

22 June 2021

Commerce Commission
PO Box 2351
Wellington 6140
New Zealand

By email: registrar@comcom.govt.nz

Attention: Jeff Hamilton

PUBLIC VERSION

Response to Commerce Commission Statement of Unresolved Issues dated 31 May 2021

INTRODUCTION AND SUMMARY

1 Introduction

- 1.1 This submission is made on behalf of Nelmac Limited (**Nelmac**) on the matters raised by the Commerce Commission (**Commission**) in its Statement of Unresolved Issues dated 31 May 2021 (**SoUI**), in respect of the proposed acquisition of Nelmac's Beta Bins business by Can Plan Limited (**Can Plan**) (**Proposed Acquisition**).
- 1.2 In preparing this submission we have reviewed confidential information the Commission has obtained which is subject to confidentiality undertakings between us and the Commission, and which Nelmac has not had the opportunity to review.
- 1.3 This version of the submission is the public version, where confidential information has been redacted. The Commission has received a separate confidential version of this submission with no redactions applied.

2 Scope of this submission

- 2.1 In this submission, Nelmac addresses only particular parts of the SoUI where Nelmac considers it can provide further perspective or where Nelmac has particular concerns with the Commission's preliminary views as contained in the SoUI.
- 2.2 We are aware that Can Plan, through its counsel, has undertaken a comprehensive analysis of the evidence on file. Nelmac urges the Commission to carefully review and give full consideration to that analysis and the conclusions drawn from it.
- 2.3 In preparing this submission Nelmac has sought and received external, independent evidence as follows:
 - 2.3.1 An expert report from Alice Grace, Director, Morrison Low and Associates Limited dated 17 June 2021 (**Morrison Low report**) which is **attached** to this submission. Ms Grace is a qualified engineer and waste industry specialist, including in the areas of strategic planning and procurement of waste services contracts for local government organisations in New Zealand. The Morrison Low report provides expert opinion on:
 - (a) the impact of council decisions on the waste collection market;

- (b) the influence and constraint on the Nelson/Stoke/Richmond market coming from the wider Nelson-Tasman region;
- (c) the constraint on the Nelson/Stoke/Richmond market coming from the threat of Nelson City Council (**NCC**) moving to a rates-based model of waste collection;
- (d) the constraint on the Nelson/Stoke/Richmond market coming from threat of new entry;
- (e) the extent of the ability for the merged entity to price discriminate post-acquisition; and
- (f) the extent of the competitive conditions affecting Smart's ability to expand in the Nelson/Stoke/Richmond market.

2.3.2 An opinion from the accounting firm BDO Christchurch Limited (**BDO**) dated 21 June 2021 (**BDO opinion**) which is **attached** to this submission. BDO was asked to consider the attractiveness of Beta Bins to various classes of purchaser (in the event the Proposed Acquisition does not occur) and concludes that it is [].

2.4 Further reference is made to this additional evidence where relevant below.

3 Summary of submission

Residential green waste collection

3.1 Given the Commission's continuing concerns in relation to the acquisition of Nelmac's green waste business by Can Plan, Nelmac and Can Plan have agreed to remove the green waste business from the Proposed Acquisition.

3.2 Nelmac will now retain the Beta Bins' green waste business. Accordingly, the Commission's concerns in relation to the acquisition of the green waste business fall away.

Residential general waste collection: No substantial lessening of competition

3.3 Nelmac submits that the Commission should be satisfied on the evidence that the Proposed Acquisition will not have, or would not be likely to have, the effect of substantially lessening competition in a market. In particular:

3.3.1 Nelmac submits that the only possible separation of markets that could be entertained by the Commission in this case is for the areas:

- (a) north and east of Nelson City up to and including Cable Bay, largely coinciding with postcode 7071 (and where, to further clarify the parameters of this area, Nelmac submits excludes the areas south of Todd Bush Road); and
- (b) of Stoke, Richmond and Nelson City (but where the market for Stoke, Richmond, and Nelson City likely extends to the wider Nelson-Tasman region);

3.3.2 the competitive constraint Smart will have on the merged firm is significant, where the [], and where it is at a significant competitive advantage in competing and expanding in the Nelson/Stoke/Richmond area due to its significant presence in the Tasman region (and nationally), and the contracts it holds with the Tasman District Council (**TDC**) giving it security and meaning that it is able to easily expand with low risk. Smart has undertaken the kind of expansion that Nelmac considers would occur in other areas, in similar conditions to that which would exist in the factual. These submissions are supported by expert evidence;

3.3.3 the competitive constraint Waste Management will have on the merged firm is significant, []. Waste Management enjoys similar competitive advantages as Smart

across the Nelson/Stoke/Richmond area coming from its significant presence in the Tasman region and nationally;

- 3.3.4 the competitive constraint coming from the threat of new entry, where:
- (a) [] represents a real and significant threat, []; and
 - (b) [] represents a further significant threat to the merged firm where [];
- 3.3.5 the competitive constraint NCC will have on the merged firm is significant, where there is the constant threat of it moving to a rates-based collection model []. Although this may also present a risk to waste management businesses (operating in Nelson/Stoke/Richmond and nationally where residential collection is privatised) in expanding and entering new markets, it is a risk shared by all such businesses and has not prevented entry or expansion (see, for example, Smart's continued expansion).

Commission's preliminary views incorrect

- 3.4 Nelmac submits that the Commission has made material errors in its treatment of the evidence it has received during the course of its investigation. Those errors have led to incorrect preliminary views, or preliminary views that are not supported by the evidence on file. In particular:
- 3.4.1 the Commission's view that there may be narrower, separate geographic markets in the Nelson/Stoke/Richmond area is artificial and risks failing to take account of the competitive constraints across Nelson/Stoke/Richmond coming from the wider Tasman region (most notably, from Smart and Waste Management's positions in the Tasman region). In addition, there is no evidential basis for the Commission to treat the areas it has identified differently (even within a wider market definition), where there are no notable differences between those areas (with the exception of the north and east of Nelson City up to and including Cable Bay, largely coinciding with postcode 7071 (and where, to further clarify the parameters of this area, excludes the areas south of Todd Bush Road);
 - 3.4.2 the Commission's view that a counterfactual where [] (or another party) purchases Betta Bins would result in significantly more competition than in the factual is not correct where [] or, alternatively, the Commission's view is not supported by the evidence and further ignores the evidence on file of the significant competitive constraint [] (and others) would bring in the factual;
 - 3.4.3 Smart's [] does not support the Commission's view that Smart [];
 - 3.4.4 a scenario where [] purchases Betta Bins is (at most) a remote possibility and should not be considered by the Commission as a counterfactual. The evidence (supported by expert evidence) is that [] [];
 - 3.4.5 market share data the Commission has adopted is not helpful in determining the state of the market post-acquisition given that:
 - (a) Smart is a relatively recent entrant to Nelson/Stoke/Richmond and the particular attributes and strategies of Smart (including its significant position in the Tasman region and how that position constrains Nelson/Stoke/Richmond);
 - (b) use of market share data is not correct in and of itself and the Commission needs to consider competition in the market as a whole, especially as there is no notable difference between the postcodes the Commission uses;
 - (c) bag availability may drop due to environmental concerns over use of plastic, making customers who currently use bags more likely to use bins, and opening

up those customers to acquisition by other competitors who supply bins (notably Smart and Waste Management); and

