

## Draft Determination

Note: This is a draft determination issued for the purpose of advancing the Commerce Commission’s decision on this matter. The conclusions reached in this draft determination are preliminary and take into account only the information provided to the Commission to date.

This is a draft determination under the Commerce Act 1986 in the matter of an application for authorisation of a restrictive trade practice. The application is made by:

### **Nelson City Council and Tasman District Council**

**The Commission:** Dr Mark Berry  
Sue Begg  
Anna Rawlings

**Summary of application:** Nelson City Council and Tasman District Council have applied for authorisation to create a Regional Landfill Business Unit that would make joint governance, management and operational decisions for the Councils’ two landfills in the Nelson-Tasman region.

**Determination:** On the basis of the information provided to date, the Commerce Commission’s preliminary decision is that it should grant conditional authorisation for the application.

**Date of draft determination:** 17 March 2017

Confidential material in this report has been removed. Its location in the document is denoted by [ ].

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## Introduction

1. On 18 October 2016, the Commerce Commission (the Commission) received a joint application (the Application) from the Nelson City Council (NCC) and the Tasman District Council (TDC) (together, the Applicants or the Councils) under s 58 of the Commerce Act 1986 for the authorisation of possibly restrictive trade practices.
2. NCC and TDC currently own and operate their own individual landfills. The Councils are seeking authorisation to enter into and give effect to an arrangement creating a Regional Landfill Business Unit (RLBU), which would operate both of the Councils' landfills in accordance with Specified Provisions (the proposed arrangement), the details of which are discussed below.
3. Each Council would have equal representation on the RLBU. The RLBU would manage and operate the Councils' two landfills in the Nelson-Tasman region (York Valley and Eves Valley) The RLBU's responsibilities would include setting the fees for those landfills and would result in only one of the existing landfills operating at any one time.
4. However, because each Council would individually be required to approve the operational plan of the RLBU on an annual basis, both Councils would still retain general responsibility for the RLBU.
5. We are considering the Application under our streamlined authorisation process.<sup>1</sup>
6. We are releasing this draft determination to provide interested parties with an opportunity to comment before we make our final determination.

## Draft determination

7. Our preliminary view is that, subject to the following condition, the proposed arrangement will, or will be likely to, result in a benefit to the public outweighing the lessening in competition, such that an authorisation should be granted.
8. As a condition of authorisation the Councils must:
  - 8.1 vary clause 21(c) of the Draft Deed of Agreement for the Nelson-Tasman RLBU, to confirm that any operating surplus from the RLBU would be used solely to fund the Councils' waste management and minimisation services, facilities or activities; and
  - 8.2 ensure that the Councils' annual reports clearly disclose the amount of any operating surplus received from the RLBU and record how any such surplus is being applied in a manner that is consistent with this condition.
9. In this instance, our preliminary view is that it is necessary to grant conditional authorisation because, without the proposed condition, there would be a real

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<sup>1</sup> See Commerce Commission, *Authorisation Guidelines* (July 2013) for further information on our streamlined process.

chance that the detriments from the proposed arrangement could exceed the benefits.

### **Next steps**

10. We invite written submissions on the draft determination. Submissions should be received by us on or before 31 March 2017.
11. At this stage, we consider a conference to be unnecessary. However, we may determine to hold a conference prior to making a final determination.<sup>2</sup>
12. The Applicants, or any interested party who receives a copy of the draft determination, may request that we hold a conference. We are required to hold a conference if one is requested.<sup>3</sup> If any such persons wish to request a conference, they must do so in writing by 31 March 2017, which is 10 working days after the date of release of this draft determination.

### **Background**

#### **Parties to the arrangement**

##### *Nelson City Council*

13. NCC is the unitary authority for Nelson City and is, among other things, responsible for promoting effective and efficient waste management and waste minimisation in and around Nelson City.<sup>4</sup> NCC's neighbouring Councils include the Tasman District Council and the Marlborough District Council.
14. NCC's waste management and waste minimisation services include:
  - 14.1 kerbside recycling services;
  - 14.2 solid waste collection services, at its Pascoe Street transfer station in Tahunanui; and
  - 14.3 solid waste disposal services, at its York Valley landfill in Bishopdale, Nelson.<sup>5</sup>
15. Most domestic and commercial solid waste generated in Nelson City tends to be disposed at the Pascoe Street transfer station. The solid waste is then compacted on site, and transferred to the York Valley landfill by a contractor. Certain large commercial customers are also granted permission to dispose of their solid waste directly at the York Valley landfill.<sup>6</sup>

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<sup>2</sup> Commerce Act 1986, s 62(6).

<sup>3</sup> Commerce Act 1986, s 62(5).

<sup>4</sup> As required under Part 4 of the Waste Minimisation Act 2008. See Clearance Application from NCC/TDC (18 October 2016) at [25].

<sup>5</sup> The legal description of the land and the location and extent of these areas are shown in DRAFT Deed of Agreement for the Nelson-Tasman Regional Landfill Business Unit. Clearance Application from NCC/TDC (18 October 2016) at [Attachment B].

<sup>6</sup> See Attachment A for the location of these two sites in Nelson.

*Tasman District Council*

16. TDC is the unitary authority for the Tasman District. TDC's neighbouring Councils include NCC and the Marlborough District Council. TDC's largest ward is Richmond, which is situated immediately to the south-southwest of Nelson City.
17. Similarly to NCC, TDC is responsible for waste management and waste minimisation services in the Tasman region. These services include:
  - 17.1 kerbside recycling services;
  - 17.2 solid waste collection services, at five transfer stations (or resource recovery centres (RRCs)) located in Richmond, Mariri, Takaka, Collingwood and Murchison;<sup>7</sup> and
  - 17.3 solid waste disposal services at the Eves Valley landfill at Eves Valley Road, Waimea West, Tasman.<sup>8</sup>
18. Most domestic and commercial waste disposal in the Tasman region is collected through the five RRCs, with the Richmond RCC alone collecting the vast majority of the region's solid waste. Solid waste from all of the five RRCs is then transferred to the Eves Valley landfill by a contractor. Although a limited number of commercial customers are granted direct access to the Eves Valley landfill, the prevalence of direct disposal is much more limited than at York Valley.

**Other relevant parties**

19. The proposed arrangement relates to the way that the Councils would operate their respective landfills. At present, all legally-disposed solid waste in the Nelson-Tasman region ends up, either directly or indirectly, in one of the two landfills. As the origination point of disposed waste is not recorded or routinely tracked, neither Council is certain how much of its landfilled waste originates from the other District.
20. The customers that would be most directly impacted by the proposed arrangement are the larger commercial operators that have been granted direct access to one or both landfills. Smaller commercial operators and members of the public are required to deposit waste at the Pascoe Street transfer station or one of TDC's RRCs. While the ownership and operation of the transfer stations and RRCs will be unaffected by the arrangement, users of the transfer station and the RRCs may be indirectly impacted by the proposed arrangement if price increases at landfills were passed on to transfer station and RRC customers.

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<sup>7</sup> The service is currently contracted out to third parties. Smart Environmental Limited is contracted to operate four RRCs in Richmond, Mariri, Takaka, and Collingwood. Fulton Hogan Limited is contracted to operate the RRC in Murchison. See Attachment A for the location of these sites in the Tasman region.

<sup>8</sup> 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). The legal description of the land and the location and extent of these areas are shown in DRAFT Deed of Agreement for the Nelson-Tasman Regional Landfill Business Unit. Clearance Application from NCC/TDC (18 October 2016) at [Attachment B].

21. Commercial customers tend to be commercial operators that have direct landfill access at York Valley, and can be divided into two categories:<sup>9</sup>
- 21.1 commercial waste collectors, such as Envirowaste Services Limited and Waste Management NZ Limited, that collect solid waste from a range of different parties and then transfer this waste directly to a landfill; and
  - 21.2 large waste generators that, as a result of their business activities, create large quantities of solid waste and have been granted permission from the relevant Council to send their waste directly to the landfill.

