-based waste collection (in particular rates-based wheelie bin collection) at any time and this risk requires Can Plan to offer services that are affordable and environmentally focussed.<sup>97</sup>
108. We continue to investigate the extent to which this constraint is likely to provide an effective discipline on the merged entity.
109. Based on current evidence, we agree that the risk of the NCC (and/or the TDC) going to a full bag and wheelie bin rates-based single contractor collection model provides some constraint on pricing in the market. However, the risk of the NCC (and/or the TDC) going to rates-based wheelie bin collection is a threat that already exists and [ ]. Given this, we are currently not satisfied that any constraint from councils moving to rates-based collection would be a sufficient constraint to prevent an SLC. We note that:
- 109.1 a number of waste companies operating in Nelson-Tasman and in other regions see councils moving to a rates-based model as a large risk to residential collection markets (which as noted above discourages, and has an impact on the likelihood of, entry/expansion by some suppliers);<sup>98</sup>
- 109.2 in 2009 the TDC consulted on a rates-based wheelie bin collection (moving to a three-bin system), but abandoned the plan in response to significant public opposition.<sup>99</sup> Can Plan strongly opposed the TDC's proposal, and dropped pamphlets across the Tasman region which urged the public to oppose the TDC's plan, because of the threat it posed to local waste collection businesses, including its own.<sup>100</sup> The TDC [ ].<sup>101</sup>
- 109.3 if the NCC did move to a rates-based collection model and Can Plan was unsuccessful in winning this contract, its business (which is solely waste and recycling collection services in Nelson-Tasman) would be destroyed;

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<sup>96</sup> Can Plan's submission on the Commission's Sol (7 April 2021) at [10] and Nelmac's submission on the Commission's Sol (9 April 2021) at [11.29]-[11.30] & [11.32]-[11.33].

<sup>97</sup> Can Plan's submission on the Commission's Sol (7 April 2021) at [32]-[37] and interview with Can Plan (21 April 2021).

<sup>98</sup> Refer to the evidence from third parties set out in **Confidential Attachment B**.

<sup>99</sup> Commerce Commission interview with Can Plan (21 April 2021).

<sup>100</sup> E-mail from Can Plan to the Commerce Commission (5 May 2021).

<sup>101</sup> Commerce Commission interview with the TDC (12 February 2021)

109.4 The NCC stated to us that

[

].<sup>102</sup> However, we consider that if the merged entity was to raise prices over time in a gradual and subtle way, this may be less likely to cause the NCC (or the TDC) concern and prompt them to consider rates-based collection;<sup>103</sup> and

109.5 as Nelmac submitted,<sup>104</sup> if the NCC were to look to move to a rates-based model, there would likely be a lengthy lead time, including a consultation period, before this came into effect. This is relevant to the constraint that the threat of moving to a rates-based collection would provide on the merged entity in the short-term.

110. As noted above, we are still considering whether there can be a combined constraint of a threat of entry and the threat of councils moving to a rates-based collection service, or whether they are mutually exclusive. If the threat of rates-based collection is perceived as credible, entry will likely be deterred because the likelihood of profitably entering decreases (and therefore they are mutually exclusive constraints). However, it may be that the threat of rates-based waste collection is a greater disincentive to de novo entry than to expansion by players already in the market – in which case, they may not be necessarily mutually exclusive constraints.
111. We invite submissions on the constraint provided by the threat of councils moving to rates-based collection contracts.

#### **Can Plan's ability/incentive to price discriminate post-acquisition**

112. For the reasons outlined below, we consider that Can Plan has the ability to price discriminate and we are currently not satisfied that the merged entity would not have an incentive to exercise market power by engaging in price discrimination post-acquisition. The merged entity is likely to have an incentive to charge customers who have no effective alternative waste collection supplier higher prices than customers in other areas where there is more competition.

#### *Can Plan's submissions*

113. Can Plan has argued that it has no ability to engage in a deliberate price discrimination strategy between residential customers in Nelson-Tasman, arguing that such a strategy would lead to a significant and permanent loss of goodwill in the community that it has worked hard to establish. It has also noted that such a strategy would risk triggering the TDC and the NCC to implement rates-based waste collection

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<sup>102</sup> Commerce Commission interview with the NCC (10 February 2021) and Commerce Commission interview with the NCC (9 April 2021).

<sup>103</sup> Refer to price discrimination section below for further discussion on this point.

<sup>104</sup> Nelmac's submission on the Commission's Sol (9 April 2021) at [11.29].

services, and risk residents choosing to use Smart or Waste Management for general waste collection services.<sup>105</sup>

114. Can Plan submitted that all areas across the Nelson-Tasman region face the same conditions of competition, and that all suppliers are constrained to price uniformly across the region. In particular, Can Plan argued that:<sup>106</sup>

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, and customer loyalty is the backbone of Can Plan’s business.