- (d) the areas north and east of Nelson City up to and including Cable Bay, largely coinciding with postcode 7071 (and which excludes the areas south of Todd Bush Road), are almost exclusively supplied by Betta Bins. Can Plan does not service that area, and where the Commission has not apparently taken this into account;
 - 3.4.6 although general waste collection prices in Nelson/Stoke/Richmond may go up regularly, and where customers may be used to such increases, the Commission confuses a customer's willingness to pay cost increases resulting from conditions outside of a supplier's control (such as increased landfill costs imposed by the NCC) with those that are simply intended to increase the profit margin of a supplier (and where a customer will be much more understanding of the former as opposed to the latter which would be likely to prompt complaint);
 - 3.4.7 the evidence is that barriers to entry and to expansion are low (and not "moderate to high" as stated by the Commission), where large competitors have economies of scale (and are able to leverage their position in surrounding areas (including coming from commercial collection) in competing/expanding further into Nelson/Stoke/Richmond) and the costs of expansion/entry are low;
 - 3.4.8 the competitive constraints in Nelson/Stoke/Richmond (as summarised in this submission) are significant, effectively constraining the merged entity from having the ability to price discriminate without any such attempt being thwarted by those constraints; and
 - 3.4.9 the Commission's view that Betta Bins [] is incorrect and not reflective of the data Nelmac has provided to the Commission.
- 3.5 Overall, Nelmac submits that in the SoUI the Commission has either misinterpreted, drawn incorrect conclusions from the evidence it has obtained, or overlooked or failed to give sufficient weight to particular parts of that evidence. Nelmac urges the Commission to carefully consider (or otherwise reconsider) the evidence on file and ensure that its analysis of the evidence is based on and supported by that evidence before making its decision in accordance with section 66 of the Commerce Act 1986.

RESIDENTIAL GREEN WASTE COLLECTION

4 Green waste removed from issue

- 4.1 Nelmac submits that the Commission should be satisfied on the evidence that the Proposed Acquisition as a whole (including Can Plan's acquisition of Nelmac's green waste business) will not, or would not be likely to have, the effect of substantially lessening competition in a market.
- 4.2 Nelmac's reasons for this view are those as set out in its submission on the Commission's Statement of Issues (SOI).¹
- 4.3 However, in order to remove this [] part of the Proposed Acquisition from issue, Nelmac and Can Plan have agreed to remove Nelmac's green waste business from the Proposed Acquisition.
- 4.4 A copy of the Variation of Agreement for Sale and Purchase is **attached** to this submission.
- 4.5 Post-acquisition of Nelmac's general waste collection business, [].

¹ Nelmac's submission dated 9 April 2021 on the Commission's SOI.

- 4.6 Accordingly, the Commission's preliminary views in relation to the green waste collection business contained in the SoUI fall away and Nelmac does not make any further submission on residential green waste collection in this submission.
- 4.7 References to the 'Proposed Acquisition' below in this submission therefore refer only to Can Plan's acquisition of Nelmac's general waste collection business.

RESIDENTIAL GENERAL WASTE COLLECTION: NO SUBSTANTIAL LESSENING OF COMPETITION

5 Overview

- 5.1 Overall, Nelmac submits that in the SoUI the Commission has either misinterpreted, drawn incorrect conclusions from the evidence it has obtained, or overlooked or failed to give sufficient weight to particular parts of that evidence.
- 5.2 In this section, Nelmac submits on particular areas of the SoUI which Nelmac considers it is able to provide further perspective or otherwise reemphasise for the Commission. Nelmac submits that the evidence, properly interpreted and applied, is that the competitive constraints that will exist across the relevant market post-acquisition will effectively constrain the merged entity such that the Commission should be satisfied that the Proposed Acquisition will not have, or would not be likely to have, the effect of substantially lessening competition in the relevant market.
- 5.3 As noted above, we are aware that Can Plan, through its counsel, has undertaken a comprehensive analysis of the evidence on file. Nelmac urges the Commission to carefully review and give full consideration to that analysis and the conclusions drawn from it.

6 Geographic market

- 6.1 The Commission considers that a 'broad' geographic market encompassing Nelson/Stoke/Richmond could be defined in this case.²
- 6.2 Nelmac previously submitted that there is a geographic separation of markets for the areas:³
- (a) north and east of Nelson City up to and including Cable Bay, largely coinciding with postcode 7071 (and where, to further clarify the parameters of this area, Nelmac submits excludes the areas south of Todd Bush Road); and
 - (b) of Stoke, Richmond and Nelson City (but where the market for Stoke, Richmond, and Nelson City may also extend to the wider Nelson-Tasman region).
- 6.3 Nelmac remains of the view that there is likely a separation of geographic markets for the areas north and east of Nelson City up to and including Cable Bay, largely coinciding with postcode 7071 (and which excludes the areas south of Todd Bush Road), because those areas:
- 6.3.1 are almost exclusively serviced by Betta Bins, and where there is no competitive overlap between Betta Bins and Can Plan;
 - 6.3.2 are sparsely populated, where Nelmac estimates there are approximately 700 households (out of an approximate total of 24, 855 households in the total area serviced by Betta Bins). There are a number of small settlements in this area, and other houses spread out in semi-rural settings which can be ~5kms apart;

² Nelmac discusses the Commission's preliminary views on defining even narrower, separate local markets (which Nelmac considers incorrect and not supported by the evidence) in the next section of this submission further below.

³ Nelmac's submission dated 9 April 2021 on the Commission's SOI, at section 9.

