

10. APPOINTMENT OF DIRECTORS - TRANSWASTE CANTERBURY LTD (TCL)

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PURPOSE OF THE REPORT

The purpose of this report is to advise members of the Subcommittee of the current process and status in respect to the appointment of directors to TCL and to seek agreement on the process for the appointment of one nominee director.

EXECUTIVE SUMMARY

In terms of clause 9.1 of the Shareholders Agreement of TCL the company has a board of eight directors, four appointed by Canterbury Waste Services (CWS) (Group A) and four appointed by the shareholding councils (CWSC) (Group B).

All rights in terms of the Shareholders Agreement and Constitution are exercised through the Canterbury Joint Standing Committee (CJSC) (refer clause 10.1). Clause 34.3 of the Shareholders Agreement allows shareholders to appoint and remove directors and clause 3(b) of the Constituting Agreement delegates all the powers of the Canterbury Joint Standing Committee to the Canterbury Waste Subcommittee (CWSC).

Current directors and their terms are as follows:

Mr Denis O'Rourke	to 17 September 2006
Councillor Bill Woods	to 17 March 2005
Mr Gerald Clemens	to 17 September 2006
Mr Gil Cox	to 18 March 2007

Members will note that the term of Councillor Bill Woods (formerly Selwyn District Council now Canterbury Regional Council) will expire in March 2005 and it is desirable therefore that a process to appoint his replacement be commenced at this meeting.

FINANCIAL AND LEGAL CONSIDERATIONS

The four directors appointed by the shareholder members of the CWSC are the main means by which shareholder councils have input into the operations, monitoring and decision-making of TCL.

Paid up capital subscribed by the six shareholder councils is \$8 million and the Christchurch City Council has a 37.5% shareholding with the remaining five councils holding a shareholding of 12.5%.

As indicated above the Constituting Agreement and the Transwaste Canterbury Ltd Shareholders Agreement and Company Constitution give authority for the CWSC to appoint and remove directors to the Board of TCL. There is also a requirement in the Shareholders Agreement there be at all times an equal number of directors appointed by CWSC and Canterbury Waste Services.

Attached is a copy of the CWSC's "Policy on appointment and remuneration of directors to Transwaste Canterbury Ltd".

The Legal Services Unit advises that the matter of the term of the directors appointed by the Canterbury Waste Subcommittee to the Board of Transwaste Canterbury Ltd came before the Subcommittee at its meeting on 9 August 2004. The members were told that some of the Transwaste Canterbury Ltd directors had expressed their desire to retain the existing nominee directors for a further 12 month period past their existing terms in view of the difficulties and complexities associated with the Kate Valley landfill opening in May 2005 and the need to review the agreement with respect to the rate of return after the first year of operation of the landfill.

At the time of the meeting, the terms of three of the directors, including Denis O'Rourke, were due to expire on 17 March 2005. Members of the Subcommittee agreed to consider the matter further and to discuss it at their September meeting. The Council meeting of 26 August 2004 accepted the Subcommittee's report.

On 6 September 2004 the matter came before the Subcommittee again. It resolved that:

“The current expiry date of 17 March 2005 for the terms as directors for Councillor Denis O’Rourke and Mr Gerald Clemens be extended by a further 18 months to 17 September 2006 to ensure continuity during the commencement of the landfill operation in 2005 and during the review of the agreement in respect of the rate of return for Transwaste Canterbury Ltd in June 2006, following the first full year of operation of the landfill.”

It was noted by the meeting that the appointment of Councillor Denis O’Rourke was in respect to representation on behalf of the Christchurch City Council. The decision was reported and noted by the Council at its meeting on 23 September 2004.

The Subcommittee’s decision to extend the term of Mr O’Rourke as a director of Transwaste Canterbury Ltd was made in anticipation of the possibility of his not being re-elected to the Council and for the reasons noted by the Subcommittee. The fact that the decision was made one month prior to the local government elections does not, of itself, invalidate the Subcommittee’s decision to extend Mr O’Rourke’s term as a director of Transwaste Canterbury Ltd.