### **Background to the arrangement**

22. At present, as part of their duties as unitary authorities, NCC and TDC each own and operate separate landfills in their respective regions.
23. Both NCC and TDC submit that they do not make significant profit from their landfills. Rather they submit that the landfills are operated on a ‘user pays’ basis, and that any proceeds from landfill fees are only used to help provide the Councils’ various waste and recycling services. The Councils consider that under the Waste Minimisation Act 2008 proceeds generated from a local authority’s landfill can only be used to implement that authority’s waste management and minimisation plan, rather than for other purposes.<sup>10</sup>
24. TDC’s Eves Valley landfill will soon reach its maximum capacity, which would require TDC to undertake significant investment to expand and redevelop the site.<sup>11</sup> Given the significant expenditure required, TDC has been considering its alternatives and whether it can mitigate or delay this expenditure.
25. As a result, as part of the Councils’ obligations under the Waste Minimisation Act 2008, NCC and TDC have been considering ways that they could work together to reduce the amount of waste produced in the wider Nelson-Tasman region.
- 25.1 In 2012, the Councils adopted a Joint Waste Management and Minimisation Plan. As part of this plan, the Councils agreed to jointly make the most

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<sup>9</sup> For the purpose of this report we have referred to all these types of operators as ‘commercial customers’. It is also common for commercial customers to also disposal of solid waste at transfer stations operated by TDC.

<sup>10</sup> For example, the Applicants noted that “s53 of the Waste Minimisation Act 2008 states that a territorial authority may sell any marketable product resulting from any activity or service of the territorial authority carried out under this Part, but any proceeds of sale must be used in implementing its waste management and minimisation plan”. E-mail from Simpson Grierson (on behalf of the Applicants) to the Commerce Commission (3 March 2017).

<sup>11</sup> TDC advised that the Eves Valley landfill is currently at Stage 2 and, based on existing demand, it will reach capacity no later than 2019. It has prepared a plan to extent the landfill to Stage 3 and the estimated cost of this redevelopment was \$14 million up until 2015 with an additional \$25 million required between 2025 and 2045. Under the proposed arrangement, based on its long term demand forecasts, the Stage 3 redevelopment would not need to happen until at least 2030. TDC Solid Waste Activity Management Plan 2015-2045 (August 2015) retrieved from [www.tasman.govt.nz](http://www.tasman.govt.nz) on 1 November 2016.

effective and efficient use of their waste management services in the wider Nelson-Tasman region. This included making the most effective use of the landfills in the region.

- 25.2 The Councils are already collaborating in other waste areas. In sewerage, for example, the Councils now coordinate operations as part of the Nelson Regional Sewerage Business Council.
26. Since 2012, the Councils have been reviewing and undertaking public consultation on preferred options for waste disposal and landfill facilities in the Nelson-Tasman region. Both Councils recognise that, unlike in many other regions of New Zealand, their existing landfills are located in relatively close proximity to one another. For example, much of the solid waste in the Tasman region is generated in and around Richmond, where there is little difference in distance between disposal at NCC's York Valley landfill and disposal at TDC's Eves Valley landfill.
27. As part of the consultation process, several alternatives to the proposed arrangement were considered, such as establishing a joint venture or negotiating a long-term service contract. However, these options were considered to be unworkable.<sup>12</sup>
28. The Councils consider the proposed arrangement to be the preferred option for the Nelson-Tasman region, as both Councils would share costs equally and because it was widely recognised that operating one landfill, rather than two, would result in cost savings for both Councils.
29. In the course of their public consultation processes, the Councils received no substantive opposition to the proposal. The Applicants consider that this reflects public support for the proposed arrangement.

#### **Arrangements for which authorisation is sought**

30. The Applicants have requested authorisation for ten specific clauses (the Specified Provisions), as contained in two agreements.<sup>13</sup> These agreements are:
- 30.1 the Deed of Agreement for the Nelson-Tasman Regional Landfill Business Council (RLBU Deed); and
- 30.2 the Draft Terms of Reference for Joint Committee of Regional Landfill Business Unit (RLBU TOR).
31. The Specified Provisions for which the Applicants are seeking authorisation include:<sup>14</sup>

<sup>12</sup> See TDC, Proposal for the regional landfill business unit, a consultation document for an amendment to the long term plan 2015-2025, retrieved from [www.tasman.govt.nz](http://www.tasman.govt.nz) on 28 October 2016.

<sup>13</sup> Clearance Application from NCC/TDC (18 October 2016) at [Attachment B] and [Attachment D].

<sup>14</sup> The full text of each clause is contained in the Clearance Application from NCC/TDC (18 October 2016) at [Attachment B] and [Attachment D].

- 31.1 clause 5 of the RLBU Deed, which relates to the Councils jointly controlling landfill facilities in the region;
  - 31.2 clauses 7, 9 and 10 of the RLBU Deed, which relate to the Councils co-operating together to provide their waste services;
  - 31.3 clauses 12 and 13 of the RLBU Deed, which relate to the Councils accepting out-of-district waste;
  - 31.4 clause 14 of the RLBU Deed, which relates to the management of the Councils' waste services, including setting terms of trade and conditions of waste acceptance;
  - 31.5 clause 1 of the RLBU TOR, which puts the RLBU in charge of managing and operating the region's landfill facilities;
  - 31.6 clause 11 of the RLBU TOR, which gives the RLBU the power to set fees and charges for disposal at the regional landfill facilities; and
  - 31.7 clause 23(iv) of the RLBU TOR, which outlines the role of the RLBU's management in making recommendations to the RLBU on fees (including charges and rebates), operational contracts, and waste acceptance.
32. We have not considered each of these clauses separately in our analysis. In practice, we view the clauses as collectively providing the RLBU with control over the pricing and operations of the York Valley and Eves Valley landfills. We have assessed the Specified Provisions on that basis.<sup>15</sup>

### **Waste disposal charges in the Nelson-Tasman region**

- 33. The Application relates primarily to how the proposed RLBU would set all fees, rates and charges for disposing solid waste at the landfills in the Nelson-Tasman region.
- 34. As discussed above, most customers have to use a transfer station to dispose of their solid waste. The proposed arrangement would only directly impact on those commercial customers that have been granted access to the existing landfills, as these customers would no longer have the option of disposing of solid waste at the Eves Valley landfill for the foreseeable future.
- 35. However, the proposed arrangement may indirectly impact on all customers who generate solid waste in the Nelson-Tasman region. This is because almost all (if not all) solid waste disposed at the transfer stations will eventually end up in a landfill. Therefore, any change in the fees for disposing solid waste at a landfill may impact on the fees charged for disposing solid waste at a transfer station.<sup>16</sup>

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<sup>15</sup> For the purposes of this report we have referred to the Specified Provisions as the proposed arrangement.

<sup>16</sup> The same applies to Council rubbish bags. While the pricing and collection of these bags is outside the scope of the proposed arrangement, these rubbish bags still end up in a landfill and, as such, pricing may be (indirectly) impacted by landfill disposal charges.

36. Both Councils submitted that they do not currently offer individual, discounted rates on landfill disposal to any customer, given the Councils' positions as neutral public entities.<sup>17</sup> As such, we understand that no one customer is able to negotiate a preferential arrangement with either of the Councils.

*How NCC currently charges for waste disposal services*

37. NCC currently provides all of its waste disposal services on a 'user pays' basis. The rates and fees for both domestic and commercial customers are set annually, following public consultation.<sup>18</sup> NCC sets the prices for all domestic and commercial users who dispose of waste at the Pascoe Street Transfer Station. It also sets prices at the York Valley landfill for those commercial customers that can directly access the landfill. NCC charges all domestic customers the same domestic rates, and all commercial customers the same commercial rates.
38. We understand that NCC currently sets 'user charges' for different waste services based on the estimated total cost of its waste management strategy. The waste management strategy includes a number of components:
- 38.1 waste minimisation programme;
  - 38.2 kerbside recycling services;
  - 38.3 Pascoe Street Transfer Station operations;
  - 38.4 green waste disposal; and
  - 38.5 York Valley landfill operations.<sup>19</sup>
39. The NCC advised that while its waste user charges are set in a way to enable it to recover its costs, the actual charges for each individual waste service do not reflect the actual cost of providing that particular service.<sup>20</sup> As such, there is a degree of cross-subsidisation between the various waste services provided by NCC. To cover the shortfall across the different waste services, NCC sets York Valley landfill fees in conjunction with the expected revenue from other waste services.<sup>21</sup>

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<sup>17</sup> Commerce Commission interview with TDC (9 November 2016) and Commerce Commission interview with NCC (2 February 2017). This was also confirmed by all commercial customers we spoke to.