- 6.3.3 are less attractive for rival firms to move into to compete due to low population density and which is why Betta Bins has remained as the almost exclusive service provider in this area. It is likely that the economics of operating in such a lower density area mean that it will be served by one provider in the foreseeable future (rather than other competitors seeking to compete in the area); and
- 6.3.4 is in contrast to the areas of Stoke, Richmond and Nelson City which are mainly town centre, urban and suburban areas and (in the residential areas) for the most part densely populated. In these areas, Nelmac, Can Plan, Smart and Waste Management compete for customers.
- 6.4 Nelmac submits that there would be no difference in competition in the areas north and east of Nelson City up to and including Cable Bay, largely coinciding with postcode 7071 (and which excludes the areas south of Todd Bush Road), in the factual, as instead of Betta Bins being the sole operator in that area, it will be the merged firm. There would also be no difference in competition in this area in a counterfactual where [] purchases Betta Bins (which the Commission has identified as being the most likely counterfactual in the SoUI, and which Nelmac submits on further below).
- 6.5 In the event the Commission does not agree that a separate geographic market exists for the areas north and east of Nelson City up to and including Cable Bay, largely coinciding with postcode 7071 (and which excludes the areas south of Todd Bush Road), Nelmac submits that the Commission should, at the least, recognise the particular conditions of this area (as described above) that mean only one significant supplier is likely to ever provide collection services in that area, such that there is not likely to be any substantial lessening of competition in the factual compared to any counterfactual in respect of that area.
- 6.6 In relation to the rest of Nelson/Stoke/Richmond, being the area of competitive overlap between Nelmac and Can Plan, Nelmac remains of the view (but which is now an even stronger view) that the relevant geographic market likely extends into the wider Tasman region due to the competitive constraints present in that wider region that affect and serve as constraints in the Nelson/Stoke/Richmond area. In particular:
- 6.6.1 Smart is able to leverage the advantages that holding the TDC contracts in the Tasman region brings to it to allow it to better compete in and expand further into Nelson/Stoke/Richmond (note that this is a separate constraint than the direct competition and threat of expansion Smart brings simply from its presence in, and [] the Nelson/Stoke/Richmond area). Those contracts provide significant security to Smart and put it at a considerable advantage such that it is able to expand in Nelson/Stoke/Richmond without any significant barriers to that expansion and little risk to its business (which is discussed further below); and
- 6.6.2 Waste Management also benefits from its significant presence in the wider Tasman region such that it could relatively easily expand its residential waste collection services in Nelson/Stoke/Richmond with little barriers or risk.
- 6.7 Nelmac does not consider that the Commission has put sufficient weight on the competitive advantage that Smart's Tasman contracts bring it, and therefore the competitive constraint that Smart would exert in the factual in the Nelson/Stoke/Richmond area.
- 6.8 In further support of this view, Nelmac refers the Commission to the Morrison Low report (described further below) which states that in the event the Commission *does* limit the geographic market to Nelson/Stoke/Richmond, the Commission must fully take into account the competitive constraints on the merged firm coming from the advantages Smart (and others) receive from their presence and significant position in the adjacent Tasman region (and which, Nelmac submits, the Commission does not do in the SoUI).⁴

⁴ Morrison Low report, at paragraph 18.

7 Constraint coming from Smart Environmental Limited

- 7.1 The Commission's preliminary view is that it is not satisfied that expansion by Smart is likely to occur on such a scale as to constrain the merged entity in the factual as compared to the counterfactual and prevent a substantial lessening of competition across all of Nelson/Stoke/Richmond.⁵
- 7.2 Nelmac draws the Commission's attention to the following key evidence:
- 7.2.1 [].⁶
- 7.2.2 Post-acquisition, the merged entity would not be able to raise prices as [].⁷ It follows that in the hypothetical scenario that the merged entity raises its prices, Smart would quickly respond by furthering its efforts in Nelson, accelerating its expansion and quickly winning market share as customers switched to Smart's lower-priced services. This continued threat will be a significant constraint on the merged entity. As Smart told the Commission [].⁸
- 7.2.3 Smart is []. Smart told the Commission [].⁹ [], Smart's [] presence in the surrounding area will ensure it is better placed to continue to expand into Nelson.
- 7.2.4 [].¹⁰
- 7.2.5 [].¹¹ Post-acquisition, and in any scenario where the merged entity raises prices, it is commercially sensible to conclude that Smart would take advantage of customers wanting to switch due to price [] Nelson City.
- 7.2.6 [].¹² This [] will continue in the factual and constrain the merged entity (and, Nelmac submits, will particularly constrain the merged entity where it may be an easier environment for Smart to acquire market share from customers in the event the merged entity increases price).
- 7.2.7 The Commission has received evidence that customers who currently use bags will be (or currently are) moving to rubbish bins for environmental reasons, and that bags will not be a long-term option for customers.¹³ This plays heavily to Smart's advantage, where it offers only bin collection services to residential customers in Nelson/Stoke/Richmond and is likely to increase the number of its residential bin collection business in Nelson/Stoke/Richmond going forward, further constraining the merged entity.
- 7.3 Smart also holds contracts with the TDC for recycling and waste collection services in the Tasman region, meaning that it is able to leverage off of those contracts to compete and expand further in the Nelson/Stoke/Tasman area, where:
- 7.3.1 the evidence is that Smart []; and
- 7.3.2 [], the risk to Smart in investing further in expanding in Nelson/Stoke/Richmond is low. Smart has a large degree of commercial security in the Tasman region coming from it holding the TDC contracts, which gives it a considerable advantage in competing and expanding in Nelson/Stoke/Richmond. Risks coming from new

⁵ SoUI, paragraph 12.3 and 77.

⁶ [].

⁷ [].

⁸ [].

⁹ [].

¹⁰ [].

¹¹ [].

¹² [].

¹³ [].

investments such as new trucks for the purpose of expanding further are greatly mitigated where Smart can, if unsuccessful in any such expansion, relatively easily re-deploy its investment to serving areas it already has a strong foothold in (e.g. Stoke and Richmond) or re-distribute elsewhere in Smart's network nationally (or otherwise re-sell the investment). This greatly reduces the risks to Smart of competing and expanding in Nelson/Stoke/Richmond. Further, the costs of such investment are insignificant for large, national, well-resourced suppliers such as Smart.

