

Submission on Can Plan / Nelmac SOUI

June 2021

Public version



DOCUMENT OVERVIEW

- This document is in the following sections:

- **Executive Summary**

- **Section I: Record submissions**

In this section we compare the evidential record with the Commission's SOUI.

- **Section II: Commerce Act submissions**

In this section we apply the standard Commerce Act analysis to the evidence on record and conclude why the Commission can be satisfied that this transaction does not substantially lessen competition.

- **Note for readers:** following the Commission's SOUI letter, Can Plan will not acquire Nelmac's residential green waste business. Nelmac will continue to operate that business as a going concern, independent from Can Plan.



EXECUTIVE SUMMARY

On 18 December 2020 Can Plan filed for clearance to acquire the Betta Bins Nelson-Tasman business. The transaction is worth \$[] and covers three rubbish collection trucks and Betta Bins' existing collection routes in the area.

In the factual:

- the merger would involve a 4→3 consolidation in the Nelson-Tasman residential waste market; and
- see the merged entity constrained by competition from aggressive national firm, Smart Environmental, multinational firms, Waste Management and Envirowaste, and the ever-present threat that Nelson City Council could move to a rates-based waste collection model as is becoming increasingly common elsewhere around the country.

Against that context, Commissioners can be satisfied that this transaction will not, and will not be likely to, substantially lessen competition.

On that front, Commissioners will see that there is no evidence on record that a third-party acquirer of the Betta Bins assets would operate that business more competitively than Nelmac.

In this submission we respond to the SOUI.



SECTION I: RECORD SUBMISSIONS

- 1 The Commission contends the market is no wider than Nelson/Stoke/Richmond and that that area is possibly split into two markets with an undefined boundary near Stoke or "South Nelson".¹
- 2 The Commission uses that narrow market definition – which has been described by the Courts as an analytical "tool" – to produce abstract market share figures which the Commission uses as a factual pillar for its preliminary view that this transaction would substantially lessen competition.
- 3 There is, though, limited evidence on record to support the view that the market shares within the Commission-defined geographic boundaries capture the competitive constraints that Can Plan faces in the Nelson-Tasman region. And, crucially, there is limited evidence on record that:
 - 3.1 Can Plan's acquisition of Betta Bins materially or substantially alters the competitive dynamics in the region's residential waste collection market; or
 - 3.2 []'s acquisition of Betta Bins would result in "substantially more competition".
- 4 We acknowledge that the Commission's process is an inquisitorial one. And, in the end, Commissioners must weigh and balance the evidence on record to make a judgement call as to whether they believe a transaction will substantially lessen competition to the applicable legal standard.
- 5 We accept that. But we respectively observe that Commissioners' deliberations depend on Commission staff presenting the evidential record fairly, impartially and accurately. Commission staff must conduct their investigation with an open-mind and appropriately investigate all evidential leads.
- 6 On review of the record, we are concerned about certain material differences between the record on the one hand, and factual assertions in the SOUI on the other.

¹ The Commission defines that market on the basis that: "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" and "the evidence before us indicates that there are differences in competitive conditions across Nelson/Stoke/Richmond".



7 We do not believe the preliminary competition concerns in that document are supported by fact.

8 We expand below.

No geographic barriers

9 The Commission’s SOUI suggests throughout the document that there are different geographic competitive conditions across Nelson, Stoke and Richmond but points to very limited evidence supporting that assertion.²

10 To the contrary, the record is clear that there are no geographic or other barriers to existing competitors operating throughout the region:

10.1 [] told the Commission that:

- (a) “the Nelson-Tasman region [is] effectively the same market, although Golden Bay is slightly different (separated from the rest of the region by the Takaka Hill)”.³
- (b) “doubt that any [] have any idea about post codes – from their point of view it’s all Nelson. Nelson, Stoke, Richmond is one place”.⁴
- (c) [] “go[es] where businesses and customers are ... no geographic boundary to that”.⁵

10.2 [] explained to the Commission that the area from Richmond to Nelson is like one “long ribbon of land” and all areas on that ribbon are attractive for residential waste collection because they are dense and close to the York Valley landfill.⁶

10.3 And, as Can Plan has previously recorded for the Commission:

- (a) Waste Management services commercial and residential customers from its base in Nelson across the region, including Stoke, Richmond,

² The Commission’s earlier Statement of Issues claimed, for instance, that Nelson’s steep streets are a barrier. But that theory has fallen away.

³ [].

⁴ [].

⁵ [].

⁶ [].



Brightwater, Wakefield and the postcode 7071 border near Todd's Valley.

- (b) Can Plan services customers from its Nelson base across most of the region,⁷ including from Nelson to Wakefield to Mapua to Motueka; and
- (c) Smart services customers from its Richmond base across most of the region, including Nelson, Stoke, Richmond, Wakefield, Brightwater, Mapua and Motueka.

11 The only evidence on record potentially supporting the SOUI view that the geographic dynamics of Nelson is different from the rest of the Nelson-Tasman region is a comment from [] that Nelson **CBD** can be traffic congested.⁸

12 But that area is one block of streets (like a smaller Queen Street or Lambton Quay). And, as Commissioners will see below, Smart is taking orders for wheelie bins in The Wood, one of Nelson's largest suburbs that directly neighbours Nelson CBD and is one of Nelson's furthest suburbs from Smart's Richmond base.

Cable Bay

13 Further on the market's geographic layout, the Commission continues to refer to the parties overlapping in Cable Bay.⁹

14 Can Plan and Nelmac made it clear to Commission staff that Can Plan does not operate in Cable Bay.

15 The furthest north Can Plan goes is Todd Bush Road, off State Highway 6 – which borders the postcode 7010-7071 boundary near Nelson's Marybank suburb.

16 Can Plan does not drive up to Cable Bay because it is rural and only has room for one residential waste collector. And, to avoid further doubt, with reference to the SOUI's figure 1 that purportedly shows the "map of overlap postcodes",¹⁰ Can Plan

⁷ Except for Cable Bay. The Commission says in the SOUI that: "The specific geographic area of competitive overlap between the parties extends from Richmond ... to Cable Bay". But, as Can Plan and Nelmac made clear to the Commission, Can Plan does not operate in Cable Bay. We expand on that point below.

⁸ [].

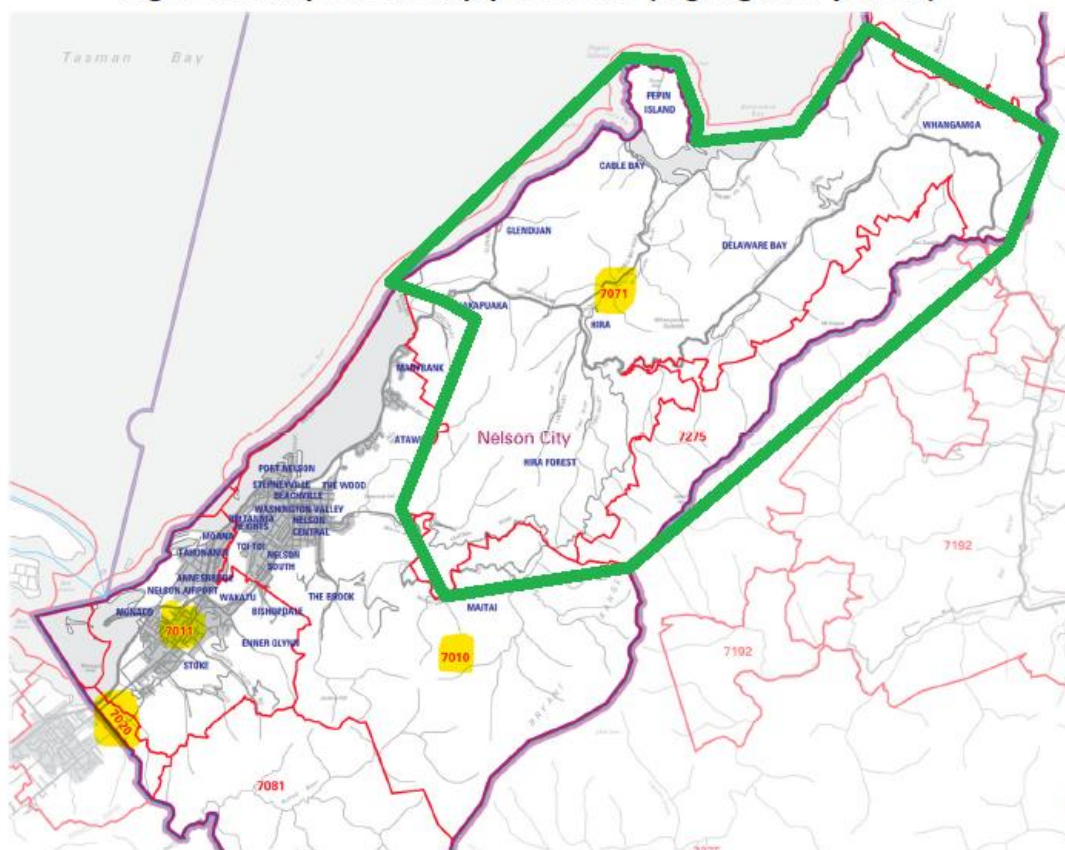
⁹ SOUI, [8].

¹⁰ SOUI, Figure 1.

does not service addresses in Hira, Glenduan, Cable Bay, Hira Forest, Delaware Bay, Whangamoia or Pepin Island.

- 17 To be clear, Can Plan does **not** service any addresses within the green outlined shape on the Commission's map:

Figure 1: Map of overlap postcodes (highlighted yellow)²⁰



- 18 This is fact, not submission.¹¹
- 19 The Commission's SOUI, though, takes Can Plan's evidence and attributes it to the whole of postcode 7071, claiming that "there would be substantial aggregation in this part of Nelson" with a view it seems to saying that all of 7071 is its own discrete market (as the Commission says: "given the largely rural nature of the postcode"). (And, consistent with that concern, the Commission's "figure 1" map exaggerates the areas where Can Plan and Betta Bins actually overlap).

¹¹ Commission staff could have fact-checked this too by going on Can Plan's website: <https://canplan.co.nz/pagesgen/collectioninformation.aspx>.