<sup>18</sup> Clearance Application from NCC/TDC (18 October 2016) at [30].

<sup>19</sup> The York Valley landfill currently only accepts compacted bulk waste transported from the Pascoe Street Transfer Station and solid waste directly from commercial customers. As such, the proposed arrangement would not impact on domestic customers' access to either the transfer station or the landfill.

<sup>20</sup> For example, it does not have a specific user charge for providing its kerbside recycling service.

<sup>21</sup> Currently the landfill costs are approximately [ ] of the revenue collected from fees. The remaining [ ] is used to fund its other waste activities. Letter from Simpson Grierson (on behalf of the Applicants) to the Commerce Commission (17 October 2016).

40. NCC also advised that the funding for its waste activities is considered a 'closed account'. This means that it is prevented from using any surplus generated from any of its various waste activities to fund non-waste activities.<sup>22</sup>

*How TDC currently charges for waste disposal services*

41. Like NCC, TDC currently provides all its waste disposal services on a 'user pays' basis. The fees to both domestic and commercial customers are set annually, following public consultation.<sup>23</sup> TDC sets the prices for all domestic and commercial users who dispose of waste at its five RRCs. Those customers are not able to negotiate individual discounted rates with the Council.<sup>24</sup> TDC also sets prices at the Eves Valley landfill for those commercial users that can directly access it.<sup>25</sup>
42. TDC currently sets 'user charges' for its waste disposal services based on a policy of full cost recovery.<sup>26</sup> In other words, TDC sets its fees to offset the fixed and variable costs of operating each site. Fixed costs include site contractor costs, Council rates, and depreciation, each of which is largely independent of the amount of waste being handled. Variable costs include waste haulage costs, waste disposal costs and maintenance, each of which is dependent, to varying extents, on the actual volume of waste handled by the landfill.<sup>27</sup>
43. Domestic and commercial customers are charged somewhat differently to dispose of solid waste in the Tasman region.
- 43.1 Commercial customers pay per-tonne rates for disposal, which vary depending on the location of the RRC they choose to use. The price differentials reflect the higher per-unit costs of handling solid waste at smaller, more remote sites.
- 43.2 In contrast, domestic customers pay per-cubic-metre rates that are the same for every RRC.<sup>28</sup>

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<sup>22</sup> Commerce Commission interview with NCC (1 February 2017) and outlined in the Revenue and Financing Policy section of NCC's Longer Term Plan 2015-2105 at 231.

<sup>23</sup> Clearance Application from NCC/TDC (18 October 2016).

<sup>24</sup> TDC advised that there was a previous instance where an out of region customer negotiated a different price but this was no longer the case. Commerce Commission interview with TDC (9 November 2016).

<sup>25</sup> At present, most public and commercial users in the region dispose of their waste at one of the five RRCs. Compacted bulk waste from these sites is then transported to the Eves Valley landfill for final disposal.

<sup>26</sup> TDC Solid Waste Activity Management Plan 2015-2045 (August 2015) retrieved from [www.tasman.govt.nz](http://www.tasman.govt.nz) on 1 November 2016 at 123.

<sup>27</sup> Letter from Simpson Grierson (on behalf of the Applicants) to the Commerce Commission (17 October 2016). For example, TDC contracts out the operation of the landfill to a third party and contract include both fixed and variable cost component with the variable cost based on the amount of solid waste sent to the landfill each year.

<sup>28</sup> The TDC notes that some smaller volume commercial customers using the more remote RRCs are charged this rate because, given the distances involved, this rate better reflects all the relevant costs involved with disposing of their solid waste and small commercial operators can not be easily distinguished from domestic users. Letter from Simpson Grierson (on behalf of the Applicants) to the Commerce Commission (17 October 2016).

## How we assess restrictive trade practice authorisations

44. Section 30 prohibits provisions that have the purpose, effect or likely effect of fixing, controlling or maintaining the prices of goods or services. Section 27 of the Act prohibits contracts, arrangements or understandings that have the purpose, effect, or likely effect, of substantially lessening competition in a market. Section 30 deems price fixing to substantially lessen competition and breach section 27.
45. Upon application under section 58 of the Act, we can authorise conduct that may otherwise breach section 27 of the Act.<sup>29</sup> However, we must be satisfied that such conduct would be likely to result in benefits to the public that outweigh the detriments arising from the likely lessening of competition.
46. In assessing an application, we first determine whether the relevant provisions of the arrangement would be likely to lessen competition, or be deemed to substantially lessen competition via s 30.<sup>30</sup> If we do not consider that a lessening of competition is likely, or is not deemed to occur, we do not have jurisdiction to further consider an application and, consequently, will not go on to consider the public benefits of the conduct.
47. If we consider that the relevant provisions of the arrangement would be likely to lessen competition, or be deemed to do so, we will authorise the conduct if we are satisfied that the public benefits are likely to outweigh the detriments from the arrangement. If we are not so satisfied, we will decline to grant authorisation.
48. Nevertheless, we can authorise a proposed arrangement subject to a condition if the condition would enable the proposed arrangement to pass the net public benefits test.<sup>31</sup>

## Relevant market

49. When we consider an application for authorisation of potentially restrictive trade practices, we assess the competitive effects of those practices in respect of a relevant market in New Zealand.<sup>32</sup>
50. Determining the relevant market requires judgement as to whether, for example, two products are sufficiently close substitutes (as a matter of fact and commercial common sense) so as to provide significant competitive constraints on each other. Markets are defined in a way that best isolates the key competition issues that arise from an application.

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<sup>29</sup> While no specific reference to s 30 appears within ss 58 or 61, the s 30 price fixing provision deems a substantial lessening of competition and therefore a breach of s 27. That is, if a price fixing provision is established for the purposes of s 30 there will necessarily be a contravention of the prohibition in s 27(1).

<sup>30</sup> Any lessening of competition need not be substantial. Commerce Act 1986, s 61(6A).

<sup>31</sup> Section 61(2) of the Commerce Act. Any authorisation granted pursuant to s 58 of this Act may be subject to such conditions not inconsistent with this Act and for such period as the Commission thinks fit.

<sup>32</sup> Commerce Act 1986, s 3(1A): "the term market is a reference to a market in New Zealand for goods or services as well as other goods or services that, as a matter of fact and commercial common sense, are substitutable for them".

51. In general, the more closely substitutable two products are, the closer the competition and the greater the competitive constraint between the products.

*Assessment of the relevant market*

52. The Applicants submit that, similar to previous assessments by the Commission, the relevant market should be the regional Nelson-Tasman market for the disposal of solid waste at landfills.<sup>33</sup> The Applicants consider the primary reason for this to be that commercial customers are able to choose between disposing their waste at the York Valley landfill or the Eves Valley landfill (or, indirectly, via the Richmond RRC).
53. We generally agree with this approach. As such, for the purposes of the application, we consider the relevant market to be the market for the disposal of solid waste at landfills, either directly or indirectly, in the Nelson-Tasman region (the Nelson-Tasman landfill market). This is primarily because:
- 53.1 solid waste and solid waste disposal is quite separate from the disposal of recyclable waste and other types of waste;<sup>34</sup>
- 53.2 solid waste needs to be disposed in a landfill, and this is the same regardless of whether the solid waste is from a residential customer, a small business customer, or a medium-to-large business;<sup>35</sup>
- 53.3 all legally-disposed solid waste is sent to a landfill, either directly or indirectly via a transfer station. As such, a component of the transfer station charges reflects the cost of disposing of the solid waste at the relevant landfill. To this extent, the final user charges at the different transfer stations is impacted, to some degree, by the extent of competition between the different landfills;
- 53.4 neither the Eves Valley landfill nor the York Valley landfill are restricted from accepting waste from other unitary authorities, and both do so;<sup>36</sup> and
- 53.5 the nearest landfill to either the Eves Valley landfill or the York Valley landfill is the relatively remote Bluegums landfill, operated by the Marlborough District Council near Blenheim.
54. Given the significant distances between the Bluegums landfill and the Eves Valley and York Valley sites, the Nelson-Tasman customers with whom we have spoken do

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<sup>33</sup> The Applicants note that in some previous instances the Commission has limited the product market to solid, non-hazardous waste. However, both Councils accept hazardous waste so, in this instance, we consider that the product dimension should cover solid waste generally.