- 7.4 [] in particular emphasised the “huge” advantage that Smart has in this respect in its interview with the Commission.¹⁴
- 7.5 The Morrison Low report obtained by Nelmac confirms the competitive advantage Smart enjoys as a result of holding the TDC contracts, and how that will constrain the merged firm, as follows:¹⁵
- 7.5.1 Smart's ability to compete in the Nelson/Stoke/Richmond area is influenced by its presence in the adjacent Tasman District Market where it is contracted by the TDC.
- 7.5.2 Where private collection services are provided, it is not unusual for residential general waste collection markets to be dominated by one or two providers, which can be a result of the provider leveraging off its council collection contracts for general waste collection contracts.
- 7.5.3 The TDC contracts provide Smart with secured revenue base from which to develop its private collection business. Such businesses tend to be able to build their businesses both within the council area they hold the contract and adjacent council areas.
- 7.5.4 Smart has used this leverage before, a prime example being it winning the Queenstown and Lakes District Council recycling contract in 2004 and using that contract as leverage to establish and expand a private waste collection business in both Queenstown Lakes District and the adjacent Central Otago District. Smart has also had a lot of success in the lower North Island using similar strategies. Note that Smart likely has increased leverage in the case of Nelson/Stoke/Richmond (compared with other areas it operates in nationally), as it has both a recycling and general waste collection contract, making waste collection expansion into Nelson/Stoke/Richmond much less risky.
- 7.5.5 Smart's presence as the TDC contractor means it will continue to have a presence in the wider area. This will likely restrict the merged firm from increasing prices in Nelson/Stoke/Richmond as this would open an opportunity for Smart to expand.
- 7.5.6 As already noted above, if the Commission limits the geographical market to Nelson/Stoke/Richmond, it must take into account the influence of providers in the adjacent Tasman market (which, in Nelmac's submission, the Commission has failed to do in coming to its preliminary views as contained in the SoUI).
- 7.6 Nelmac therefore submits that the evidence is that the advantages Smart enjoys in holding TDC contracts in the Tasman region will mean that Smart will serve as an effective constraint on the merged entity in the Nelson/Stoke/Richmond area.
- 7.7 The Commission appears to put weight on [].¹⁶ Nelmac finds this comment, and the Commission's views that it should be given weight, difficult to reconcile; there are *no* notable differences in barriers ([]) across the entire Nelson/Stoke/Richmond area (with the exception

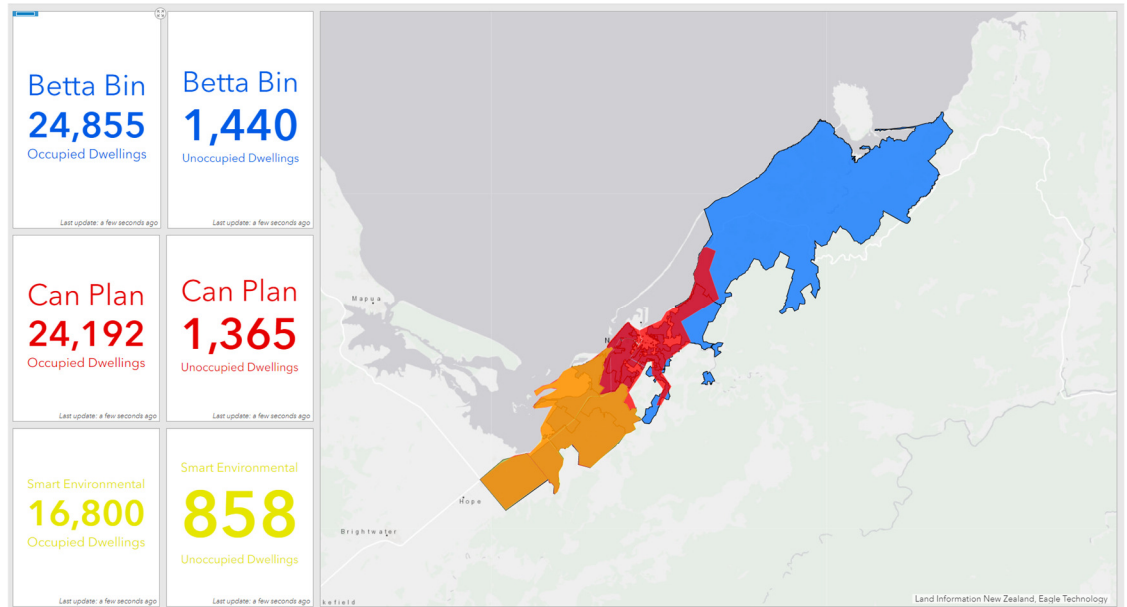
¹⁴[].

¹⁵ Morrison Low report, at paragraphs 13 to 18.

¹⁶[].

of the areas north and east of Nelson City up to and including Cable Bay, largely coinciding with postcode 7071 (and which excludes the areas south of Todd Bush Road)), where:

7.7.1 housing density is similar in all residential areas across Nelson/Stoke/Richmond. Nelmac included the following map in its submission on the Commission's SOI, and which shows an approximately consistent density of households across Nelson/Stoke/Richmond (and particularly where the area shaded in orange is the same length, but twice the width, of the area shaded in red);¹⁷



7.7.2 all have a central city with more commercial/less residential customers;

7.7.3 all have traffic density issues during 'rush hour', where:

- (a) Richmond backs up around the mall, SH 6 and offshoots, the main street, as well as around Waimea Intermediate;
- (b) Stoke is busy around Enner Glynn (Waimea Road), Enner Glynn School, and Nayland Road/School; and
- (c) Nelson gets busy mainly along Waimea Road, with Nelson Boys a school that contributes to this. Note that there are also significant areas in Nelson that can be reached and serviced without having to endure this traffic, and where there is only such traffic at certain times of the day ('rush hour' traffic).

7.8 Further, [] [] [].

7.9 Nelmac does note that there is a slight hill/elevation between Nelson and Stoke. Importantly, however, Smart currently has to drive beyond Stoke and travel over/alongside this hill/elevation using Waimea Road into Nelson (encountering traffic) to dump all refuse from the Nelson/Tasman region. Note also that it is a very short distance to travel (if at all) without residential housing density.

¹⁷ At paragraph 11.10. Note that this data is based on NCC GIS data populated during the last census. This map represents the areas where Beta Bins almost exclusively provides collection services (shaded blue – total 700 households), where Smart, Can Plan, Waste Management and Beta Bins compete (shaded orange – total 16,800 households), and where Can Plan, Beta Bins and Waste Management compete (shaded red – 7,400 households)

- 7.10 Accordingly, the Commission should discount [].
- 7.11 Nelmac submits that on a proper assessment and analysis of the evidence the Commission has received in relation to Smart, including that which is set out in this section of the submission above, it is clear that:
- 7.11.1 the advantages that Smart has as a result of it holding contracts with the TDC in the Tasman region enable Smart to operate as an effective constraint on the merged entity where Smart can use those advantages to rapidly (and with low risk) expand in Nelson; and
- 7.11.2 [].
- 7.12 Accordingly, Nelmac submits that the Commission should be satisfied that Smart will serve as a significant competitive constraint in the factual such that the Commission should be satisfied (on this constraint alone or in combination with other constraints) that the Proposed Acquisition will not have, or would not be likely to have, the effect of substantially lessening competition in the relevant market.