The Subcommittee’s decision is in line with the principles contained in its policy on the appointment and remuneration of directors of Transwaste Canterbury Ltd, adopted in June 2003. The policy is not a legal requirement, it was accepted voluntarily by the Subcommittee. That aside, it is worth noting that one of the principles is that directors of Transwaste Canterbury Ltd are to be appointed on the basis of the contribution they can make to the company and not on the basis of representation. It seems clear that it was recognised by both the Subcommittee and the Council that Mr O’Rourke’s contribution was considered important enough to warrant extending his term of tenure to cover the initial stages of operation of the Kate Valley landfill, in the event that he was no longer a councillor.

It could also be argued that the Subcommittee’s decision, whilst anticipating an event that had not yet occurred, was in line with its policy that the position of a councillor who has been appointed to the Transwaste Canterbury Ltd Board, but who fails to retain his or her seat, may be reviewed by the Subcommittee before expiry of that person’s full term of three years. The September review was done on the basis that this might happen and a decision made to extend Mr O’Rourke’s term. If the Subcommittee was exercising its right to appoint a director now, then Mr O’Rourke would not be validly appointed. However, that does not require the Subcommittee to review its earlier decision, given that it was made with the full knowledge of the upcoming elections. Unless there are other good reasons, apparent now and not available at that time, to review and revoke Mr O’Rourke’s appointment then, if this was to occur, Mr O’Rourke would have a justifiable complaint.

As this is a matter relating to the landfill joint venture only members representing shareholder councils may in terms of clause 22(c)(i) and (ii) of the Constituting Agreement vote on the basis that the Christchurch City Council shall be entitled to 50% of the votes able to be cast (which votes must be cast as a block and cannot be split) and the members appointed to represent the other five councils will be entitled to one vote each.

STAFF RECOMMENDATION

It is recommended that pursuant to clause 9.1 of the Shareholders Agreement and section 24 of the Constitution of TCL the Subcommittee:

- (a) Note the current expiry dates of the terms of its four nominee directors on the Board of TCL.
- (b) Request the Ashburton, Selwyn, Banks Peninsula, Waimakariri and Hurunui District Councils to consult together on the appointment of a nominee director to the Board of TCL to replace Councillor Bill Woods from 18 March 2005, having regard to the policy adopted by the Subcommittee on 9 June 2003, and report their recommendation to the February 2005 meeting of the Subcommittee.

BACKGROUND

The CWSC at its meeting on 9 June 2003 adopted, as provided by Section 57(1) of the Local Government Act 2002, a policy on the appointment and remuneration of directors to TCL (see attachment).

The policy provides for the four directors appointed by the CWSC to comprise:

- Two external appointees (who are not elected representatives)
- One internal appointee - being one of the three Christchurch City Council elected representatives on the Subcommittee
- One internal appointee - being an elected representative of the other five remaining shareholder councils represented on the CWSC

As noted in the Executive Summary current directors are:

External Appointees

Mr Gil Cox, Mr Gerald Clemens

Christchurch City Council Appointee

Mr Denis O'Rourke

Other Five Shareholder Councils Representative

Councillor Bill Woods (formerly Selwyn District Council)

It is necessary therefore that the five shareholder councils (other than the Christchurch City Council) now consult together to agree a replacement for Councillor Bill Woods whose term will expire on 17 March 2005. Page 4 of the policy provides a criteria for selection of Councillor directors and their tenure.

It will also be necessary for all directors appointed by the Subcommittee to appoint an alternate in the event that they were not available as provided for in Section 25 of the company's Constitution.

Directors' remuneration is \$18,000 pa and that of the Chairperson is \$30,000 pa, paid by Transwaste Canterbury Ltd.

THE OBJECTIVES

To continue the operation of TCL Ltd.

THE OPTIONS

The options available to the Subcommittee are:

1. Initiate a replacement for Councillor Bill Woods.
2. Consider the term and tenure of all directors. (Note comments on page 2 of the report.)
3. Modify and vary the current policy on the appointment of directors as it may see fit.

PREFERRED OPTION

The preferred option is that the recommendation be adopted and a replacement be made for Councillor Bill Woods only. The three other CWSC appointed directors have extensive experience in the operation of the company and the management of Tiromoana Station Ltd.

It is important during the period of establishment of the regional landfill at Kate Valley that there be substantial stability in the directors appointed by the Subcommittee. In addition the agreement in respect to the fair rate of return for the company is due to be reviewed following the first year of operation of the regional landfill and it is desirable that the expertise and strong leadership of the current directors be retained for this purpose.