

Nelson City Council / Tasman District Council

**Application for Authorisation
(Streamlined Process) of a
Restrictive Trade Practice**

Pursuant to ss58(1) and 58(2) of the Commerce Act 1986

17 October 2016

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Executive Summary

- (i) This is an application for authorisation under ss58(1) and 58(2) of the Commerce Act 1986 by Nelson City Council (**NCC**) and Tasman District Council (**TDC**; together referred to as the **Councils**). The Councils wish to establish and give effect to a Regional Landfill Business Unit (**RLBU**), controlled by a Joint Committee of the Councils. The RLBU would make governance, management and operational decisions about the two landfills the Councils own in the Nelson-Tasman region, including the setting of fees for those landfills.

Legislative and Factual Background

- (ii) The Waste Minimisation Act 2008 requires both NCC and TDC to "promote effective and efficient waste management and minimisation" (s42), and provides for neighbouring councils to prepare a "Joint Waste Management and Minimisation Plan" (**JWMMP**) (s45). Similarly the Local Government Act 2002 requires a local authority in performing its role to "actively seek to collaborate and co-operate with other local authorities and bodies to improve the effectiveness and efficiency with which it achieves its identified priorities and desired outcomes" (s14(1)(e)). This means the Councils have to look for ways in which they can work together on waste issues.
- (iii) In 2012 the Councils developed a JWMMP that considered regional waste management, but all decisions for the collection, management and disposal of waste remained with the individual Councils. Currently, both NCC and TDC operate separate landfills at York Valley and Eves Valley respectively. These landfills are located close to each other as can be seen in the map in **Appendix A**. As required by the legislation above, and like other councils around the country, the Councils have been looking for ways to share landfill services and better manage them to minimise costs, reduce the total volume of waste and plan for the long term.
- (iv) The existing operational area of TDC's Eves Valley landfill is expected to reach capacity around 2019. Unless a joint arrangement can be reached with NCC, TDC will most likely need to incur significant capital expenditure in the short term in order to develop the next stage of this landfill (Stage 3) so it can accept waste after 2019. The predicted cost of developing Stage 3 at Eves Valley for TDC by itself is \$14 million over the next eight years to 2025, and \$26 million more over the next 20 years to 2045 (i.e. a total of \$40 million).
- (v) A key action arising from the JWMMP was to investigate a joint landfill. For a region of Nelson-Tasman's size it would be significantly more efficient to operate one landfill rather than two. With a single landfill the Councils can more accurately plan for waste volumes and reduce the amount of money each Council needs to invest in infrastructure over the long term. It would also mean that efforts to minimise waste generation would be more successful.

What the RLBU Arrangements Involve

- (vi) A number of options have been canvassed by the Councils through this investigation process over recent years.¹ The preferred RLBU option (which forms the basis for this authorisation application) involves joint governance and management arrangements for the two landfills through the RLBU which include the following elements (amongst other matters):

¹ These have included the establishment of a joint venture as a Council Controlled Trading Organisation (**CCTO**) which would acquire and operate the landfills, a contract for service model which would include TDC paying NCC to use its landfill, and a "go it alone" model where TDC would continue operation of the Eves Valley landfill and proceed with developing new landfill capacity there.

- NCC and TDC would each retain ownership of their respective landfills;
- NCC and TDC would establish a RLBU. The RLBU's governance functions would be exercised through a Joint Committee established under the Local Government Act to make decisions about the landfills, including the setting of fees for the landfills. The Joint Committee would include members from each Council. The RLBU's management functions would take place through a management group, its operational functions would be controlled by a General Manager, and its general administration would be carried out by the Administering Council (which would be NCC);
- Each Council would transfer control of their landfill² to the RLBU and the Joint Committee from 1 July 2017;
- From 1 July 2017, NCC's York Valley landfill would become the primary regional landfill facility. TDC would send all waste it collects to York Valley, rather than to its own Eves Valley landfill as it currently does, until Gully 1 of the York Valley landfill fills up (expected to occur around 2031) or until expiry of the existing resource consents for the York Valley landfill (being 31 December 2034), whichever occurs first;
- TDC's Eves Valley landfill would have all necessary consents and approvals obtained so it can accept up to one years' waste from the Nelson-Tasman region in case of any unforeseen temporary issues with the ability of the York Valley landfill to accept waste;
- The proposal anticipates that, when NCC's landfill is full, all waste collected by the two Councils would then go to TDC's landfill at Eves Valley. As a result, Stage 3 of the Eves Valley landfill would be retained for future use as a regional landfill facility. The capital expenditure required to develop Stage 3 of the Eves Valley landfill would be shared by both Councils, rather than borne alone by TDC as would be the case if the RLBU arrangements do not proceed;
- TDC would make a one-off payment of approximately \$4.2 million to NCC, to recognise the difference in the values of the two landfills, and thereby enable all future financial interests to be allocated equally.

Rationale for the RLBU Arrangements

(vii) The rationale for the proposed RLBU arrangements includes:

- Realising the benefits of a regional approach (capital and operational efficiency through one landfill, reduction of commercial risk, waste minimisation and non-financial benefits such as environmental benefits) to help the Councils meet their obligations under the Waste Minimisation Act to "promote effective and efficient waste management and minimisation". In particular the Councils are required to work towards minimising waste, but at the moment they are hampered in those efforts by having two landfills in the region due to the high fixed costs of running a landfill, meaning there is a financial incentive to increase rather than reduce waste;
- By entering into the RLBU arrangement TDC will defer the need to invest in expanding the Eves Valley landfill in the immediate future. The Councils would

² NCC would only transfer control of Gully 1 of the York Valley landfill to the RLBU.

expect to share \$0.9 million of capital expenditure over the next eight years. Over the following 20 years, the Councils expect to share \$48 million of capital expenditure on developing Stage 3 of the Eves Valley landfill³, and around \$1.4 million at York Valley when it closes;

- For its part, NCC would receive the benefit of the one-off payment of approximately \$4.2 million from TDC on 1 July 2017, to recognise the difference in the values of the two landfills. It would also receive long term security for its waste disposal needs once the York Valley landfill becomes full.

Previous Public Consultation

- (viii) The proposed RLBU arrangements, and the alternative options identified, have been publicly consulted on twice by TDC in 2016. TDC sought feedback on the proposal through the Annual Plan process in early 2016, and then formally sought submissions through the Long Term Plan (**LTP**) amendment process. The concept of a shared landfill was also consulted on by TDC in 2011 as part of approving the JWMMP. Few submissions were received by TDC during any of the consultation processes. In the 2016 LTP consultation process, there was only one submission (from a private individual) in opposition to the proposed arrangements that was presented before the public Hearings Panel.
- (ix) As regards NCC, it included the proposal in its Draft Annual Plan for 2016/2017. The proposal attracted seven submissions, all of which were in support of the proposal. There was also earlier public consultation by NCC on a regional landfill proposal in 2014, and in relation to the JWMMP.

Why Authorisation is Sought

- (x) While the Councils are confident there is a strong case for proceeding with the proposed RLBU arrangements, the Councils are concerned that the joint arrangements risk breaching s27 via s30 of the Commerce Act 1986 in the following respects:
- The RLBU and/or Joint Committee would be setting fees and charges for waste disposal at both landfills;
 - By ceasing to accept disposal of solid waste at the Eves Valley landfill (at least in the short to medium term), the RLBU and/or Joint Committee would be restricting the capacity or likely capacity of the Councils to supply landfill waste disposal services (eg by directing that waste in the region be disposed at the NCC's landfill at York Valley, rather than at TDC's landfill at Eves Valley);
 - This is in circumstances where both Councils are arguably in competition with one another at present in the same regional market for the permanent disposal of solid waste, at least for some commercial customers;
 - The proposed joint arrangements therefore risk amounting to an arrangement between competitors to fix the price of services to be supplied and/or restrict capacity in breach of s27 via s30 of the Commerce Act. The s31 joint venture exemption to the application of s30 does not apply since the existing landfill services are not made available as a result of any joint venture;

³ This figure of \$48 million is higher than the \$40 million figure referred to at para. (iv) above for TDC to develop Stage 3 of Eves Valley landfill by itself, since it anticipates higher capacity requirements if Stage 3 becomes a regional landfill with higher waste volumes.

- There are various legislative provisions requiring the Councils to work together on waste issues (including those identified above). However, these provisions do not "specifically authorise" the proposed joint arrangements in this case, and therefore there is no exception under s43 to the application of the Commerce Act. TDC raised this issue in submissions it made to the Local Government and Environment Select Committee on the Local Government Act Amendment Bill in August 2016.
- (xi) These concerns have prompted the current application by the Councils for authorisation of the Specified Provisions⁴ of the proposed joint arrangements.

Benefits vs Detriments of the RLBU Arrangements

- (xii) The Councils' application for authorisation is supported by an independent report from John Small of Covec. Covec's analysis shows that the public benefits of the proposed RLBU arrangements will clearly outweigh any detriments. In particular:
- There are three main categories of public benefits from the RLBU arrangements, namely reduced costs of providing landfill services, environmental benefits and resilience benefits. While the environmental and resilience benefits are clear, they are prohibitively expensive to quantify accurately, and are therefore included as qualitative benefits;
 - In respect of cost savings across the region, the RLBU will save the following amounts:
 - In undiscounted terms, the RLBU proposal will require investment of just under \$51m over the period to 2046, whereas in the absence of the RLBU the total investment across both Councils would be \$65.5m, a saving of around \$14.6m or 22%. After discounting future expenditures, Covec consider there will be a saving of \$2.5m of capital expenditure measured in 2016 dollars over the next 30 years; and
 - \$351,000 per annum in ongoing operational costs in each year, which amounts to \$10.5m in total operational cost savings over the next 30 years before discounting, and \$6.7m savings in 2016 dollars over the next 30 years after discounting.
 - There should be no detriments from the RLBU arrangement. While landfill prices are not expected to increase under the RLBU arrangements, even if they did, s46 of the Waste Minimisation Act expressly permits local authorities to price above or below the cost of the service to promote the waste minimisation objectives of that statute. So price increases by a local authority in this situation do not amount to a detriment in the same way they could in normal commercial markets, given that such price increases deter the generation of waste which is an environmental benefit.
 - In addition, the Councils' ownership / operation of the landfills under the RLBU arrangements limits any detriments that could apply. This is on the basis that the relevant "public" are the residents and ratepayers in the Nelson/Tasman region. The RLBU arrangement has been specifically designed to benefit these people by reducing the total cost of landfill services through a joint arrangement between both Councils – something the Councils are expressly encouraged to consider under the applicable industry legislation.

⁴ The Specified Provisions are set out in para. 24 of the body of the authorisation application.

Streamlined Authorisation Sought

(xiii) Streamlined authorisation is sought for this application on the basis that:

- Only one regional market is affected by the proposed RLBU arrangements, and the number of affected parties is not large;
- Based on the statutory public consultation already carried out by the Councils, there appears to be a general consensus of interested parties in favour of the arrangement;
- The Commission is familiar with the market from its previous clearance decisions in the waste industry, and also from its own recent investigation into another independent party in the wider waste industry in the Tasman district;
- Detailed quantification of benefits versus detriments should not be necessary, and any such analysis should be relatively straight-forward. As noted in Covec's report, there are clear public benefits from the RLBU arrangement and there should not be any detriments;
- The landfills fall within the streamlined authorisation thresholds when measured by revenue (for size of the relevant market) and number of full time employees;
- The Councils accept that the Commission has jurisdiction to grant the authorisation.

Part 1: Details of Applicants and Other Parties

APPLICANTS

1. This application for authorisation to enter into and give effect to the Specified Provisions of the proposed RLBU arrangements is given jointly by NCC and TDC. Their contact details are as follows:

Nelson City Council
Civic House, 110 Trafalgar Street
Nelson 7040
<http://nelson.govt.nz/>

Attention: Richard Kirby
Consulting Engineer
Richard.Kirby@ncc.govt.nz
Mobile +64 27 441 3282

Tasman District Council
189 Queen Street
Richmond
Richmond 7050
<http://www.tasman.govt.nz/>

Attention: David Stephenson
Asset Engineer – Waste Management & Minimisation
david.stephenson@tasman.govt.nz
Mobile: +64 27 221 2940

2. The Councils request that all correspondence is directed in the first instance to:

Simpson Grierson
Solicitors
Level 27, 88 Shortland Street
Auckland 1010

Attention: James Craig / Johanna McDavitt
Partner / Solicitor
09 977 5125 / 09 977 5243
james.craig@simpsongrierson.com
johanna.mcdavitt@simpsongrierson.com

OTHER PARTIES

3. There are no other relevant parties to the proposed RLBU arrangements.

PARTIES TO THE PROPOSED PRACTICES

Nelson City Council

4. Nelson City Council (**NCC**) is the unitary authority for Nelson City, constituted under the Local Government (Nelson-Marlborough Region) Reorganisation Order 1989. Its website can be found at <http://nelson.govt.nz/>.

5. Nelson is located on the eastern shores of Tasman Bay. Established in 1841, it is the second-oldest settled city in New Zealand and the oldest in the South Island. Nelson City is bordered to the West and South-West by TDC, and to the North-East, East and South-East by the Marlborough District Council. Nelson City has a population of around 49,900.
6. NCC owns the York Valley landfill at 34 Market Road, Bishopdale, Nelson, and a Refuse Transfer Station (**RTS** – also referred to as a Resource Recovery Centre (**RRC**)) in Tahunanui.

Tasman District Council

7. Tasman District Council (**TDC**) is the unitary authority for the Tasman District of New Zealand, constituted under the Local Government (Nelson-Marlborough Region) Reorganisation Order 1989. Its website can be found at <http://www.tasman.govt.nz/>.
8. The Tasman District is situated at the North-Western tip of the South Island covering an area of 9,786 square kilometres. It borders the West Coast Region, Marlborough Region, and Nelson City. The district's largest ward, Richmond, is situated immediately to the west of Nelson City – which has its own separate Council, the NCC. Outside of the main urban areas of Richmond and Motueka, the district is made up of numerous small towns with lower population-density and long travelling distances. The District's estimated resident population at June 2015 was 49,500, but this number increases significantly during holiday periods.
9. TDC owns the Eves Valley landfill at 214 Eves Valley Road, Waimea West, Tasman. It also provides kerbside waste collection throughout Tasman District, and owns five RRCs in Collingwood, Motueka, Murchison, Richmond and Takaka for the deposit of solid waste, greenwaste, recyclables, and special waste.