115. Can Plan further submitted that it has no incentive to price discriminate as:

115.1 price discrimination may be very unpopular with Can Plan’s customer base and could be difficult to manage. As a result, Can Plan’s advertised pricing is currently the same across all of Nelson-Tasman, regardless of the extent of competition,<sup>107</sup> although we consider that it is possible for suppliers to price discriminate in practice (as noted below); and

115.2 Can Plan is unlikely to jeopardise the reputation and business it has built up over many years, given the potential for this to trigger the NCC (and/or the TDC) to intervene with rates-based collection. To the extent that disgruntled customers have alternative suppliers to choose from, there is the potential for them to shift away from Can Plan when they become aware of a price discrimination strategy.<sup>108</sup>

#### *Ability to price discriminate*

116. We consider that Can Plan already has the ability to price discriminate by charging higher prices to customers in locations where it faces weaker competitive constraints. Through customer addresses and postcodes, Can Plan is also able to tailor its pricing based on the location of a specific customer. Through its website, direct marketing materials and direct customer engagement (along with its internal computer systems), Can Plan is able to implement different pricing for different customers and keep track of this. Because the waste is collected from outside residential addresses, customers would be prevented from pretending to be in a different location to pay a lower price (ie, it could not engage in price arbitrage).
117. Can Plan is already price discriminating to a degree – where customers contact it, Can Plan will price-match existing competitors regardless of where the customer is located and how strong the competition is in that area. However, we acknowledge that any existing price discrimination is on a small scale (less than [ ]% of customers) and reactionary. A concerted practice of Can Plan proactively targeting and price

<sup>105</sup> Can Plan’s submission on the Commission’s Sol (7 April 2021) at [41]-[48].

<sup>106</sup> Ibid at [10].

<sup>107</sup> Commerce Commission interview with Can Plan (21 April 2021).

<sup>108</sup> Ibid. We note that, for some Nelson residents, the only alternative supply option may be Waste Management, who is unlikely to expand. New entry is unlikely for the reasons discussed above.

discriminating between groups of customers would be quite different and more likely to upset customers.

118. In practical terms, for Can Plan to engage in a price discrimination strategy post-acquisition, first it could change the websites of Can Plan and Betta Bins in terms of how they display prices. Currently, if a consumer goes to the website of either supplier to order a bin or bags, pricing appears first, before a consumer has even entered their address to check if services are available. Can Plan would therefore need to 'hide' pricing until customers revealed where they live. It could do this by altering its website to operate the same way as the websites of Smart and Waste Management – where a consumer enters their address first to see if services are available and then gets pricing information for that address.
119. To the extent that Can Plan also advertises its pricing to customers via other mediums, it would also need to adjust what it says in such communications. The next time that Can Plan writes to existing customers notifying them of price changes due to cost increases [ ], it could at the same time adjust prices for customers in different areas and could potentially do so without highlighting this to customers.
120. We have gathered data on the prices charged by all suppliers providing residential general waste collection services in Nelson/Stoke/Richmond for the past three calendar years.<sup>109</sup> This data shows that price increases are relatively common, applied by all suppliers and are often more than five per cent. Therefore, customers are likely to be already accustomed to such increases, and providing their waste continues to be collected, it may be relatively easy for the merged entity to charge customers slightly higher prices without causing any adverse reaction.

*Incentive to price discriminate*

121. We are currently not satisfied that the merged entity would not have an incentive to engage in price discrimination post-acquisition.
122. In considering whether the merged entity would have an incentive to engage in price discrimination, we have assessed whether it would be profitable for it do so. This has, in turn, involved us considering:
- 122.1 the extent to which the merged entity would be constrained (by competition from other suppliers and/or customer switching) from raising general waste prices in parts of Nelson/Stoke/Richmond where the competitive conditions are not as strong;
- 122.2 whether customers that face price discrimination might punish the merged entity in other waste markets in Nelson/Stoke/Richmond (ie, by switching to an alternative supplier for other waste collection services) and/or customers

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<sup>109</sup> This data is summarised in Table A5 in **Confidential Attachment A**.

in other parts of Nelson/Stoke/Richmond where the competitive conditions are stronger punish the merged entity by switching suppliers;

