

5. GOVERNANCE ISSUES – CANTERBURY REGIONAL LANDFILL JOINT COMMITTEE

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PURPOSE OF REPORT

1. The purpose of this report is to bring to the attention of Committee members the following matters:
 - (a) The need to ensure that all participating councils have properly adopted the Committee's Constituting Agreement, appointed their representatives and granted the appropriate delegations.
 - (b) Amendments that are recommended to be made to the Shareholders Agreement between Canterbury Waste Services Limited and the participating councils in respect of Transwaste Canterbury Limited and the Constitution of the Company.
 - (c) A suggested review and adoption by the Committee of a policy for the appointment of directors to Transwaste Canterbury Limited.
2. To put before Committee members documents that reflect these matters.

STAFF RECOMMENDATION

It is recommended:

- (a) That members of the Canterbury Regional Landfill Joint Committee seek the consent of the councils they represent to entering into the documents attached to this report.
- (b) That members of the Canterbury Regional Landfill Joint Committee ask staff to carry out a review of the Canterbury Waste Subcommittee's policy for the appointment and remuneration of directors of Transwaste Canterbury Limited and report that review to the Committee.

BACKGROUND ON GOVERNANCE ISSUES – CANTERBURY REGIONAL LANDFILL JOINT COMMITTEE

3. In 2005, councils that were members of the Canterbury Joint Standing Committee and the Canterbury Waste Subcommittee resolved to establish the Canterbury Regional Landfill Joint Committee. This comprised representatives of those councils that held shares in Transwaste Canterbury Limited. The company developed and now owns and operates the Kate Valley landfill. A Constituting Agreement for the new Committee was prepared and endorsed by all participating councils. The Committee came into effect on 1 July 2006.
4. Christchurch City Council has been advised that there are a number of issues that have arisen with regard to the establishment of the Committee. These are:
 - (a) Clause 17 of the Constituting Agreement states that all delegations made by the participating councils to the Canterbury Regional Landfill Joint Committee are to record the functions, duties and powers that have been delegated in writing. Such delegations may set out:
 - (i) the extent to which each council may be bound in respect of those delegated functions, duties and powers that are delegated;
 - (ii) the limit (if any) to which that council can be committed to expenditure of funds in pursuance of those delegated functions, duties and powers; and
 - (iii) the circumstances in which (if any) the council can withdraw those delegated functions, duties and powers in whole or in part.
 - (b) Clause 18 of the Constituting Agreement provided for the delegation of all matters relating to participation in Transwaste Canterbury Limited, for the purposes of owning and operating the Kate Valley landfill and associated transport and collection systems. These included:
 - (i) performing the obligations of the councils under the Shareholders Agreement;
 - (ii) exercising the voting rights attaching to Transwaste Canterbury Limited shares held by the councils;
 - (iii) appointing nominee directors to the board of the company;
 - (iv) considering the issues in relation to any scheme for the equalisation of transport costs between the councils and if appropriate, developing such a scheme;
 - (v) appointing the councils' representatives at the shareholders' meetings of the company.
 - (c) The issue that has been raised with regard to the delegations set out in Clause 18 is that they are subject to each council complying with the earlier provision requiring delegated powers to be set out in writing. The concern is that this has not been done. In order to ensure that valid delegations are granted to the Canterbury Regional Landfill Joint Committee, each council should resolve to grant the delegations set out in the attached document.
 - (d) Sitting alongside this issue is the status of the Canterbury Regional Landfill Joint Committee so far as the Shareholders Agreement entered into by Canterbury Waste Services Limited and the participating councils is concerned. Clause 10.1 of the agreement states that:

“All rights of the councils under this agreement and the constitution shall be exercised through CWJSC on behalf of the participating councils including without limitation rights to appoint and remove directors, rights to vote at shareholder meetings, signed shareholder resolutions and to pass any resolutions required under this agreement.”