8 Constraint coming from Waste Management

- 8.1 The Commission is not satisfied that Waste Management is likely to expand to any material degree to constrain the merged entity.¹⁸
- 8.2 Nelmac submits that the evidence strongly supports the alternate view, that Waste Management will, in fact, serve as a significant competitive constraint on the merged firm and that the Commission should be satisfied that the Proposed Acquisition will not have, or would not be likely to have, the effect of substantially lessening competition in the relevant market.
- 8.3 Nelmac draws the Commission's attention to the following evidence from Waste Management:
- 8.3.1 Waste Management does currently service residential customers in Nelson/Stoke/Richmond.
- 8.3.2 [].¹⁹
- 8.3.3 [].²⁰
- 8.3.4 [].²¹ [].²²
- 8.3.5 We note that the Commission has received evidence that customers who currently use bags will be (or currently are) moving to rubbish bins for environmental reasons, and that bags will not be a long-term option for customers.²³ As with Smart, this plays heavily to Waste Management's advantage, where Waste Management offers only bin collection services to residential customers and is likely to increase the number of its residential bin collection business in Nelson/Stoke/Richmond going forward, further constraining the merged entity.
- 8.3.6 [].²⁴
- 8.4 Further, although Waste Management does not hold TDC contracts in the Tasman region (as Smart does), its significant presence in the Tasman region (and dominant position nationally)

¹⁸ SoUI, at paragraphs 12.3 and 91.

¹⁹ [].

²⁰ [].

²¹ [].

²² [].

²³ [].

²⁴ [].

means that it is able to leverage off of its success in that area when expanding in the area of Nelson/Stoke/Richmond. This will be particularly so in any scenario where the merged firm raised its prices.

- 8.5 Given the above, Nelmac submits that the Commission should be satisfied that Waste Management will serve as a significant competitive constraint in the factual such that the Commission should be satisfied (in combination with other constraints) that the Proposed Acquisition will not have, or would not be likely to have, the effect of substantially lessening competition in the relevant market.

9 Constraint coming from new entry

- 9.1 The Commission has discounted the threat of new entry into the market as being insufficiently likely to constrain the merged entity.²⁵
- 9.2 Nelmac submits that the evidence is that new entry is a real likelihood in the factual, and that the threat of such entry will serve as a significant competitive constraint on the merged entity.
- 9.3 Again, Nelmac submits that this competitive constraint, together with the other constraints that will exist in the factual, will serve to effectively constrain the merged entity in the factual such that the Proposed Acquisition will not have, or would not be likely to have, the effect of substantially lessening competition in the relevant market.

Threat coming from []

- 9.4 The Commission should give sufficient weight to the real threat of new entry coming from [] in the factual.
- 9.5 [] told the Commission that:
- 9.5.1 [].²⁶ [].²⁷ [].²⁸
 - 9.5.2 [].²⁹
 - 9.5.3 [].³⁰ [].³¹
 - 9.5.4 [].³²
 - 9.5.5 [].³³
 - 9.5.6 [].³⁴
- 9.6 Nelmac submits that the evidence from [] confirms that even if [].
- 9.7 [].³⁵
- 9.8 The conclusion that must be drawn from this evidence is that [] will be a significant threat to the merged entity and will be an effective competitive constraint post-acquisition.

²⁵ SoUI, at paragraph 12.4.

²⁶ [].

²⁷ [].

²⁸ [].

²⁹ [].

³⁰ [].

³¹ [].

³² [].

³³ [].

³⁴ [].

³⁵ [].

Threat coming from []

- 9.9 The Commission has identified evidence of a potential new entrant to the market in [].
- 9.10 [].
- 9.11 In its interview with the Commission, [] made it clear that:
- 9.11.1 [].³⁶
- 9.11.2 [].³⁷
- 9.11.3 Nelson/Stoke/Richmond would be attractive to [], where:
- (a) [].³⁸
- (b) [].³⁹
- (c) [].⁴⁰
- 9.11.4 [].⁴¹
- 9.11.5 [].⁴²
- 9.12 It is clear from this evidence that the Nelson/Stoke/Richmond area is attractive to [] and that it is likely to enter the market. It does not see any significant barriers in entering the market, and where this is particularly so given [].
- 9.13 Nelmac further submits that entry by [] is even more likely in the factual, where there is more opportunity for increased competition and acquisition of market share with Betta Bins out of the picture.
- 9.14 Nelmac also submits that the [] can absorb/pass on those costs to customers may open the door for others to compete (i.e. enter the market). The Morrison Low report obtained by Nelmac states that this is something that Can Plan (and the merged entity) will need to consider if it were to adjust its price.⁴³
- 9.15 Given the above, Nelmac submits that the evidence favours new entry is likely in the factual and which (together with the *threat* of new entry) will serve as a significant constraint on the merged entity.

10 Constraint from Nelson City Council moving to rates-based collection

- 10.1 The Commission discounts the competitive constraint that the threat of NCC moving to a rates-based collection model has across the Nelson/Stoke/Richmond area.
- 10.2 Nelmac submits that the evidence supports that this threat will be a significant competitive constraint on the merged firm post-acquisition. Indeed, the Commission heard of the significant constraint that comes from the threat of a council moving to a rates-based collection model from (and in addition to Can Plan and Nelmac's evidence):

³⁶ [].

³⁷ [].

³⁸ [].

³⁹ [].

⁴⁰ [].

⁴¹ [].

⁴² [].

⁴³ Morrison Low report, at paragraph 31.

