

## Statement of Preliminary Issues

### Can Plan Nelson Limited / Nelmac Limited

22 January 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 Nelmac Limited's (Nelmac) waste collection business in Nelson, which forms part of Nelmac's 'Betta Bins' business (the Proposed Acquisition).<sup>1</sup> The Proposed Acquisition includes the following assets that Nelmac uses to provide waste collection services:
  - 1.1 two side loader trucks;
  - 1.2 one rear loader truck; and
  - 1.3 the Betta Bins wheelie bins, large bins, and "pay-as-you-go" rubbish bags and bin liners that are currently in circulation.
2. The Commission will give clearance if it is satisfied that the Proposed Acquisition will not have, or would not be likely to have, the effect of substantially lessening competition in a market in New Zealand.
3. This statement of preliminary issues sets out the issues we currently consider to be important in deciding whether or not to grant clearance.<sup>2</sup>
4. We invite interested parties to provide comments on the likely competitive effects of the Proposed Acquisition. We request that parties who wish to make a submission do so by close of business on **9 February 2021**.

#### The parties

5. Can Plan collects general (non-hazardous) waste from residential customers that purchase its bags or rent its wheelie bins,<sup>3</sup> and from commercial customers that use larger bins. Can Plan also provides a skip hire service and a fortnightly green waste

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<sup>1</sup> A public version of the Application is available on our website at: <http://www.comcom.govt.nz/business-competition/mergers-and-acquisitions/clearances/clearances-register/>. Nelmac's recycling business, which forms part of the Betta Bins business, does not form part of the Proposed Acquisition.

<sup>2</sup> The issues set out in this statement are based on the information available when it was published and may change as our investigation progresses. The issues in this statement are not binding on us.

<sup>3</sup> Customers can alternatively purchase Can Plan's "blueBin" wheelie bin, and pay for collection by purchasing bin liners or collection tags.

collection service. Can Plan serves customers in the Nelson-Tasman area, including Nelson City, Stoke, Richmond, Māpua, Brightwater, Wakefield and Motueka.

6. Betta Bins is the waste collection division of Nelmac, which is owned by Nelson City Council. Betta Bins serves residential customers that buy its bags or wheelie bin services,<sup>4</sup> and offers large bin collection services for commercial customers. Like Can Plan, Betta Bins collects general waste and also provides a fortnightly green waste collection service. Betta Bins serves customers located in Nelson City, Stoke, and Richmond.
7. Below we refer to Can Plan and Betta Bins collectively as ‘the Parties’.

## **Our framework**

8. Our approach to analysing the competition effects of the Proposed Acquisition is based on the principles set out in our Mergers and Acquisitions Guidelines.<sup>5</sup> As required by the Commerce Act 1986 (Commerce Act), we assess mergers and acquisitions using the substantial lessening of competition test.
9. We determine whether an acquisition is likely to substantially lessen competition in a market by comparing the likely state of competition if the acquisition proceeds (the scenario with the acquisition, often referred to as the factual), with the likely state of competition if the acquisition does not proceed (the scenario without the acquisition, often referred to as the counterfactual).<sup>6</sup> This allows us to assess the degree by which the Proposed Acquisition might lessen competition.
10. If the lessening of competition as a result of the Proposed Acquisition is likely to be substantial, we will not give clearance. When making that assessment, we consider, among other matters:
  - 10.1 constraint from existing competitors – the extent to which current competitors compete and the degree to which they would expand their sales if prices increased;
  - 10.2 constraint from potential new entry – the extent to which new competitors would enter the market and compete if prices increased; and
  - 10.3 the countervailing market power of buyers – the potential constraint on a business from purchasers’ abilities to exert substantial influence on negotiations.

## **Market definition**

11. We define markets in the way that we consider best isolates the key competition issues that arise from a proposed acquisition. In many cases this may not require us

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<sup>4</sup> Customers can choose to rent or purchase wheelie bins.

<sup>5</sup> Commerce Commission, *Mergers and Acquisitions Guidelines*, July 2019. Available on our website at [www.comcom.govt.nz](http://www.comcom.govt.nz)

<sup>6</sup> *Commerce Commission v Woolworths Limited* (2008) 12 TCLR 194 (CA) at [63].

to precisely define the boundaries of a market. A relevant market is ultimately determined, in the words of the Commerce Act, as a matter of fact and commercial common sense.<sup>7</sup>