<sup>34</sup> For example, Transpacific Industries Group (NZ) Limited and Ironbridge Capital Pty Limited (Commerce Commission Decision 604, 2007).

<sup>35</sup> For example, Commerce Commission Investigation Report on Smart Environmental Limited (21 June 2016).

<sup>36</sup> Clearance Application from NCC/TDC (18 October 2016) at [115].

not consider the Bluegums landfill to be a reasonable economic alternative, even in the presence of a small but significant and non-transitory increase in price.<sup>37</sup>

55. As such, we do not consider that the Bluegums landfill is properly considered within the same relevant market as Eves Valley and York Valley. That being said, we accept that it may provide some competitive constraint on the proposed RLBU, and have considered such constraints in our analysis.

### **With and without the proposed arrangement**

56. When assessing the likelihood of a lessening of competition arising from an arrangement, the Commission compares the likely state of competition with the arrangement and the most competitive likely state of competition without the arrangement. By assessing the relative state of competition in each scenario, the Commission can determine whether the arrangement will likely result in a lessening of competition.

#### **With the arrangement**

57. Under the proposed arrangement, the RLBU would be responsible for the governance, management and operation of the landfills in the Nelson-Tasman region.
58. As the RLBU would only be responsible for the region's landfills, the proposed arrangement would not change the way in which either Council operates its respective transfer stations. However, as noted above, the proposed arrangement may indirectly impact on the rates that customers are charged to dispose of solid waste at the transfer stations, as these rates incorporate landfill disposal charges.
59. Nevertheless, the Applicants noted that each Council would still retain general oversight of landfill operations, including access restrictions and relevant fees. This is primarily because RLBU's operational plan would have to be approved annually by each Council.
60. The Applicants submitted that the proposed RLBU would not change the way that the Councils set their landfill charges. Both NCC and TDC stated that the current 'user pays' pricing policies for solid waste disposal services would continue under the proposed RLBU, because the primary aim of these policies is to ensure the Councils recover the cost of providing these services.
61. In addition, the Councils submitted that they would be constrained by provisions of the Waste Minimisation Act 2008, which limit their ability and incentive to use proceeds from their waste related services to fund non-waste related services.<sup>38</sup>

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<sup>37</sup> Commerce Commission interview with [redacted] (10 November 2016). Commerce Commission interview with [redacted] (11 November 2016). Commerce Commission interview with [redacted] (9 November 2016).

<sup>38</sup> To support this, the Applicants referenced section 53 of the Waste Minimisation Act 2008, which states that that proceeds from waste related activities and services must be used in implementing each

62. To this extent, the Councils submitted that under the proposed arrangement, they would be required to use any surpluses to implement their waste management and minimisation plan, rather than for any other purposes.
63. Table 1, below, sets out the main changes that would result from the proposed arrangement.

**Table 1: Main changes under the proposed arrangement**

|  | <b>NCC facilities</b>  | <b>TDC facilities</b>  |
|--|--|--|
| <b>Access to transfer stations</b>               | <b>✘ No change:</b> NCC would continue to operate, and determine access to, the Pascoe St transfer station, separately from the RLBU.  | <b>✘ No change:</b> TDC would continue to operate, and determine access to, its five transfer stations, separately from the RLBU.  |
| <b>Access to landfills</b>                       | <b>✘ No change:</b> York Valley would remain open until at least 2030.   | <b>✓ Change:</b> Eves Valley would close in 2017, until subsequent redevelopment sometime after 2030.  |
| <b>Transportation costs</b>                      | <b>✘ No change until at least 2030:</b> When the York Valley landfill ultimately closes, all waste from the Nelson region would be redirected to a redeveloped Eves Valley landfill. | <b>✓ Change:</b> All of the bulk waste from the five RRCs would be transported to the York Valley landfill which, in many instances, is somewhat further away from the RRCs than the Eves Valley landfill. <sup>39</sup> |
| <b>Landfill disposal costs</b>                   | <b>✓ Change:</b> The RLBU would be responsible for setting landfill disposal fees, rather than NCC.  | <b>✓ Change:</b> The RLBU would be responsible for setting landfill disposal fees, rather than TDC.  |
| <b>Investment in future landfill development</b> | <b>✓ Change:</b> Future investment costs shared equally between both Councils.   | <b>✓ Change:</b> Future investment costs shared equally between both Councils.   |

Source: Application.

### Without the arrangement

64. The Commission agrees with the Councils that the continuation of the status quo, involving separate ownership and operation of the landfills, is likely to occur without the proposed arrangement.<sup>40</sup>
65. TDC advised that, if it were to continue to operate the Eves Valley landfill independently, it would need to redevelop the site and have this completed by at

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Council's waste management and minimisation plan. E-mail from Simpson Grierson (on behalf of the Applicants) to the Commerce Commission (3 March 2017).

<sup>39</sup> TDC Solid Waste Activity Management Plan 2015-2045 (August 2015) retrieved from [www.tasman.govt.nz](http://www.tasman.govt.nz) on 1 November 2016 at 135. In 2015, the Council estimated that the additional cost of transporting waste from RRCs to the York Valley landfill, compared to the Eves Valley landfill, would be 3%.

<sup>40</sup> Clearance Application from NCC/TDC (18 October 2016) at [129].

least 2019, given that, at present, the Eves Valley landfill is forecasted to reach capacity around this time. In order for TDC to be able to pay for the redevelopment within this timeframe, it advised it would need to have the necessary capital expenditure approved by the Council by the middle of 2017.<sup>41</sup>

### **Analysis of section 30**

66. The Application seeks authorisation on the basis that section 27 via section 30 of the Act might apply to an arrangement that includes the Specified Provisions.
67. A key issue raised by the Application is whether the Specified Provisions contain price fixing provisions that are likely to breach s 30 of the Act. Such arrangements may be authorised under section 61(6), if they are of net benefit to the public.
68. This section explains our preliminary view that the Specified Provisions are likely to breach section 30 of the Act.

### **General approach**

69. We first determine whether the Specified Provisions contain, or may contain, a price fixing provision under section 30 of the Act.
70. Under section 30 of the Act, a price fixing provision will be found if:
  - 70.1 any one or more of the Specified Provisions have the purpose, effect or likely effect of fixing, controlling or maintaining the prices of goods or services or any discount, allowance, rebate or credit in relation to goods or services; and
  - 70.2 the goods or services to which the Specified Provisions relate are supplied or acquired by NCC and TDC in competition with each other, or the Councils would likely be in competition with each other but for the Specified Provisions.
71. If there is a deemed lessening of competition, we will go on to assess whether the conduct will in all the circumstances result, or be likely to result, in a benefit to the public which would outweigh the lessening of competition. If the benefits outweigh the detriments, we may grant authorisation. Despite the deeming effect of section 30, to assess the detriments arising from the proposed arrangement, we need to assess the extent to which the Specified Provisions may lessen competition.<sup>42</sup>

### **Do the Specified Provisions contain a price fixing provision?**

72. In our preliminary view, the Specified Provisions are likely to contain price fixing provisions under section 30.

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<sup>41</sup> TDC Solid Waste Activity Management Plan 2015-2045 (August 2015) retrieved from [www.tasman.govt.nz](http://www.tasman.govt.nz) on 1 November 2016 The 'go alone' option shows ongoing increases in capital expenditure starting from 2017/2018 at 13.

