Nelson City Council
Te Kaunihera o Whakatū

Strategic Development and Property Subcommittee

3 December 2021

REPORT R26108

Nelson Marina s17A Governance Review

1. Purpose of Report

1.1 To consider the various options available to Council for the future governance structure of Nelson Marina.

1.2 To approve the preferred option of the formation of a Council Controlled Organisation (CCO) that manages the Marina with Council retaining ownership of the assets.

2. Summary

2.1 Nelson Marina requires significant investment over the next 10 years due to an historical lack of investment.

2.2 Council has engaged Wardale Marine Consultants to develop a Masterplan to set out the Marina Long Term Plan, as per the Nelson Marina Strategic Plan approved by Council in December 2017.

2.3 Nelson Marina is accountable to the community through Council, so should be adding value with the view of providing a return on investment.

2.4 The potential for the asset is community-wide through placemaking activation and broader use of the precinct, as well as a return on investment.

2.5 On July 1, 2021 the management of Nelson Marina was brought in house to Council with the early termination of the Nelmac Management Contract.

2.6 The current governance and delivery model is not commercially focused, nor dynamic enough to fulfil the future development plans for Nelson Marina.

2.7 A review of the various management options available to Council has therefore been undertaken to ensure that the governance structure is fit for purpose and will achieve Council's goals (See, Attachment 1, Section 17a Review).

2.8 Based on the report findings, it is recommended that Council establish a CCO to manage and operate Nelson Marina on behalf of Council.

2.9 Nelson Marina is operated as a closed account with no income coming from Council rates; an opportunity to enhance investment as well as return would be created through this model.

2.10 Post workshop further research was conducted on the option of establishing a Limited Liability Partnership (LLP) as the framework within which the Management CCO would operate.

3. Recommendation

That the Strategic Development and Property Subcommittee

1. <u>Receives</u> the report Nelson Marina s17A Governance Review (R26108) and its attachment (A2764091).

Recommendation to Council

That the Council

1. <u>Approves</u> the recommendation of a Council Controlled Organisation that manages the Marina as the preferred governance model for Nelson Marina; and

2. <u>Approves</u> undertaking consultation on the proposal to establish a Council Controlled Organisation as per Section 56 of the Local Government Act; and

3. <u>Notes</u> that undertaking consultation on a proposal to establish a Council Controlled Organisation would require additional unbudgeted expense to a maximum of $65,000 in addition to current budget ($40,000), to formulate the required documentation and reviews for the new Council Controlled Organisation; and

4. <u>Approves</u> funds, if required for undertaking consultation, to be sourced from the Marina closed account.

4. Background

4.1 Council owns and has operated Nelson Marina (Marina) since 1 July 2021.

4.2 Prior to 1 July 2021, Nelson Marina was operated by Nelmac Limited, a general contracting Council Controlled Organisation (CCO), under a contract with the Council. Council chose to cancel that contract early as it was determined that more active management was needed.

4.3 The Council anticipates significant development of the Marina in the future. It is currently developing a Masterplan for the Marina, which it expects to consult with the community at the end of 2021 and adopt in early 2022.

4.4 Alongside this, Council is considering the best approach for governance of the Marina going forward. For this purpose, it engaged Infracure Ltd (Infracure) to carry out a review under section 17A of the Local Government Act 2002 (LGA 2002).

4.5 Infracure has now provided a report that recommends that Council establishes a Management CCO for Marina governance. (Attachment 1 A2764091).

Section 17A review summary

4.6 For the review process, Infracure held several meetings and workshops with staff and stakeholders.

4.7 Infracure's report identifies that there is consensus that the Marina needs development and more proactive management. For example:

4.7.1 Marina and Marina support services (e.g., parking, provisioning, repairs, fuelling) are not integrated,

4.7.2 Current facilities and services will not meet future demand as boat ownership and profiles, environmental and health and safety standards evolve,

4.7.3 Land is viewed as being under-utilised,

4.7.4 Fees and charges are considered too low for the market, and collections have historically been low.

4.8 Initial master planning work suggests that there will be significant changes to both current Marina operations and the Marina land to meet future need.

4.9 The report also identified a risk that the Marina's current governance model is inadequate to manage the complexity of concurrent change initiatives across several areas, including:

4.9.1 Marina-provided services such as fuel, dry docking and storage,

4.9.2 Changing approach to, and increasing, fees and charges,

4.9.3 Development of new commercial operations to service all users (boat parts, repairs, food and sea sports), 4.9.4 Increasing recreational value for the community i.e., managing the Marina and land as a destination,

4.9.5 Managing consequent environmental, health and safety and reputational risks.

4.10 The report identified that Council's current reporting and decision making isn't appropriately structured or resourced to support:

4.10.1 Management of the Marina as a commercial business,

4.10.2 Development of the Marina and land as a mixed use destination for boat owners, associated service providers and the wider community,

4.10.3 Effective strategic integration and alignment with boat owning users, other recreational users, neighbours, Iwi and the Nelson Regional Development Agency (NRDA).