12. In the Application, Can Plan submitted that there are separate markets in the Nelson-Tasman region for the collection of waste in:
  - 12.1 wheelie bins (typically 120L, 140L or 240L) and bags (typically 65L). Can Plan submitted that these are typically collected weekly or fortnightly from residential homes (or smaller businesses that create a small amount of waste);<sup>8</sup> and
  - 12.2 large bins, including large “rear-loaded” bins (typically 660L and 1100L) and “front-end-load” bins (typically 1,500L, 3m<sup>3</sup> and 4m<sup>3</sup>). The Application states that these are suitable for commercial customers that create large amounts of waste.<sup>9</sup>
13. Can Plan also submitted that general waste and green waste collection services are in the same market, submitting that firms which collect general waste can also collect green waste without difficulty.<sup>10</sup>
14. Our assessment of the relevant market(s) will include consideration of:
  - 14.1 whether the sale/rental of bags and bins is in the same market as the collection of those bags and bins;<sup>11</sup>
  - 14.2 whether the relevant market(s) should be segmented based on bag and bin size;
  - 14.3 whether there are separate markets for the collection of green waste and general waste;
  - 14.4 the geographic scope of the market(s), including whether it is appropriate to define a market for the Nelson-Tasman region (as the Application submits), or whether narrower (or broader) markets should be defined; and
  - 14.5 whether there are separate potential markets for waste and/or recycling collection tenders run by Tasman District Council and Nelson City Council.

### **Without the acquisition**

15. Can Plan submitted that, without the Proposed Acquisition, it expects Nelmac would sell the Betta Bins assets to the next preferred tenderer.<sup>12</sup>

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<sup>7</sup> Section 3(1A). See also *Brambles v Commerce Commission* (2003) 10 TCLR 868 at [81].

<sup>8</sup> The Application at [104].

<sup>9</sup> At [105].

<sup>10</sup> At [101].

<sup>11</sup> For ease of reference, unless otherwise specified in this document we use the term “collection” to cover both the supply of bins and bags and their collection.

16. We will consider what the Parties would do if the Proposed Acquisition did not go ahead. We will consider the evidence on whether the without-the-acquisition scenario is best characterised by the status quo or whether, for example, Nelmac would seek to sell Beta Bins to a different buyer.

### **Preliminary issues**

17. We will investigate whether the Proposed Acquisition would be likely to substantially lessen competition in the relevant market(s) by assessing whether horizontal unilateral, coordinated and/or conglomerate effects might result. The questions we will be focusing on are set out below.
- 17.1 *Unilateral effects* – would the loss of competition between the Parties enable Can Plan to profitably raise prices or reduce quality or innovation by itself?<sup>13</sup>
- 17.2 *Coordinated effects* – would the Proposed Acquisition change the conditions in the relevant market(s) so that coordination is more likely, more complete or more sustainable?
- 17.3 *Conglomerate effects* – if there are separate markets for the collection of general waste and green waste, could Can Plan gain significant market power over one service and leverage that into the other?
18. Based on the information provided, we do not consider that the Proposed Acquisition is likely to give rise to vertical effects. This is because the Proposed Acquisition does not create any vertical relationships that would enable Can Plan to harm competitors by raising prices for, or withholding access to, necessary inputs.

### **Unilateral effects: would Can Plan be able to profitably raise prices by itself?**

19. Unilateral effects arise when a firm merges with a competitor that would otherwise provide a significant competitive constraint (particularly relative to remaining competitors) such that the merged firm can profitably increase price above the level that would prevail without the merger, without the profitability of that increase being thwarted by rival firms' competitive responses.
20. In the Application, Can Plan submitted that the Proposed Acquisition would not be likely to substantially lessen competition in relation to wheelie bin/bag collection services (including for general and green waste) due to unilateral effects, on the basis that:
- 20.1 post-Acquisition Can Plan would continue to face significant competition from Smart Environmental and Waste Management, which also provide wheelie bin and/or bag collection services in the Nelson-Tasman region;<sup>14</sup>

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<sup>12</sup> The Application at [87].

<sup>13</sup> For ease of reference, we only refer to the ability of the merged entity to "raise prices". This should be taken to include the possibility that the merged entity could reduce quality or innovation, or worsen an element of service or any other element of competition, ie it could increase quality-adjusted prices.

- 20.2 post-Acquisition Can Plan would be constrained by the threat of entry or expansion, for example, by EnviroWaste, which already supplies large bins in the Nelson-Tasman region and provides wheelie bin collection services in other regions around New Zealand;<sup>15</sup>
- 20.3 customers can reduce their demand for waste collection services by recycling more, constraining Can Plan's ability to raise price or lower quality in respect of its services;<sup>16</sup> and
- 20.4 Nelson City Council and Tasman District Council have substantial countervailing power due to their ability to contract for waste collection (and recycling) services.<sup>17</sup>
21. Can Plan also submitted that the Proposed Acquisition would not be likely to substantially lessen competition in relation to large bin collection services in the Nelson-Tasman region due to unilateral effects, on the basis that:
- 21.1 there is no material overlap between the Parties in this submitted market because, at present, Betta Bins has only a limited presence in large bin collection services;<sup>18</sup> and
- 21.2 large bin customers will have multiple alternative options, including Waste Management, EnviroWaste and Smart Environmental.<sup>19</sup>
22. We will consider:
- 22.1 *closeness of competition* – the degree of competitive constraint that Can Plan and Betta Bins impose upon one another. To the extent that any constraint is material, we will assess whether the lost competition between the Parties could be replaced by rival competitors;
- 22.2 *remaining competitive constraints* – the degree of constraint that existing competitors such as Smart Environmental and Waste Management would impose on Can Plan post-Acquisition. In this regard, we will assess whether any increase in Can Plan's route density may give it an advantage over its competitors;
- 22.3 *entry and expansion* – how easily rivals could enter and/or expand, and how likely it is that entry and/or expansion would take place; and
- 22.4 *countervailing power*: whether customers would be able to resist a price increase by Can Plan, for example, by recycling more.