- 20 The Commission's finding overlooks Can Plan's evidence that it just services a few addresses that fall on the 7071 side of the 7010-7071 border near the Marybank and Todd Valley suburbs.
- 21 That small part of 7071 is, unlike Cable Bay, no different geographically to other parts of Richmond, Stoke, Nelson, Brightwater and Wakefield (using []'s term, it is all on the same "ribbon of land"). []. And, for further context, the drive from Grove Street – where Smart is taking orders in Nelson – to Marybank/Todd Valley is just 8-10 minutes on State Highway 6. (By comparison, Cable Bay follows a windy country road off SH6 down to the coast).
- 22 As [] told the Commission "our people do not have any idea about post codes – from their point of view it's all Nelson" and "we go where the customers are".¹²
- 23 To put the **non**-Cable Bay postcode 7071 customers – who are on the postcode 7010-7071 border – into context, in 2020:
- 23.1 Can Plan serviced 40 customers; and
- 23.2 [].
- 24 We record for completeness that Can Pan has no plans to enter into Cable Bay, Hira, Glenduan, Cable Bay, Hira Forest, Delaware Bay, Whangamoia or Pepin Island; and it certainly has not planted seed bins in those areas.

There are, and will continue be, "effective alternative waste collection suppliers in the market"

- 25 The SOUI says that Can Plan would not face competition or the threat of competition in Nelson-Tasman post-transaction because:
- 25.1 Smart would not be an "effective alternative waste collection" option for consumers;
- 25.2 Waste Management would not be an "effective alternative waste collection" option for consumers;

¹² [].



25.3 Can Plan would not be threatened by Envirowaste's entry because entry for Envirowaste would be "difficult, costly and risky"; and

25.4 Can Plan would not be threatened by de novo entry by other national waste collection companies, like [], because entry would be "difficult, costly and risky".

26 The evidential record does not support those views.

Smart

SOUI factual assertion 1: []

27 The Commission says that: "[].¹³

28 We deal with the geographic constraint point above.

29 [] Smart has planted "seed bins" across Nelson – including near the CBD – which it services on a weekly basis as it looks to generate more business in the area. Smart is accepting orders – including offering year-long contracts until at least June 2022 – deep into Nelson.

30 As Smart's spokesperson told a member of the public on 11 June 2021: "*we are moving into Nelson with the wheelie bins*".

31 That quote is from the third of three transcripts below from [],¹⁴ an independent contractor, calling Smart on 4, 9 and 11 June 2021 to order a bin for Grove Street, Milton Street and, more generally, "The Wood" suburb in Nelson.

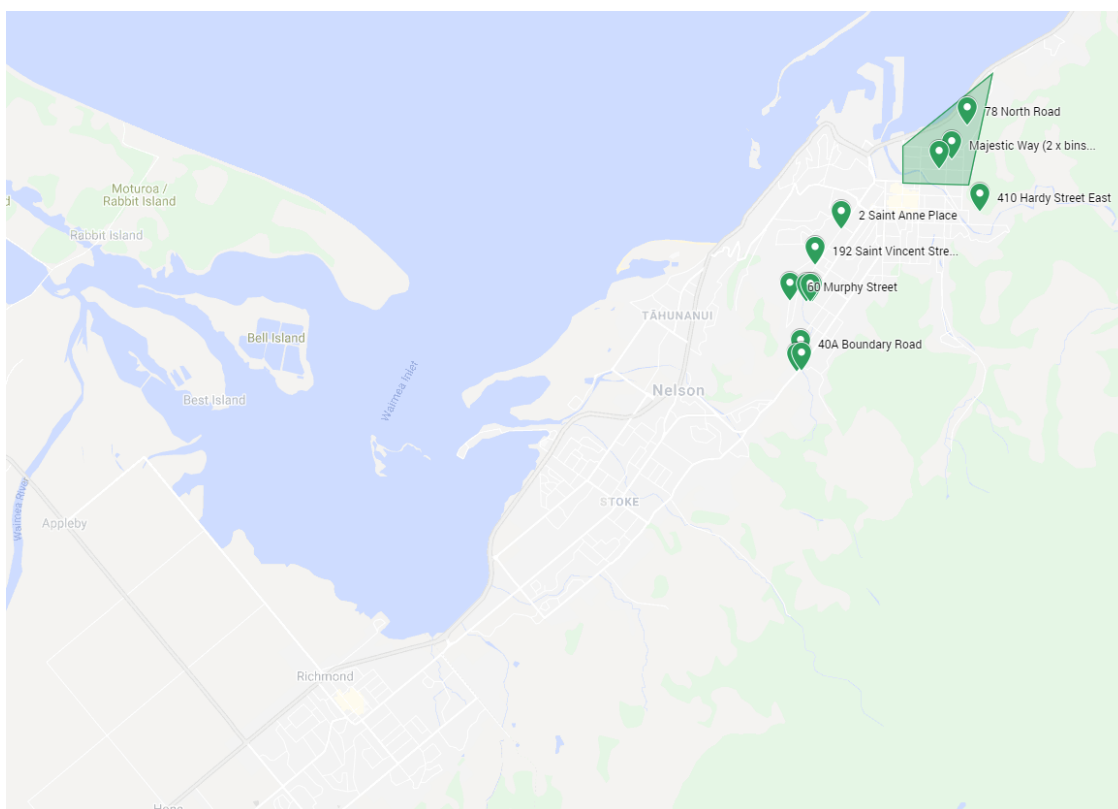
32 The particular focus on "The Wood" is because the only way to service that area to drive through the heart of Nelson and beyond the CBD. It follows Smart will be incentivised to "in-fill" the route it takes to service those customers which is practically all of Nelson.

33 The following map shows The Wood, outlined green, with the other markers being locations of Smart bins that Can Plan photographed for the Commission:¹⁵

¹³ SOUI, at [88.3].

¹⁴ These transcripts are from []'s "Anne-Marie" and "Stephen" cold calling Smart on 4, 9 and 11 June 2021. We record that Can Plan paid [], an independent third-party consultant, to complete this investigatory job.

¹⁵ That map has been updated to include one additional bin that Can Plan noticed at 410 Hardy Street in Maitai (West Nelson). We **enclose** that photograph which was taken on 17 May 2021.



Call to Smart on 4 June 2021

Automatic answerphone message	Business hours are Monday to Friday, 8.30 am till 5.00 pm, excluding public holidays. If you call outside these hours, your message will be received on the next business day. Please press 1 for new inquiries and events. Please press 2 for bookings and accounts. Please hold for all other
	[Phone rings]
[]	Hello, Smart Environmental, it's [] speaking.
Anne-Marie	Hi [], I'm calling from Nelson. I was told to give you a call from the Nelson office. I was just wondering if you could give me pricing for your bins. I've seen them in our area.
[]	Whereabouts do you live?
Anne-Marie	It's Grove Street.
[]	Grove. Yes. Gosh, there's so many, because there are streets that are called something Grove, there's so much is coming up.



Anne-Marie	It's actually Grove Street in Nelson.
[]	Yes. What area in Nelson?
Anne-Marie	It might come up as The Brook. The Wood. I've just moved here. The Wood. We're in The Wood. I should remember that. I tried to remember it as My Wood. Yes.
[]	Oh yes. Yes. Perfect. Cool. I've got you guys there. All right, so. We can service your bins. And we have got either 140 litre bins or 240 litre. What would you?
Anne-Marie	Are they weekly or fortnightly?
[]	Weekly.
Anne-Marie	Can you just tell me about those and I'll just check with my husband and see what he thinks.
[]	Yes, no worries. So they are, it's a weekly collection. I'd have to look up and see what day. Because that's a newer area isn't it?
Anne-Marie	Yes.
[]	So we've actually got a first year promo going on at the moment. So for the first year, for the 240 litre, including GST, it's \$255 for a weekly collection.
Anne-Marie	So that's a special at the moment?
[]	Yes. And then the 140 litre is \$195.
Anne-Marie	And that's for a year?
[]	Yes, for a year. A year, once per week collection.
Anne-Marie	Okay. Do you have a weekly payment option or a three-monthly payment option or is it all just paid for a year?
[]	You can do monthly if you want to.
Anne-Marie	How much does that come to monthly?
[]	Monthly, for the 240 litre, it's \$23.25.
Anne-Marie	Yes.



[]	And the 140 is \$18.25.
Anne-Marie	That's great. Thank you very much for your help [].
[]	No worries. See you later.
Anne-Marie	Okay. Bye.
[]	Bye.

Call to Smart on 9 June 2021

[]:	Hello Smart Environmental, it's [] speaking.
Anne-Marie:	Hey []. How are you today?
[]:	Good.
Anne-Marie:	That's good. Hey I've seen your bins in my area and I'm just enquiring about pricing.
[]:	Ooh, your number has come through very weird. All zero.
Anne-Marie:	Interesting. I've no idea why that is.
[]:	Yeah. Whereabouts are you calling from?
Anne-Marie:	I am in Milton Street in The Wood, Nelson.
[]:	Oh yeah. Cool. That's new area isn't it?
Anne-Marie:	Yeah. Correct.
[]:	So we've got a 240 litre and a 140 litre bin.
Anne-Marie:	Yep. How much ... Sorry
[]:	240 litre is \$255 for the year.
Anne-Marie:	For the year yep.
[]:	And the 140 is \$195.



Anne-Marie:	\$195 a year.
[]):	Yeah.
Anne-Marie:	OK cool. Alright. That is all I need to know at the moment. I will give you a call back if we want to go from here [].
[]):	OK. Thank you.
Anne-Marie:	Awesome. Thank you for that. Have a good day.
[]):	Bye
Anne-Marie:	Bye

Call to Smart on 11 June 2021

Pre-recorded welcome message	Welcome to Smart Environmental. Please choose from the following options: For the North Island please press 1 or for the South Island please press 2. For Queenstown or Wanaka please press 1. For Buller please press 2. For Tasman please press 3. Or for Greymouth please press 4.
Pre-recorded information message	Hello, you've reached Smart Environmental. Our office hours are Monday to Friday 8.30am till 5.00pm excluding public holidays. If you call outside these hours your message will be received on the next business day. Please press 1 for new enquiries and events. Please press 2 for bookings and accounts. Please hold for all other enquiries.
[]):	Hello Smart Environmental it's [] speaking.
Stephen	Oh giddy [], I'm ringing from Blenheim. My mum lives in Nelson City and I've just been looking at some bins and I just wondered do you do wheelie bins, do you do the wheelie bin empties?
[]):	We do. Whereabouts in Nelson City because we're mainly Tasman but we are moving into Nelson with the wheelie bins.
Stephen	She's in The Wood area.
[]):	Oh The Wood. Yes yes, we do. Yep.