PROPOSED PRACTICES

10. Currently, NCC and TDC each own and operate a landfill in their respective districts:
 - (a) NCC owns the York Valley landfill. The site includes the current operational area (Gully 1) and two other areas potentially suitable for landfill operations (Gully 3 and Gully 4);
 - (b) TDC owns the Eves Valley landfill. The site includes a closed landfill (Stage 1), the current operational area (Stage 2), and a further area potentially suitable for landfill operations (Stage 3) which would require further consents and capital expenditure before it could be developed.
11. A map of the location of both existing landfill sites is attached as **Appendix A**. Both landfills are located within a short distance of one another.
12. The current operational area of TDC's Eves Valley landfill is almost at capacity, and is expected to reach capacity around 2019. Unless an arrangement can be reached with NCC, TDC would most likely need to incur significant capital expenditure in the short term in order to develop Stage 3 of the landfill so it could accept waste after 2019. The predicted cost of developing Stage 3 at Eves Valley

is \$14 million over the next eight years to 2025, and \$26 million more over the next 20 years to 2045 (a total of \$40 million).⁵

13. The Councils propose to share jointly the management of the two landfills they own in the Nelson-Tasman region through a Joint Committee of the Councils (a Joint Committee is provided for in Schedule 7 of the Local Government Act, and anticipated through ss15 and 17A). In particular, the Councils intend to enable the joint governance, management and use of York Valley Gully 1 and Eves Valley Stages 2-3 as regional landfill facilities to accept all municipal solid waste generated in the Nelson-Tasman region.
14. Under the proposed RLBU arrangements:
 - (a) NCC and TDC would each retain ownership of their respective landfills;
 - (b) NCC and TDC would establish a RLBU, controlled by a Joint Committee, to make governance decisions about the landfills, including the setting of fees. The Joint Committee would include members from each Council. A management group, including general manager, would provide management duties, and manage the operational aspects of the landfills;
 - (c) Each Council would transfer control of their landfill (just Gully 1 of the York Valley landfill for NCC) to the RLBU and the Joint Committee from 1 July 2017;
 - (d) TDC would make a one-off payment of approximately \$4.2 million to NCC, to recognise the difference in the values of the two landfills. All future financial interests would be allocated equally;
 - (e) From 1 July 2017, the York Valley landfill would be the primary regional landfill facility. TDC would send all waste collected at its RRCs to NCC's landfill at York Valley, as would commercial operators who collect waste from the Tasman District, until Gully 1 of that landfill fills up (expected to occur around 2031) or until expiry of the existing resource consents for the York Valley landfill (being 31 December 2034), whichever occurs first;
 - (f) The Eves Valley landfill would have all necessary consents and approvals obtained so it can accept up to one years' waste from the Nelson-Tasman region in case of any unforeseen temporary issues with the ability of the York Valley landfill to accept waste;
 - (g) The proposal anticipates that, when NCC's landfill is full, all waste collected by the two Councils would go to TDC's landfill at Eves Valley. As a result, Stage 3 of the Eves Valley landfill would be retained for future use as a regional landfill facility. The capital expenditure required to develop Stage 3 of the Eves Valley landfill would be shared by both Councils, rather than borne alone by TDC as would be the case if the RLBU arrangements did not proceed.

Draft Agreements for Establishing the RLBU

15. The proposed Draft Agreement for the Nelson-Tasman RLBU between NCC and TDC is attached as **Appendix B**. Entry into this agreement is conditional on the

⁵ Page 13 of TDC's 2016 Proposal for a RLBU Consultation Document at <http://www.tasman.govt.nz/policy/public-consultation/recently-closed-consultations/proposal-for-a-regional-landfill-business-unit/>.

Councils first obtaining authorisation from the Commission. An organisational structure chart for the RLBU is attached as **Appendix C**.

16. Under this draft agreement, control of all land, landfill activities and assets used for TDC's Eves Valley landfill will be transferred to the RLBU. Control of all land, activities and assets used for Gully 1 of NCC's York Valley landfill will be transferred to the RLBU, but control of all land associated with Gully 3 and Gully 4 of the York Valley landfill will remain with NCC.
17. The landfills controlled by the RLBU will operate as a closed business account by NCC as the administering Council. The operating account will meet all operating costs of the RLBU (including but not limited to contractors' costs, resource consent charges, insurance, taxes and other administrative charges). The RLBU will look to contract out the operational management of the landfills to external third party contractors, under a competitive tender process.
18. The RLBU will be established as a Joint Committee of the NCC and TDC under the provisions of Schedule 7 to the Local Government Act. The Draft Terms of Reference for the Nelson-Tasman Joint Committee of the RLBU between NCC and TDC are also attached as **Appendix D**.
19. The RLBU Joint Committee will comprise four or five members as follows:
 - (a) Two members appointed by NCC (at least one of whom will be an elected member of the Council);
 - (b) Two members appointed by TDC (at least one of whom will be an elected member of the Council);
 - (c) One iwi advisor (who will not hold voting rights), nominated by local iwi and appointed by both the Councils; and
 - (d) The Joint Committee may include one jointly appointed independent member.
20. The Joint Committee will have the authority to:
 - (a) Set fees and charges for waste disposal at the regional landfill facilities by 30 June each year. This will include the power to discount fees and charges for the disposal of waste in bulk;
 - (b) Enter into all contracts necessary for the operation and management of the RLBU in accordance with the approved budgets and intent of the Business Plan and the "Procurement Guidance for Public Entities" as produced by the Office of the Auditor General;
 - (c) Authorise all payments necessary for the operation and management of the RLBU within the approved budgets and intent of the Business Plan; and
 - (d) Do all other things, other than those things explicitly prohibited by the Agreement or relevant statutes, that are necessary to achieve the objectives as stated in the JWMMP, Long Term Plan, Activity Management Plan or Business Plan approved by the Councils, including setting terms of trade and acceptance criteria for waste to landfills.

21. There will be a RLBU Management Group which will be predominantly made up of Council staff/contractors, and funded through the RLBU closed account. Its purpose and functions are described in the Terms of Reference.
22. In terms of the relevant roles of the proposed RLBU Management Group and Joint Committee:
- (a) The Management Group will report and make recommendations to the Joint Committee on financial and operational matters, including capex requirements and setting of fees;
 - (b) The Joint Committee will prepare the JWMMP, and annual business plans based on the recommendations of the management group. It will report to both Councils through an annual business plan and annual report. The Joint Committee will have input into both Councils' Long Term Plans, infrastructure strategy, activity management plans, annual plans, and development contribution and financial contribution policies.
23. The Joint Committee will need to consider whether it is required to consult on decisions through s82 of the Local Government Act, and the Significance and Engagement Policies of each Council (s76AA LGA). Such decisions that could require public consultation include setting fees, plans for capital expenditure, and income to be derived through the Long Term Plan and Activity Management Plans. The RLBU will be accountable through the Annual Reports of both Councils.

Specified Provisions for which Authorisation is Sought

24. The particular operative provisions (the **Specified Provisions**) of the draft Agreement for the Nelson-Tasman RLBU and the Terms of Reference for which the Councils seek authorisation from the Commission are as follows:

Draft Agreement for the Nelson-Tasman RLBU

- (a) Clause 5 – providing for control of activities and assets at separate areas of both landfills to be delegated to the Joint Committee to be used as regional landfill facilities under the RLBU;
- (b) Clauses 7 and 9-10 – setting out the principles of the Agreement, and requiring both Councils to act co-operatively in an open and transparent manner on all matters relating to the two landfills and to support the RLBU. This includes the Councils agreeing to use one of York Valley or Eves Valley as the primary landfill for the disposal of waste generated in the Nelson-Tasman region (reflecting the intent of background recitals F- I of the draft Agreement);
- (c) Clauses 12-13 – relating to the acceptance of out of district waste by the RLBU;
- (d) Clause 14 – providing for the RLBU to have responsibility for all management and administrative matters, including setting terms of trade and acceptance criteria for waste to landfills;

Terms of Reference

- (e) Clause 1 - providing for the purpose of the RLBU being to manage and operate a regional landfill facility or facilities;

- (f) Clause 11 - giving the RLBU the power to set fees and charges for disposal at the regional landfill facilities, and to make decisions to accept waste generated outside the region;
- (g) Clause 23(iv) – providing for the Management Group to report to the RLBU with recommendations for the setting of fees, charges and rebates for the disposal of waste at the regional landfill facilities, making recommendations on the awarding of operational contracts, and making recommendations concerning any proposal to accept out-of-district waste for disposal at the regional landfill facilities, and waste acceptance criteria.

Rationale for the Authorisation Application

25. The proposed RLBU approach for landfills is the Councils' preferred option because:

- (a) It realises the benefits of a regional approach (capital and operational efficiency through one landfill, reduction of commercial risk, waste minimisation and non-financial benefits such as environmental benefits) to help the Councils meet their obligations under the Waste Minimisation Act to "promote effective and efficient waste management and minimisation";
- (b) In particular, by entering into the RLBU arrangement TDC will defer the need to invest in expanding the Eves Valley landfill in the immediate future. The Councils would expect to share \$0.9 million of capital expenditure over the next eight years. Over the following 20 years, the Councils expect to share \$48 million of capital expenditure on developing Stage 3 of the Eves Valley landfill⁶, and around \$1.4 million at York Valley when it closes;
- (c) For its part, NCC would receive the benefit of the one-off payment of approximately \$4.2 million from TDC, to recognise the difference in the values of the two landfills. It would also receive long term security for its waste disposal needs once the York Valley landfill becomes full; and
- (d) Risks and benefits are shared equally.

26. Both Councils' Mayors have made the following public statements on the rationale for the RLBU:⁷

Tasman Mayor Richard Kempthorne: The joint landfill will result in greater operational efficiencies, and reduced capital costs for both councils over the medium to long term. Councils are required to work towards minimising waste, but at the moment we're hampered in those efforts by having two landfills in the region. That's because the high fixed costs of running a landfill mean there is a financial incentive to increase rather than reduce waste.

Nelson Mayor Rachel Reese: A joint landfill is just one example of utilising a partnership approach with our neighbours, for the benefit of the entire region. Through our combined efforts this project will ensure that our region has a focus on minimising waste, and maximising operational efficiencies.

⁶ Refer to p13 of TDC's 2016 RLBU Consultation Document. This figure of \$48 million is higher than the \$40 million figure referred to earlier for TDC to develop Stage 3 of Eves Valley landfill by itself, since it anticipates higher capacity requirements if Stage 3 becomes a regional landfill with higher waste volumes.

⁷ Media Release by TDC dated 15 September 2016.

27. Further details on the rationale for the proposed arrangements can be found in TDC's recent public consultation document for an amendment to its Long Term Plan (i.e. TDC's 10 year plan for 2015-2025) setting out details for the community on what is proposed.⁸ It is worth noting that Audit New Zealand has carried out an independent audit of this consultation document which concludes that it fairly represents the reasons for and implications of the proposed amendment, identifies and explains the main issue and choices facing TDC and the district relating to the proposed amendment, and the information and assumptions underlying the information in the consultation document related to the proposed amendment are reasonable.⁹

What will the RLBU mean for landfill fees?

28. The proposed RLBU arrangements (if implemented) are not expected to result in a substantive change to the fees charged for the disposal of waste at the landfills.¹⁰ As expanded on below, those fees only relate to the cost of commercial waste disposal, on the basis that the public do not have direct rights of disposal at either landfill.¹¹
29. The process for setting fees will largely remain unchanged, except the Joint Committee will calculate the fees required rather than each Council. The Joint Committee will propose fees each year and, like other Council fees, these may be consulted on with the public before they are adopted.
30. Waste disposal fees have to be set in accordance with the Waste Minimisation Act and the Local Government Act, which contains public consultation requirements. As expanded upon below, under that legislation waste disposal fees may be higher or lower than required to recover the costs of the service or facility if the Joint Committee is satisfied that it will provide an incentive or disincentive to promote the objectives of the JWMMP.
31. Waste disposal fees are currently set by TDC to help offset the costs of running the five RRCs and the Eves Valley landfill. In contrast, NCC only has to fund one RTS and the York Valley Landfill. TDC's costs are subsidised by a General Rate on all rateable properties. In Nelson, the landfill fees exceed landfill costs and are used to fund other waste activities of Council. NCC does not provide any rate input into the operational solid waste activity it delivers. However, it is providing rate funding of \$159k/year for 10 years for the capital purchase of recycling bins for each property in Nelson.
32. Landfill fees must also cover the costs associated with the Government's Emissions Trading Scheme and Waste Disposal Levy. These costs may change annually and will usually affect the price for waste disposal.
- (a) In relation to the Emissions Trading Scheme (**ETS**), landfills generate landfill gas, which contains a proportion of methane, a greenhouse gas. Since 1 January 2013, operators of waste disposal facilities have been required to surrender New Zealand Units (**NZUs**) to match their

⁸ The link to this consultation document on TDC's website is at <http://www.tasman.govt.nz/policy/public-consultation/recently-closed-consultations/proposal-for-a-regional-landfill-business-unit/>.

⁹ Page 17 of TDC's consultation document – link above.

¹⁰ Page 15 of TDC's consultation document – link above.

¹¹ The public have access for special waste at Eves Valley, but only on application. There are perhaps 10 transactions by the public per annum like this. NCC does not accept any waste from the public for disposal at its landfill.

emissions. The cost is passed on to the landfill users. The ETS charges for landfills vary depending on the cost of NZUs and the efficiency of the gas capture and destruction system at the landfills;

- (b) As regards the Waste Disposal Levy, from 1 July 2009 the Waste Minimisation Act introduced a Waste Disposal Levy of \$10 per tonne (plus GST) on all waste disposed of at disposal facilities. The purpose of this levy is to raise revenue to promote and achieve waste minimisation, and recognise the cost of waste disposal on the environment, society and the economy by increasing the cost of waste disposal.

33. That said, the ETS and Waste Disposal Levy costs will apply both with and without the proposed RLBU arrangements. As a result, their effect is neutral in the context of the current application.

Why the Proposed RLBU Arrangements Risk Breaching Section 27 via Section 30 of the Commerce Act 1986

34. If implemented, the Councils are concerned that the proposed arrangements would risk breaching s27 via s30 of the Commerce Act 1986 in the following respects:

- (a) Both ss27 and 30 prohibit certain conduct by "persons". "Persons" are defined in s2(1) of the Commerce Act as including "a local authority", which is in turn defined as including "every local authority and every public body or other authority created by or pursuant to any public Act or local Act". The Commerce Act therefore applies to the Councils;
- (b) The RLBU and/or Joint Committee would be setting fees and charges for waste disposal at both landfills;
- (c) By ceasing to accept disposal of solid waste at the Eves Valley landfill (at least in the short to medium term), the RLBU and/or Joint Committee would be restricting the capacity or likely capacity of the Councils to supply landfill waste disposal services (for instance by directing that waste in the region be disposed at the NCC's landfill at York Valley, rather than at TDC's landfill at Eves Valley);
- (d) This is in circumstances where both Councils currently compete with one another to provide landfill waste disposal services in the regional market for the permanent disposal of solid waste, at least for some commercial customers (as expanded upon below in the industry overview and market definition sections);
- (e) The proposed joint arrangements therefore risk amounting to an arrangement between competitors to fix the price of services to be supplied and/or restrict capacity in breach of s27 via s30 of the Commerce Act;
- (f) The s31 joint venture exception does not apply to exempt the proposed RLBU arrangements involving a Joint Committee of the Councils from the application of s30. This is because, under the proposed RLBU arrangements, landfill services are not "made available as a result of, the joint venture" for the purposes of s31(2)(b) of the Commerce Act. This is on the basis that both Councils have been able to provide separately the existing landfill services in the past in the absence of any joint venture. Nor will a joint venture be established as a body corporate to supply

landfill services in pursuance of the joint venture under s31(2)(c)(ii), taking into account the fact that a Joint Committee rather than a CCTO is being proposed, and both Councils will retain ownership of their respective landfills;

- (g) Leaving aside the s30 issues and focusing more generally on s27 by itself, the proposal will involve a joint arrangement between the owners/operators of the only two landfills currently present in the landfill market in the Tasman/Nelson region. Given the absence of any other competitors, the proposal is likely to lessen competition in that market in any event;
- (h) As set out below, there are various legislative provisions requiring the Councils to work together on waste issues. However, these provisions do not "specifically authorise" the proposed joint arrangements in this case, and therefore there is no exception under s43 to the application of the Commerce Act.

35. These concerns have prompted the current application for authorisation of the proposed joint arrangements.

Part 2: The Industry

SERVICES SUPPLIED BY THE PARTIES

36. The proposed arrangements just relate to the waste disposal services provided through the two landfills owned by the Councils in the Nelson / Tasman region.