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<sup>14</sup> The Application at [118]-[132].

<sup>15</sup> At [137]-[152].

<sup>16</sup> At [153]-[161].

<sup>17</sup> At [162]-[165].

<sup>18</sup> At [177]-[183].

<sup>19</sup> At [184].

23. We will also consider the extent to which Nelson City Council and/or Tasman District Council could impose a constraint on waste collection providers through their ability to tender out waste collection (and recycling) services.

**Coordinated effects: would the Proposed Acquisition make coordination more likely?**

24. An acquisition can substantially lessen competition if it increases the potential for the merged entity and all or some of its remaining competitors to coordinate their behaviour and collectively exercise market power or divide up the market such that output reduces and/or prices increase. Unlike a substantial lessening of competition which can arise from the merged entity acting on its own, coordinated effects require some or all of the firms in the market to be acting in a coordinated way.<sup>20</sup>
25. Can Plan submitted that the Proposed Acquisition would not be likely to substantially lessen competition due to coordinated effects, stating that prices are not transparent and that competitors do not know each other's pricing for waste collection services.<sup>21</sup>
26. We will assess whether any relevant market is vulnerable to coordination (in relation to price, customer allocation or output), and whether the Proposed Acquisition would change conditions so that coordination is more likely, more complete or more sustainable. Factors we will consider, in the factual and counterfactual, include:
- 26.1 the number of competitors providing waste collection services in the Nelson and Tasman regions;
  - 26.2 how similar competitors are in terms of size and cost structure;
  - 26.3 the level of similarity between the collection services offered by different competitors;
  - 26.4 the extent to which the Proposed Acquisition removes a particularly vigorous competitor;
  - 26.5 the extent to which waste collection firms can observe each other's prices or volumes; and
  - 26.6 the stability of demand for waste collection over time.

**Conglomerate effects: could Can Plan leverage market power between separate markets for general waste and green waste?**

27. A conglomerate merger is a merger between firms supplying goods or services that may be complementary. Such mergers may, in certain situations, increase a merged firm's ability and/or incentive to foreclose competitors by, for example, bundling together complementary products, or by refusing to sell those goods or services to customers unless they also buy a second service from it (this is known as tying).

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<sup>20</sup> *Mergers and Acquisitions Guidelines* above n5 at [3.84].

<sup>21</sup> The Application at [121] and fn39.

28. If there are separate markets for general waste and green waste, such services are likely to be complementary where customers that need both services are unable to switch between them,<sup>22</sup> but need more of each as they generate more total waste.
29. Since Can Plan and Betta Bins both collect green waste as well as general waste, conglomerate effects could arise if as a result of the Proposed Acquisition Can Plan would gain significant market power in relation to one service but not the other. In these circumstances, we would need to assess Can Plan's ability and incentive to leverage market power from the less competitive market(s) into the more competitive one(s).
30. The Application does not explicitly consider conglomerate effects. However, as noted above, Can Plan submits that the Proposed Acquisition will not give Can Plan market power in relation to the collection of general waste or green waste. We will assess this claim, and other relevant evidence, as part of our investigation.

### Next steps in our investigation

31. The Commission is currently scheduled to make a decision on whether or not to give clearance to the Proposed Acquisition by **9 March 2021**. However, this date may change as our investigation progresses.<sup>23</sup> In particular, if we need to test and consider the issues identified above further, the decision date is likely to extend.
32. As part of our investigation, we will be identifying and contacting parties that we consider will be able to help us assess the preliminary issues identified above.

### Making a submission

33. 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 email, or by mail to The Registrar, PO Box 2351, Wellington 6140. Please do so by close of business on **9 February 2021**.
34. Please clearly identify any confidential information contained in your submission and provide both a confidential and a public version. We will be publishing the public versions of all submissions on the Commission's website.
35. 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 under the OIA to withhold certain information contained in a submission, for example in circumstances where disclosure would unreasonably prejudice the supplier or subject of the information.

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<sup>22</sup> For example, a household or business with extensive gardens might be able to put some green waste in its general waste bin but might also need a separate green waste bin for bulkier green waste. The customer may be unable to use a single larger general waste bin for everything if bulky green waste cannot ultimately be disposed of at the same location as general waste.

<sup>23</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.