Stephen	Oh great. What sort of – there’s little bins in there and big bins is that right?
[]	Yeah so we’ve got a 140ltr bin which is the smallest one. That would probably fit her the best if it’s just her in the house. And we’ve got a first year promotion at the moment so that’s \$195 including GST for the year.
Stephen	\$195 for the year. Okay cool. And I suppose you pay that before hand?
[]	Yeah she can either pay up front the \$195 for the year or \$18.25 per month.
Stephen	Or \$18.25 per month.
[]	It’s just whatever suits best financially.
Stephen	Okay, cool. And you have a bigger one as well? Is that done, is that weekly or is that like fortnightly.
[]	That is weekly.
Stephen	That’s weekly. Cool. And there’s a bigger one, that right?
[]	And the bigger one, yeah its \$255 including GST for a once per week collection.
Stephen	Okay she’d probably use the little one, that she actually wants. Yeah. Thank you [inaudible 2.13].
[]	Yeah.
Stephen	Great. I’ll go away and have a chat with her and see what we can organise. Thank you very much for your help.
[]	No worries, thanks for the call. Bye bye.
Stephen	Bye bye.

34 The Commission’s comment that Smart “[]” is not supported by Smart’s evidence on record either.



Nowhere in the record does []. Nowhere in the record does [].

35 We go through in detail each of the Commission’s communications with [] to demonstrate this fact.

[Paragraphs [36]-[61] redacted in its entirety]

[]

36 []:¹⁶

36.1 “[]”;¹⁷ and

36.2 []:

(a) “[]”; and

(b) “[]”.

37 []:¹⁸

“[]”.

38 [].

39 []:¹⁹

¹⁶ [].

¹⁷ []

¹⁸ [].

¹⁹ [].



40 [].

41 [].

42 [].

43 []:

43.1 [];

43.2 []; and

43.3 [].

[]

44 [].

45 []:

45.1 []; and

45.2 [].

46 []:²⁰

"[]"

[...]

"[]".

47 [].

²⁰ [].



48 [].²¹

49 [].

50 [].

51 [].²² [].

52 []:²³

[]

53 [].

54 [].

55 []:

[]

55.1 [].

55.2 []:

(a) []²⁴

²¹ [].

²² [].

²³ [].

²⁴ [].



(b) []

55.3 [].

[]

55.4 [].

55.5 [].

[]

55.6 [].

55.7 [].

55.8 [].

[]

55.9 [].

55.10 []:²⁵

[].

[]

56 []:²⁶

[]

57 [].

[]

58 [].

59 [].

²⁵ []

²⁶ [].



60 [].

61 []:

[].

SOUI factual assertion 2: []

62 The Commission says that "[]".²⁷ []".²⁸

63 []. The record shows, though, that [] is clearly saying something different.

[Paragraphs [64]-[77] redacted in its entirety]

64 [].

65 []:

65.1 [].

65.2 [].²⁹

66 [].³⁰

67 []:

67.1 [],³¹ and

67.2 [].³²

68 [].

69 [].³³ [].³⁴

²⁷ SOUI, at [12.3].

²⁸ SOUI, at [88.7].

²⁹ [].

³⁰ [].

³¹ [].

³² [].

³³ [].

³⁴ [].



70 []:

70.1 []:

(a) [];³⁵ and

(b) []".³⁶

70.2 []:

(a) [];³⁷ and

(b) [].³⁸

(c) [].³⁹

70.3 []:

(a) [].⁴⁰

(b) [].⁴¹

71 [].

72 []:

72.1 [].⁴²

72.2 [].

72.3 [].

³⁵ [].

³⁶ [].

³⁷ [].

³⁸ [].

³⁹ [].

⁴⁰ [].

⁴¹ [].

⁴² [].



72.4 [].⁴³

72.5 [].⁴⁴

72.6 [].⁴⁵

73 [].⁴⁶ [].

74 [].

75 [].

76 [].

77 [].

SUI factual assertion 3: [] would operate Betta Bins assets more aggressively

78 The Commission says that: “[] would be likely to operate Betta Bins more aggressively than Nelmac does currently, including by likely increased advertising and the introduction of special price offers. This could similarly be the case where Betta Bins is owned by another waste collection service supplier”.

79 There is, though, no evidence on record that [] would price or advertise the *existing* Betta Bins contracted routes – which is the asset subject to this transaction – more aggressively than Betta Bins at the moment.

[Paragraphs [80]-[88] redacted in its entirety]

80 [].⁴⁷ []:

[]

81 []:

⁴³ [].

⁴⁴ [].

⁴⁵ [].

⁴⁶ [].

⁴⁷ [].



82 [].

83 [].

84 [].

85 [].

86 [].⁴⁸ [].

87 [].

88 [].

SOUI factual assertion 4: []

89 Finally, the Commission says that "[]".⁴⁹

[Paragraphs [90]-[96] redacted in its entirety]

90 []:

90.1 [];

90.2 []; and

90.3 [].

91 [].⁵⁰

92 [].

93 [].

94 []:

⁴⁸ [].

⁴⁹ SOUI, at [55.2].

⁵⁰ [].



94.1 [],⁵¹

94.2 [].⁵²

94.3 [].⁵³

94.4 []:

(a) [];⁵⁴ and

(b) [].⁵⁵

95 [].⁵⁶

96 [].⁵⁷

Waste Management

SOUI factual assumption 1: Waste Management is a declining competitive constraint

97 The Commission says that the competitive constraint that Can Plan faces from Waste Management – who’s services are available online to all addresses from Brightwater to the Todd’s Valley area – is “overstated” because:

97.1 “Waste Management is not competing with Can Plan, Betta Bins and Smart for customers that opt to use rubbish bags for general waste”.⁵⁸

97.2 “[...] ... Can Plan said Waste Management used to drop promotional flyers to houses, but no longer does so, suggesting that it has seen a decline in competitive constraint from Waste Management”.⁵⁹

⁵¹ [].

⁵² [].

⁵³ [].

⁵⁴ [].

⁵⁵ [].

⁵⁶ [].

⁵⁷ [].

⁵⁸ SOUI, [92.1].

⁵⁹ SOUI, [92.2].



97.3 “[]”.⁶⁰

97.4 And, “[]” ... and the Commission also cites that “[]”.⁶¹

98 We compare each of those SOUI comments to the record in turn.

Bags

99 [].⁶² Bags aren’t a long-term solution because of the affect that single-use plastic bags have on our environment and for health and safety reasons.⁶³ (For completeness, and as Can Plan has previously explained to the Commission, we record that there was an increase in use of rubbish bags in 2020 because of the Covid pandemic).

100 That reality means that wheelie bin-only residential waste companies – like Waste Management – can be expected to become an *increasing* competitive constraint on Can Plan and the market as consumers substitute bags for bins for over time.

101 In support of that view, we record that [].⁶⁴ And, as we see below, Waste Management [] whereas Betta Bins [] customers.⁶⁵

102 Moreover, the Commission’s logic of discounting Waste Management’s constraint on the basis that it doesn’t offer bags is not carried through in the SOUI when assessing competition between Can Plan and Betta Bins.

103 The SOUI makes repeated reference to the pair having significant market shares across Nelson/Stoke/Richmond and its preliminary views is that that is a significant problem, but overlooks that Can Plan focuses on bins like Waste Management. Specifically in Nelson:

103.1 Betta Bins sells (by revenue) []% of bags and bin liners (with Can Plan responsible for just []%);⁶⁶ and

⁶⁰ SOUI, [93.6].

⁶¹ SOUI, [92.3]-[92.4].

⁶² [].

⁶³ [].

⁶⁴ With Waste Management’s figure [].

⁶⁵ [].

⁶⁶ Based on 2020 figures.



103.2 Can Plan sells (by revenue) []% of wheelie bins, with Betta Bins and Waste Management having [] and []% share respectively.⁶⁷

104 With, of course, those figures expected to change over time as bags are phased out and Smart, Waste Management and Can Plan compete to sell wheelie bins to homes in the Nelson-Tasman market, including to [].

Waste Management advertising

104.1 The SOUI says that: "Can Plan said Waste Management used to drop promotional flyers to houses, but no longer does so, suggesting that it has seen a decline in competitive constraint from Waste Management".

104.2 The Commission's statement about what Can Plan said, and the critical inferences it draws from that statement, overstate what Can Plan clearly told the Commission.

104.3 Can Plan told the Commission that:⁶⁸

... not sure [Waste Management] used to put flyers out in the region, um, and being the largest waste company in New Zealand, they can deal with us pretty swiftly if they wanted to.

104.4 We cannot reconcile how the Commission could take Can Plan's statement – answered during a voluntary, purportedly cooperative, interview – and repurpose the remark as a pillar for the Commission's argument that Can Plan sees Waste Management as a declining competitive constraint.

104.5 To the contrary, Can Plan made it clear to Commission staff that Waste Management is and remains a strong competitive constraint and could "deal with" Can Plan swiftly if, for instance, it attempted to increase prices.

Waste Management pricing

105 The Commission asserts that "[]" to support its conclusion that Waste Management is not a strong competitor to Can Plan.

⁶⁷ Based on 2020 figures.

⁶⁸ Can Plan interview.



106 That assertion is not supported by [].

107 Further, the Commission's SOUI statement ignores that service quality is also a dimension of price. [].⁶⁹ And, indeed, as we see from the figures above []. With that observation consistent with Can Plan's comments to Commission staff that it wins customers from Betta Bins because it offers a better service, but has not recorded any lost customers to Betta Bins over the last three years.⁷⁰

108 In any event, the Commission's assertion that [] is difficult to reconcile logically with the Commission's apparent theory of harm for this case. As we understand it, the Commission's hypothetical theory of harm is that:

108.1 Post-transaction Can Plan might be able to price discriminate against some undefined Nelson customers by implementing a small but significant non-transitory pricing increase to their general website price (step (A)); and

108.2 Can Plan could then protect that price increase by avoiding losing marginal customers to competitors by price matching customers that are thinking about switching to rivals (step (B)).