<sup>42</sup> *New Zealand Vegetable Growers Federation (Inc) v Commerce Commission (No.3)* (1988) 2 TCLR 582.

73. The RLBU and/or Joint Committee would be jointly setting the rates and charges for waste disposal at both landfills.<sup>43</sup> The Specified Provisions would therefore interfere with the competitive determination of the price for disposing solid waste at landfills in the Nelson-Tasman region.
74. The Commission also accepts the Councils' submission that the Councils currently compete with one another to provide solid waste disposal services at landfills in the Nelson-Tasman region.<sup>44</sup>
75. In our view, the York Valley and Eves Valley landfills currently constrain each other's pricing. Council documents and third-party interview evidence<sup>45</sup> indicate that the Eves Valley landfill and the York Valley landfill take each other into account when setting charges for landfill waste disposal.
- 75.1 Several customers, including [ ] and Waste Management NZ Limited consider the two landfills to be in competition with each other.<sup>46</sup> [ ], in particular, noted that it switched between the two landfills in the past when Eves Valley charged more than York Valley.
- 75.2 The Applicants submitted that the proximity of the York Valley landfill to parts of the Tasman region means that commercial customers would be easily able to take waste from the Tasman District to the York Valley landfill if the relative pricing makes this more profitable.<sup>47</sup> In addition, the NCC Solid Waste Asset Management Plan indicates the presence of price and quality competition between the two landfills:
- The policy, services, facilities of one district can dramatically impact on demand for services in neighbouring districts. This is well demonstrated in the Nelson Tasman region, where policy and/or pricing changes have in the past affected the ability of both Councils to improve waste minimisation and improve waste management practices.<sup>48</sup>
- 75.3 TDC acknowledged that there is high commercial risk of continuing to operate its own landfill, because the competition between the two landfills reduces

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<sup>43</sup> Clause 11 of the RLBU TOR.

<sup>44</sup> Clearance Application from NCC/TDC (18 October 2016) at [34(d)].

<sup>45</sup> At present, the Councils advised that only a limited number of commercial customers[ ] have direct access to either landfill. The Commission spoke to [ ] of these customers. In aggregate, commercial customers with direct access to landfill account for approximately [...] of all solid waste that is disposed at the two landfills.

<sup>46</sup> Commerce Commission interview with [ ] (10 November 2016); Commerce Commission interview with [ ] (11 November 2016); Commerce Commission interview with [ ] (9 November 2016); and Submission from Waste Management NZ Limited to the Commerce Commission (4 November 2016).

<sup>47</sup> Clearance Application from NCC/TDC (18 October 2016) at [54] and at [64].

<sup>48</sup> NCC and TDC Waste Management and Minimisation Plan (April 2012) retrieved from [www.tasman.govt.nz](http://www.tasman.govt.nz) on 28 October 2016 at [3.3.2].

the amount of waste that would be disposed at its landfill.<sup>49</sup> In particular, [ ]<sup>50</sup>

75.4 This is supported by TDC's current pricing for the Richmond RRC, which is only \$10/tonne more than the charges at the York Valley landfill. While the Richmond RRC is more convenient than the York Valley landfill for most of its commercial customers that are located within its boundaries, implying a somewhat higher willingness to pay, TDC considers that any further increase in charges at the Richmond RRC would [ ]<sup>51</sup>

76. Some other commercial customers, however, do not consider the two landfills to be in competition with each other. In our view, the primary reason for these different views relates to the location of the customer. Commercial customers typically send solid waste to the nearest landfill or transfer station, and this can impact on the perceived alternatives for that particular customer. For example, if faced with a price increase, several commercial customers considered their next best alternative to be reducing the amount of solid waste they produce.

76.1 [ ] sends its waste to the Eves Valley landfill. Given its location, [ ] does not consider there to be much difference in the transportation costs to either landfill. That being said, if faced with a price increase, it would still look to reduce the amount of waste it was producing, rather than pay any increase.<sup>52</sup>

76.2 [ ] sends its waste to York Valley, as it is the closest landfill. It has previously considered sending waste to Eves Valley, but considered the additional transport costs to be uneconomic.<sup>53</sup>

76.3 [ ] sends its waste to Eves Valley, as it is the closest landfill. Due to the additional transport costs and time it would take to send the same waste to the York Valley landfill, a price increase at Eves Valley would result in the firm looking to reduce the amount of waste it generates.<sup>54</sup>

77. However, we note that there are a number of commercial customers in and around Richmond that are in close proximity to both the Pascoe Street transfer station and

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<sup>49</sup> TDC, Proposal for the regional landfill business unit, a consultation document for an amendment to the long term plan 2015-2025, retrieved from [www.tasman.govt.nz](http://www.tasman.govt.nz) on 28 October 2016 at 11 (4. 'GO IT ALONE').

<sup>50</sup> TDC Staff Report – Provision to charge for refuse by weight (10 July 2006) attached to an e-mail from Simpson Grierson (on behalf of TDC) to the Commerce Commission (3 November 2016).

<sup>51</sup>

[ ]

<sup>52</sup> Commerce Commission interview with [ ] (10 November 2016).

<sup>53</sup> Commerce Commission interview with [ ] (8 November 2016).

<sup>54</sup> Commerce Commission interview with [ ] (8 November 2016).

the Richmond RRC, and similar distances from each landfill. These particular commercial customers are more likely than more remote customers to divert waste between regions, on the basis of different prices or different operating policies (eg, hours of operation). As such, commercial customers based in Richmond may receive the greatest benefit from competition between the two landfills.<sup>55</sup>

#### *Assessment on whether there would be a breach of section 30*

78. Our preliminary view is that the York Valley and Eves Valley landfills currently constrain each other's pricing and, given that the proposed RLBU would be setting fees and charges for waste disposal at both landfills, the Specified Provisions would interfere with the competitive determination of the prices for disposing solid waste in the Nelson-Tasman landfill market.
79. We therefore consider the proposed arrangement, which contains the Specified Provisions, amounts to an arrangement between competitors to fix the price of services in breach of section 27, via section 30 of the Act.

#### **Assessment of benefits and detriments**

80. We will grant authorisation if we are satisfied, on the evidence before us, that the arrangement will in all the circumstances result, or will be likely to result, in a benefit to the public outweighing the lessening in competition arising from the arrangement.
81. In making this assessment, we have regard to the quality of the evidence and make judgements as to the weight to be given to the evidence.
82. The Commission's approach is to quantify benefits and detriments to the extent that it is practicable to do so,<sup>56</sup> but, as the Court of Appeal in *Godfrey Hirst* noted, this guidance must not be allowed to obscure the Commission's primary function of exercising a qualitative judgment in reaching its final determination and "...making what is an essentially evaluative judgment on any application".<sup>57</sup>

#### **Preliminary view**

83. As discussed above, NDC and TDC compete in the provision of landfill services. The main source of competitive constraint is the ability of customers to shift volume between the York Valley and Eves Valley landfills (or the respective transfer stations). As neither Council prices differently depending on the source of the waste, all customers currently benefit from this competitive tension.
84. The removal of this competitive constraint could leave the parties with a greater ability to raise prices after the creation of the RLBU. Our preliminary assessment is that the potential price increases could be significant and that there would be a real

<sup>55</sup> Clearance Application from NCC/TDC (18 October 2016) at [54] and at [64].

<sup>56</sup> *Telecom Corporation of New Zealand Ltd v Commerce Commission* [1992] 3 NZLR 429 (CA) (AMPS-A CA) at 447 and *Air New Zealand and Qantas Airways Limited v Commerce Commission* (2004) 11 TCLR 347 (Air NZ No 6) at [319]. *Ravensdown Corporation Ltd v Commerce Commission* High Court, Wellington.