INDUSTRY OVERVIEW

37. In this section we deal with the following matters:
- (a) The relevant supply chain from collection to disposal of waste;
 - (b) How the Councils compete for the provision of landfill waste disposal services;
 - (c) The legislative and regulatory overlay that the Councils are required to follow in the collection and disposal of waste;
 - (d) The public consultation that has taken place over the proposed RLBU arrangements;
 - (e) Previous consideration by the Commission of landfills.

The relevant supply chain from collection to disposal of waste

38. We provide a general overview, and then specifically focus on the supply chain for each of NCC and TDC.

General Overview

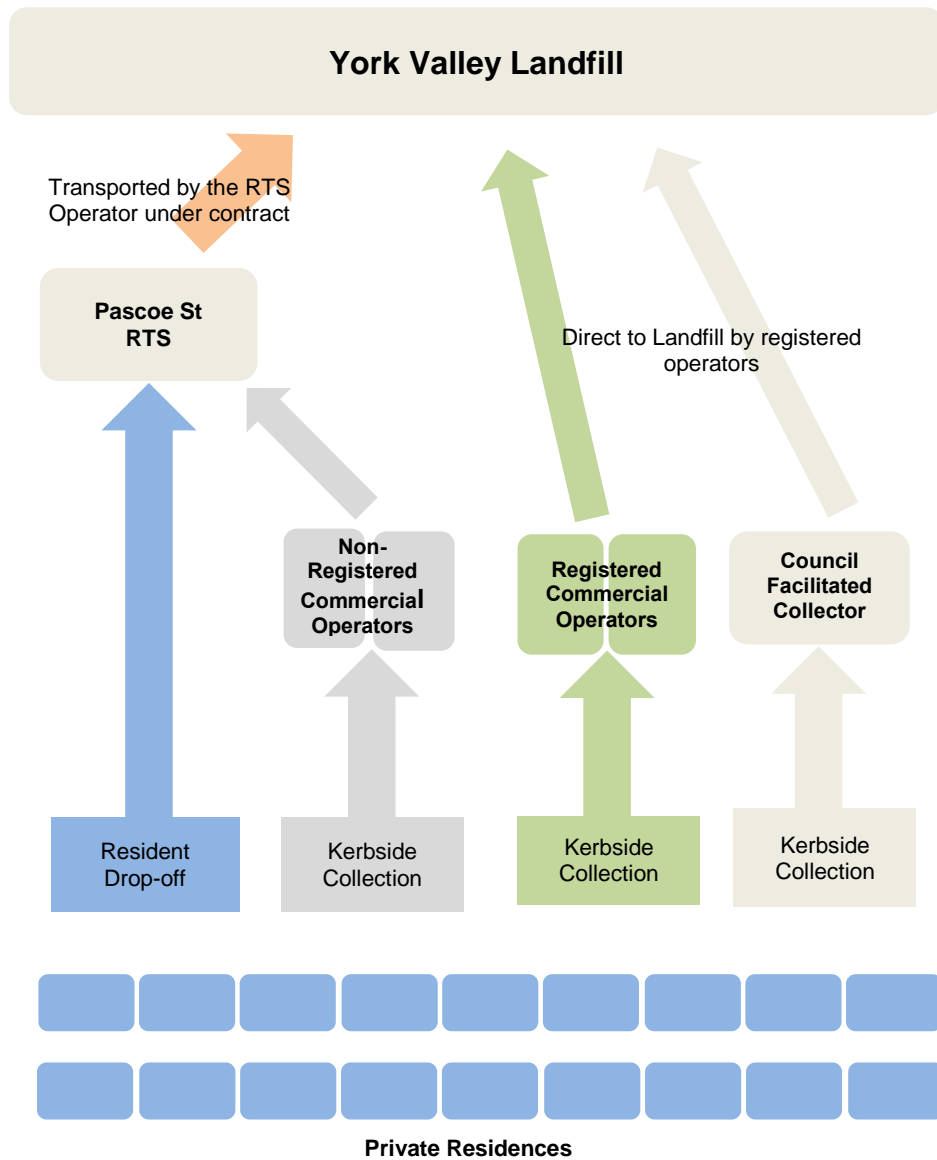
39. The New Zealand waste management industry comprises a range of different services, including solid waste collection, transfer and handling stations, treatment and processing, recycling, disposal, and a range of specialist activities and services.
40. Waste is generated by households, offices, businesses and industry. It is collected and disposed of by both public and private enterprises.
41. Collection of solid waste is the largest segment of the waste management industry. This involves the collection of a range of waste types across a broad customer mix and transportation to disposal sites - either directly to landfills, or to the RTS or RRCs for aggregation, consolidation and compaction.
42. The role of local authorities in collection of residential waste varies. In some regions the council is directly involved in the collection of waste. In other regions the local authority outsources collection services to the private sector or has no involvement in waste collection, other than the enforcement of local waste bylaws.
43. The RTS and RRCs provide an intermediate step between waste collection and final disposal. Householders or small businesses may take their waste to these sites. Commercial operators also use these sites, especially where a long haul to a landfill with a small collection truck can thereby be avoided.
44. The RTS or RRC then aggregates the waste for onward haulage to a landfill. In some cases, transfer stations are located adjacent to landfills. Increasingly,

because of Occupational Safety and Health regulations, cars, trailers and small trucks are not permitted access to landfills, thus forcing them to use the RTS or RRCs.

45. With the trend towards larger, regionally-based landfills and the closure of small local rubbish dumps, the latter are often being replaced by RTSs or RRCs to provide the same degree of convenience of access for local users.

Nelson City Council

46. The diagram below summarises the flow of waste from NCC private residences to the York Valley landfill.



47. Until this year NCC has funded its solid waste activity entirely from landfill fees and charges. However, as part of its Annual Plan 2016/2017, NCC has made a decision to fund recycling bins through rates. These bins are being delivered to each rateable unit in the city and NCC is funding \$159,000 per year for the next 10 years. This funding covers the capital purchase cost, as well as depreciation.

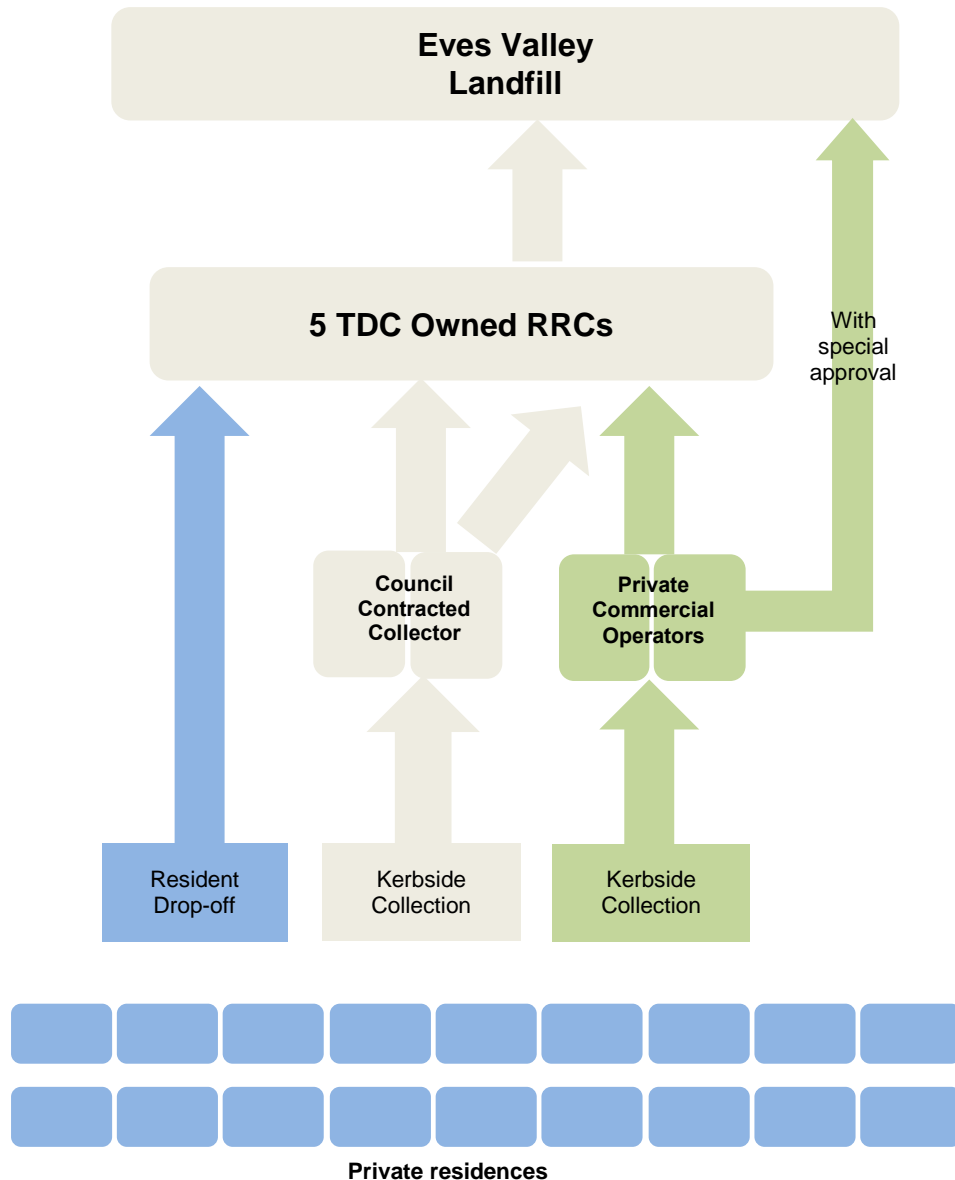
48. Apart from recycling, NCC does not directly provide waste collection services. Nelson City residents do however have access to a weekly user pays household refuse collection service which is facilitated by NCC. This system involves residents purchasing disposal bags, which are collected by Nelmac Ltd (an independent company owned by NCC).
49. Alternatively, residents can directly contract with a number of private commercial operators that provide collection services, including EnviroWaste, Can Plan and Waste Management.
50. Residents also have the option of paying to drop refuse directly at the NCC owned Pascoe Street RTS. The RTS also accepts greenwaste and recyclables.
51. NCC provides a weekly kerbside collection service for recyclables. From 17 October 2016, these collections will switch to fortnightly frequency with new larger bins. The recyclable materials will be transported to the Richmond RRC in Tasman District. The materials will be processed in a Materials Recovery Facility (MRF) operated by Smart Environmental, the recycling contractor for TDC.
52. Commercial kerbside collection operators that are registered and approved by NCC can take refuse directly to the NCC owned York Valley landfill, and pay approximately \$121 per tonne (including GST) to dump the refuse. The same price is charged to all operators who utilise the York Valley landfill.¹²
53. In contrast, non-registered kerbside collection operators deposit the refuse at the Pascoe Street RTS, where it is aggregated with other waste and transported by the RTS operator (under contract with NCC) to the York Valley landfill.
54. The private commercial operators have the option of depositing waste at one of the TDC owned RRCs or the TDC landfill, rather than York Valley, and this can happen if significant pricing differences arise between the facilities.
55. The York Valley landfill is a modern facility owned by NCC. The operation and maintenance of the York Valley landfill is provided by Downer under contract with NCC. This landfill accepts waste from the RTS, and also from registered commercial operators.¹³ In the year ending June 2016 NCC landfilled around 31,260 tonnes at York Valley.
56. The current stage of the landfill is consented through to 2034. Landfill gas is collected and sold to provide water heating for Nelson Hospital.

Tasman District Council

57. The diagram below summarises the flow of waste from TDC private residences to the Eves Valley landfill.

¹² See <http://nelson.govt.nz/services/rubbish/rubbish-collection-disposal> .

¹³ See <http://nelson.govt.nz/services/rubbish/rubbish-collection-disposal/>.



58. TDC provides weekly household waste collection and disposal services in the Tasman District under a collection contract with Smart Environmental.
59. Residents also have the option of paying to drop refuse directly at one of the five TDC owned refuse transfer stations that are situated around the TDC region. The refuse stations also accept greenwaste and recyclables.
60. TDC provides a fortnightly kerbside collection service for recyclables, which are transported to the Richmond RRC in Tasman District. The materials are processed in the MRF operated by Smart Environmental, the recycling contractor for TDC.
61. Similar to NCC, a number of private waste operators directly contract with and provide collection services to TDC residents, and a number of these are the same contractors that operate in the NCC region.
62. As the Council contracted collections provide a district-wide service at a universal price, the areas which are closer to the RRCs (and NCC facilities) such as

Richmond are the main areas which are targeted by private waste operators for competing collection services.

63. TDC operates RRCs at Richmond, Motueka, Takaka, Collingwood and Murchison. Waste disposal from these sites is transferred to the Eves Valley landfill, and recyclable material is processed and on-sold by Council contractors. Smart Environmental is contracted to operate four RRCs in Richmond, Mariri, Takaka, and Collingwood, as well as the MRF in Richmond. Fulton Hogan is contracted to operate one small RRC in Murchison. The RRCs enable TDC to separate and process the different forms of waste in five locations. Refuse is transported to the landfill. Recyclable materials are processed at a special recycling facility at the Richmond RRC.
64. Given the commonality of private waste operators, and the proximity of the York Valley landfill to parts of the TDC region, contractors are able to take waste from the Tasman District to the York Valley site if the relative pricing makes it more profitable. This was particularly observed in the mid-2000's when TDC increased the disposal prices and operators diverted the refuse to York Valley.
65. The Tasman District is served by a modern TDC owned landfill at Eves Valley. The landfill currently accepts waste from each of the five RRCs in the district and, as permitted, special waste directly from waste generators and waste from commercial operators with special approval.¹⁴ There is no direct access to the landfill for the public. Eves Valley receives around 29,000 tonnes of waste annually, mostly from the Tasman district (in the year ending June 2016, the actual figure was 29,835 tonnes).
66. In addition to this, TDC is contracted to accept waste at the Eves Valley landfill from the Buller District, at approximately 2,000 tonnes per annum (in the year ending June 2016, the actual figure was 2,023 tonnes). TDC's contract to dispose of Buller waste is via Smart Environmental, who have a contract with Buller District Council to dispose of waste.
67. Stage 1 of the Eves Valley landfill is full, and Stage 2 has approximately three years of life left based on current volume projections. Stage 3 at Eves Valley is yet to be developed. If Stage 3 is required to be used by the Tasman District following the closure of Stage 2 the development and consenting process will need to commence soon in order to be ready in three years' time.
68. TDC previously operated a landfill at Murchison, but this landfill ceased operations in the 2007/2008 financial year after it was decided that it was uneconomic to continue operating the Murchison landfill.

How the Councils compete for landfill services in the region

69. As noted above, NCC's York Valley landfill accepts waste from the Pascoe Street RTS, and also from registered commercial operators. TDC's Eves Valley landfill accepts waste from each of the five RRCs in the district and, as permitted, special waste directly from waste generators and waste from commercial operators with special approval. The public have limited access for special waste at TDC's Eves Valley landfill on application, but NCC does not accept any waste from the public for disposal at its landfill.
70. Based on this, the Councils consider there is competition for the disposal of solid waste between:

¹⁴ See <http://www.tasman.govt.nz/services/fees-charges/solid-waste-fees-charges/>.

- (a) NCC's York Valley landfill and TDC Eves Valley landfill for municipal and special waste from commercial operators; and
- (b) NCC's York Valley landfill and TDC's Richmond RRC for municipal waste from commercial operators. The charges for municipal waste at TDC's Richmond RRC reflect the cost of operating the RRC, transporting the waste and disposing of the waste at the Eves Valley landfill.