- 10.2.1 [], where it told the Commission that it fully expects in the next five years that Nelson City will go to a fully rate payer funded collection service.⁴⁴
- 10.2.2 [], where it told the Commission that the threat of the NCC moving to a rates-based model is significant and taken into account when investing resources in expanding.⁴⁵
- 10.2.3 [], where it told the Commission it fears that the NCC could move to a rates-based contract for residential waste collection at any time.⁴⁶
- 10.2.4 [], where the Council holds out the threat of a rate-based model which acts as a “massive price cap” in that area. [] noted that it is efficient and able to charge sharply competitive prices (should a Council decide to move to a rates-based model).⁴⁷
- 10.2.5 [], which told the Commission that it assumes all Council’s will move to a rates-based wheelie bin collection service (but that it would consider entering residential collection if it was to have at least five years before a rates-based model was implemented).⁴⁸
- 10.3 The Commission’s states that NCC []. It in no way indicates that the NCC would *not* implement such a model in the future, especially in the event the Council, for example, received complaints from constituents in relation to the price of private waste collection services.
- 10.4 [].⁴⁹ Although the Commission notes this in the SoUI (at paragraph 109.4) it does not give the competitive constraint coming from the NCC on the merged firm sufficient consideration or weight.
- 10.5 Nelmac also refers the Commission to the Morrison Low report which states that:⁵⁰
- 10.5.1 There is a trend in councils moving to rates-funded services (which includes Council’s considering they can provide a cost-effective, comprehensive collection service).
- 10.5.2 In the past 12 months, the number of Councils providing rates-funded service has increased from 23 to 27 (and with Dunedin City Council recently voting to implement such a model from 1 July 2023).
- 10.6 This shows that councils, such as the NCC, are willing to implement rates-based models and it is entirely likely that the NCC could do the same in the event of unjustified price rises by the merged firm in the factual. It is this threat of the NCC moving to a rates-based model which would act as a significant constraint on the merged firm post-acquisition.
- 10.7 Given the above, the Commission should be left with no doubt that the threat coming from the NCC transitioning to a rates-based model will be a significant constraint on the merged firm in the factual (as it currently is for all waste management businesses operating in Nelson/Stoke/Richmond). Any increase in price that the merged firm (or others) implements increases the risk of customer complaints and the Council moving to a rates-based model.
- 10.8 That there would be a delay in the Council consulting and deciding to implement such a service would be of no comfort to the merged entity (and other competitors) – if they did not secure a Council contract, their business in the relevant areas would no-longer exist past implementation date. A rates-based model could be implemented in sufficient time, even with consultation, to be a credible threat.

⁴⁴ [].

⁴⁵ [].

⁴⁶ [].

⁴⁷ [].

⁴⁸ [].

⁴⁹ [].

⁵⁰ Morrison Low report, at paragraphs 8 and 9.

- 10.9 Finally, the Commission is 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”.⁵¹
- 10.10 As above, the evidence is clear that the threat of councils moving to rates-based models is a constraint on waste management businesses, and will serve as such in the factual on the merged entity. However, the evidence is also that waste management businesses consider this is a risk when looking to expand or enter a given market.
- 10.11 This is a risk shared by all waste management businesses, and is a key driver in those businesses considering entry (in particular) or expansion [].⁵²
- 10.12 As the Commission notes, [].
- 10.13 For these reasons, Nelmac submits that:
- 10.13.1 the *threat* of NCC moving to a rates-based model will be a significant constraint on the merged firm in the factual (and other firms operating in the Nelson/Stoke/Richmond area); and
- 10.13.2 although this threat will need to be taken into account by competitors wishing to expand and enter, all waste management companies share this risk and Nelson/Stoke/Richmond will remain attractive to current competitors/new entrants unless and until NCC indicates that it will move to a rates-based model of collection.

COMMISSION’S PRELIMINARY VIEWS INCORRECT

11 Overview

- 11.1 Nelmac has concerns in relation to the Commission’s treatment of the evidence it has received during its investigation and as set out in the SoUI.
- 11.2 These concerns include the Commission’s summaries of the evidence it has received, and upon which its preliminary views are based on, containing significant errors and/or misunderstanding.
- 11.3 As noted above, we are aware that Can Plan, through it’s counsel, has undertaken a comprehensive analysis of the evidence on file. Nelmac urges the Commission to carefully review and give full consideration to that analysis and the conclusions drawn from it.
- 11.4 In the above section, Nelmac outlined key competitive constraints that will exist in the factual such that the Commission should be satisfied that the Proposed Acquisition will not have, or would not be likely to have, the effect of substantially lessening competition in the relevant market (and touches on why particular views held by the Commission are incorrect).
- 11.5 This section deals directly with the preliminary views of the Commission which Nelmac considers to be plainly incorrect and unsupported by the evidence the Commission has received during its investigation.
- 11.6 Nelmac submits that the Commission’s views must be based on and supported by the evidence, and urges the Commission to carefully review the evidence it has received before proceeding to make its decision in accordance with section 66 of the Commerce Act 1986.

⁵¹ SoUI, at paragraph 105.

⁵² [].

12 Narrow geographic market definitions incorrect

- 12.1 The Commission considers that there may be narrower geographic markets for:⁵³
- 12.1.1 the area that starts with Richmond in the west and extends towards (and likely into) Stoke, and potentially into, Nelson South; and
 - 12.1.2 the area that starts in Cable Bay in the east, extends into Nelson City and also extends towards, and potentially into, Stoke.
- 12.2 Nelmac submits that the Commission's view on this possible further separation of the market is artificial, and risks the Commission failing to take into consideration the competitive constraints that apply across the entire Nelson/Stoke/Richmond area (extending into, and where some of those constraints come from, the wider Tasman region).
- 12.3 Nelmac submits on the correct market definition in section 6 above (including in relation to the areas north and east of Nelson City up to and including Cable Bay, largely coinciding with postcode 7071 (and which excludes the areas south of Todd Bush Road)).
- 12.4 In particular, Nelmac submits that there is nothing inherently different across the areas of Nelson/Stoke/Richmond (with the exception of the areas north and east of Nelson City up to and including Cable Bay, largely coinciding with postcode 7071 (and which excludes the areas south of Todd Bush Road)) that means they should be treated differently by the Commission.
- 12.5 Notably, the residential areas across Nelson/Stoke/Richmond areas (with the exception of the areas north and east of Nelson City up to and including Cable Bay, largely coinciding with postcode 7071 (and which excludes the areas south of Todd Bush Road)) have similar population density, collection requirements, traffic density, and distance/separation.⁵⁴
- 12.6 Accordingly, in Nelmac's submission, the only possible geographic areas which could be defined separately are the areas north and east of Nelson City up to and including Cable Bay, largely coinciding with postcode 7071 (and which excludes the areas south of Todd Bush Road), where Betta Bins is almost sole provider of residential general waste collection services.
- 12.7 In the event the Commission does adopt narrower markets (which Nelmac strongly disagrees with for the reasons set out above), the Commission must carefully consider the competitive constraints apparent in those markets coming from surrounding areas, including the constraint from Smart and the significant leverage it has coming from its TDC contracts (and which have already been discussed further above).