109 But under step "(A)" of that theory, Can Plan would be constrained by Waste Management's online price (as well as Smart's "full price") which is only marginally higher than Can Plan's today. And, indeed, the record shows that Commission staff were aware of this fact when they put to Waste Management that: *"If Can Plan was to increase its prices by 10%, this would appear to put its pricing (which after a 10% increased would be \$379.50) above that of Waste Management".*⁷¹ (For comparison, Waste Management's current price is \$350.50).

110 The SOUI makes no reference to this detail at all.

[]

111 [].

⁶⁹ [].

⁷⁰ Contrary to the SOUI's comment at [66] that "Can Plan did not include any data on the number of customers switching from Betta Bins to Can Plan (or vice versa)". Can Plan did provide the Commission with data on how many customers it had recorded being lost to Betta Bins. It was just that that figure was **zero**. We made that clear to Commission staff during the investigation. We expand on this point further below when assessing how the SOUI has treated Can Plan's evidence.

⁷¹ [].



112 However, the Commission ignores that, most recently, Waste Management’s Nelson customer figures [].

113 Further, to highlight the inconsistency between the way the SOUI treats different parties’ evidence, we note that at [68] the Commission uses Betta Bins’ []% growth in customers between 2018 and 2020 to support its conclusion that Betta Bins’ provides a material competitive constraint that would be lost by this transaction. However, the SOUI is silent on the fact that Betta Bins [] between 2019 and 2020.

114 The fact is Can Plan sees Waste Management as a strong competitive option that customers can and will switch to if it attempted to implement a non-transitory price increase. And that constraint will only increase as customers increasingly prefer wheelie bins over bags.

Theme 2: Can Plan would not be constrained by the threat of Waste Management expanding

115 The Commission says that: “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”.

116 First, we record that [].⁷² That is, of course, because Can Plan does not know how much capacity Waste Management has but certainly knows how deep its pockets are. Can Plan too has no idea of Waste Management’s internal thinking about whether or not it would bring a new truck to Nelson.

117 Consistently, the fact that [].

118 We flag too, at the date of this submission, the Commission has not yet responded to our OIA request for the recording/transcript of Waste Management’s interviews with the Commission, so we have not been able to conduct a full review of Waste Management’s evidence – including the questions asked by Commission staff.

⁷² [].



Envirowaste

119 Can Plan has submitted throughout this process that Envirowaste is one of its main, and key, entry threats.⁷³ That is because Envirowaste is already in the Nelson-Tasman commercial market and is a very established player nationally.

120 On the threat of Envirowaste's expansion, the Commission concludes that:

120.1 "other factors make new entry (and expansion) difficult, costly and risky compared to the market opportunities available ... [because] new entrants are likely to face barriers in competing to win customers and market share of existing suppliers with economies of scale and very low incremental costs"; and

120.2 "there may also be strategic barriers to new entry, including due to price matching by existing suppliers".⁷⁴

121 There is no evidence on the record to conclude that expansion into Nelson's residential wheelie bin market would be "difficult, costly and risky" for Envirowaste because of Can Plan's scale.

122 In fact, [].

[Paragraphs [123]-[141] redacted in its entirety]

123 []:⁷⁵

123.1 [];

123.2 "[]";

123.3 []; and

123.4 [].

124 []:⁷⁶ []".⁷⁷

⁷³ To avoid doubt, Smart and Waste Management are already in the market.

⁷⁴ SOUI, [102].

⁷⁵ [].

⁷⁶ [].

⁷⁷ [].



125 []:

125.1 []". []:

(a) "[].⁷⁸

(b) "[].⁷⁹

125.2 []. [].⁸⁰

126 []:⁸¹

126.1 []"; and

126.2 []".

127 [].⁸² [].⁸³ [].

128 []. [].⁸⁴

129 [].⁸⁵

130 [].

131 []:

⁷⁸ [].

⁷⁹ [].

⁸⁰ [].

⁸¹ [].

⁸² [].

⁸³ [].

⁸⁴ [].

⁸⁵ [].



132 [].

133 [].

134 [].

135 [].

136 [].

137 [].

138 [].

139 []:

139.1 [];

139.2 []; and

139.3 [].

140 []. [].

141 []:

141.1 [].

141.2 [].

142 As we explain above, large national waste management companies are different to local businesses. Those large players have deep capital resources and national scale which they can use to quickly, easily and affordably enter and expand in markets through loss-leading strategies and innovative solutions. That reality differs quite materially from Can Plan who, unlike Smart, Waste Management, Envirowaste and [], does not have deep capital resources, with or without this transaction. It follows that the brief views of [] and [] can be discounted against the clear line of information that the Commission received from industry participants on the ease of entry and expansion.



Other entrants: []

143 Consistently, [].

Paragraphs [144]-[151] redacted in its entirety

144 []:⁸⁶

145 []:

146 [].

147 []:

148 []:

[].

⁸⁶ [].



149 []. [].⁸⁷

150 []:⁸⁸

150.1 “[]”;

150.2 “[]”;

150.3 “[]”;

150.4 []

[];

150.5 [],

[]; and

150.6 [].

151 []. []:

(a) [];

(b) [];

(c) [];

(d) [];

(e) []; and

(f) [].

⁸⁷ [].

⁸⁸ [].



152 All of []'s evidence demonstrates that: (a) the barriers to entry and expansion are very low; and (b) that Can Plan's proposed acquisition of Betta Bins' assets (trucks and routes) will not make entry or expansion any more difficult – such that those trucks and routes in []'s hands would lead to “substantially more competition.”

Can Plan's evidence

153 The final part of this record analysis turns to the way that the SOUI treats Can Plan's evidence.

154 In many cases the SOUI omits key context around the information provided and/or appears to place materially lesser weight to Can Plan's evidence than third-party material.

155 We expand on examples of our concerns below.

Example 1: catchment graph

156 The SOUI refers to a Can Plan map showing the areas in Nelson-Tasman that other residential waste suppliers advertise online.

157 When Can Plan submitted that map to the Commission, it made it very clear to Commission staff that:

157.1 the map only shows what's on the residential waste companies' websites; and

157.2 that those companies serve areas outside of the online zones and, in particular, Smart operates and takes orders in Nelson.

158 But the Commission omits those caveats when analysing Can Plan's graph in the SOUI and makes the following points to apparently contradict Can Plan's submissions:

158.1 “Can Plan's graphic, reproduced below as figure 2, shows four suppliers serving Richmond and Stoke but fewer parties serving Nelson”;⁸⁹ and

158.2 “However, Can Plan submitted that all areas across the Nelson-Tasman region face the same conditions of competition”.⁹⁰

⁸⁹ SOUI, [38].

⁹⁰ SOUI, [39].



159 This might seem to be a relatively minor omission of detail.

160 But we present it to raise our concerns that Commission staff seem focused on (incorrectly) dismissing Can Plan's submissions rather than fairly testing and balancing what Can Plan is telling the Commission. We accept of course that in a process with imperfect information some submissions will not be borne out by the evidence the Commission gathers – but that is a different proposition to our concern that Can Plan's views are not being fairly or carefully tested or presented to Commissioners and the public.

161 For completeness, and consistently with Can Plan's submissions, Smart does operate in Nelson and is taking wheelie bin orders from all customers that phone up. So, as Can Plan has consistently submitted, post-merger, it will face the same conditions of competition across Nelson-Tasman. That is, indeed, the reality of a market with very low barriers to entry and expansion.

162 We expand on this point in Section II.

Example 2: Can Plan data

163 To support its previous submissions, Can Plan provided the Commission data showing:

163.1 Customers that switch to competitors (with that data from Can Plan's customer feedback log that its call-centre use to record customer feedback in); and

163.2 Customers price matched to a competitor (which was from Can Plan searching its systems to find customers that had been price matched to competitors' prices).

164 The price switching dataset has limitations. All datasets do. But importantly, all customer feedback was collected in the same manner and equally applied to all competitors.

165 Can Plan explained the methodology behind price switching data to Commission staff on two occasions:



165.1 in our 4 February 2021 email:⁹¹ *"Can Plan only has records of the customers that told Can Plan they were switching their business to a competitor. The attached "Customer Switching" spreadsheet records the [] customers that told Can Plan that detail over the last three years" ... "As it happens, those [] customers either switched to Smart, Waste Management or EnviroWaste (see column H)".*

165.2 in our 8 April 2021 email:⁹² *"the price switching data (which was used to create the map) is Can Plan's log of former customers that, upon cancelling their services with Can Plan, said they were switching to another waste management company" ... "Can Plan has compiled that data over time by logging those customers' feedback and detail [that] in the spreadsheet we provided the Commission".*

166 But, still, the SOUI inaccurately and incorrectly says that "Can Plan did not include any data on the number of customers switching from Betta Bins to Can Plan (or vice versa)" and "given this, we do not have any evidence to say with any certainty how frequently residents may switch between the Parties".⁹³

167 Can Plan did include data (based on the methodology above that we explained to Commission staff) on the number of customers switching from Can Plan to Betta Bins; it's just that that figure was **zero**.

168 That is, to be clear, of [] customers that Can Plan call-centre has logged customer switching data for, none of those [] customers said Betta Bins over the last three years.

Example 3: interpretation of Can Plan submissions

169 The SOUI reads more into Can Plan's reference to customer 'stickiness' than was intended by its statement of issues response.⁹⁴ Can Plan was available to respond to any clarification questions Commission staff had about that terminology.⁹⁵

⁹¹ Chapman Tripp email to Commerce Commission 4 February 2021.

⁹² Chapman Tripp email to Commerce Commission 8 April.

⁹³ SOUI, at [66].

⁹⁴ Customer stickiness is defined as: "Customer Stickiness occurs where customers keep coming back to you in a competitive environment because of a consistently better value transaction – possibly due to price, speed, benefits, convenience, service or a range of factors. Stickiness is real and valuable". (<https://www.cxtraining.com.au/customer-loyalty-vs-customer-stickiness/>).