The legislative and regulatory overlay that the Councils are required to follow in the collection and disposal of waste

71. As recognised by the Commission in *Decision 604*¹⁵, the legislative and regulatory framework is an important overlay in the waste industry.
72. The following legislation regulates the waste management industry:
- (a) Waste Minimisation Act 2008 (**WMA**);
 - (b) Local Government Act 2002 (**LGA**);
 - (c) Climate Change Response Act 2002; and
 - (d) Resource Management Act 1991.
73. We briefly deal in turn with each piece of legislation below. As noted above, while this legislation encourages the Councils to work together on waste management initiatives, there is no specific authorisation in this legislation for the Councils to act in breach of the Commerce Act for the purposes of s43 of the Commerce Act.

Waste Minimisation Act 2008

74. The purpose of the WMA is to encourage waste minimisation and a decrease in waste disposal to protect the environment from harm and provide environmental, social, economic and cultural benefits. The WMA introduced several new tools for managing and minimising waste. These include:
- (a) Clearer responsibilities for territorial authorities in managing and minimising waste, including requirements for reviewing and implementing waste management and minimisation plans (**WMMPs**)
 - (b) A levy of \$10 per tonne (plus GST) on waste disposed of at disposal facilities, to be used for funding waste minimisation activities undertaken by territorial authorities, businesses and community groups.
75. Relevant provisions from the WMA for present purposes include the following:
- (a) Section 42 which requires a territorial authority to "promote effective and efficient waste management and minimisation within its district";
 - (b) Section 45 which states that "Two or more territorial authorities may jointly prepare and adopt a waste management and minimisation plan for the whole or parts of their districts, and sections 43 and 44 apply accordingly, with all necessary modifications" (s43 of the WMA deals

¹⁵ Commerce Commission, *Decision No. 604: Transpacific Industries Group (NZ) Limited and Ironbridge Capital Pty Limited*, 30 May 2007 – at [78ff].

with WMMPs, while s44 deals with requirements when preparing, amending or revoking plans). This section is obviously particularly relevant in the present application;

- (c) Section 46 which allows a territorial authority to charge fees for a particular service or facility provided by the territorial authority that is higher or lower than required to recover the costs of the service or facility, or provide a service or facility free of charge, if (a) it is satisfied that the charge or lack of charge will provide an incentive or disincentive that will promote the objectives of its WMMP; and (b) the plan provides for charges to be set in this manner;
- (d) Section 56 which allows a territorial authority to make bylaws for purposes including prescribing charges to be paid for use of waste management and minimisation facilities provided, owned, or operated by the territorial authority (s56(1)(d)); and prohibiting, restricting, or controlling access to waste management and minimisation facilities provided, owned, or operated by the territorial authority (s56(1)(e)).

76. It is worth noting that Parliament expressed a clear intent behind the WMA for local authorities to work together on waste issues. In debate in the Committee of the Whole House on the Bill that resulted in the WMA, Members of Parliament from both the National and Labour parties stated:¹⁶

Nicky Wagner (National): We made sure that we included in the bill the possibility for two or more territorial authorities to jointly prepare and adopt their waste management and minimisation plan. We believe that that is particularly important, as during the select committee process we heard in the Local Government and Environment Committee from many councils that were working very well together and were getting valuable economies of scale for recycling their products, and they were doing great waste minimisation work that perhaps would not have happened had they been working individually. ...

Moana Mackey (Labour): One of the important parts of this legislation is that we have clarified that joint plans are a good idea, where that is appropriate, and that as long as territorial authorities meet the requirements under the bill there is nothing within the part that stops them from working together to carry out joint plans and to share overhead costs and initiates, as well, especially across districts. We can think perhaps of the Bay of Plenty – Waikato area where there is already a lot of collaboration, and we want to encourage that. We certainly do not want any questions being raised in this bill that that is not an appropriate thing to happen or that there is uncertainty about whether it is able to happen.

77. Similarly, the Ministry for the Environment issued a guide for territorial authorities on Waste Assessments and Waste Management and Minimisation Planning in December 2015.¹⁷ In that guide, the Ministry commented:

Many of the waste issues faced by a council are common across other councils. Councils may also have shared interests with other parties such as local industry or research institutions. The waste management and minimisation plan (WMMP) provides an opportunity to cement collaborative approaches to waste management and minimisation in a district, and with adjacent councils.

Where shared interests exist, a collaborative approach can ensure mutually helpful projects are established. Joint projects will avoid duplication of effort and leverage the

¹⁶ Hansard, 30 July 2008, 648 NZPD 17570. The transcript of this debate is located at https://www.parliament.nz/en/pb/hansard-debates/rhr/document/48HansD_20080730_00001317/waste-minimisation-bill-in-committee. The above extracts are taken from the section of debate dealing with Part 4 of the Bill, pages 34-35 of the printed version of this transcript.

¹⁷ Located at <http://www.rma.govt.nz/sites/default/files/media/Waste/wmmp-guide.pdf>.

value of funding available, particularly where available budgets are not large enough to be effective on their own. Neighbouring councils may also help identify opportunities outside your district to use existing facilities, or develop new infrastructure, or find markets for materials. As a result of working together, economies of scale when purchasing waste infrastructure, services or selling products to market, have been used to council advantage. ...¹⁸

Working collaboratively with other councils to develop a joint WMMP may be particularly helpful for groupings of medium and small councils with similar issues and goals, as it allows planning resources and costs to be shared.¹⁹

78. The Ministry expressly noted at p17 of the guide that options for collaboration included "establishing a joint committee comprising councillors from neighbouring councils to identify and oversee joint waste management and minimisation projects". This is of course the option the Councils are taking in the present case.

Local Government Act 2002

79. The LGA requires territorial authorities to produce a Long Term Plan (**LTP**) every three years from 2006. The LTP describes the activities of the territorial authority, outlines the financial strategy, and provides a long-term focus for its decision-making. The LTP discusses the first three years in detail and outlines the following seven years. As noted above, a territorial authority's WMMP will be influenced by desired community outcomes (as outlined in an LTP) and, once adopted, implementation of the WMMP will need to be incorporated into the LTP.
80. Relevant provisions from the LGA include the following:
- (a) Section 10 which states that the purpose of local government includes meeting the current and future needs of communities for good-quality local infrastructure, local public services and performance of regulatory functions in a way that is most cost-effective for households and businesses. "Good-quality" means efficient, effective and appropriate to present and anticipated future circumstances;
 - (b) Section 12(4)-(6) which states that, while a territorial authority must exercise its powers for the benefit of its district, two or more local authorities may engage in a joint undertaking, a joint activity or a co-operative activity;
 - (c) Section 14(1)(e) which requires a local authority in performing its role to "actively seek to collaborate and co-operate with other local authorities and bodies to improve the effectiveness and efficiency with which it achieves its identified priorities and desired outcomes";
 - (d) Section 15 which provides for triennial agreements between all local authorities within each region which include protocols for communication and co-ordination among the local authorities, and processes and protocols through which all local authorities can participate in identifying, delivering and funding facilities and services of significance to more than one district. This includes establishing one or more joint committees or other joint governance to achieve these matters;

¹⁸ Page 17 of the guide.

¹⁹ Page 18 of the guide. Both NCC and TDC would be characterised as medium to small councils for this purpose.

- (e) Section 17A(4)(c) which also provides for governance of infrastructure or services to be delegated to a joint committee or other shared governance arrangement including with another local authority where there are opportunities for more cost effective delivery of services; and
- (f) Schedule 7, clause 30A, which provides for joint committees with other local authorities. However, clause 30A(4) states that "A local authority or public body must not enter into an agreement under subclause (1) that is inconsistent with any enactment applying to that local authority or public body, or its members".
81. Key provisions of the LGA, such as ss14, 15 and 17A above, were introduced under the Local Government Act 2002 Amendment Act 2014. The purpose of this Amendment Act was to encourage efficient delivery and governance of local authority services through facilitating collaboration and entry into joint service arrangements by councils.²⁰ In a July 2013 Cabinet Paper, it was noted that "it is desirable that there be clear and effective options that encourage territorial authorities to work collaboratively to improve the overall effectiveness and efficiency of service and facility provision".²¹ Similarly the Regulatory Impact Statement behind these amendments encouraged collaboration between councils.²²
82. This amendment to the LGA followed the November 2012 Report of the Local Government Efficiency Taskforce. This body was appointed in June 2012 by the Minister of Local Government to provide independent advice on how to streamline local government consultation, planning and financial reporting requirements and practices under the LGA. The Taskforce found in relation to sharing innovation and collaboration that:²³
- From an overall efficiency viewpoint there would appear to be major opportunities for councils to be more proactive and willing to give up some perceived autonomy in order to reduce overall costs or risks of certain projects or services – particularly where relevant expertise or experience is not readily available with the councils' own staffing or jurisdiction. Increased willingness to utilise a shared or collaborative approach to managing the risks associated with major projects or new services provision would appear to have a number of financial, management and operational advantages.
83. The Taskforce therefore recommended amending the LGA to establish a clear mandate and incentives for councils to share innovation and collaborate to improve efficiency and performance.²⁴

²⁰ Q&A Document in relation to the "Efficient delivery and governance of local authority services" aspects of the Local Government Act 2002 Amendment Act 2014: "[https://www.dia.govt.nz/vwluResources/BLG-QandA-3b/\\$file/BLG-QandA-Efficiency-June-2014.pdf](https://www.dia.govt.nz/vwluResources/BLG-QandA-3b/$file/BLG-QandA-Efficiency-June-2014.pdf)".

²¹ Please refer to a Cabinet Paper from the Hon. Chris Tremain, Minister of Local Government, regarding "Opportunities to improve efficiency", dated 3 July 2013: "[https://www.dia.govt.nz/vwluResources/Cabinet_paper_Opportunities_to_improve_efficiency/\\$file/Cabinet_paper_Opportunities_to_improve_efficiency.pdf](https://www.dia.govt.nz/vwluResources/Cabinet_paper_Opportunities_to_improve_efficiency/$file/Cabinet_paper_Opportunities_to_improve_efficiency.pdf)", at para. 77.

²² Regulatory Impact Statement, "Better local government: opportunities to improve efficiency": "[https://www.dia.govt.nz/pubforms.nsf/URL/RIS_BLG_Opportunities-to-improve-efficiency.pdf/\\$file/RIS_BLG_Opportunities-to-improve-efficiency.pdf](https://www.dia.govt.nz/pubforms.nsf/URL/RIS_BLG_Opportunities-to-improve-efficiency.pdf/$file/RIS_BLG_Opportunities-to-improve-efficiency.pdf)", at paras. 103ff.

²³ Local Government Efficiency Taskforce Report: "[https://www.dia.govt.nz/pubforms.nsf/URL/Local-Government-Efficiency-Taskforce-Final-Report-11-December-2012.pdf/\\$file/Local-Government-Efficiency-Taskforce-Final-Report-11-December-2012.pdf](https://www.dia.govt.nz/pubforms.nsf/URL/Local-Government-Efficiency-Taskforce-Final-Report-11-December-2012.pdf/$file/Local-Government-Efficiency-Taskforce-Final-Report-11-December-2012.pdf)" at para. 290.

²⁴ Ibid, Recommendation 29, p87.

Climate Change Response Act 2002

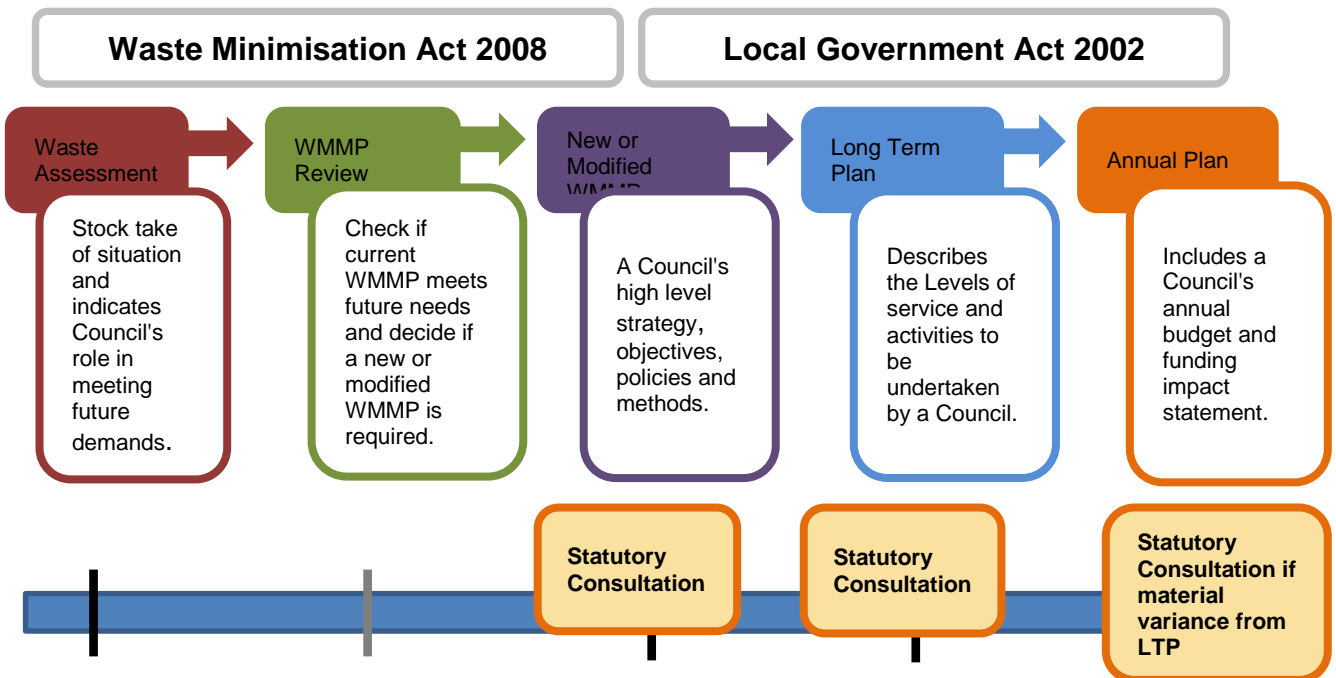
- 84. The New Zealand ETS, under the Climate Change Response Act 2002, is intended to help New Zealand meet its international climate change obligations and reduce emissions.
- 85. Under the legislation, operators of waste disposal facilities have mandatory obligations from 2012. Since 2013, operators of disposal facilities have been required to report total emissions. Since 2014, disposal facility operators have been required to report emissions by 31 March and surrender a matching number of emission units by 31 May for the preceding calendar year.

Resource Management Act 1991

- 86. The environmental impacts of waste facilities, such as disposal facilities, recycling plants and cleanfills, are controlled through the Resource Management Act 1991.
- 87. Consents are required for new disposal facilities, and are generally also required for controlling and monitoring discharges from closed landfills. Depending on the requirements of district and regional plans, waste facilities generally require consents for land use, discharges of leachate, discharges of waste onto land, discharges of stormwater, and discharges of disposal facility gas to air.

Public consultation that has taken place over the proposed RLBU arrangements

- 88. As required by the WMA, the Councils have carried out a waste assessment and made a decision that a JWMMMP be developed. The diagram below illustrates the statutory planning requirements for solid waste management and minimisation. A WMMP provides direction for the development of a LTP.



- 89. TDC and NCC have prepared and adopted a JWMMMP as provided for in ss43 and 45 of the WMA. As noted on TDC's website:²⁵

²⁵ <http://www.tasman.govt.nz/policy/plans/joint-waste-management-and-minimisation-plan/>

... the [JWMMP] recognises the cross-boundary issues each Council faces in waste management and minimisation. The plan provides common goals, objectives and policies across the region, to reduce waste and increase recycling. There is also flexibility for each council to choose different methods to achieve results.