<sup>57</sup> *Godfrey Hirst* (CA) at [35].

chance that the detriments from the proposed arrangement could exceed the benefits.

### **Detriments arising from the arrangement**

85. In undertaking our assessment of detriment, we sought to estimate the extent of the allocative inefficiencies that could result from price increases under the RLBU, were it to operate as a typical commercial entity having regard to some constraints in price increases that might result from councillor push-back. We have also considered the extent to which productive or dynamic inefficiencies may arise from the proposed arrangement.

#### *Loss of allocative efficiency*

86. In general, when the price of a product increases, the quantity of that product demanded by customers will decrease, as some customers switch to alternatives. These alternatives may, however, meet customers' requirements in less satisfactory ways and/or be more costly to produce than the products they replace.
87. Alternatively, some customers may simply make fewer purchases, losing the benefits that they otherwise would have obtained from the product. Either way, the net result is that resources are allocated less efficiently.
88. The size of this allocative efficiency loss depends, to a large extent, on the extent of the expected price increases following the proposed arrangement. All else equal, the higher the expected price increases, the larger the expected allocative efficiency loss.
89. The Councils and Covec (on behalf of the Councils) both consider that the proposed RLBU would not result in any detriments to the public, as prices would be unlikely to significantly increase.<sup>58</sup> It was further submitted that should any price increase eventuate, this would be in the public interest as waste minimisation is an objective of the elected government, and because ratepayers (consumers of the final waste services) are in effect cooperative owners of the council services so are beneficiaries of the monopolists' activities.<sup>59</sup>
90. As the proposed RLBU would continue to be overseen by the Councils' representatives, and as it has been designed to benefit local residents and ratepayers by reducing the total cost of Nelson-Tasman waste disposal, the Councils submitted that the proposed arrangement satisfies their existing statutory obligations towards cost-effective government and waste minimisation.
91. Nonetheless, we consider that there would be a risk of significant price increases under the proposed RLBU, arising from the removal of the existing competition between the two landfills.

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<sup>58</sup> Clearance Application from NCC/TDC (18 October 2016).

<sup>59</sup> Covec Report, Regional Landfill Business Unit for the Nelson and Tasman Region (14 October 2016) prepared for Simpson Grierson (on behalf of the Applicants) sent to the Commerce Commission (17 October 2016).

- 91.1 We note that the disposal fees at York Valley and Eves Valley are significantly lower than exist in many other New Zealand regions, which may indicate an ability and incentive on the part of local authorities to sustain higher prices.<sup>60</sup>
- 91.2 We understand that waste customers are typically price insensitive, which could imply the potential for significant price increases, were the RLBU to be so inclined.
- 91.3 Due to the distances involved, it would take a significant price increase before the next-nearest landfill, Marlborough District Council's Bluegums site, would be considered a feasible alternative for customers in the Nelson-Tasman region. The existence of even some competitive constraint from the Bluegums landfill relies on an assumption that Marlborough District Council would be prepared to accept solid waste from the Nelson-Tasman region, something which we understand it may not be inclined to do.<sup>61</sup>
92. We have attempted to quantify the extent of allocative efficiency losses from the removal of the existing competition between the two landfills. This has involved modelling the impact from a range of price increases, under a number of different assumptions.<sup>62</sup> Our preliminary estimates of the allocative efficiency loss from the proposed arrangement range from between \$5 million to more than \$26 million, depending on the assumed elasticity of demand.<sup>63</sup> The bases for these estimates are outlined below.
- 92.1 Since 2006, the maximum year-over-year price increase imposed at NCC's York Valley landfill was approximately 15% while the average year-over-year price increase over this time was under 5%.<sup>64</sup> However, these price increases were constrained by political considerations and by the competitive constraint imposed by TDC's Eves Valley landfill. To this extent, our modelling used the maximum observed price increase to reflect the political pressure that might weigh on public entities' price determinations, although we recognised that price increases might be greater under a monopoly scenario. Using the 15% per year price increase figure, our estimated limit price would be reached at year six with price increases remaining constant between years six to 14.
- 92.2 Our model conservatively places a \$239 per tonne ceiling on the monopoly price the Councils could charge for solid waste at the upper end of council

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<sup>60</sup> For example, see Covec Report, Economic Factors of Waste Minimisation in New Zealand (November 2012) Prepared for Ministry for the Environment and retrieved from [www.mfe.govt.nz](http://www.mfe.govt.nz) on 20 December 2016. On average the Councils are currently charging approximately \$112 per tonne whereas this 2012 study reported charges ranging between \$0 and \$327 per tonne.

<sup>61</sup> Commerce Commission interview with Marlborough District Council (20 February 2017).

<sup>62</sup> The Commission's preliminary model was provided to the Applicants for review and Covec, on behalf of the Applicants, did not disagree with any of the key assumptions used in the design of the model. However, Covec noted that it was not appropriate to treat the two councils as profit maximising entities.

<sup>63</sup> Elasticities range from the weight based elasticity of -0.123 reported in the study's own aggregation of results to the 5<sup>th</sup> percentile of relevant elasticities reported in the study.

<sup>64</sup> This excludes the imposition of the national waste disposal levy.

prices reported in 2012, based on the range of prices charges by other local councils.<sup>65</sup> This maximum excludes outlier charges of over \$300 per tonne and does not adjust these prices to 2017 levels. For this reason, landfills charges could reach more than \$239 per tonne.

- 92.3 We have modelled allocative efficiency losses based on the landfill prices and waste-related costs. It is likely that actual allocative efficiency losses fall between the with- and without-transfer range. However, we have reported the with-transfer range which returns lower allocative efficiency losses since we consider that the actual loss is likely to be closer to this figure since the marginal cost of an additional tonne of waste is likely to be divided, although not evenly, between recycling costs, solid waste costs and the cost of kerbside collection.
- 92.4 Our model has been tested over a range of demand elasticities. Studies on demand elasticities for solid waste report relatively inelastic consumer demand, meaning that customers are not price sensitive. The variance in demand elasticities for waste prices based on weight varied between almost perfectly inelastic demand -0.123 and -0.65. More elastic demand estimates returned higher allocative efficiency estimates as the quantity effects were higher and some pre-existing level of market power was assumed.<sup>66</sup>

#### *Loss of productive efficiency*

93. An arrangement will lead to a loss in productive efficiency if it results in a greater number of inputs being required to produce a certain volume of output. We do not assume an arrangement leads to productive inefficiency. Instead, we assess on the facts of the case whether productive inefficiency would likely arise as a result of a transaction, and where possible, the likely size of that efficiency loss.<sup>67</sup>
94. Productive efficiency loss may be more likely if an arrangement reduces management's ability and/or incentive to minimise costs. Productive efficiency could also be enhanced as more waste is put through a single landfill, an operation that reaps economies of scale but we have not sought to quantify or balance these effects for the purposes of this Draft. However, we do accept the Applicants' submission that the Council's waste minimisation objective may limit potential productive efficiency losses.<sup>68</sup>

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<sup>65</sup> For example, see Covec Report, Economic Factors of Waste Minimisation in New Zealand (November 2012) Prepared for Ministry for the Environment and retrieved from [www.mfe.govt.nz](http://www.mfe.govt.nz) on 20 December 2016.

<sup>66</sup> For example, see Bel, G. and Gradus, R. Effects of unit-based pricing on the waste collection demand: a meta-regression analysis. *Research Institute of Applied Economic*. Working paper 2014/20.

<sup>67</sup> Commerce Commission, Authorisation Guidelines (July 2013) at [68]-[69].