- (e) Clause 10.2 states that Canterbury Waste Services Limited will be entitled to treat any director of the company who has been appointed by notice in writing by CWJSC as having the authority to act on behalf of CWJSC. That entity is defined in the Shareholders Agreement as being “the existing Canterbury Waste Joint Standing Committee and the replacement sub-committee to be advised by the participating councils.”
 - (f) The subcommittee referred to is the Canterbury Waste Subcommittee, which is no longer in existence. The constitution of Transwaste Canterbury Limited contains the same definition.
 - (g) There is a risk that by attempting to exercise their rights through the Canterbury Regional Landfill Joint Committee, without amending the Shareholders Agreement to recognise that committee, the participating councils may be in breach of the agreement. Potentially, this could have serious repercussions because clause 16 of the Shareholders Agreement provides that if any shareholder is in breach, then that shareholder is deemed to have given a transfer notice of the shares held by it and is bound to transfer the shares as if a transfer notice had been given. This is what is known as a pre-emptive right of the shareholders not in breach to purchase the other’s shares. It could include the entire council shareholding in Transwaste Canterbury Limited.
 - (h) The matter can be resolved by all shareholders agreeing to amend the Shareholders Agreement and Transwaste Canterbury Limited constitution by providing that the rights exercised through CWJSC are now to be exercised through the Canterbury Regional Landfill Joint Committee.
5. At the same time, members of the committee are asked to agree to a further amendment of the Shareholders Agreement to deal with another matter that has arisen.
- (a) Clause 9.5 of the Shareholders Agreement states that:

“The first chairperson of [Transwaste] shall be appointed by the Group B Directors [the participating councils] and will hold office as chairperson until such time as the landfill is operational and then for a further period of two years, after which the office of chairperson will be rotated biennially by the Group A Directors [CWS] and the Group B Directors.”
 - (c) This provision effectively prevents any person other than the current chairperson from holding that position until 9 June 2007. Advice given to Christchurch City Council is that if steps were taken to replace the current chairperson before then, there is a risk that a further breach of the Shareholders Agreement could occur and this could again trigger the pre-emptive rights provisions in the agreement and the constitution. It is suggested that the Shareholders Agreement be amended to give the Canterbury Regional Landfill Joint Committee the opportunity to replace the current Group B chairperson, whose term of appointment by the Canterbury Waste Subcommittee has expired. The chairperson has agreed to remain until a replacement director is appointed.
6. The last issue to be dealt with involves the process for the appointment of directors to the board of Transwaste. At its meeting on 17 August 2006, the Christchurch City Council resolved to:
- “Instruct staff to draft amendments to those provisions of the policy for the appointment of directors to be adopted by the Canterbury Regional Landfill Joint Committee that refer to Christchurch City Council representatives, to reflect the Council’s current policy. These can then be discussed with the Council’s representatives on the committee with a view to obtaining the consent of the committee to including the amended provisions in its policy.”

- (a) The Canterbury Regional Landfill Joint Committee has yet to adopt a policy on the appointment of directors.
 - (b) It is suggested that the members of the Committee resolve to ask staff to carry out a review of the Canterbury Waste Subcommittee's policy for the appointment and remuneration of directors of Transwaste Canterbury Limited before a decision is made on the terms of the policy to be adopted. This will not affect the Committee's power to make an appointment in the interim, provided the procedural matters referred to in this report are dealt with.
7. Attached are draft documents recording the steps that it is recommended the participating councils should take to rectify the matters referred to in this report. These comprise:
- (a) Agreement amending the Shareholders Agreement in respect of Transwaste Canterbury Limited.

This document provides for the amendment of the Shareholders Agreement and Constitution of the company, with effect from the date a unanimous resolution of the shareholders is passed confirming such amendments.
 - (b) Unanimous Shareholders Resolution regarding amendments to the Shareholders Agreement and Constitution.

This is in respect of the amendments to the agreement and Constitution referred to in the earlier document.
 - (c) Special resolutions of the Group A and Group B shareholders approving amendments to the Constitution.

The reason for special resolutions being required is that clause 6.1 of the Constitution states that any action affecting the rights, privileges, limitations or conditions attached to any shares by this constitution must be approved by special resolution of each interest group.
 - (d) Suggested resolutions for the grant of delegated powers to the Canterbury Regional Landfill Joint Committee.