90. There was public consultation on the Councils' proposed joint landfill approach in 2011 as part of approving the JWMMP, and the joint approach was referenced in the 2012 LTP documents. The 2015 LTP documents included a "contract for service" landfill proposal, which proposed disposal of TDC's waste at York Valley. This option did not proceed, and in early 2016 the two Councils decided to consider a joint governance and management approach for regional landfill activities instead.
91. TDC included information about the planned proposal as part of its Annual Plan 2016/2017 process which was consulted on across the district in early 2016.
92. Following this, TDC published a public consultation document for an amendment to its LTP (i.e. TDC's 10 year plan for 2015-2025) setting out details for the community on what is proposed for the RLBU.²⁶ An amendment to TDC's LTP was necessary because the LGA requires decisions relating to the transfer of control of a strategic asset to be explicitly included in the LTP. In this case TDC's consultation process involved:
- (a) A public drop in session in Richmond on 11 July 2016;
 - (b) A presentation to the Brightwater Residents Association;
 - (c) Presentations to the Golden Bay and Motueka Community Boards;
 - (d) Individual letters and consultation material sent to landowners surrounding Eves Valley and along the main transport route, six local iwi with mana whenua over the Eves Valley site, TDC's solid waste customers, and NCC;
 - (e) Notices and articles in TDC's fortnightly newsletter to all residents (Newsline), TDC's website and a newspaper seeking public input and submissions; and
 - (f) A small number of meetings with individuals on request.
93. Submissions on the consultation document closed on 5 August 2016. TDC received only four submissions on the consultation document. One submission was withdrawn ahead of a public hearing which took place before a Hearings Panel on 24 August 2016, leaving two submissions in support and one submission in opposition.
94. Only the submitter in opposition (a private individual) wished to be heard at the Hearing. This submitter's opposition was in relation to the impacts of waste disposal to landfills, and options for use of alternative technology, such as incinerators. Following discussions with the Hearings Panel, the submitter agreed that there were economic benefits as well as greater waste minimisation opportunities for the region under the RLBU arrangements proposed.

²⁶ The link to this consultation document on TDC's website is at <http://www.tasman.govt.nz/policy/public-consultation/recently-closed-consultations/proposal-for-a-regional-landfill-business-unit/>.

95. NCC consulted on the proposal through its Draft Annual Plan 2016/2017. The proposal attracted seven submissions all of which were in support of the proposal. NCC did not need to amend its Annual Plan as a result of the submissions, and the final Annual Plan was adopted on 2 June 2016. NCC's LTP already plans for operation of the York Valley Landfill for at least a further ten years, and was not required to be altered to accommodate the proposal on the basis that the York Valley landfill has not been listed as a significant asset by NCC (in contrast to the Eves Valley landfill for TDC). This followed earlier consultation by NCC on the "contract for service" proposal in 2014.

Previous Consideration by the Commission of Landfills

96. The Commission dealt in detail with the background to the waste industry in 2007 in *Decision No. 604*.²⁷ The Commission made the following comments about landfills in 2007 in this Decision.²⁸

63. A landfill is an engineered and regulated land containment site for receipt of refuse designed to minimise environmental effects. Waste is received directly from waste collection operators, customers and transfer stations. There has been a continuing reduction in the number of landfills throughout New Zealand (60 in 2006 with a further eight to 10 landfills due to close over the next 24 months).

64. Because of the difficulty of finding suitable sites for new landfills (typically, many sites are investigated and then rejected before one is found), the cost of developing the large sites required (both land purchase and construction costs), the elaborate consent procedures under the Resource Management Act, together with appeal rights to the Environment Court, the process of building a new landfill is both lengthy and expensive. Industry participants suggested that a period of from three to five years may elapse before operations can begin. The cost may be in the range from \$20 to \$50 million, all of which are costs incurred before any revenues are earned, and hence are fixed in nature.

65. Where there is competition between adjacent landfills in the larger centres, such as Auckland, competition for the ownership of waste streams becomes very important. Landfill operators are likely to become vertically integrated to ensure that their landfills maintain their share of the market, either by ownership or by contract, as rival operators will almost always take their waste to their own landfills. In this context, appropriately located transfer stations are crucial strategically in capturing a share of the waste stream.

66. The concentration of waste disposal in a smaller number of larger landfills, increasingly owned privately, rather than by the local territorial authority, has raised fears amongst some smaller, non-vertically integrated operators that their access to disposal sites may become increasingly difficult, thereby jeopardising their continuing operation. Indeed, EnviroWaste observes that "an integrated service offering provides a number of strategic advantages, enabling efficiencies to be derived throughout the value chain from collections to disposal, and is a key reason for the recent consolidation trend within the waste industry." [footnotes omitted]

97. The Commission has also recently investigated waste refuse and recycling collection and processing (but not landfill) activities more generally in the Tasman region in relation to another party.²⁹ In that 2016 investigation report, the Commission identified the wider waste markets that are relevant for the region³⁰, although it did not have to consider specifically the relevant landfill market.

²⁷ *Decision 604*, supra, at [46ff].

²⁸ *Decision 604*, supra, at [63] - [66].

²⁹ Investigation Report by the Commerce Commission dated 21 June 2016.

³⁰ At paras. 32-36 and Attachment B.

CURRENT INDUSTRY TRENDS

98. At a general level, industry trends in the wider waste industry are summarised in "The New Zealand Waste Strategy", published by the Ministry for the Environment, as follows:³¹
- There has been a major improvement in the access to and use of recycling services. In 2006, 73 per cent of people had access to kerbside recycling, up from 20 per cent in 1996; and 97 per cent had access to either kerbside recycling or drop-off centres.
 - More stringent application of regulatory requirements provided by the Resource Management Act has resulted in the closing of a number of substandard disposal facilities. In 1995, there were 327 operational disposal facilities. Today, 54 operational waste disposal facilities are registered with the Online Waste Levy System.
 - The increased uptake of best practice guidelines for managing disposal facilities means the disposal of waste is now generally concentrated in larger, better designed and managed facilities using leachate collection systems, engineered liners, and systems for recovering methane gas.
 - The introduction of the Waste Minimisation Act 2008 has significantly enhanced the regulatory framework for efficient resource use. For example, the introduction of the waste disposal levy has contributed to an increase in the cost of waste disposal, which may encourage more recycling and other waste minimisation activities.
99. As set out above in the discussion of the WMA, there continues to be a move towards a collaborative approach by local authorities for waste issues. Recent examples of this can be seen in:
- (a) The joint landfill developed at Kate Valley in North Canterbury to serve the Canterbury region by a joint venture company called Transwaste Canterbury Limited. Half of its shares are owned by five local authorities (Christchurch City Council, Hurunui, Waimakariri, Selwyn and Ashburton District Councils), with the other 50% of its shares being owned by Waste Management NZ Limited;³²
 - (b) Joint waste management arrangements (including a jointly owned landfill at Omarunui) by Hastings District Council and Napier City Council;³³
 - (c) The councils in the lower South Island have established "WasteNet Southland" as a joint service between the Invercargill City Council, Southland District Council and Gore District Council, in collaboration with Environment Southland. WasteNet Southland's functions are to facilitate the implementation of the councils' waste management and minimisation plans, provide support to organisations to develop their waste management and minimisation initiatives, facilitate the local reuse, recovery, recycling, composting and reduction in use of materials, and gather data and report to the Councils;³⁴
 - (d) As noted earlier, the Ministry for the Environment issued a guide for territorial authorities on Waste Assessments and Waste Management

³¹ <http://www.mfe.govt.nz/sites/default/files/wastestrategy.pdf> at p3.

³² Refer to <http://www.hurunui.govt.nz/services/hurunui-district-council-waste-and-recycling/kate-valley-landfill/> and <http://www.transwastecanterbury.co.nz/webpage/kate-valley/>.

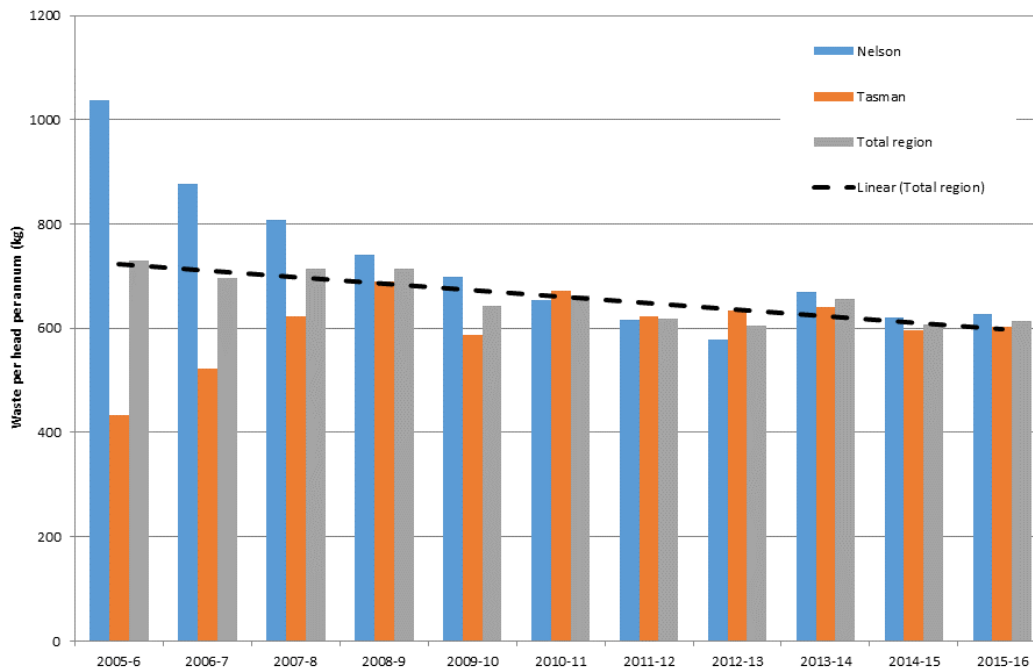
³³ Refer to the Performance Audit Report by the Office of the Auditor General entitled "Waste Management Planning by Territorial Authorities", dated April 2007 at: <http://www.oag.govt.nz/2007/waste-management/docs/oag-waste-management.pdf>.

³⁴ Further information on WasteNet Southland is available at <http://www.wastenet.org.nz/AboutWasteNet.aspx>.

and Minimisation Planning in December 2015 which has referred to the benefits of councils working together on waste issues.³⁵

100. In relation to general industry trends in the Nelson-Tasman region, some companies are now moving to a “full service” option where they provide waste diversion and waste disposal services (including waste assessment and consulting). This is generally carried out by the larger companies through national contracts (e.g. [Redacted]). In these contracts the company provides a single full service where they manage all aspects of waste management and may need to engage a subcontractor – even a competing waste company where necessary.
101. With the change to kerbside recycling wheelie bins in Tasman, TDC saw a 28% increase in recycling volumes in year one. NCC is about to roll out this service and may see similar changes.
102. Total regional waste to landfill per capita has fallen from around 730 kg in 2005-2006 to around 615 kg in 2015-2016 as reflected in the graph below.

Waste to landfill per head of population



RECENT MERGER ACTIVITY

103. As far as the Councils are aware, there have not been any significant mergers or acquisitions in the waste industry generally in the Nelson / Tasman region in the last three years.
104. As noted above, previously there have been clearance applications to the Commission by Transpacific Industries Group (NZ) Limited to acquire the South Island or Nelson/Blenheim assets and business of EnviroWaste Services Limited in *Decision No. 604* dated 30 May 2007 and *Decisions No. 622-625* dated 31 October 2007.

³⁵ Located at <http://www.rma.govt.nz/sites/default/files/media/Waste/wmmp-guide.pdf>.

INDUSTRY REPORTS AND SURVEYS

105. In addition to the reports already referred to above, further details of each Council's waste activities (including details of fees and charges, the Councils' JWMMP and their Solid Waste Activity Management Plan) are contained in the following links:
- (a) <http://www.tasman.govt.nz/services/rubbish-recycling/>;
 - (b) <http://nelson.govt.nz/services/rubbish/rubbish-collection-disposal/>.
106. We also refer to the Commission's previous consideration of clearance applications for the acquisition of assets in the top of the South Island, and the Commission's recent June 2016 investigation report into waste collection in the Tasman district, as noted above.

Part 3: Market Definition

107. For the purposes of this application, the Councils broadly adopt the market definition for landfills identified by the Commerce Commission in previous clearance decisions³⁶ - namely a regional Nelson / Tasman market for the disposal of solid waste at landfills (the **Nelson / Tasman regional landfill market**).

RELEVANT SERVICES

108. The Commission has previously characterised the relevant services as being those involving the disposal of solid, non-hazardous waste and excavated earth in *Decision No. 355*.³⁷ This is the primary waste disposed of at the landfills in the present case, although the landfills do accept some demolition and construction waste and limited amounts of hazardous waste. For this reason, the Councils propose the slightly wider reference to the disposal of solid waste generally.

FUNCTIONAL LEVEL

109. Similarly the Councils agree with the Commission's characterisation of the functional levels of the market as set out in *Decision No. 355*³⁸ and *Decision No. 604*.³⁹ In those Decisions, the Commission identified the following functional levels:
- (a) Collections: collections of solid non-hazardous waste at the point of generation and its delivery to the point of disposal, either at RTSs/RRCs (for temporary disposal) or at landfills (for permanent disposal);
 - (b) RTSs / RRCs: facilities used as an intermediate point at which small lots of collected waste are temporarily deposited, and which are then aggregated into large lots for onwards haulage to a landfill; and
 - (c) Landfills: points of final, permanent disposal of solid waste.
110. The relevant functional level of the market in the present case is that for landfills. The proposed arrangements will not affect the RTS / RRC functional level given that the RTS / RRCs will remain under their existing Council ownership, with separate operation and control.

GEOGRAPHIC AREA

111. In *Decision 355* and *Decision 604* the Commission recognised regional markets for the disposal of solid non-hazardous waste at landfills. The Commission noted the following in *Decision No. 355* in relation to the geographic scope of the market:⁴⁰
- Disposal market: all larger towns and cities appear to have landfills. These typically service both the population centre and the outlying districts. There appear to be significant throughput economies in landfill operations because of the high proportion of fixed costs, especially for new ones because of the initial Resource Management

36 Commerce Commission, *Decision No. 355: Waste Management NZ Limited and Waste Care Limited*, 14 May 1999; Commerce Commission, *Decision No. 359: Waste Management NZ Limited and Waste Care Limited*, 9 June 1999; Commerce Commission, *Decision No. 604: Transpacific Industries Group (NZ) Limited and Ironbridge Capital Pty Limited*, 30 May 2007.

37 Commerce Commission, *Decision No. 355: Waste Management NZ Limited and Waste Care Limited*, 14 May 1999 at [45] - [53].

38 At [57] - [58].

39 At [198] - [204].

40 *Decision 355* at [59] - [62].