⁹⁵ The Commission has interpreted "stickiness" to mean that customers are not price sensitive.



170 All Can Plan was saying is that customers will “stick” to their choices if they are happy with the prices and services that they are getting. And Can Plan can profit from that “stickiness” through the efficiencies that this transaction will generate if it does not give its customers a reason to switch.

171 But Can Plan made it clear that people can and do switch providers if they are unhappy with their services.⁹⁶

172 The evidence on record of that point – which points against the Commission’s ungenerous interpretation of Can Plan’s submissions – is clear:

172.1 [] told the Commission that “you can run a marketing campaign to attract a number of small [residential wheelie bin customers] relatively quickly, sometimes using price at the start to get people on board ... however, in the commercial [waste collection space] most people are locked in [to long-term contracts] already”.⁹⁷

172.2 [] told the Commission: “most of [] conversion came from competitor’s [wheelie] bins because of []”.⁹⁸

172.3 [] explained to the Commission that: “Can Plan [has] grown exponentially ... footprint has markedly increased in Richmond”.⁹⁹

172.4 [] gained [] customers in just two years since pushing its targeting advertising strategy.

172.5 [] explained that, in [] (where it is the major player), it is constantly checking its prices to make sure [] remains the market leader.

172.6 [] explained to the Commission that: “customers valu[e] service as important and are price conscious”.¹⁰⁰

⁹⁶ This argument is clear in Can Plan’s SOI response at [57] where it says “Can Plan reiterates that it is the threat of new or unhappy customers choosing Smart, Waste Management or Envirowaste, or customers voicing their displeasure about waste services to the council, that constrains Can Plan’s pricing today and into the future. This transaction will not change that reality”.

⁹⁷ [].

⁹⁸ [].

⁹⁹ [].

¹⁰⁰ [].



172.7 [] told the Commission that: “residential customers usually look around to see what are the best deals and services for their needs.”¹⁰¹

172.8 [] explained that it was able to quickly and organically grow its residential wheelie bin customer numbers [(see above)].

172.9 [].

172.10 []:

(a) [];

(b) [];

(c) [];

(d) [];

(e) [].

173 Separately, Can Plan’s statement of issues response explained that market shares reflect customer’s historical choices and are not reflective of current or future constraints. That is particularly because:

173.1 Betta Bins has struggled in recent years:

(a) [];

(b) []; and

(c) [] observed too that “Betta Bins is “diminishing” and has been “suffering over the last year”.¹⁰²

173.2 the vast majority of Betta Bins market share is from bags which are likely to be phased out over time;

173.3 Betta Bins has []; and

¹⁰¹ [].

¹⁰² [].



173.4 since 2019, Smart has launched an aggressive expansion strategy including planting seeds and taking orders across Nelson-Tasman.

174 We expand on the current and future competitive constraints in Section II.

Example 4: no documentary evidence on the threat of councils

175 The Commission says in the SOUI: “while Can Plan submits that the threat of the NCC and TDC going to a full bag and wheelie bin-rates based collection is a constraint on its pricing and its behaviour, then evidence from the [], []”.

176 We are concerned that the statement is seeking Can Plan to “prove” its case beyond reasonable doubt, rather than balancing the evidence at hand and asking, on the balance of probabilities, whether the transaction – on its whole – is likely to substantially lessen competition, including because of council’s countervailing power.

177 On review of the record, [] third-party evidence the Commission has received supports Can Plan’s view that the *threat* of councils going rates-based has a significant effect on business decision-making, including on Can Plan given the investment it has made on the future of user-pays waste collection services in Nelson-Tasman.¹⁰³

178 We note, for instance that:

178.1 [],¹⁰⁴

178.2 [];

178.3 []”;¹⁰⁵ and

178.4 Can Plan has provided a number of examples from around New Zealand of councils going rates-based and the catastrophic effect that those decisions have on local waste management companies.

¹⁰³ We note that Commission staff asked Can Plan in its interview was threat does council have on Can Plan’s “day-to-day” pricing. Can Plan does not set prices daily or even monthly, prices are changed very infrequently to respond to external factors like increased tip fees. And, as Can Plan explained in its interview with the Commission, the threat of councils going rates-based is an overarching constraint on the business – in addition to the significant threats it faces from Smart, Waste Management and Envirowaste.

¹⁰⁴ [].

¹⁰⁵ [].



- 179 []. Can Plan does not know what the councils are thinking and will not be incentivised to give the councils a reason to go rates-based, particularly given the risk Can Plan takes in its Betta Bins' investment being sunk. Even the mere suggestion of going rates based will be costly and uncertain for Can Plan to lobby against. [].¹⁰⁶
- 180 Against that context, we're not sure what further documentary evidence the Commission thinks Can Plan could realistically or fairly be expected to provide. We doubt very much that, say, Tauranga's *Kleena Bins* had written documentary evidence about how it feared councils going rates-based before that decision was made and that business's \$3m value was wiped.
- 181 Moreover, as we explain above, documentary evidence only tells so much. [].
- 182 As we note earlier too, the residential waste collection business, on this scale, in this area, is not a document intensive commercial activity.

¹⁰⁶ [].



SECTION II: COMMERCE ACT SUBMISSIONS

183 We submit:

183.1 the factual assumptions the Commission uses for the basis of its SOUI concerns are not supported by the evidential record; and

183.2 based on a fair and objective review of the evidential record, Commissioners can be satisfied that this transaction is not likely to SLC for the reasons submitted by Can Plan in its clearance application and throughout this six month process.

184 As outlined above, we are concerned that evidence has not been fairly and/or objectively presented to Commissioners based on the significant material differences between the SOUI and what third parties told Commission staff members.

185 We summarise in this section the evidence on record and why it leads to the conclusion that Can Plan's acquisition of Betta Bins would not substantially lessen competition.

Market definition

186 There is, at its narrowest, a market for residential waste collection services in the "ribbon of land" between Wakefield and Nelson, including the Richmond, Stoke, Tahunanui, The Wood and Marybank areas.

187 That market definition submission is consistent with the following facts on record:

187.1 []'s view that: "the Nelson-Tasman region [is] effectively the same market, although Golden Bay is slightly different (separated from the rest of the region by the Takaka Hill)".

187.2 []'s view that: "doubt that any [] people have any idea about post codes ... from their point of view it's all Nelson: Nelson, Stoke, Richmond is one place";

187.3 []'s view that it "go[es] where the businesses and customers are. No geographic boundary to that".

187.4 []'s view that: Richmond to Nelson is like one "long ribbon of land" and all areas on that ribbon are attractive for residential waste collection because they are dense and close to the York Valley landfill.



- 187.5 All waste collection companies in the area provide residential and commercial waste collection services throughout that ribbon of land.
- 187.6 All waste collected within that area goes to the same landfill: Nelson City Council's York Valley landfill.
- 187.7 All residential waste collection companies charge the same rates to households across that area.
- 188 Those facts outweigh the single comment by [] to the Commission that Nelson CBD can be traffic congested. We say that because: (a) []; (b) there are likely to be no/few residential customers within the one block of streets that forms Nelson CBD; and (c) there is no evidence of potential Nelson CBD customers being price-discriminated against.
- 189 We record too that []'s evidence suggests that barriers to expansion by incumbent commercial waste collection companies are so low that, from the supply-side, the product market could be defined as the market for residential and commercial waste collection services. [] suggested to the Commission that a 5% hypothetical non-transitory price increase would "potentially be enough" to induce expansion from the commercial side of the market (but it was the transitory nature of any price increase being competed away that would deter entry). But, for present purposes, we deal with this view as part of the constraint from entry and expansion.
- 190 Lastly, we note the SOUI's footnote 30 that says: "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".
- 191 That catchall footnote does not, though, fit with:
- 191.1 the Commission's question in the SOUI that "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";¹⁰⁷

¹⁰⁷ SOUI, at [11.1].



191.2 the Commission's concern is about Can Plan "price discriminating" in certain, very confined but undefined, geographic areas; and

191.3 Commission staff's questioning of third-parties consistently focused on "the merged entity having a hypothetical monopoly in Nelson".

192 It is clear from the record that, from early in its investigation, Commission staff decided that Nelson was a separate market with different competitive conditions. And that view plainly had a significant and material effect on the Commission's SOUI analysis and its investigations from that point on.

Conditions of entry and expansion

193 We deal up front with the Commission's view that the conditions of entry and expansion in the market are "moderate to high", as that assumption colours the Commission's SOUI analysis and the weight the Commission gives to its market share analysis.

194 The Commission formed that view on the market's entry conditions on the following grounds:

194.1 "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".

194.2 "But 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".¹⁰⁸

195 The problem with the Commission's view is that there is little to no evidence on record to support the view that new entrants (or incumbent players in terms of

¹⁰⁸ The Commission also recorded that "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". But we deal with that in Section I, given the Commission's ungenerous interpretation of Can Plan's submissions is plainly not supported by the evidence on record.



expansion) need economies of scale *from within the Nelson-Tasman residential wheelie bin market* to compete with Can Plan now or post-merger.

196 The evidence on record demonstrates that specialist waste management companies with deep pockets, regional and national scale and innovative business solutions can quickly, easily and affordably generate scale to compete effectively in a market. Specifically:

196.1 **Smart** was able to grow its customer base by [] customers in two-years, using a loss-leader strategy of heavily discounting the first year of its services. And, despite Smart's [], it was [] and that []. Those responses would be highly unlikely if the transaction gave Can Plan unassailable scale and would restrict Smart's [].

196.2 [] explained to the Commission that: "[the] fact we're not in the market at the moment doesn't mean we can't be in the market, and if the acquisition went ahead, it wouldn't change our thought process about potential interest in the future".¹⁰⁹ Which implies that Can Plan's size and scale in the market now, or post-transaction, would not be a barrier to [] competing to win customers and market share.

196.3 To be sure, [] told the Commission that:

- (a) "[We] don't see the deal that is on the table between Nelmac and Can Plan [as changing [] strategy of entering into [the Nelson] market in any way, shape or form"; and
- (b) [] is "pretty relaxed about the transaction" ... "no concerns" ... "[the market is] just about getting reps out on the road, giving good service and you'll gain the clients".