13 More competitive scenario if [] purchases Betta Bins

- 13.1 Nelmac previously submitted, in its submission on the Commission's SOI, that [].⁵⁵
- 13.2 Nelmac notes that the Commission takes the position that if there is an alternate buyer [].⁵⁶

⁵³ SoUI, at paragraph 44.

⁵⁴ Nelmac submitted (at paragraph 9.10 of its submission on the SOI) that the area the areas north and east of Nelson City up to and including Cable Bay, largely coinciding with postcode 7071 (and which, to provide further clarification, excludes the areas south of Todd Bush Road) should be excluded from the Commission's consideration where Betta Bins is almost exclusively the sole supplier in that area and where the features of that area mean that it is likely that only one supplier will ever provide services. If the Commission distinguished this area separately, it would be using the unique features of an area with small customer density to influence its views about a much larger part of the market).

⁵⁵ [].

⁵⁶ [].

- 13.3 The Commission states that [].⁵⁷
- 13.4 Nelmac submits that, for the reasons discussed in this submission, the Commission's view on this is incorrect. Nelmac maintains that the 'without' scenario for the Commission to consider [].⁵⁸
- 13.5 However, in the event the Commission continues its view [] Nelmac submits the Commission is incorrect in its statement that a counterfactual where an alternate purchaser acquires Beta Bins would result in significantly more competition than would be the case with the Proposed Acquisition.⁵⁹
- 13.6 To support this statement, the Commission states that:

The acquisition of Beta 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.

- 13.7 This view ignores the significant evidence of the competition that [].
- 13.8 It also ignores all of the other competitive constraints that will be present in the factual [].
- 13.9 Nelmac submits that in comparing the likely state of competition between the factual and a counterfactual, the Commission must fully consider the competitive constraints (and likely actions by the merged firm) in the factual just as it does in the counterfactual. The Commission fails to do this in the SoUI.
- 13.10 Having regard to the above, the evidence does not support the Commission's view that a sale to an alternate third party [] in the counterfactual would result in substantially more competition than in the Proposed Acquisition (we discuss the Commission's view in relation to another counterfactual where [] purchases Beta Bins further below).

14 Smart []

- 14.1 The Commission says that [].⁶⁰
- 14.2 The Commission considers that Smart [].⁶¹
- 14.3 This view disregards the evidence that shows []:
- 14.3.1 [].⁶²
- 14.3.2 [].⁶³
- 14.4 The Commission reads too far into [].⁶⁴
- 14.5 Nelmac therefore urges the Commission to carefully consider the evidence in respect of Smart's growth, and the likely trajectory of further growth in the factual.

⁵⁷ SoUI, at paragraph 51.

⁵⁸ [].

⁵⁹ SoUI, at paragraph 12.2.

⁶⁰ SoUI, at paragraph 12.3.

⁶¹ SoUI, at paragraph 88.7.

⁶² SoUI, at paragraph 80.1.

⁶³ SoUI, at paragraph 80.2.

⁶⁴ [].

15 Counterfactual where [] purchases Betta Bins incorrect

- 15.1 Nelmac submits, for the reasons identified in Nelmac's submission on the SOI (and as discussed above), that the Commission should only consider a counterfactual where []. Nelmac has provided evidence to the Commission that supports this counterfactual.⁶⁵
- 15.2 However, the Commission is considering the possibility of a further counterfactual where an [], and it refers to [] as that possible purchaser, purchases Betta Bins.
- 15.3 The only piece of evidence that Nelmac has identified that might give rise to the Commission's view is a single paragraph contained in the file note of its interview with [], [] is recorded (although noting we do not have access to the recording of this interview) as saying:

[].

- 15.4 [] are far from making any indication that it would buy Betta Bins. On our reading, it appears to be more of a general statement of the considerations [] takes into account or criteria it applies when considering whether to acquire *any* business when passed with the question by the Commission out of the blue.
- 15.5 There can be no reasonable inference drawn, based on this evidence, that a purchase by [] is a feasible counterfactual.

- 15.6 In addition:

15.6.1 [].

15.6.2 Nelmac sought and has received an opinion from BDO as to the attractiveness of Betta Bins to particular classes of purchasers. The BDO opinion concludes []:⁶⁶

(a) [];

(b) []; and

(c) [].

- 15.7 Nelmac notes that [].

15.8 The evidence does not, therefore, support a sale to [] as anything but (at most) a remote possibility. The Commission seemingly recognises this in the SoUI itself where the scenario of [] purchasing Betta Bins is mentioned briefly as being a possible counterfactual in the SoUI's introductory paragraphs (at paragraph 12.2), but where there is no further mention of it in the body of the SoUI.

- 15.9 Nelmac therefore submits that the Commission should disregard a scenario where Betta Bins is purchased by [] as a counterfactual for the purposes of its competition analysis.

16 Market aggregation/share

16.1 The Commission is concerned about market aggregation post-acquisition across the four postcodes of Nelson/Stoke/Richmond.⁶⁷

16.2 Nelmac has not seen the data about [], but submits that market share information is not particularly helpful in this case given that:

⁶⁵ [].

⁶⁶ BDO opinion, at paragraphs 6.1 to 6.4.

⁶⁷ SoUI, at paragraph 12.1.

- 16.2.1 Smart is a relatively new entrant, and where it has expanded rapidly in the past 12 – 24 months (and particularly in Richmond).
- 16.2.2 Smart has []:
- (a) []; and
 - (b) [].
- 16.2.3 Smart has not [].
- 16.2.4 Smart's [].
- 16.2.5 Customer acquisition occurs over time (in standard conditions where prices between competitors are similar) as customers come out of contract or are dissatisfied with the services offered by their current provider. Customer acquisition in these conditions requires persistence.
- 16.2.6 Smart has a strong base in Tasman, and where it is able to leverage its significant competitive advantage in that reason coming from its TDC contracts in further expansion across Nelson/Stoke/Richmond.
- 16.3 Further, Nelmac submits that it is not right for the Commission to break down the market by post code and then use market share in each post code as a proxy for competition (as it does, for example, at paragraph 75 of the SoUI). Use of market share is not correct in and of itself and the Commission needs to consider competition in the market as a whole, especially as there is no notable differences between the post codes as submitted in section 7 above (and except for the areas north and east of Nelson City up to and including Cable Bay, largely coinciding with postcode 7071 (and which excludes the areas south of Todd Bush Road), which we've dealt with separately).
- 16.4 Nelmac also notes that bag availability may drop because of environmental concerns over use of plastic, making customers who currently use bags more likely to look at bins, and therefore open to acquisition by Smart or competitors (including Waste Management). The split between bags and bins in Nelmac's customers numbers is important too, [] meaning that the market share analysis (again) overstates [] and is largely unhelpful for the purposes of considering the competitive state of the market.
- 16.5 Further, as submitted above at section 6, the Commission should properly take into account that the areas north and east of Nelson City up to and including Cable Bay, largely coinciding with postcode 7071 (and which excludes the areas south of Todd Bush Road), are almost exclusively supplied by Betta Bins. Can Plan does not service that area, but the Commission makes no note of that in its SoUI and has apparently not taken this important fact into account.
- 17 General waste collection prices increase regularly**
- 17.1 The Commission's preliminary view is that "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".⁶⁸
- 17.2 There is no logical connection between the statement in the first sentence and the conclusion in the second sentence. Past increases in collection prices have generally been due to increases in tip charges and there hasn't been ratepayer concern. What the Commission is talking about in the second sentence is a price increase for which there is no external explanation.