- 122.3 the likely reaction of the NCC and the TDC to any price discrimination, in particular, whether this would prompt them to consider going to rates-based wheelie bin collection; and
- 122.4 whether price discrimination would be likely to damage the merged entity's reputation to such an extent that it would be disincentivised to attempt it.
123. For reasons already discussed earlier, we consider that post-acquisition there would be parts of Nelson/Stoke/Richmond where the competitive conditions would not be as strong. In these areas, we currently consider that the merged entity would not be sufficiently constrained by existing suppliers and, by implication, customers may be limited in their ability to switch suppliers.
124. We acknowledge that some factors (such as the reputational risk as set out above) suggest that Can Plan may have a low incentive to price discriminate. However, we consider that price discrimination against Nelson households may not cause an outcry or lead to a response by the NCC if implemented in a gradual and subtle way. We also note that there may be ways in which Can Plan could mitigate the risks of customers learning of any price discrimination by being less price transparent. For example, it could leave its website prices unchanged for most addresses but start requiring customers subject to price increases to call or e-mail for pricing information.
125. Currently we are not satisfied that the merged entity would not have the incentive to engage in price discrimination post-acquisition by charging customers in the parts of Nelson/Stoke/Richmond that have no effective alternatives higher prices than those customers in other areas where there are higher levels of competition.
126. We invite submissions on the ability and incentive of the merged entity to exercise market power by engaging in price discrimination post-acquisition.

### **Green waste collection services**

127. The Parties submitted that the Proposed Acquisition will not cause an SLC in green waste because barriers to entry are very low and in response to a price-increase, customers have viable alternatives to dispose of green waste.<sup>110</sup>
128. For reasons set out below, and on the basis of available evidence, we are yet to be satisfied that the Proposed Acquisition will not be likely to result in an SLC in the supply of residential green waste collection services in Nelson/Stoke/Richmond.
129. We note that the markets for residential green waste in Nelson/Stoke/Richmond may be very small by revenue, going by each of the Parties' low revenues from green

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<sup>110</sup> Can Plan's submission on the Commission's Sol (7 April 2021) at [58]-[59] and Nelmac's submission on the Commission's Sol (9 April 2021) at [11.40].

waste collections.<sup>111</sup> However, the Proposed Acquisition may cause more concerns in green waste than in general, since the Parties are currently the only active collectors of green waste from residential customers in Nelson/Stoke/Richmond, where expansion and entry may be less likely in green waste than in general waste.

*Loss of competition and out of market constraints*

130. We have concerns about horizontal aggregation in green waste collection as the Parties appear to be the only suppliers of a designated residential green waste collection service in Nelson/Stoke/Richmond. Many of the reasons for our concerns about green waste are similar to those for residential general waste collection services (discussed earlier).
131. Can Plan is the largest provider of green waste collection services to residential customers in Nelson/Stoke/Richmond. Since commencing green waste collection services in 2013, Can Plan has increased the number of its green waste customers to the current figure of around [ ] customers.<sup>112</sup> Betta Bins is the only other existing provider of green waste collection services, but its presence is relatively small with only an estimated [ ] customers.<sup>113</sup> With the Proposed Acquisition, Can Plan would increase its market share to 100% and consolidate its already strong position in the supply of residential green waste collection services in Nelson/Stoke/Richmond.
132. Current evidence continues to suggest that some customers have alternatives for disposing of their green waste. These methods are:
- 132.1 dropping off their own green waste at either of the two composting facilities in the Nelson-Tasman region (Greenwaste to Zero in Richmond and Wholesale Landscapes in Stoke), or to the NCC's Tahunanui transfer station (which then contracts the transportation of the green waste to Greenwaste to Zero for processing);
- 132.2 for some customers who only generate a small amount of green waste, composting their own green waste; or
- 132.3 hiring a skip from EnviroWaste or Waste Management.<sup>114</sup>
133. However, our view is that these out of market constraints are not sufficient to prevent an SLC. in particular, the evidence we have gathered to date reveals that:

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<sup>111</sup> Betta Bins' revenue from the collection of green waste is less than \$[ ] per annum, a small portion of its total annual revenue of \$[ ]. Application at [12]. Can Plan's revenue from its greenBIN (green waste) service is larger, but still a relatively small portion of its total revenue – Can Plan's 2020 greenBIN revenue was \$[ ], compared to its total residential wheelie bin and bag revenue of \$[ ]. Can Plan Revenue per Service spreadsheet, included as part of Schedule A to the Application.

<sup>112</sup> Can Plan's submission on the Commission's Sol (7 April 2021) at [61].

<sup>113</sup> E-mail from Nelmac to the Commerce Commission (4 May 2021).

<sup>114</sup> Commerce Commission interview with [ ] (5 February 2021).