196.4 Similarly, [] told the Commission that:

- (a) "[[] considered that the market was competitive and he couldn't see the transaction making any difference. He had read the SoPI we published but nothing had struck him that warranted comment"; and

¹⁰⁹ [].



- (b) “[] had a brief read of the SOI. Overall reaction – surprised that there is concern over what [] would have seen as a relative minor change in the market”.

196.5 And, [] told the Commission that:

- (a) “[]”.

- (b) [].

- (c) []:

- (i) [].

- (ii) [].

- (d) [].

197 In fact, []. And, as Can Plan told the Commission, it is threatened by the fact that those large players could “deal with us pretty swiftly if they wanted to”.

198 And, respectfully, we submit that that consistent line of evidence from New Zealand’s four main waste collection companies outweighs:

198.1 a single line from []; and

198.2 a comment by a [].

199 As a result, the Commission’s market share calculations offer a very limited picture on the competitive constraints that Can Plan faces in the Nelson-Tasman residential waste market that has very low barriers to entry/expansion.

How sales are made and prices set

200 Can Plan makes sales by taking orders from new customers online or over the phone.

201 Can Plan’s prices are constrained by competitors which offer the same services, the ease in which rival firms can enter the market, and the ever-present threat of the councils switching to rates-based waste collection services.

202 Can Plan is also constrained by the commercial need for Mr and Mrs Boocock to make a living. And, on that note, we record that Can Plan cannot offer – as its



general price – the first-year heavily discounted prices that some financially well-resourced rivals, with national scale, are able offer to the market as part of “loss-leading” strategies to win Can Plan’s customers.

- 203 There is a theme in the SOUI that prices in Nelson-Tasman are somehow already above the competitive levels. They are not. As Commission staff were consistently told by market participants, the Nelson-Tasman market is highly competitive.
- 204 The Commission has Can Plan’s profit & loss statements to confirm that view.
- 205 Those financial statements show that, over the last four years combined, Can Plan has a net profit margin of just []%.¹¹⁰ By comparison, Smart’s one-year loss-leading prices – that it can only offer because of its ability to cross-subsidise from its significant regional and national scale – are between [] and []% cheaper than Can Plan’s standard rate.¹¹¹
- 206 Can Plan competes hard to resist Smart’s market power and “loss-leader” strategy by price-matching Smart’s discounted rates. That is the very essence of competition.
- 207 The Commission’s SOUI says, though, that Can Plan’s policy is “plausibly strategic behaviour to dissuade expansion into an area with different competitive conditions”.
- 208 But what else does the Commission expect Can Plan to do: Give up its customers to Smart? Roll-over to the large national players?
- 209 We are concerned that the Commission’s overly narrow view on market definition and factually unsupported take that Can Plan’s scale acts as a structural barrier to entry and expansion has lost sight of the dynamics of competition in this market. Can Plan is a small local business which is competing hard to hold its own against large-scale competitors that have financial resources and systems far beyond its means.
- 210 That reality is clearly supported by the fact that []. In addition to the fact that [].
- 211 Indeed, the mounting pressure of large waste management firms on small local businesses is why, over the last two years, Betta Bins []. And Can Plan is fighting

¹¹⁰ Amounting to \$[] net profit over the last four years combined.

¹¹¹ [].



hard to avoid the same fate as Betta Bins by securing the material efficiencies that it would gain from this transaction.

212 The transaction will not affect prices to consumers in any way. Can Plan will continue to be constrained by the

212.1 market's existing competitors: Smart and Waste Management;

212.2 threat of entry by new competitors: in particular, Envirowaste and, the likes of, []; and

212.3 threat of the councils wielding their countervailing power and going rates based.

213 And that was the feedback too that Commission staff consistently got from market participants and the councils.

214 We expand on those constraints below with comparison to the evidence on record.

Constraint from existing competition

215 Within the Nelson-Tasman residential waste market, Can Plan will continue to be constrained by the existing competition offered by Smart and Waste Management.

Smart Environmental

216 Can Plan knows that Smart offers its residential wheelie bin services across the market. The evidence on record to support that view is:

216.1 Can Plan sees Smart's bins across the market.

216.2 Can Plan knows that any customer from Wakefield to Tahunanui can go online to Smart's website and order a bin for their address.

216.3 Can Plan knows that Smart is expanding into Nelson and, indeed, Smart is:

- (a) telling the public that "we are moving into Nelson with the wheelie bins"; and
- (b) taking orders to service one of Nelson's northern-most suburbs for, at least, the next 12-months.



217 Can Plan knows that Smart does not need “route density” or a “high market share” to be an effective competitor in Nelson because of Smart’s resources and observed loss-leading pricing strategy.

218 That view is corroborated by the following evidence on record:

218.1 [].

218.2 Smart has recently brought new trucks into Nelson-Tasman which Can Plan has spotted.

218.3 Smart has investment backing of Maui Capital, an Auckland-based private equity firm with four investment funds totalling over \$500m.

218.4 Smart has the capital resources to expand via a loss-leader strategy of offering large discounts in the first year.

218.5 [].

218.6 Smart has acquired [] customers in just two years.

218.7 [].

218.8 [].

219 We record too that Can Plan’s response to Smart’s loss-leading strategy clearly demonstrates that it views Smart as a significant competitive threat across the region. Since Smart introduced its loss-leading strategy in 2019, Can Plan:

(a) [];

(b) [];

(c) [];

(d) [];

(e) [].

220 Despite those facts, the Commission’s SOUI argues that Smart is: (a) not currently an “effective alternative waste collection supplier[s]” across the region; and (b) would not likely become a strong competitor. Those arguments cannot stand



compared with the evidence on record, as Section I and the tables below summarise.

The SOUI’s reasoning on: (a) why Smart is not currently a strong competitor	The record
<p>“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”. (SOUI, [83]).</p>	<p>There is no evidence on record to found a submission that there are differences in competitive conditions across different geographic areas of the market. As [] told the Commission, there’s “no geographic boundary” to where suppliers can go in the region.</p> <p>The record demonstrates too that there are very low barriers to entry and expansion (see section above).</p> <p>So the price matching and customer switching data relied on by the Commission does not, as it purports to, suggest “differences in competitive conditions”. Rather, it shows a snapshot in time of Smart’s rolling targeted advertising strategy.</p>
<p>“Current competitive conditions in Nelson appear to differ significantly from the competitive conditions in Richmond, where evidence suggests the constraint provided by Smart is materially greater”. (SOUI, [83]).</p>	<p>There is no evidence on record to say that there are differences in competitive conditions across different geographic areas of the market. See above.</p> <p>Consistently, Smart is currently taking orders for 12-month services in one of Nelson’s northernmost suburbs. All customers have to do is phone up. Smart would then clearly be incentivised to “in-fill” the rest of Nelson with targeted advertising.</p> <p>And, of course, wheelie bin prices are the same everywhere in the region.</p>
<p>“Outside of Richmond and particularly in Nelson, Can Plan’s price-matching of Smart may represent a response to intermittent</p>	<p>There is no evidence that Smart’s competition is “intermittent”. Smart is taking 12-month bin orders across the Nelson-Tasman region and has increased its customers numbers by [] over the last two years.</p>



<p>competition there and, plausibly, also strategic behaviour to dissuade expansion into an area with different competitive conditions". (SOUI, [83]).</p>	<p>As set out in Section I, [].</p>
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<p>The SOUI's reasoning on: (b) why Smart is not likely to become a stronger competitor</p>	<p>The record</p>
<p>"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)". SOUI, [86].</p>	<p>[], Smart has planted seed bins across Nelson and is taking orders in "The Wood", north of the CBD for customers that phone up. In other words, Smart has laid the foundations for in-filling its routes across the region. Smart must be incentivised to make servicing those routes more efficient by winning customers across the market, especially as it's taking orders for 12-month contracts in Nelson.</p> <p>What is possibly incremental is Smart's targeted advertising strategy. That incremental advertising strategy is, though, different to the clear reality that Smart has laid its foundations in Nelson. As Smart's spokesperson said: "we are moving into Nelson".</p> <p>And, Can Plan recognises this reality, so increased its marketing activity across the Nelson-Tasman region – and not just in the areas where Smart is currently targeting its advertising.</p>
<p>"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</p>	<p>The view is not supported by the record.</p> <p>Smart is objectively doing the opposite. Smart has laid seed bins throughout Nelson and is taking 12-month orders in The Wood – almost the furthest part of Nelson from Smart's busier routes in Richmond and Stoke.</p>



<p>and, to a lesser degree, Stoke), from which it can more easily expand". SOUI, [87].</p>	
<p>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. SOUI, [87].</p>	<p>As above, Smart is objectively doing the opposite. The record shows too that Smart's discounted first-year loss-leading prices in The Wood are the same as it offers in other parts of the market.</p> <p>After taking "Anne-Marie's" and "Stephen's" orders, Smart would be plainly incentivised to target that area and neighbouring parts of Nelson with targeted advertising to win more customers and make servicing those routes even more efficient.</p> <p>It logically follows that Smart would roll-out its targeted advertising strategy into Nelson, including opening its website to online orders in that area.</p>
<p>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. SOUI, [88].</p>	<p>This view is not supported by the record or by how customers make choices in the market.</p> <p>Can Plan's customers are not subject to long-term contracts. Customers can, and do, switch providers if they are unhappy with their services. Can Plan's price-matching policy is one way of keeping customers happy, but the policy does not change or add barriers to customers switching if they want to.</p> <p>Section 47 prevents mergers that substantially affect those buyer's choices; the section is not, on the other hand, designed to protect certain businesses nor is it a tool to ensure market shares remain equal in a market for a point in time.</p> <p>Importantly too, [].</p> <p>Further, the record shows that []. (By comparison, Can Plan doesn't have the benefit of deep capital resources so obtaining efficiencies is important for its business).</p>



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Waste Management

221 Can Plan knows that Waste Management offers its residential wheelie bin services across the market. The evidence on record to support that view is:

221.1 Can Plan sees Waste Management's bins across the market.

221.2 Can Plan knows that any customer from Wakefield to Nelson can go online to Waste Management's website and order a bin for their address.