Act compliance and construction costs. The difficulty of finding suitable sites also appears to contribute to the relatively small numbers of landfills. At the same time, the cost of hauling waste to landfills rises with increasing distance. Using heavy trucks carrying 22-24 tonne loads – the most efficient form of haulage – the cost per tonne rises (according to industry estimates) from around [] for 5 kms, to [] for 20 kms, and to around [] for 100 kms (very occasionally on long hauls the availability of a back-haul cargo may lower rates significantly). These rates make long distance haulage to a landfill unattractive when a closer landfill is available, unless the operator offers a discount on the landfill charge. This may happen for large deliveries. However, LTA owned facilities seem to be less enterprising in this regard, with the focus being one of providing capacity for local ratepayers. Some landfills operate with artificially restricted catchment areas, sometimes to extend their limited lives and so to delay the expense of building a replacement landfill. **The Commission has concluded that, broadly speaking, the geographic extent of the disposal market is regional. It is recognised that it is possible for there to be competition between landfills in some densely populated regions, such as greater Auckland. As the present application involves aggregation only in the Auckland region, the relevant market is that for the Auckland region.** [emphasis added]

112. In *Decision No. 604*, the Commission again concluded that the geographic scope of the market for landfills was regional:⁴¹

218. Despite the trend towards the closure of smaller landfills and their replacement by larger ones servicing larger areas, all larger towns and cities appear to have access to adjacent landfills. The landfills typically service the population within one or more districts. There appear to be significant throughput economies in landfill operations because of the high absolute level, and high proportion, of fixed costs in their operation, especially for new ones because of initial Resource Management Act compliance and construction costs. The difficulty of finding suitable sites also appears to contribute to the relatively small number of landfills. **The Commission concludes that the geographic extent of the market for disposal of solid non-hazardous waste at landfills is regional.** [emphasis added]

113. The Commission has not previously considered the geographical boundaries of the regional market(s) for the disposal of solid waste at landfills in the upper South Island.
114. Based on the Commission's previous approach to landfill market definition, the Councils submit that the geographic dimension of the relevant regional market is that for the Nelson-Tasman region. While it could be argued that the regional market incorporates Marlborough District Council's landfill as well (as referred to in Part 5 of this application), the exact scope of the regional market should not be determinative of the authorisation issues in the present case. For this reason the Councils are content to adopt the more conservative (narrower) option of a Nelson-Tasman regional market.
115. Such a regional Nelson-Tasman market reflects what the Councils see in practice. As noted above in the industry overview, commercial customers of the landfills are able to choose between disposing of their waste at NCC's landfill or TDC's landfill (or the Richmond RRC) based on factors that include each landfill's fees. This suggests that the two landfills are in the same regional market.
116. A regional market of this extent is also consistent with the Commission's observations in its recent 21 June 2016 investigation report where it noted at para. 146.4 that "Commercial refuse collection competitors are able to dispose of Tasman refuse at the York Valley Landfill in Nelson (approximately 15km from Richmond), although this does involve additional distance and time".

41 *Decision No 604* at [218].

Part 4: Counterfactual

117. The Councils have previously identified three alternative options to the preferred RLBU arrangement proposal. Each was included as an option in TDC's consultation documents for the necessary amendments to the LTP for the period 2015-2025.⁴²
118. These alternative options are set out below. We then go on to identify which of these options are unlikely, and which would be likely, in the event that the proposed RLBU arrangements did not proceed.

First Alternative Option: Council-Controlled Trading Organisation

119. Under the first alternative option, the Councils would establish a CCTO to acquire and control the two landfills as a joint venture.⁴³ This would likely involve a Management Board that reported to a Joint Committee. The Councils would agree to a Statement of Intent regarding the CCTO.
120. The Councils would equally share indirect control of the landfills through the Statement of Intent of the CCTO, and would equally share the costs and benefits (including sharing the costs of Eves Valley landfill).
121. The disadvantages of this option from the Councils' perspective include:
- (a) Higher set-up and operating costs of around \$150,000 per annum;
 - (b) Higher accounting and auditing costs;
 - (c) CCTOs are primarily profit-driven, which may not be consistent with the JWMMP, which aims to reduce long term waste entering landfills;
 - (d) Despite providing a 'Statement of Intent' (SOI) to the CCTO, the Councils would have less ability to directly influence the activities of the CCTO in order to achieve community outcomes. This would reflect the fact that the Councils would no longer own the landfills themselves; and
 - (e) Income tax would likely be charged on profits from a CCTO and may increase the price of waste disposal.

⁴² The link to this consultation document on TDC's website is at <http://www.tasman.govt.nz/policy/public-consultation/recently-closed-consultations/proposal-for-a-regional-landfill-business-unit/>

⁴³ A CCTO is defined in s 6(1) of the Local Government Act 2002 as follows:

council-controlled organisation means a council organisation that is—

- (a) a company—
 - (i) in which equity securities carrying 50% or more of the voting rights at a meeting of the shareholders of the company are—
 - (A) held by 1 or more local authorities; or
 - (B) controlled, directly or indirectly, by 1 or more local authorities; or
 - (ii) in which 1 or more local authorities have the right, directly or indirectly, to appoint 50% or more of the directors of the company; or
- (b) an entity in respect of which 1 or more local authorities have, whether or not jointly with other local authorities or persons,—
 - (i) control, directly or indirectly, of 50% or more of the votes at any meeting of the members or controlling body of the entity; or
 - (ii) the right, directly or indirectly, to appoint 50% or more of the trustees, directors, or managers (however described) of the entity

council-controlled trading organisation means a council-controlled organisation that operates a trading undertaking for the purpose of making a profit

Second Alternative Option: Regional Contract-for-Service

122. Under the second alternative option, the Councils would agree a contract-for-service under which NCC would own and operate York Valley landfill, and TDC would send all waste to York Valley and pay commercial disposal fees (i.e. TDC would not accept waste at the Eves Valley landfill). TDC would recover an annual lump sum and a share of the operating surplus of the landfill. Once York Valley was full, Eves Valley would be developed by TDC and a reciprocal arrangement would see NCC send its waste to Eves Valley. This option would mean that TDC would not need to fund construction of a new landfill stage at Eves Valley until around 2027.
123. This was an earlier option contained in NCC's and TDC's LTP for the period 2015-2025. However, NCC and TDC could not agree mutually beneficial terms and conditions and the contract-for-service option was not pursued.
124. The disadvantages of this option include:
- (a) The high capital costs to construct the Eves Valley landfill (Stage 3) from 2027 would be borne by TDC alone;
 - (b) It has proven difficult to establish terms and conditions for access to the landfills that are equally favourable to both Councils;
 - (c) The organisational structure is reasonably complex, with limited ability for TDC at least to have input on governance decisions for regional solid waste until Eves Valley landfill (Stage 3) is operational.

Third Alternative Option: Continuation of the Status Quo

125. Under this alternative, TDC and NCC would continue to separately own, control and operate their respective landfills.
126. This option would require TDC to develop Stage 3 at Eves Valley and to cover the costs of this alone, taking into account the fact that by 2019 Stage 2 of Eves Valley will be full. The predicted capital cost of this is \$14 million over the next 8 years to 2025, and \$26 million more over the next 20 years to 2045 (a total of \$40 million). There would also be costs for NCC as well, including around \$500k in 2032/33 to renew the consent at York Valley, and then \$14 million inflated at 2% per annum (i.e. around \$25m in total) in 2045/46 to create extra capacity at York Valley.
127. Under this option the two Councils would continue to offer landfill services separately. That said, unless TDC incurred significant capital expenditure in the short term to develop Stage 3 of the Eves Valley landfill, Stages 1-2 of that landfill will be full by 2019 and unable to be used in any event after that time.
128. The disadvantages of this option include:
- (a) Two smaller landfills are less efficient than a single regional landfill;
 - (b) High commercial risk – especially if two competing landfills are operating at the same time;
 - (c) High capital cost for development of the Eves Valley landfill (Stage 3) with all costs being paid by TDC's ratepayers via disposal fees or rates. Rates would likely rise to offset the higher costs that could not be

recovered from fees while the Councils competed for waste at the two landfills;

- (d) On-going issues with planning for and managing waste from commercial contractors, as they seek the best price between the Tasman and Nelson landfills; and
- (e) Difficult to achieve the objectives of the Joint Waste Plan.

Applicable Counterfactual

- 129. In terms of which of these alternative options the Councils consider is likely and therefore the counterfactual (based on having a real and substantial possibility of occurring in the absence of the proposed joint arrangements proceeding), the Councils consider this option to be the third alternative option (being the continuation of the status quo involving separate ownership and operation of the landfills).
- 130. There is the possibility that there could be a hybrid of the second and third options under which TDC would send waste to York Valley for disposal once Stage 2 of the Eves Valley landfill is full around 2019, without the reciprocal arrangements that would exist under the second contract for service option referred to above. Under this hybrid option, the two Councils would then need to negotiate an acceptable gate charge at the York Valley landfill. However it is questionable whether an agreement could be reached on such gate charges, given that NCC and TDC could not agree mutually beneficial terms and conditions for the second contract-for-service option in circumstances where there were reciprocal benefits for both Councils in that case. As a result, the third alternative option (status quo) remains more likely than this hybrid option.
- 131. The first alternative option (CCTO) and second option (contract for service) are unlikely as a result of the disadvantages identified for both of them above.

Part 5: Existing Competitors

132. The two Council owned landfills are the only landfills in the Nelson / Tasman region.
133. The closest alternative landfill is situated at the Bluegums landfill site, located to the South of Blenheim, which is owned by Marlborough District Council (**MDC**). MDC's WMMP states in relation to this landfill that:

The Bluegums Landfill site, located to the south of Blenheim, is the only disposal site for commercial, industrial, residential and some hazardous waste within the region. The site has an estimated lifespan of 53 years based on the current inputs. This is an engineered containment facility operating under RMA resource consent U000950 which expires in November 2030. The site is operated by Council under contract no 2011/06. The site is split into thirteen stages. Stage seven of the site will be constructed over the 2015/16 period. There are no other new landfill site developments envisaged over the term of this WMMP.⁴⁴

134. While the MDC does not have a formal policy on out-of-region waste, the Councils understand that at a meeting of the MDC Assets and Services Committee on 5 May 2016 a request for disposal of waste from Canterbury was declined at that time.

ESTIMATED MARKET SHARES

135. Together the two Councils have 100% of a Nelson / Tasman regional landfill market.
136. The relevant tonnages of waste disposed by each of NCC and TDC in their landfills are set out in a graph in **Appendix E**.

⁴⁴ Located at <http://www.marlborough.govt.nz/Council-Publications/Plans-Policies-and-Documents/Asset-Management-Plans.aspx>

Part 6: Potential Competition

CONDITIONS OF ENTRY

137. The Commission previously noted in *Decision No. 604* that conditions of entry (and expansion) for landfills are not simple. It stated at para. 64:

Because of the difficulty of finding suitable sites for new landfills (typically, many sites are investigated and then rejected before one is found), the cost of developing the large sites required (both land purchase and construction costs), the elaborate consent procedures under the Resource Management Act, together with appeal rights to the Environment Court, the process of building a landfill is both lengthy and expensive. Industry participants suggested that a period of from three to five years may elapse before operations can begin. The cost may be in the range from \$20 to \$50 million, all of which are costs incurred before any revenues are earned, and hence all fixed in nature.

138. In the present case, the Councils consider that the conditions of entry would require the landfill owner to purchase a suitably sized and located property. They would need to apply for a resource consent (the activity status would depend on the zoning that applied to the property). At a minimum an activity would likely be a Discretionary Activity, but more likely Non-Complying. In either case the consent process would likely go through a public notification process, and any associated appeals (from neighbours, iwi, environmental groups etc). Appropriate technical and scientific evidence would be required. Timeframes from inception to completion could be 2 – 10 years (rough estimate).
139. If approved, the new landfill would face ongoing consent conditions that would require monitoring, such as leachate and methane emissions. There would also be ongoing costs associated with landscaping, site management, and drainage etc. Operational costs would include the requirement for specialised landfill equipment (primarily a landfill compactor) and other civil contracting equipment. Estimated establishment and operation costs would be in the region of \$16 - \$18 million. This is consistent with the figures previously obtained by the Commission in *Decision No. 604*, albeit at the lower end of the cost range reflecting the smaller size of landfill required.
140. Factors which could impede new landfill entry into the market would include:
- (a) Finding a suitable location and obtaining consent;
 - (b) Having competitive prices with either of the Council's landfills/or a single landfill;
 - (c) Potentially relatively low volumes of waste (including for instance reductions in waste volumes due to greater recycling/reuse options);
 - (d) Technological changes, such as greater innovation in incineration/energy conversion.
141. Conversely, factors which might prompt new entry would include:
- (a) If, over time, disposal fees rose substantially at the regional landfill operated by the RLBU (although this is not anticipated);
 - (b) Cartage costs increasing substantially and making a smaller more distant landfill viable, such as in Golden Bay etc;

- (c) If much higher waste volumes make entry profitable.
142. The key factor would be securing sufficient volumes of waste. Higher landfill prices at the regional landfill may well further waste diversion to other markets (such as Marlborough District Council's landfill), rather than prompting another landfill to be built in the Nelson / Tasman region.

COUNTERVAILING POWER IN THE MARKET

143. As noted above, there are no direct competitors to the Councils in a market for landfills in the Nelson-Tasman region. There is countervailing power with some larger commercial operators which will have the potential option of looking to dispose of waste at MDC's landfill if the cost of disposal at the RLBU becomes too high. Other than this, the main constraints on the Councils going forward arise from their local government identity.
144. As previously discussed, the Joint Committee must consider whether it is required to consult, as the Councils currently do, on setting fees, its plans for capital expenditure, and income each year through the Annual Plan. Both Councils must consult on their LTPs, and supporting information, including the Activity Management Plans. The RLBU will be accountable through the Annual Reports of both Councils.
145. Waste disposal fees have to be set in accordance with the WMA and the LGA. Fees may be higher or lower than required to recover the costs of the service or facility if the Joint Committee is satisfied it will provide an incentive or disincentive to promote the objectives of the JWMMP.
146. When considering disposal fees, the Joint Committee would need to consider the beneficial and adverse effect of these fees. For example, a rise in landfill fees may reduce waste generation and increase recycling and the life of the landfill, but may also reduce affordability of waste disposal and increase fly tipping, burning and other adverse behaviour.

Part 7: Public Benefits and Detriments

OVERVIEW

147. The Councils' application for authorisation is supported by an independent report from John Small of Covec. This concludes that the benefits of the proposed RLBU arrangements clearly outweigh any detriments. In summary:
- (a) There are three main categories of public benefits from the RLBU arrangements, namely reduced costs of providing landfill services, environmental benefits and resilience benefits. While the environmental and resilience benefits are clear, they are prohibitively expensive to quantify accurately, and they are therefore included as qualitative benefits;
 - (b) In respect of cost savings across the region, the RLBU will save the following amounts:
 - (i) In undiscounted terms, the RLBU proposal will require investment of just under \$51m over the period to 2046, whereas in the absence of the RLBU the total investment across both Councils would be \$65.5m, a saving of around \$14.6m or 22%. After discounting future expenditures, Covec consider there will be a saving of \$2.5m of capital expenditure measured in 2016 dollars over the next 30 years; and
 - (ii) \$351,000 per annum in ongoing operational costs in each year, which amounts to \$10.5m in total operational cost savings over the next 30 years before discounting, and \$6.7m savings in 2016 dollars over the next 30 years after discounting.
 - (c) There should be no detriments from the RLBU arrangement at a factual level. In addition, the Councils' ownership / operation of the landfills under the RLBU arrangements limits any detriments that could apply. This is on the basis that the relevant "public" are the residents and ratepayers in the Nelson/Tasman region. The RLBU arrangement has been expressly designed to benefit these people by reducing the total cost of landfill services through a collaborative approach – something the Councils are expressly encouraged to consider under the applicable industry legislation referred to above.

PUBLIC BENEFITS

148. We deal in turn below with the public benefits identified from the RLBU arrangements, being reduced costs of providing landfill services, environmental benefits and resilience benefits.

Lower Costs of Supplying Landfill Services

149. There are two separate benefits from lower costs of supplying landfill services from the RLBU arrangement. These are the deferral of capital expenditure costs for TDC associated with supplying new capacity at Eves Valley, and also reductions in total operating costs.