- 133.1 composting at home is likely to only be an option if households have sufficient space and time, is not suitable for large garden jobs, and not all garden waste is readily composted;<sup>115</sup>
- 133.2 hiring a skip bin is generally only a feasible option for larger, “one-off” gardening jobs;<sup>116</sup> and
- 133.3 while households in Nelson-Tasman can drop off their green waste at a local transfer station or directly at a composting facility, both options provide a relatively inexpensive way of disposing of green waste,<sup>117</sup> and account for most of the green waste processed at the two composting facilities, these options tend to be mainly used for larger volumes of green waste (eg, trailer and truck loads and volumes that cannot easily dealt with at home).<sup>118</sup>

### *Entry*

134. On the evidence currently before us, we are not satisfied that new entry into green waste collection in Nelson/Stoke/Richmond would be likely to meet the LET test and provide sufficient constraint to prevent an SLC.
135. We consider that conditions of entry into residential green waste collection services in Nelson/Stoke/Richmond are similar as for general waste. The conditions of entry are moderate to high. As noted above, the green waste may be very small in terms of revenue and substantially smaller than the general waste market. This is likely to impact on the profitability of entry into green waste, even in response to a price increase.
136. We consider that, with the Proposed Acquisition, new entry into green waste may be less likely than for general waste in Nelson/Stoke/Richmond.
- 136.1 Only [ ] has indicated any interest in entering the supply of green waste services. While it may enter green waste collection, it has no existing plans in the current financial year and [ ].<sup>119</sup>  
Even if [ ] is considered to be a likely entrant, there is no evidence that it might occur in a timely fashion and to a sufficient extent across Nelson/Stoke/Richmond to satisfy the LET test.
- 136.2 No other parties that we interviewed expressed any interest in establishing a standalone residential green waste collection service in Nelson/Stoke/

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<sup>115</sup> Commerce Commission interview with [ ] (9 March 2021).

<sup>116</sup> Commerce Commission interview with Waste Management (13 April 2021) and Commerce Commission interview with EnviroWaste (3 February 2021).

<sup>117</sup> For example, Greenwaste Zero charges \$8 for a car boot and trailer starting from \$18 per m<sup>3</sup>, the NCC charges \$4 for a 65L bag and \$17 for a car boot load at its Tahunanui transfer station. This compares with Can Plan’s 12-month charge of \$129 for its 240 litre greenBin.

<sup>118</sup> Commerce Commission interview with [ ] (5 February 2021).

<sup>119</sup> Commerce Commission interview with [ ].

Richmond. [ ] told us that it is set against beginning green collections in the medium term.<sup>120</sup> None of these other parties have undertaken any evaluation or planning around entry into green waste.

137. We invite submissions on whether the Proposed Acquisition is likely result in an SLC in the supply of residential green waste collection services in Nelson/Stoke/Richmond.

### Next steps in our investigation

138. The Commission is currently scheduled to decide whether or not to give clearance to the Proposed Acquisition by **30 July 2021**. However, this date may change as our investigation progresses.<sup>121</sup> In particular, if we need to test and consider the issues identified above further, the decision date may be extended.
139. As part of our investigation, we are identifying and contacting parties that we consider will be able to help us assess the issues identified above.

### Making a submission

140. We are continuing to undertake enquiries and seek information from industry participants about the impact of the Proposed Acquisition. We welcome any further evidence and other relevant information and documents that the Parties or any other interested parties are able to provide regarding the issues identified in this SoUI.
141. If you wish to make a submission, please send it to us at [registrar@comcom.govt.nz](mailto:registrar@comcom.govt.nz) with the reference "Can Plan/Nelmac" in the subject line of your e-mail, or by mail to The Registrar, PO Box 2351, Wellington 6140. Please do so by close of business on **22 June 2021**.
142. All information we receive is subject to the Official Information Act 1982 (OIA), under which there is a principle of availability. We recognise, however, that there may be good reason to withhold certain information contained in a submission under the OIA, for example in circumstances where disclosure would be likely to unreasonably prejudice the commercial position of the supplier or subject of the information.
143. Confidential information must be clearly marked in all submissions (by highlighting the information and enclosing it in square brackets). Submitters must also provide a public version of their submission with confidential material redacted. At the same time, a schedule must be provided which sets out each piece of information over which confidentiality is claimed and the reasons why the information is confidential (preferably with reference to the OIA).

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<sup>120</sup> Commerce Commission interview with [ ]. It provided a list of reasons.  
[ ]

<sup>121</sup> The Commission maintains a clearance register on our website at <http://www.comcom.govt.nz/clearances-register/> where we update any changes to our deadlines and provide relevant documents.

**Attachment A: Analysis/evidence on existing competition**

[      ]

**Attachment B: Summary of the evidence we have gathered from third parties on entry/expansion**

[      ]