221.3 Can Plan has no reason to believe that Waste Management would not act rationally and take any opportunity to "deal with" Can Plan if it attempted to increase prices. The evidence on record to support that view is:

- (a) Waste Management is a multi-billion dollar global business.
- (b) Waste Management is New Zealand's largest waste management provider and operates in residential wheelie bin markets across New Zealand.
- (c) Waste Management has [] residential wheelie bins in the Nelson-Tasman market; [].
- (d) [].
- (e) []".
- (f) Waste Management's prices are at, or around, the market rate. And offers the same price online to all households across the region.
- (g) [].
- (h) []:
 - (i) "[]"; and
 - (ii) "[]".
 - (iii) "[]".



- (i) [] was confused by the Commission’s question that the merged entity would have a “monopoly” in Nelson because: “Waste Management are still in that space aren’t they?”.
- (j) [].

222 Despite those facts, the Commission’s SOUI argues that Waste Management’s competitive presence is overstated. We respond to these points in section I and summarise the position in the following table.

The SOUI’s reasoning on: (a) WAM’s market position is overstated	Response
<p>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.</p>	<p>[], That reality is, of course, because there’s a push toward using less rubbish bags.</p> <p>It follows that those environmental and health and safety changes will make Waste Management’s wheelie bin service increasingly appealing to consumers over time.</p> <p>Indeed, Waste Management has []</p>
<p>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. [] Can Plan said Waste Management used to drop promotional flyers to houses, but no longer does so, suggesting that it has seen a decline in competitive constraint from Waste Management.</p>	<p>As set out in Section I, the Commission’s statement that Can Plan suggested that it sees Waste Management as a declining constraint is not supported by the record. Can Plan told the Commission the opposite: <i>“not sure [Waste Management] used to put flyers out in the region, um, and being the largest waste company in New Zealand, they can deal with us pretty swiftly if they wanted to”</i>.</p> <p>[], if Can Plan raised its price, or dropped its service quality, it would lose customers to Waste Management.</p> <p>Further, we cannot reconcile the Commission’s comment about Waste Management’s pricing with the apparent theory of harm in this case.</p> <p>Just because Waste Management doesn’t follow Smart’s “loss-leading” strategy that doesn’t mean Waste</p>



	<p>Management is any lesser of a constraint on Can Plan's pricing or services.</p> <p>Indeed, there is an inherent inconsistency in the Commission's treatment of Can Plan's price matching policy in response to Smart's loss-leading strategy. On one hand, the Commission is saying Waste Management is not a strong competitor because it is not running "loss-leading" advertising strategies. But, on the other hand, the Commission is saying that Can Plan's policy to respond to Smart's loss-strategy strategy might be "strategic behaviour aimed at deterring competition, not a response to actual competition".</p>
<p>Waste Management commented to us that [], 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 []</p>	<p>We agree with Waste Management's comment that competition in the market is [].</p> <p>As set out in Section I, [].</p>
<p>[]</p>	<p>As above, just because Waste Management doesn't follow Smart's "loss-leading" strategy that doesn't mean Waste Management is any lesser of a constraint on Can Plan's pricing or services.</p> <p>As Waste Management told the Commission it: "[]". [].</p> <p>Indeed, the fact that Waste Management is maintaining its existing [] customers demonstrates that it is providing waste management services at prices and quality levels that its large customer base is happy to pay for. [].</p>



223 Next the Commission's SOUI says Waste Management "is unlikely to expand to any material degree in the supply of residential general waste".¹¹² We make five points on that Commission submission:

223.1 First, we would like to distance Can Plan from that public Commission declaration. []. Can Plan continues to assume that Waste Management would act commercially rationally and take orders from any Can Plan customers who are unhappy with the prices/services they were getting. To be clear, Can Plan will continue to be constrained by the continued threat of Waste Management taking its customers if it attempted to implement non-transitory price increases or reductions in quality. Can Plan is, like [], confused by the Commission's underlying assumption that Waste Management does not compete effectively in the market.

223.2 [] is inconsistent with the Commission's theory of harm. In the Commission's own words from its email to Waste Management: "If Can Plan was to increase its prices by 10%, this would appear to put its pricing (which after a 10% increase would be \$379.50) above that of Waste Management".¹¹³

223.3 Section 47 prevents mergers that substantially lessen competition. If Can Plan can offer services the most efficiently and at the lowest prices than its remaining competitors, then Can Plan is entitled to secure those customers. Competition law is not, on the other hand, about securing equal market shares in markets with low entry and expansion barriers.

223.4 If the Commission persists with its preliminary view that Can Plan would not be constrained by Waste Management because of information that Can Plan (and []) does not know about and will not know about, that would be a significant and material departure from established competition law analysis. The evidence on record is clear that trucks are not a material barrier to expansion. So the "constraint" (or lack there-of) that the Commission is relying on is, in essence, that []. []. If adopted, the Commission's new personalised approach to investigating market constraints would make it impossible for potential merging parties to assess their section 47 liability without knowing [].

¹¹² SOUI, at [12.3].

¹¹³ Commerce Commission email to Waste Management, 13 April 2021.



224 We flag, at the date of this submission, the Commission has not yet respond to our OIA request for the recording/transcript of Waste Management’s interviews with the Commission, so we have not been able to conduct a full review of Waste Management’s evidence – including the questions asked by Commission staff.

New Entry

225 We deal with the market’s conditions of entry/expansion above.

226 The record of evidence is clear that having scale from within the Nelson-residential waste market is not a barrier to entry/expansion in the market. Indeed, the Commission’s SOUI view that barriers to entry/expansion in this market are medium-to-high is clearly out of step with what third-parties told it.

227 Rather, new entrants with national scale can offer loss-leader strategies and/or innovative solutions to defeat the scale of existing local players. The evidence from well-resourced potential competitors is clear that the entry decision comes down to two commercial considerations:

227.1 How competitive is the market already (i.e., is there enough margin for a new entrant to profit from); and

227.2 Is there certainty around whether the council will go rates-based.

228 We deal with the second point in the following section. That council uncertainty is a constant for all players within the market and constrains everyone’s business decisions.

229 Turning now, though, to the first point: how competitive is the market. That consideration is not a barrier to entry.

230 To the contrary, it is a non-transparent, non-uniform and unique decision point that will possibly be different for any new entrant.

231 It is too not the type of “constraint” that the Commission can fairly expect third-parties to answer on the fly, with imperfect information, as part of merger clearance process. As the following exchange between Commission staff and [] demonstrates, the Commission’s line of questioning doesn’t match reality either:



232 The key fact here for a competition analysis is that Can Plan knows that barriers to entry are low and that new entrants can quickly, easily and affordably take its customers if it priced too high or decreased quality.

233 Crucially for a competition analysis that centres on threats and constraints, Can Plan does not know at when it will be commercially attractive for the likes of Envirowaste and [] to pull the trigger on entry. That reality is the very definition of what a constraint or threat is in any given market.

Envirowaste

234 Importantly for the LET test here, Envirowaste made clear to Commission staff that:

234.1 “”;

234.2 Envirowaste could [];

234.3 “[]”;

234.4 Envirowaste is “[]”;

234.5 Envirowaste has [];

234.6 []:

(a) “[]”;¹¹⁴ and

(b) [].¹¹⁵

235 That evidence demonstrates that, putting aside the council uncertainty which affects all businesses, Envirowaste could quickly, easily and affordably enter the Nelson-Tasman residential waste market [].

236 Crucially, Can Plan [], is constrained by the threat of Envirowaste’s entry, satisfying the LET test.

¹¹⁴ [].

¹¹⁵ [].



237 Again, as with the SOUI's comments on the threat of Waste Management, we are concerned that in this transaction the Commission is applying an impossibly high standard of proof on Can Plan.

238 As set out in Section I, it would be impossible to satisfy the LET test if it requires potential new entrants in markets with very low barriers to entry, like the residential waste market, to have written plans about how they will enter the market if Commission staff's "hypothetical" assessment actually plays out. Here, Envirowaste [].

[]

239 Similarly, [] was []:

239.1 "[]. []"

239.2 "[]".

240 So [] is saying that: (a) []; and (b) [].

241 After explaining that []'s screening criteria, [] told the Commission that entry into Nelson "[]".

242 [].

243 Again, in a market with very low barriers to entry, the fact that [] for a hypothetical factual scenario cannot be fatal to the LET test. This market is quite different to, say, a market where entry requires high fixed cost investment. In that type of market, then the Commission's desire to see supporting business documents is perhaps more justified.

244 We are concerned that in this case the Commission is applying a standard of proof far beyond the relevant Commerce Act standard.

Example for context

245 To support our concerns, here is how the Commission applied the LET test in 2020 to the *Juice Technologies Pty Ltd* transaction.

246 The key facts and analysis pulled from the Commission's determination are as follows:



246.1 “We consider that prior to the entry of Discover, Infocare and APT established a relatively static duopoly in which they had approximately equal shares of the preschool SMS market and did not compete aggressively for each other’s customers”.

246.2 “We consider that the conditions of entry into the pre-school SMS market are not so onerous as to prevent sufficient and timely entry or expansion. In addition, we consider that such entry and expansion [] is likely to further constrain the merged entity”.

246.3 “We consider that successful entry and expansion in the pre-school SMS market requires overcoming barriers relating to:

- (a) the Ministry’s process for approving new SMS suppliers and integrating their software with the Ministry’s ELI database; and
- (b) the apparent reluctance of some customers to switch providers”.

Ministry barrier

246.4 “As noted, all SMS products (except for OSCAR, which is outside the relevant market) must be approved by the Ministry and integrated with its ELI system. Applications for approval are accepted once a year and there are no application fees. Upon application, the SMS software must already be developed with its intended functionality and must be capable of supporting:

- (a) both centre-based and home-based ECE providers;
- (b) both sessional and all-day ECE providers;
- (c) a minimum of 50 services; and
- (d) the funding and regulatory requirements of ECE providers”.

246.5 “After the application window closes, the Ministry works with applicants to assist them in integrating with its ELI system. This can require further investment in product development by the SMS supplier. In total, the testing, approval, and integration process can take over a year.”