<sup>68</sup> Covec Report, Regional Landfill Business Unit for the Nelson and Tasman Region (14 October 2016) prepared for Simpson Grierson (on behalf of the Applicants) sent to the Commerce Commission (17 October 2016) at [3.2]

95. We have considered the increased transport costs faced by the transfer station operator, and charged to TDC, as a productive inefficiency.<sup>69</sup> We assume that these higher costs will be passed on in the form of higher prices at the RRCs, which collect the majority of TDC waste.<sup>70</sup>
96. We have conservatively estimated that the increased transport costs passed on to the TDC could total approximately \$9,000 per year, should there be no further cost changes based on decreases in waste quantities arising from the proposed arrangement. This would equate to a productive efficiency loss of approximately \$84,000 over a 14 year time period.<sup>71</sup> These estimates reflects the following:
- 96.1 a 3% increase on haulage prices that the transfer station operator currently charges per year to TDC in the Tasman region;<sup>72</sup> and
- 96.2 TDC's current expenditure of approximately \$[ ] per year for haulage from transfer stations to the Eves Valley landfill.<sup>73</sup>

#### *Loss of dynamic efficiency*

97. Dynamic efficiency typically refers to improvements made by firms over the long term, with respect to product quality, product variety, and cost efficiency. These improvements can occur through innovations in processes, equipment or managerial practices.
98. The Councils submitted that the RLBU arrangements appear to pose no risk to the future availability of quality landfill services in the Nelson-Tasman region. The Councils submitted that there is no material risk that future tranches of landfill capacity will be of lower quality design, specifications, or construction than would be the case under the without scenario.<sup>74</sup>
99. The Commission accepts these submissions, and considers that dynamic efficiency losses arising from the proposed arrangement are unlikely to be significant. In particular, the Commission considers that landfill quality (in terms of design,

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<sup>69</sup> Under the proposed arrangement, solid waste in the Tasman region would be diverted to the York Valley landfill. As the York Valley landfill is further away from most Tasman RRCs than the Eves Valley landfill, the proposed arrangement would likely result in greater total waste transport costs borne by the Councils.

<sup>70</sup> [ ]% of waste was transported from NCC's five RRC's to the Eves Valley landfill by Fulton Hogan in 2010. (TDC – Confirmed Contract No. 781 For Refuse Haulage and landfill operations Appendix 3 (29 September 2010) attached to an e-mail from TDC to the Commerce Commission (29 November 2016).) Although commercial operators depositing waste directly at the landfill would also incur higher transport costs, we consider this a second order effect.

<sup>71</sup> The Commission has used this time period as it is the length of time that the proposed arrangement would delay the redevelopment of the Eves Valley landfill by.

<sup>72</sup> TDC currently contracts Fulton Hogan to transport all compacted waste from its five transfer stations to the Eves Valley landfill. Commerce Commission interview with Fulton Hogan (11 November 2016).

<sup>73</sup> TDC incurs \$[ ] in haulage costs to transfer waste from RRCs to Eves Valley, see Deloitte, Nelson City Council and Tasman District Council, Landfill Proposal Financial review (October 2015) attached to an email from Simpson Grierson (on behalf of the Applicants) to the Commerce Commission (10 October 2016) at 17.

<sup>74</sup> Clearance Application from NCC/TDC (18 October 2016) at [182].

specification and external impact), are unlikely to diminish under the proposed arrangement. Finally, we do consider that the council's waste minimisation objective may limit any potential dynamic efficiency loss.

100. We also consider that total supplied landfill capacity in the region will not diminish under the proposed arrangement. However, capacity will be provided in series, rather than in parallel. To the extent that cost savings from this rationalisation of landfill supply are redirected toward waste minimisation processes, we instead consider that dynamic efficiency gains may occur. We have not, however, attempted to quantify any such benefits.

### **Benefits arising from the arrangement**

101. The Councils submitted that the arrangement will result in public benefits, in the form of operational cost savings, deferred investment, and environmental benefits from reduced waste volumes. We consider each of these categories of benefits below.<sup>75</sup>

#### *Operational cost savings*

102. We have reviewed the operational cost savings estimated for the closure of the Eves Valley Landfill, as submitted by the Councils, and consider them to be reasonable.<sup>76</sup> We accept that the proposed arrangement will result in likely operational cost savings of \$351,000 per year. This would equate to a benefit from cost savings of approximately \$3.3 million over a 14 year time period.

#### *Savings from deferred investment*

103. By delaying the Eves Valley landfill expansion by approximately 14 years, and avoiding a York Valley landfill expansion during the same period, the Councils submitted that the proposed arrangement would provide the Councils with net present value (NPV) savings of approximately \$2.5 million over the 30 years between 2017 and 2046 based on a lower 'social' discount rate of 3.5%, or \$1.1 million at 6.5%.
104. Our preliminary view is that the difference in the NPVs of the TDC and NCC investments to 2046, compared to their investments under the proposed RBLU, would amount to investment savings of approximately \$1.4 million at the standard 6% discount rate.<sup>77</sup> While lower social discount rates have been considered in

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<sup>75</sup> The Councils claimed that several other benefits arise from the arrangement, but these were less able to be confirmed and we have not placed significant weight on these claims. These other benefits included lower debt and lower rates for ratepayers, as well as diversity and resilience benefits through greater long-term infrastructure security. Clearance Application from NCC/TDC (18 October 2016) at [163-164] and [170-172].

<sup>76</sup> This figure did not change substantially when we tested the sensitivity on a 5% volume waste growth for TDC waste.

<sup>77</sup> This figure is based on NPV of lumped savings. When savings were spread across the various years then higher NPV savings are reported. Nevertheless, a lower investment savings would not alter our assessment of the net public benefits or detriments.

international analysis,<sup>78</sup> we do not consider it necessary to move away from the standard approach of following the New Zealand Treasury's suggested infrastructure discount rate, which is currently 6%.<sup>79</sup>

105. We have considered investment savings over a longer 30 year period compared to the 14 years that the other benefits and detriments have been assessed over. This is because the investments with and without the proposed arrangement are lumpy and so the timeline that we use has a large impact on the NPV of these figures. For this reason, we have used the timeframe over which the Councils themselves have considered the benefits of this proposal, noting that if we were to consider the full range of benefits and detriments over a 30 year period the outcome of our assessment would not be altered.

### *Environmental benefits*

106. Under the proposed arrangement, the Councils submitted that the relevant negative environmental effects from the Nelson-Tasman landfills (such as noise, smell, and the attraction of feeding birds) would be reduced by half. Moreover, they submitted that further environmental benefits would accrue from any reduction in waste volumes brought about by the proposed arrangement.<sup>80</sup>
107. Both Councils' waste minimisation obligations have resulted in a reduction in the amount of solid waste per capita sent annually to their respective landfills.<sup>81</sup> This is widely considered to be a benefit to the region as a whole. Reduced waste volumes are consistent with the objectives of the Waste Minimisation Act 2008.
108. Underlying the Councils' waste minimisation strategies is an acceptance that appropriately-set landfill disposal fees encourage solid waste to be diverted to more environmentally-friendly disposal options, such as recycling.<sup>82</sup> However, when fees are set too high, this can instead encourage illegal dumping over the near term.
109. If the proposed RLBU were to increase landfill disposal fees, any resulting reduction in the absolute amount of solid waste disposed of in the region would be likely to

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<sup>78</sup> See for example the European Commission guidelines on recommended social discount rates of 4% at [http://ec.europa.eu/smart-regulation/guidelines/tool\\_54\\_en.htm](http://ec.europa.eu/smart-regulation/guidelines/tool_54_en.htm) or the recommended UK public service discount rate of 3.5% at [https://data.gov.uk/sib\\_knowledge\\_box/discount-rates-and-net-present-value](https://data.gov.uk/sib_knowledge_box/discount-rates-and-net-present-value).

<sup>79</sup> See the Treasury's current discount rates at:

<http://www.treasury.govt.nz/publications/guidance/planning/costbenefitanalysis/currentdiscountrates>  
Clearance Application from NCC/TDC (18 October 2016) at [165-169].

<sup>81</sup> TDC Solid Waste Activity Management Plan 2015-2045 (August 2015) retrieved from [www.tasman.govt.nz](http://www.tasman.govt.nz) on 1 November 2016. NCC and TDC Waste Management and Minimisation Plan (April 2012) retrieved from [www.tasman.govt.nz](http://www.tasman.govt.nz) on 28 October 2016.