⁶⁸ SoUI, at paragraph 12.6.

17.3 In terms of the Commission's view that customer's are used to small price increases in the cost of waste collection,⁶⁹ the Commission confuses a customer's willingness to pay additional costs resulting from conditions outside of the supplier's hands, and in-line with other supplier's cost increases, such as (for example) landfill cost increases, with those that are simply intended to increase the profit margin of a supplier. A customer will be much more understanding of and willing to pay costs attributed to the former than the latter (the latter likely prompting the customer to complain and switch, or consider switching, supplier).⁷⁰

18 Further barriers to new entry and expansion

18.1 The Commission's preliminary view is that "...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 from existing suppliers with economies of scale and very low incremental costs".⁷¹

18.2 The Commission also comments that the barriers to entry/expansion are "moderate to high".⁷²

18.3 Nelmac submits that the Commission preliminary view is not supported by the evidence, where:

18.3.1 Smart has economy of scale from Tasman and nationwide (as discussed at section 7 above).

18.3.2 Envirowaste and Waste Management have nation-wide economies of scale and local economies of scale from commercial [].

18.3.3 [] has nationwide economies of scale.

18.3.4 Smart, Envirowaste and Waste Management have very low incremental costs. [], and [] does not see the cost of entry as being significant from its comments to the Commission. Also, costs of withdrawal aren't high for the nationwide operators (e.g. investments in trucks aren't lost).

19 Price discrimination

19.1 The Commission says that it is not satisfied that the merged entity would not have the ability, and that it would not have the incentive, to price discriminate.

19.2 Nelmac submits that this view is not supported, and where it is clear on the evidence in relation to the competitive constraints that the merged entity will face post-acquisition (as summarised above) that any possible price discrimination by the merged entity would be thwarted by those competitive constraints.

19.3 Nelmac refers the Commission to the Morrison Low report which (on an objective view of the state of competition in the market) states that the merged entity will be constrained from any price discrimination by (in particular) the presence of Smart in the wider Nelson-Tasman region. This is despite the merged entity likely needing to increase prices initially as a result of increases in waste disposal levies nationally, and any further increases in operational costs (such as wage increases). The extent to which competitors (including the merged entity) can pass on these costs to customers is unknown, however, this may open the door for others to compete.⁷³ In other words, this is something the merged entity will need to consider if it were to adjust its prices.⁷⁴

⁶⁹ SoUI, at paragraph 120.

⁷⁰ Note that the extent to which a supplier is able to absorb these costs could influence response from outside competitors in the wider area, as stated in the Morrison Low report at paragraph 31.

⁷¹ SoUI, at paragraph 102.

⁷² SoUI, at paragraph 98.

⁷³ Morrison Low report, at paragraphs 23 – 31.

⁷⁴ Morrison Low report, at paragraph 29.

- 19.4 In relation to bags, the merged entity would need to create different bags for different areas if it wanted to price discriminate prices for bag collection (which would risk opening the door to increased competition from other suppliers).⁷⁵
- 19.5 Bins are theoretically easier to price discriminate on because pricing is less visible on a website, (though this is much less of an issue with the Proposed Acquisition because []). However, Competitors will make “dummy” inquiries to the merged entity to price check and if any instances of price discrimination are apparent, those competing firms can easily proceed with advertising in that area where customers will become aware of price discrimination and seek to switch to the new supplier(s). If it is easier to price discriminate on bin pricing than for bags, then it will also be easier for competing firms to respond. The potential for the merged firm’s competitors to respond will act to constrain the merged entity from price discriminating.⁷⁶
- 19.6 Nelmac further submits that residents will likely complain if they identify any increases in price that they do not think are justified, especially if they do further investigation and identify that price discrimination has occurred. The Commission should note from the submissions it has received from members of the public on the Proposed Acquisition (which, on our understanding, is not common in applications for clearance under section 66 of the Commerce Act 1986) that prices of waste collection is closely watched by the general public in the Nelson region.
- 19.7 Nelmac points to the areas north and east of Nelson City up to and including Cable Bay, largely coinciding with postcode 7071 (and which excludes the areas south of Todd Bush Road), as an example of where price discrimination might be possible in the status quo. Betta Bins is the almost exclusive supplier in this area, and could be justified in charging more for services in this area than the densely populated areas across Nelson/Stoke/Richmond. However, Betta Bins does not charge increased prices in this area, [].

20 Constraint currently provided by Betta Bins

- 20.1 Nelmac notes that the Commission describes that [].⁷⁷
- 20.2 []:⁷⁸
- 20.3 [].
- 20.4 []:
- 20.4.1 [];
- 20.4.2 []; and
- 20.4.3 [].
- 20.5 [].

CLOSING REMARKS

21 Conclusions on the evidence

- 21.1 Nelmac submits that the evidence is clear that the competitive constraints that will exist post-acquisition will effectively constrain the merged entity. The Commission should have little difficulty, following proper analysis of the evidence, in coming to the conclusion that the

⁷⁵ Morrison Low report, at paragraph 30.

⁷⁶ Morrison Low report, at paragraph 27.

⁷⁷ SoUI, at paragraphs 65 and 68.

⁷⁸ See the information attached to Nelmac’s response dated 21 January 2021 to the Commission’s RFI.

Proposed Acquisition will not have, or would not be likely to have, the effect of substantially lessening competition in a market.

21.2 Nelmac invites the Commission to carefully review the evidence it has received during the course of its investigation and proceed to make its decision in accordance with section 66 of the Commerce Act 1986 upon that evidence.

21.3 Nelmac is available to answer any further questions that the Commission may have or to meet with the Commission's staff.

Yours sincerely



Nick Crang
Partner

d +64 4 471 9440
m +64 21 616 884
nick.crang@duncancotterill.com