Customer switching barrier



246.6 Evidence suggests that the customers of SMS software suppliers – childcare centres and home-based care providers – do not readily switch from one SMS supplier to another. Customers and SMS suppliers that we spoke to stated that this is based on:

- (a) a reluctance on behalf of customers to move away from the SMS that they know and that works for them;
- (b) the perceived inconvenience of switching to a new system, which would entail costs such as staff training and data migration; and
- (c) the fact that customers in general do not appear to be overly price sensitive

Commission weighing of evidence

246.7 “While barriers to entry and expansion do appear to be present, we do not consider they are insurmountable. On balance our view is that the likelihood of entry by new competitors [] and expansion by existing competitors (such as Discover and Juniorlogs) is likely to be sufficient in extent and timely enough to constrain the merged entity and prevent a substantial lessening of competition”.

246.8 “The evidence we have collected also does not suggest that the Proposed Acquisition is likely to raise barriers to entry in the pre-school SMS market. Rather, several industry participants indicated that it is possible that it could provide an opportunity for competing SMS suppliers by making Infocare’s and APT’s customers more open to switching providers.”

247 We provide this example to show that, in the end, the Commission must apply the LET test by balancing the evidence on record.

248 In the case of the childcare SMS software market, the Commission received a submission against the transaction and identified demonstrable barriers to entry and expansion. But, “on balance”, formed the view that entry by new competitors and expansion by existing competitors was likely. It did not appear central to the Commission’s decision that new entrants had actually written business plans to enter the market.



249 And, standing back, we respectfully say that the record shows that barriers to entry and expansion in the Nelson-Tasman residential wheelie bin market are lower than entry into a childcare software market.

250 There is very limited evidence on record to support the Commission's SOUI assertion in this case that: "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". Or that "the evidence ... collected ... suggest[s] that the Proposed Acquisition is likely to raise barriers in this market".

251 To the contrary, in []'s, []'s and []'s words:

251.1 "[] don't see the deal that is on the table between Nelmac and Can Plan [] strategy of entering into [the Nelson] market in any way, shape or form"

251.2 "[] have no problems with the transaction: []".

251.3 "[] Overall reaction – surprised that there is concern over what [] would have seen as a relative minor change in the market".

Council uncertainty

252 We acknowledge that uncertainty around whether Nelson City Council and Tasman District Council will go rates-based provides some short-term constraints on business investments and decisions.

253 But that uncertainty is a constant for all businesses. And the uncertainty places a stronger constraint on Can Plan given that it has taken a significant risk by investing in the future of user-pays waste collection services in Nelson-Tasman by acquiring Betta Bins.

254 Given that Can Plan's investment would be lost overnight if the councils went rates-based, Can Plan faces a very strong incentive to ensure that it's pricing and services remain highly competitive and does not lead to calls for the council to consider rates-based services.

255 Can Plan's views are clearly supported by evidence on record:

255.1 [].

255.2 [].



256 Despite that evidence, Commission’s SOUI presents a theory that Can Plan might not be constrained from raising prices just a little bit (5%) but not enough to invoke a negative reaction from the public and the council.

257 Again, as with the Commission’s treatment of other threats and constraints in this application, the Commission assumes that Can Plan has perfect information about the type of price increase that would invoke a certain outcome. It does not. And with \$[] on the line, Can Plan is strongly incentivised to ensure that it continues to provide services that the council and public are happy with.

258 We note too the Commission’s comment that “[]”. Respectfully, that would not give Can Plan any greater comfort on NCC’s future decision-making. The evidence is clear that councils around New Zealand are increasingly going rates-based, and that present trend is what will constrain Can Plan. Not decisions that have been made in the past.

259 Further, the council uncertainty is temporal. As [] advised Commission staff: []. [] went on to say: “[]”.¹¹⁶

260 It follows that:

260.1 if the council *does* go rates-based then Can Plan will lose its significant investment and this transaction will be obsolete; or

260.2 if the council signals over the next 12-months or so its intention to stay user-pays, then the market will only become more attractive for players like Envirowaste and [] to enter into (in addition to the constraints Can Plan already faces from Smart and Waste Management).

261 More to the point, though, the Commission’s theory assumes that Can Plan could implement a non-transitory increase price. It could not for all of the reasons we discuss above and summarise in the next section.

Summary of constraints on Can Plan

262 The evidential record clearly supports Can Plan’s submissions that it will collectively face significant constraints post-transactions from:

¹¹⁶ [].



262.1 Smart Environmental which:

- (a) is an online option for all customers in Tasman to Stoke to Nelson's Tahunanui;
- (b) is currently an option for Nelson customers in, at least, The Wood who phone up (see transcripts in Section I);
- (c) on objective reading of the evidence, Smart plainly has an incentive to continue to win customers across the entire Nelson-Tasman market to make its collection of wheelie bins in The Wood (one of Nelson's northernmost suburbs) more efficient;
- (d) Smart can win those customers because of its deep pockets which allow it to offer a first-year loss-leading discounted price;
- (e) in doing so, Smart will logically roll-out its targeted advertising strategy into Nelson and open its website up to online orders in that area; and
- (f) to be sure, [].

262.2 Waste Management which:

- (a) is an option for all customers within the Nelson-Tasman market;
- (b) []; and
- (c) Can Plan has no knowledge of Waste Management's internal plans or strategies and will continue to be constrained by the fact that the company would act rationally in a market with demonstrably low barriers to expansion.

262.3 The threat/constraint of new entry from the likes of:

- (a) [] which described to the Commission that it could quickly, easily and affordably enter the Nelson-Tasman residential waste market and that this transaction wouldn't change those plans in "any way, shape or form"; and



- (b) [] which described in detail to the Commission how easy de novo entry into a market is and the size of incumbent market players has no bearing that entry decision.

262.4 The threat/constraint of Nelson City Council going rates based if Can Plan sought to increase prices, with that submissions supported by the following evidence on record:

- (a) [];
- (b) []; and
- (c) The observed trend of councils going rates-based in Tauranga, Upper Hutt and so on.

263 The Commission's theory of harm that Can Plan would have "market power" in Nelson is clearly and objectively not supported by the evidential record.

264 But, to conclude the point, we record the following issues that Can Plan would face if it tried to price discriminate to an undefined group of Nelson customers (including the 40 customers on the postcode 7010-7071 border):

264.1 Can Plan does not know when or where Smart will open up new parts of Nelson for business. Can Plan's price discrimination strategy would, for example, have to exclude The Wood suburb given that it knows Smart is taking orders in that suburb.

264.2 Can Plan would also not be incentivised to offer the price discrimination rates in other suburbs where it sees Smart's bins on a weekly basis, including Maitai, Toi Toi, Nelson South and Bishopdale. (See map in Section I).

264.3 By the time Can Plan changed its website to cover any remaining suburbs, it is very likely that Smart will be taking orders in those areas in short order too, given that Smart has made it clear that it is "moving into Nelson".

264.4 Can Plan would also have to turn a blind eye to Waste Management and the threat of entry by Envirowaste and the likes of [].

265 Those submissions are objectively supported by the following natural experiments on offer to the Commission:



- 265.1 Nelmac is the only residential waste supplier in Cable Bay, but does not price discriminate in that area.
- 265.2 Can Plan is the only green waste supplier in Brightwater, Wakefield and Mapua, but does not price discriminate in those areas.
- 265.3 Smart, as we understand it, is the only residential waste supplier in Takaka, but does not price discriminate.
- 266 In fact, we are not aware of anywhere in New Zealand where neighbouring suburbs are price discriminated against, lending support to the clear view on record that the barriers to entry and expansion in residential waste markets are very low and/or the loyalty constraint is significant.
- 267 The SOUI tries to get around those facts by saying: "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". That comment, though, ignores that Can Plan is responding to Smart's loss-leader strategy – and that that pricing is not sustainable on its own.
- 268 On the basis of that information on record, we submit that Can Plan's acquisition of Betta Bins would not substantially lessen competition against a status quo counterfactual: which is the most competitive alternative counterfactual.

Alternative purchaser counterfactual

- 269 Lastly, we address the Commission's assertion that a scenario where [] acquired Betta Bins would result in "significantly more competition that would be the case with the Proposed Acquisition (in the factual)" and would "result in a relatively strong independent competitor (with []% market share across Nelson/Stoke/Richmond to compete the remaining competitors, including Can Plan)".
- 270 There is no evidence on record to support that assertion. The assertion is drawn from the Commission's mistaken belief that scale from *within* the Nelson-Tasman residential market is critical to [] others competing effectively in that market.
- 271 But as we outline in the "conditions of entry/expansion" section, all evidence on record supports the view that barriers to entry and expansion are very low and that large multi-regional waste management companies do not need scale to win



customers in a market. Instead, they are able to win customers through loss-leader strategies (like Smart) or through innovation (like []).

272 Indeed, that is why both []. That position is quite different to Can Plan who needs efficiencies to fend off the competitive attacks it faces from larger firms that can enter the market and grow scale quickly, easily and affordably with loss-leader strategies.

273 If the Commission declined this transaction and handed the assets to [] at a fire-sale rate, it would not increase competition in the market at all, let alone substantially.

274 The evidence to support that view is:

274.1 Smart has entered and is taking orders from The Wood with a loss-leader strategy – one of the furthest suburbs from its base in Richmond, plainly demonstrating that it does not need route density to begin targeting Can Plan's customers.

274.2 Despite those objectively clear expansion plans in Nelson, [].

274.3 [].

274.4 [].

274.5 [].

274.6 [] told the Commission that it was surprised that the Commission took concern over the transaction which it sees as a "relatively minor change in the market".

274.7 [] explained that they can quickly, easily and affordably grow scale via de novo entry, and [] gave the Commission a number of examples to support that evidence.

275 [].

276 The Commission's decision would also forgo the ~\$[] in efficiencies that Can Plan is hoping to obtain from this acquisition by continuing to provide cheap, reliable and high quality residential waste management services in the Nelson-Tasman region. And, in doing so, would leave Can Plan severely hamstrung and inefficient compared to Smart's national scale and ability to offer loss-leading prices, with no



corresponding benefit to the Nelson-Tasman community. Indeed, around \$[] would be lost with no evidence that that money will be reflected in lower wheelie bin prices.

- 277 On balancing all of the evidence on record, we say that Commissioners can be satisfied that Can Plan's acquisition of Betta Bins' assets will not be likely to substantially lessen competition in any market.