Capital Cost Efficiencies

150. Without the RLBU, TDC would need to spend \$14m almost immediately⁴⁵ to develop further capacity at Eves Valley to be available to dispose of waste from 2019, a further \$10m in 2032 and a further \$16m in 2045 - for a total of \$40m.
151. Without the RLBU, Nelson would spend \$25m in 2046 to create extra capacity at York Valley, this sum being equal to \$14m inflated at 2% per annum in line with the assumption in the Deloitte reports, and \$500,000 in 2032 for re-consenting York Valley.⁴⁶
152. In contrast, with the RLBU there would be a combined capital expenditure outlay by both Councils of \$1.5m almost immediately (including \$672,000 for closing Eves Valley), a further investment of \$48m in 2030 to develop new capacity at Eves Valley, and a further \$1.4m in 2032 associated with closing York Valley.⁴⁷
153. In un-discounted terms, the RLBU proposal will require investment of just under \$51m over the period to 2046, whereas in the absence of the RLBU the total investment across both Councils would be \$65.5m. This results in a saving of around \$14.6m or 22%.
154. As referred to by the Commission in its Authorisation Guidelines, Covec has discounted these future expenditures to achieve a present value figure.⁴⁸ In terms of the relevant discount percentage figure, Covec consider that a relatively low discount rate is appropriate, in line with social rate of time preference, since these are socially desired projects undertaken by local authorities rather than commercial enterprises. Covec have represented this approach by applying a rate of 3.5% per annum which is the current UK government guidance. For completeness, they have also calculated the relevant discount figures using the New Zealand Treasury's guidance for public infrastructure projects which uses a rate of 6% per annum, and the 6.5% discount rate used in the Deloitte reports previously provided to the Councils.⁴⁹ However, Covec's view is that the 3.5% discount figure is the appropriate rate to use in this case. Based on the above rates, the relevant capital expenditure savings discounted to present value have been calculated by Covec as follows:

Table 1: Total NPV of Avoided Capital Investment (in \$m) by Scenario and Discount Rate

	Discount Rate	
	3.5%	6.5%
Proposed Transaction	34.2	24.7
Counterfactual	36.7	25.8
NPV of Benefit	2.5	1.1

⁴⁵ Tasman District Council, 2016 RLBU Consultation Document, page 11. For the "go it alone" counterfactual, this envisages capital investment of \$14m over the next 8 years to 2025 and \$26m more over the next 20 years to 2045. This has been modelled by recognising the initial \$14m in 2017 (year 1), \$10m in 2032 (year 15) and \$16m in 2046 (year 30).

⁴⁶ Deloitte, Nelson City Council, Landfill Proposal Review, 26 February 2014, page 14. See also, Deloitte, Nelson City Council, Landfill Proposal Financial Review, 15 October 2015 at page 21.

⁴⁷ See Tasman District Council, 2016 RLBU Consultation Document, page 6.

⁴⁸ As noted by the Commission at paragraph 51 of its Authorisation Guidelines.

⁴⁹ Eg at p20 of Deloitte's February 2014 report, and p16 of their October 2015 report.

155. Discounting reduces the capital cost efficiency benefits of the RLBU. However, the benefits remain substantially positive, saving some 7% of capital spending using a 3.5% discount rate (\$2.5m in NPV terms).

Operational Cost Savings

156. As noted above, in the year ending June 2016 NCC landfilled 31,260 tonnes, and TDC landfilled 29,835 tonnes from Tasman and 2,023 tonnes from Buller. Under the RLBU proposal, the flow of waste into the York Valley landfill would therefore increase by 102% based on these actual figures.

157. The terms of the landfill operator contract at York Valley are described by Deloitte as follows:⁵⁰

- (a) [Redacted];
- (b) [Redacted];
- (c) [Redacted];
- (d) [Redacted].

158. For TDC's part, the terms of its landfill operator contract are described by Deloitte as involving [Redacted].⁵¹

159. Compared with the counterfactual, TDC will save around [Redacted]⁵² operating costs in the first year plus the fixed charge of [Redacted], but will incur an extra [Redacted] per annum for ongoing maintenance at Eves Valley, for a total saving of \$406,071 in that year. In all subsequent years, TDC's cost savings remain the same at a total of \$406,071.⁵³

160. Compared with the counterfactual, NCC will incur extra operating costs of around [Redacted] each year under its landfill contract, to accommodate the waste from TDC (including Buller).⁵⁴ These operating costs will be shared with TDC going forward.

161. Across both Councils, there is consequently a net benefit from saved operating costs of \$351,496 per annum over each year of the 30 year modelling horizon. This results in total cost savings before discounting of \$10.5m.

162. Over the 30 year modelling horizon this leads to a total NPV of \$6.69m using a 3.5% discount rate. The corresponding NPV would be \$4.89m using Deloitte's discount rate of 6.5%, although Covec remain of the view that the 3.5% discount rate is the appropriate figure to use for the reasons above.

⁵⁰ Deloitte, Nelson City Council and Tasman District Council, Landfill Proposal Financial Review, October 2015, page 26, under the operational costs reference.

⁵¹ Deloitte, October 2015 report, page 26, under the operational costs reference.

⁵² The figure of [Redacted] is comprised of 31,858t from Tasman/Buller now going to Nelson multiplied by TDC's contracted disposal rate of [Redacted].

⁵³ These estimates assume that the total flow of waste across the region is fixed at 63,118t per annum with 31,260t and 31,858t being sourced from Nelson and Tasman (including Buller) respectively. [Redacted]

[Redacted]

⁵⁴ These [Redacted]

Debt and Rates Effects

163. The RLBU arrangements will result in lower debt and lower rates for ratepayers, compared with the other options considered by the Councils.⁵⁵
164. Nevertheless, to be conservative, from an economic perspective, Covec have not attributed any *extra* benefit to lower Council debt or rates. Lower debt and rates could reasonably be viewed as an *alternative* way to estimate the net public benefits of the RLBU proposal, but it would be double-counting to treat them as *extra* benefits above the benefits already identified.

Environmental Benefits

165. The Councils also anticipate environmental benefits as a consequence of the RLBU initiative. Even though modern landfills are subject to careful consenting processes, including over the management of leachate for example, there are inevitably still some negative spill-over effects associated with operating a landfill. General categories of these social costs include noise, smell and the attraction of feeding birds.
166. These are localised environmental detriments: they arise and are largely limited to the area around the landfill. Moreover, with the exception of negative spill-overs arising directly from truck movements, it seems reasonable to assume that they arise primarily from the operation of a landfill rather than the volume of material flowing into it.
167. Under the RLBU arrangement, there will be only one operational landfill in the region at all times, instead of two. Consequently, the relevant localised negative environmental effects will be halved by the RLBU proposal, relative to the counterfactual scenario.
168. There is also the added environmental benefit of waste minimisation. By having one regional landfill, there will not be competition between the two existing landfills that perversely could lead to incentives for increased waste being disposed of at the landfills rather than less waste disposal. This is on the basis that the high fixed costs of running separate landfills mean that there is a financial incentive to increase rather than decrease the amount of waste being disposed of at the landfills. Waste minimisation is the objective of the Waste Minimisation Act, and Parliament clearly sees it as having public benefits (as set out in more detail in the legislative background to the industry set out above).
169. While there is clearly an environmental benefit from the RLBU, it would be very difficult and unduly costly to quantify it accurately. Consequently, it has been included as a qualitative benefit.

Diversity and Resilience

170. The RLBU proposal is also likely to generate greater long-term security in respect of waste disposal for the region.
171. Because the RLBU is intended to actively manage the region's resources in a co-ordinated way, it should reduce the likelihood that either Council will find itself without local options for disposal. Under the counterfactual scenario, that could occur in Tasman if it proved impossible to secure further consents for Eves Valley in a timely manner, for Nelson if a similar event occurred as York Valley

⁵⁵ See, for example, Tasman District Council, 2016 RLBU Consultation Document, at pp. 8, 11-12 and 14.

approached its capacity limits, and for either Council in the event of an emergency such as an earthquake that rendered a landfill inoperable.

172. Again, these diversity and resilience benefits are included as qualitative rather than quantitative benefits, due to the difficulty with quantifying them accurately.

DETRIMENTS

173. The potential public detriments that are assessed by Covec cover all three forms of economic efficiency. The specific detriments analysed, and the reasons why the Councils and Covec submit they do not apply, are set out below.

The cost of operating landfills might increase, which could reduce productive efficiency

174. Competition between the existing landfills for commercial customers appears primarily focused on reducing *long-term capital costs* by adding volumes from the neighbouring area, rather than economising on operating costs. In addition, the Councils will remain subject to the same statutory constraints under the RLBU arrangements and the status quo.
175. As a result, it does not appear that there would be any loss of productive efficiency when the factual is compared with the counterfactual, and indeed the opposite is likely to apply.

Service quality might reduce, which could compromise either productive or allocative efficiency or both

176. Resource consents were required (and obtained) for both of the landfills. While the quality standards required by such consents change over time, and are generally becoming more stringent, these existing landfills are nevertheless being operated in compliance with the terms of their consents. Nothing about the proposed transaction will change this fact, so there should not be any service quality detriments that could arise from this source.
177. Nor does it seem likely that the proposed RLBU arrangements will cause lower service quality to emerge from changes to other aspects of the landfill operations.

Landfill usage prices might increase for reasons unrelated to cost, which could reduce allocative efficiency

178. While the proposed RLBU arrangements are not expected to result in a major change to the fees charged for the disposal of waste to the landfills, there is a risk that landfill prices for commercial users could increase in future.
179. However, even if this happened, s46 of the Waste Minimisation Act expressly permits local authorities to price above or below the cost of the service to promote the waste minimisation objectives of that statute. So price increases by a local authority in this situation do not amount to a detriment in the same way they could in normal commercial markets. This is on the basis that such price increases deter the generation of waste which is an environmental benefit rather than a detriment.
180. In any event, for the reasons set out in their report, Covec have concluded that the RLBU could not raise existing landfill prices at York Valley significantly above their current levels without risking commercial operators approaching Marlborough District Council (**MDC**) to dispose of waste at MDC's landfill. This is consistent

with the views of the Councils that the proposed RLBU arrangements are not expected to result in a major change to the fees charged for the disposal of waste at the York Valley landfill. As a result, Covec do not consider that there is likely to be any significant price increase that would result in a material detriment to commercial operators.

Dynamic efficiency might be compromised

181. The RLBU arrangements appear to pose no risk to the future availability of landfill services in the Nelson/Tasman region. On the contrary, they are motivated in large measure by a desire to co-ordinate the current and future supply of landfill capacity in a cost-effective manner.
182. Nor is there a material risk that the future tranches of landfill capacity that come on stream in this region will be of inefficiently low quality in their design and/or specification. In practice, landfill quality requirements are specified as part of the Councils' regulatory function, and they will be the same irrespective of who operates the (current and future) landfills. There is no reason to expect these regulated quality standards to change as a consequence of the transaction. In fact quality may be higher under the proposed RLBU structure compared with the status quo.
183. For the reasons above, Covec have concluded that public detriments are very unlikely under any of these heads.

Impact of Council Ownership / Operation of the Landfills Through the RLBU on Detriments Assessment

184. In addition to the points above, Covec note that:
- (a) The relevant "public" are the residents and ratepayers in the Nelson/Tasman region who are ultimately the buyers of waste disposal services, despite the fact that commercial waste firms often act as intermediaries. The RLBU arrangements have been specifically designed to benefit these people by reducing the total cost of landfill services, resulting in lower rates increases and each Council taking on less debt; and
 - (b) There are strong obligations on the two Councils to ensure that the public is effectively consulted, and both Councils are ultimately accountable to the public.
185. Regarding the first two of these reasons, it is generally understood that costs to consumers of being supplied by a monopolist are greatly reduced in co-operative settings where the relevant set of consumers are also the beneficiaries of the monopolist's activities. This is why consumer-owned electricity network monopolists are excused from regulation under the Commerce Act.⁵⁶ The consultation and accountability obligations on the Councils provide further assurances that the interests of consumers of waste disposal services will not be harmed under the RLBU proposal. These are statutory obligations, as set out in the provisions of the relevant legislation applicable to the industry which has been summarised above.
186. For these reasons Covec consider that there are no public detriments from the RLBU arrangements.

⁵⁶ As set out in ss54(1)(b) and 54G(2) of the Commerce Act.

Part 8: Identification of Interested Parties

187. Other parties who may be interested include:

- (a) Commercial operators who dispose of waste at the landfills;
- (b) Commercial operators who dispose of waste at the RTS and RRCs (and who are not included in the landfills category above); and
- (c) Other nearby councils referred to in this application.

188. Their details are set out below:

Commercial Users of NCC's York Valley Landfill

Company Name	Address	Contact / Telephone	Email
[Redacted]			

Commercial Users of TDC's Eves Valley Landfill

Company Name	Address	Contact Person	Telephone	Email
[Redacted]				

Commercial Users of TDC's RRCs (not including operators already referred to in the landfills section above)

Company Name	Address	Contact Person	Telephone	Email
[Redacted]				

Other Potentially Interested Parties

Organisation Name	Address	Contact Person	Telephone	Email
Buller District Council	PO Box 21, Westport 7866	Steve Griffin	03 788 9111	steve@bdc.govt.nz
Marlborough District Council	PO Box 443, Blenheim 7240	Alec McNeil	03 520 7541	Alec.McNeil@marlborough.govt.nz

Part 9: Confidentiality

189. Confidentiality is requested for the information in this application that is contained in square brackets and highlighted in blue shading, on the basis that disclosure would be likely unreasonably to prejudice the commercial position of the parties providing the information.
190. The Councils request that they be notified if a request is made to the Commission under the Official Information Act 1982 for release of the information for which confidentiality has been claimed, and given a chance to provide submissions to the Commission on whether it should make disclosure prior to any such disclosure taking place.
191. This applies equally in respect of any additional information that is expressed to be confidential subsequently provided to the Commission during the course of its consideration of this application by the Councils.
192. Confidential and public versions of this application have been provided to the Commission.

Declaration

THIS NOTICE is given jointly by Nelson City Council and Tasman District Council.

The Councils hereby confirm that:

- all information specified by the Commission has been supplied;
- if information has not been supplied, reasons have been included as to why the information has not been supplied;
- all information known to the applicants which is relevant to the consideration of this application/notice has been supplied; and
- all information supplied is correct as at the date of this application/notice.

The Councils undertake to advise the Commission immediately of any material change in circumstances relating to the application/notice.

Dated this day of October 2016

Signed by Nelson City Council:

Clare Hadley
Chief Executive Officer

I am an officer of Nelson City Council and am duly authorised to make this application.

Signed by Tasman District Council:

Lindsay McKenzie
Chief Executive Officer

I am an officer of Tasman District Council and am duly authorised to make this application.