<sup>82</sup> The Waste Minimisation Act 2008 "allows a territorial authority to charge fees for a particular service...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 Waste Management and Minimisation Plan". Clearance Application from NCC/TDC (18 October 2016) at [75(c)].

result in a positive environment benefit. In particular, lower waste volumes are associated with reduced greenhouse gas emissions.<sup>83</sup>

110. We have not found it necessary to quantitatively estimate the environmental benefits from reduced greenhouse gas emissions resulting from any fee increase. Under the 14 year time horizon we have considered, the benefit from lower emissions would largely be discounted. We understand that emission levels peak many years after waste is deposited.<sup>84</sup> We do not consider that these gas emission savings would contribute meaningfully to our assessment.<sup>85</sup>
111. While we have identified other potential environmental benefits arising from the proposed RLBU, we consider that significant specialist environmental analysis would be required to quantify the magnitude of these benefits, and how they may differ between the with and without scenarios.<sup>86</sup> Given our overall views on the proposed arrangement, we do not consider it necessary to undertake this additional analysis.

### **Balancing benefits and detriments**

112. The Councils submitted that the proposed RLBU would not result in any detriments to the public but that there would be significant public benefits from the proposed arrangement, primarily through investment and operational cost savings.
113. Nonetheless, we consider that there is a risk of significant price increases under the proposed RLBU, arising from the removal of existing competition between the two landfills and the increase in market power that would result.
114. The Commission's preliminary quantification of these benefits and detriments is summarised in Table 2 below. Our preliminary estimates indicate that there would be significant net public detriments from the proposed arrangement and these detriments would range between \$400,000 and \$22 million.
115. Our range of net public detriments is mainly due to the loss of allocative efficiency as a result of the proposed arrangement. The remaining detriments from the proposed RLBU would primarily arise from increased transportation costs for solid waste

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<sup>83</sup> See for example BDA Group, The full cost of landfill disposal in Australia (July 2009). Prepared for the Department of the Environment, Water, Heritage and the Arts at 7.

<sup>84</sup> Studies show that emissions peak many years after disposal. See for example European Commission, A study on the environmental externalities from landfill disposal and incineration of waste (October 2000) at 28.

<sup>85</sup> Based on our base case of 4.64% price increases p.a. and a price ceiling of \$165.91 based on volumes switching to the Bluegums landfill in Marlborough that emission savings were realised immediately, environmental benefits of between \$8 and \$13 per tonne of waste would approximately return between \$175,000 and \$285,000 over the 14 years. Covec Report, Economic Factors of Waste Minimisation in New Zealand (November 2012) Prepared for Ministry for the Environment and retrieved from [www.mfe.govt.nz](http://www.mfe.govt.nz) on 20 December 2016.

<sup>86</sup> Including changing traffic patterns, the relative risks of leaching and the different effects on property values related to landfill investment timing. Many of the disamenity effects of landfill disposal will be largely unchanged, such as impacts associated with dust, litter, odour, vermin and the effects on land values surrounding existing sites. Covec Report, Economic Factors of Waste Minimisation in New Zealand (November 2012) Prepared for Ministry for the Environment and retrieved from [www.mfe.govt.nz](http://www.mfe.govt.nz) on 20 December 2016.

originating at the more remote Tasman RRCs. Based on these preliminary calculations, the likely detriments would significantly outweigh the benefits from the proposed RLBU, which would primarily be through investment and operational cost savings.

116. In addition to these quantified benefits and detriments, we have considered the unquantified environmental and productive efficiency benefits and detriments that may arise from the proposed arrangement. However, our preliminary view is that these unquantified benefits and detriments are unlikely to change the outcome of any balancing assessment.

**Table 2: Summary of quantified and unquantified detriments and benefits**

| Detriments                     | Estimate                        |
|--------------------------------|---------------------------------|
| Allocative efficiency loss     | \$5 million - \$26 million      |
| Productive efficiency loss     | \$84,000                        |
| Dynamic efficiency loss        | Unquantified                    |
| Benefits                       |                                 |
| Operational cost savings       | \$3.3 million                   |
| Investment savings             | \$1.4 million                   |
| Environmental benefits         | Unquantified                    |
| <b>Estimated net detriment</b> | <b>\$400,000 - \$22 million</b> |

Source: Commission estimates based on a discount rate of 6%.<sup>87</sup>

117. Although we have considered the potential of illegal dumping and ratepayer pressure on Councils to limit price increases, we are not satisfied that these factors would necessarily preclude the Councils from extracting economic rents from their joint landfill operations, now or in the future. We also do not consider the provisions of the Waste Minimisation Act 2008 places sufficiently clear constraints on the behaviour of the Councils.
118. On balance, having regard to the available evidence, our evaluative judgement is that there is likely to be a net public detriment arising from the proposed arrangement.

### The proposed condition

119. We decline to grant authorisation if we are not satisfied that the public benefits from a proposed arrangement are likely to outweigh the detriments from the arrangement. However, it is open to the Commission to grant authorisation subject to a condition, if that condition is not inconsistent with the Act and if it alleviates the Commission's concerns about potential detriments arising from a proposed arrangement.
120. The Applicants do not consider that there is a risk of unjustified price increases under the proposed arrangement, because the Councils cannot use the proposed RLBU to

<sup>87</sup> We have based all of these estimates using NPV over a 14 year period except for the investment savings which are estimated over a 30 year period.

generate revenue to fund non-waste services. Rather, the Applicants have stated that that they would continue to operate the proposed RLBU on a 'user pays' basis.

121. To support this, the Councils are willing to commit to a condition that confirms that any operating surplus would be applied solely for funding any waste management and minimisation service, facility or activity.<sup>88</sup> Under this condition, the Councils would need to amend their Deed of Agreement for the Nelson-Tasman RLBU and ensure that each Council's annual report clearly records how any operating surplus received from the RLBU is being used.
122. Our preliminary view is that the proposed condition would remove the risk of allocative efficiency losses resulting from the proposed arrangement. We are satisfied that the imposition of this commitment would remove the incentive of the Councils to exercise market power created as a result of the proposed arrangement, while allowing the proposed RLBU the flexibility and discretion to adjust pricing in response to changes in costs or demand.
123. With the proposed condition, the remaining detriments would likely be significantly outweighed by the public benefits from the proposed RLBU. We have estimated that, without any loss in allocative efficiency, the likely net public benefit from the proposed arrangement is in the order of \$4.5 million as a result of the likely operational cost savings and deferred investment expenses.
124. Our preliminary view is that, subject to our proposed condition, the proposed arrangement will, or will be likely to result, in a benefit to the public outweighing the lessening in competition, such that an authorisation should be granted.

### **Draft Determination**

125. Subject to the condition specified below, the Commission proposes to grant authorisation under section 58 of the Act.
126. The Commission's authorisation is conditional on the Councils taking the following steps within five working days of receiving notice of authorisation from the Commission:
  - 126.1 The Councils must vary clause 21(c) of the Draft Deed of Agreement for the Nelson-Tasman Regional Landfill Business Unit as follows (with changes from the existing clause underlined):<sup>89</sup>

to pay any operating surplus as a "solid waste rebate" (or to apportion any operating deficit) at the conclusion of each operating year in the proportions 50% to Nelson and 50% to Tasman, for each Council to apply any such surplus solely for funding any waste management and minimisation service, facility or activity (either jointly or independently).

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<sup>88</sup> E-mail from Simpson Grierson (on behalf of the Applicants) to the Commerce Commission (3 March 2017).

<sup>89</sup> Clearance Application from NCC/TDC (18 October 2016) at Attachment B.

- 126.2 For the duration of the authorisation, each Council's annual report must clearly disclose the amount of any operating surplus received from the RLBU and record how any such surplus is being applied in a manner that is consistent with this condition.
127. To fulfil this condition, the Councils must provide the Commission with a copy of the executed Deed of Agreement for the Nelson-Tasman Regional Landfill Business Unit, as varied on the basis above.

### Attachment A: Location of landfills and transfer stations in the Nelson-Tasman region