Appendix A

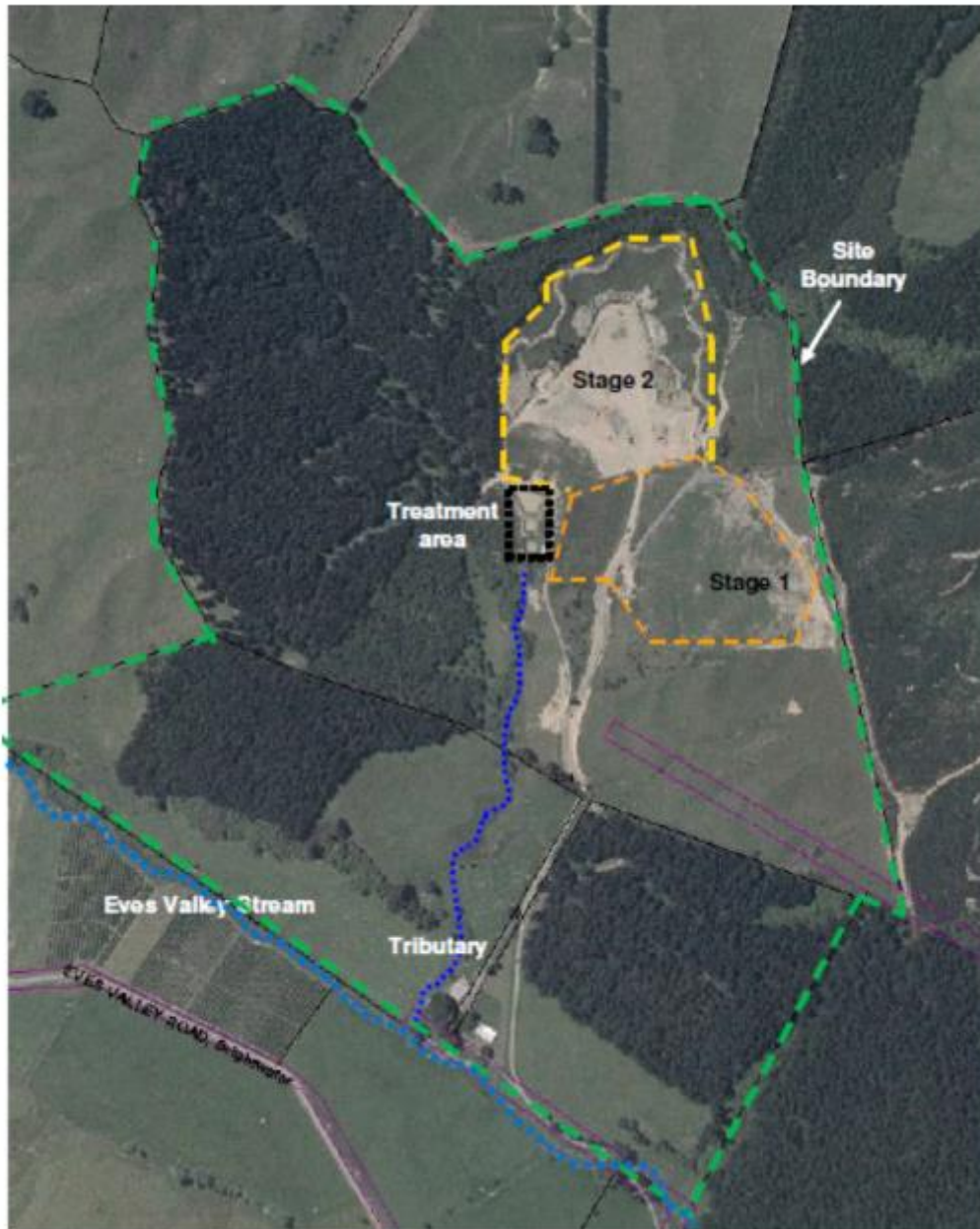
Map of Landfill Sites



York Valley Landfill
Current Operational Area – Gully 1



Eves Valley Landfill
Current operational area Stage 2

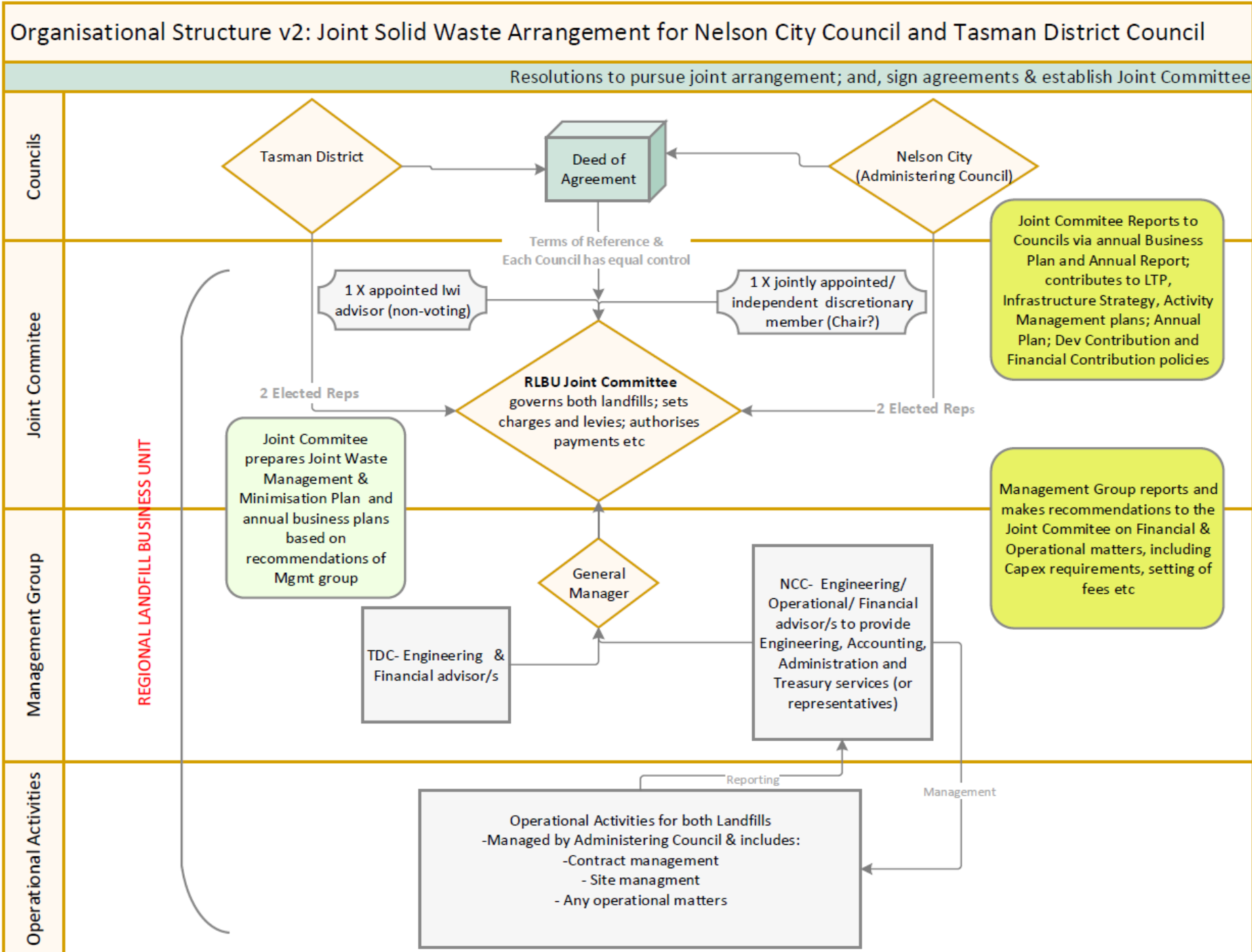


Appendix B

Draft Agreement for the Nelson-Tasman Regional Landfill Business Unit

[separately provided to the Commission]

Appendix C – Organisational Structure Chart of Joint Committee of RLBU



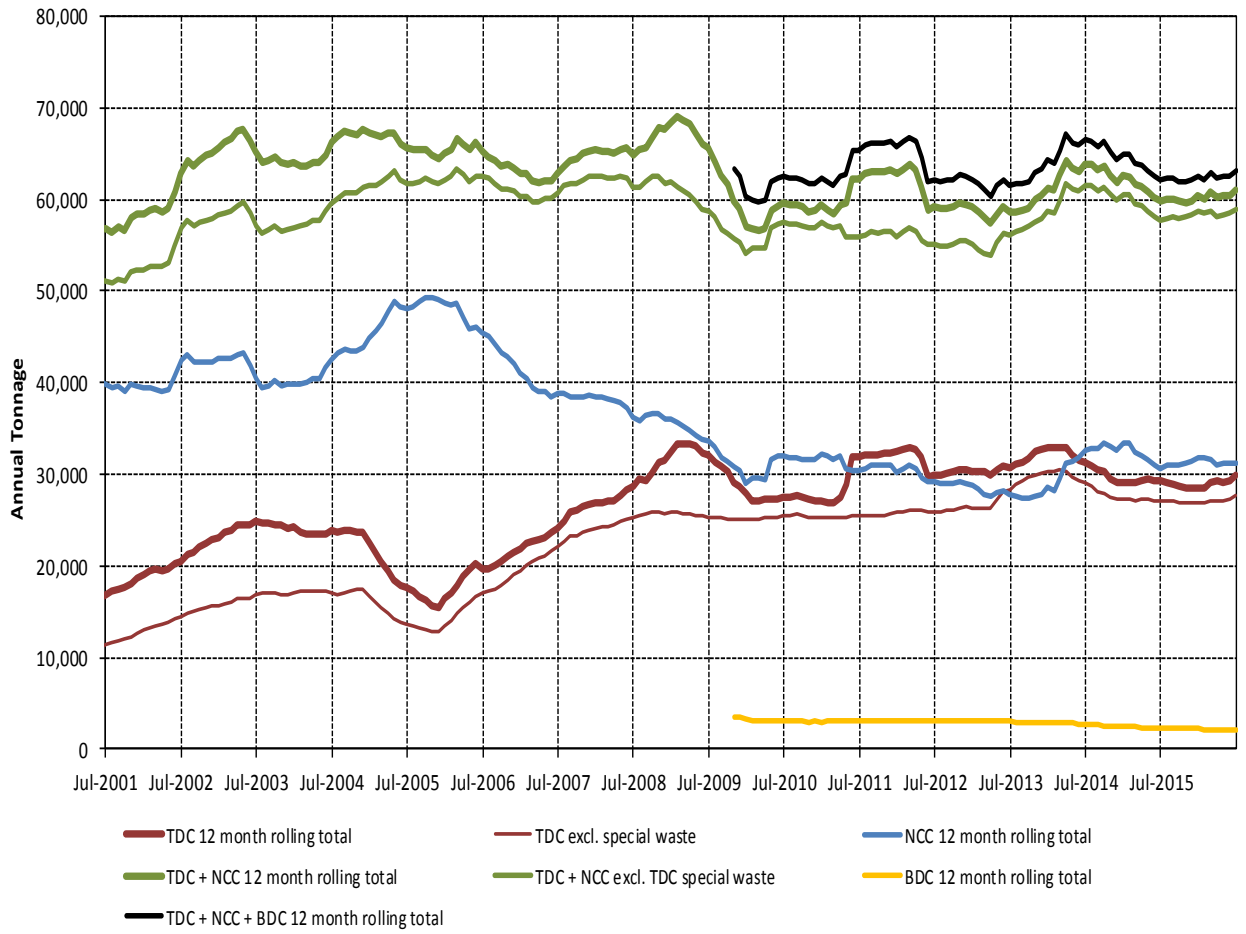
Appendix D

Draft Terms of Reference for Joint Committee of RLBU

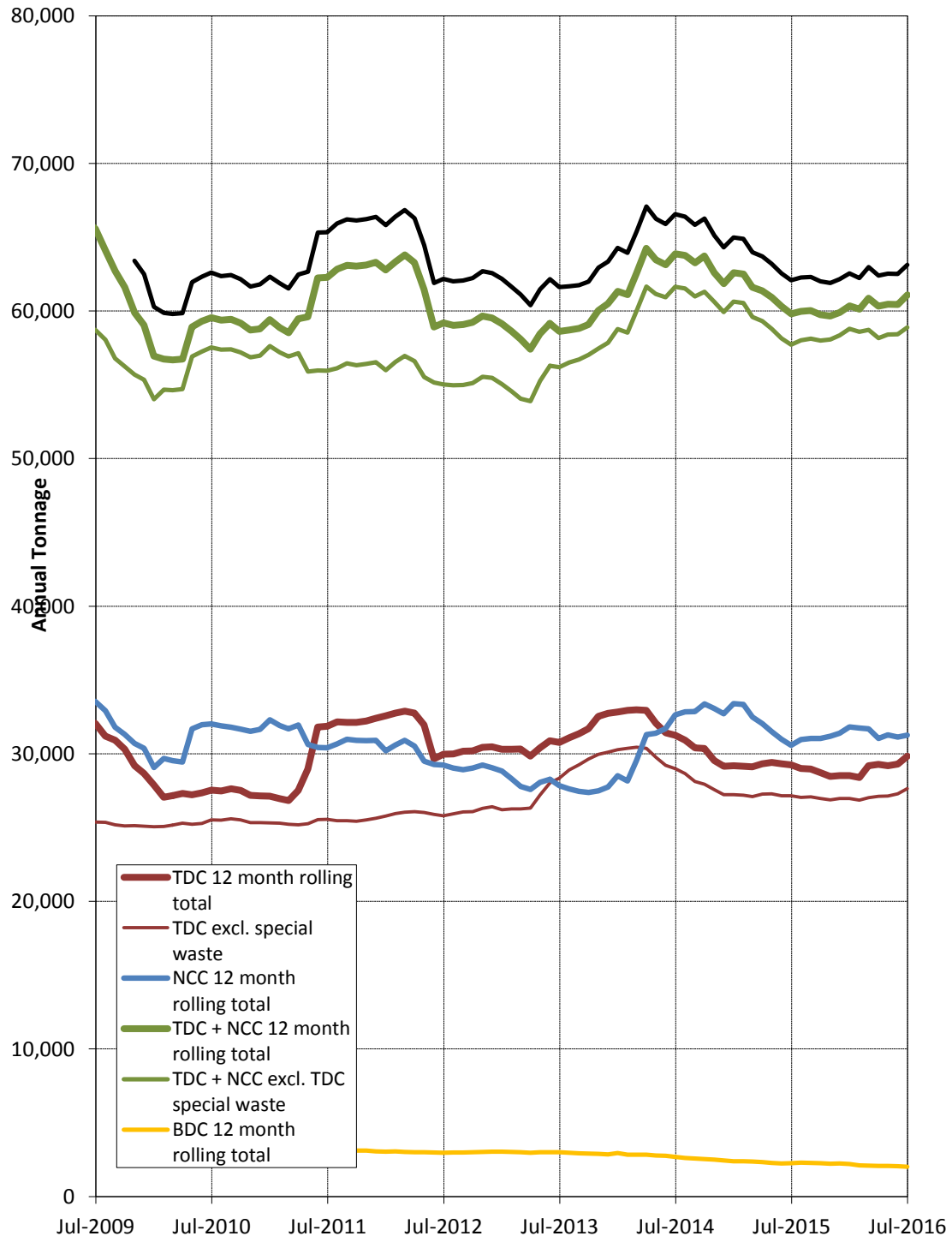
[separately provided to the Commission]

Appendix E

Regional Waste to Landfill



Regional Waste to Landfill



Appendix F

Glossary of Terms

Councils	Nelson City Council and Tasman District Council
CCTO	Council Controlled Trading Organisation
Disposal	The final (or more than short term) deposit of waste into or onto land set apart for that purpose
Disposal Facility	A facility including a landfill at which waste is disposed of, where the waste disposed of includes household waste, and that operates at least in part as a business to dispose of waste
ETS	Emissions Trading Scheme
JWMMP	Joint Waste Management and Minimisation Plan
LGA	Local Government Act 2002
LTP	Long Term Plan
MDC	Marlborough District Council
MRF	Materials Recovery Facility
NCC	Nelson City Council
Refuse Transfer Station (RTS)	A site where diverted material and waste are collected
RLBU	Regional Landfill Business Unit
Resource Recovery Centre (RRC)	A site where diverted material and waste are collected
Specified Provisions	The Specified Provisions for which authorisation is sought, as set out in para. 24 of the authorisation application
TDC	Tasman District Council
Waste	Anything disposed of or discarded; includes a type of waste that is defined by its composition or source (for example organic material, electronic waste, or construction and demolition waste); and to avoid doubt includes any component or element of diverted material
Waste Minimisation	The reduction of waste; and the re-use, recycling and recovery of waste and diverted material

WMA

Waste Minimisation Act 2008

WMMP

Waste Management and Minimisation
Plan, as defined in s43 of the Waste
Minimisation Act 2008