4.11 Following interviews and a stakeholder workshop, the review identified key themes that stakeholders would like to see addressed. The key themes are:

4.11.1 The Marina should be an efficient and profitable business,

4.11.2 The Marina is undergoing a step change that will secure its value for future generations,

4.11.3 The Marina offers amenity and recreation value opportunities for everyone in Nelson,

4.11.4 Council as shareholder should get a return on its investment.

4.12 An analysis was then undertaken of various options available to Council, with the four options below being deemed to be the best fit for purpose:

4.12.1 Option 1: Council owns and operates the Marina (status quo),

4.12.2 Option 2: A "stand-alone business unit" (SABU) or "enhanced Status quo" within Council that manages the Marina,

4.12.3 Option 3: A new CCO that manages the Marina with Council retaining ownership of the assets (Management CCO) (Infracure and Report Recommendation),

4.12.4 Option 4: A new CCO that holds ownership of all assets and manages the Marina (Owner CCO).

4.12.5 Option 5: A Limited Liability Partnership that holds ownership of all assets and manages the Marina (LLP)

5. Discussion

5.1 The status quo (Option 1) has serious limitations and is therefore not the recommended option. The key issues are the relative complexity of the management of the Marina, and the lack of commercial orientation and flexibility.

5.2 A SABU (Option 2) was identified as intermediatory solution and would be an enhanced status quo option while Council was assessing a CCO in the Section 17A review.

5.3 While the SABU model is an option and would go some way to solving the key issue of the lack of commercial orientation for the management of the Marina, it is not identified here as the preferred option for the following reasons:

5.3.1 A significant amount of time and cost would need to be invested to establish a SABU that would provide the benefits of a more commercial board structure but would not achieve the goal of independence from Council. There is good commercial, operating and reputational rationale to move ahead with expediency to finalise and implement the Masterplan,

5.3.2 A SABU model does not provide appropriately rigorous structure and is less consistent with Council's existing successful governance models and entities (eg Nelmac, Port Nelson), which have a statutory basis and existing rules around their establishment and operation,

5.3.3 There would also be some on-going drawbacks of a SABU model, with the board of a SABU, for example, being able to engage in contracts and statutory commitments but with the liability being retained by Council.

5.4 Due to the need to be commercially focussed, establishing a CCO to manage the Marina is the recommended option (Option 3: Management CCO).

5.4.1 This option has benefits as identified above (5.3.1 - 5.3.3), regarding expediency and a rigorous structure for reporting and liability,

5.4.2 A Management CCO also draws on a well-established CCO framework, regarding statements of expectation, statements of intent, regular reporting and accountability,

5.4.3 This option also means there would be a company structure with a board of directors appointed by, and accountable to, the Council, along with means for the Council to influence the way the CCO is operated and governed, with Council-appointed Board members, 5.4.4 Fiduciary duty, the duty of care and liability would be assumed by Board Members rather than Council,

5.4.5 This structure would provide a good balance between commerciality in the running of the Marina as a business, and appropriate Council oversight and influence,

5.4.6 LGOIMA applies but not to meetings,

5.4.7 Profits derived through the operation of the Marina will be for the benefit of the asset owners (Council) and will not be subject to corporate tax.

5.4.8 While establishing a CCO requires consultation, this would not unduly slow down the process. Establishing a management CCO and establishing a SABU would involve about the same amount of time and cost (although the SABU could be slightly more complex).

5.4.9 If a Management CCO is established, this also leaves future flexibility for the Marina land and assets to be transferred to the new CCO should Council consider that to be appropriate in the future (Option 4: Owner CCO) or a Limited Liability Partnership (LLP)(Option 5).

5.5 For this reason, the Owner CCO (Option 4) and Limited Liability Partnership (LLP)(Option5) are not the recommended options at this stage due to the tax implications to Council. Both options are also more complex to establish, would require more consultation, and Council's commercial objectives with respect to the Marina can be achieved without the transfer of assets at this stage.

5.6 Option 3, a Management CCO is therefore the preferred option.

Other options that should be discounted because they are not reasonably practicable:

5.7 Other governance options for the Marina were also reviewed. On assessment, these do not meet Council's objectives and should be discounted as they are not reasonably practicable options.

For completeness, these options are:

5.7.1 **Subcommittee –** The Council could establish a subcommittee (under clause 30(1), Schedule 7 of the LGA 2002) to carry out a similar function to the board in option 2 (stand-alone business unit option). The subcommittee membership could include external appointees with relevant skills and knowledge and Council employees and would not necessarily need to include elected members (clause 31(3) and (4), Schedule 7 of the LGA 2002). This would not be a reasonably practical option for the Council, as it would not allow for the 'nimbleness' and responsiveness in decision-making that the Council wants to achieve for Marina operations.

5.7.2 **Management contract –** The Council could contract out the management of the Marina to a third party (such as was the case with its contract with Nelmac Limited). The contract could be drafted to require a more commercial focus for the Marina. This is not a reasonably practical option for the Council: first, because this is essentially the structure that has been used to date (with Nelmac Limited) and issues were identified with this; and second, because achieving a more business-like operation would be difficult through a contract only (with the Council ultimately still making any key decisions, compared with, for example, the board of a CCO).

5.7.3 **Incorporated society –** The Council could incorporate a society under the Incorporated Societies Act 1908 to manage and/or own the Marina. This is not a reasonably practicable option for the Council because there are serious limitations with an incorporated society as a structure including that it cannot operate for pecuniary gain of any of its members (including the Council if the Council is a member), and there are minimum member requirements (so parties other than the Council would need to be members of the society). This structure would not align with the more commercial orientation the Council wishes to achieve for the Marina.

Benefits of the SABU model

5.8 Benefits of the SABU model that were identified in the Infracure report (Attachment 1, p. 7), are also applicable to the preferred Management CCO option (Option 3). These include:

5.8.1 The Board having an independent chair,

5.8.2 Wider community recreation interests being represented on the Board e.g., passive and active recreation, arts and culture,

5.8.3 The Marina Manager being appointed to the Board as an 'Executive Director'…,

5.8.4 The Chief Executive ensuring the Board has the delegated authority required to develop and deliver the agreed Masterplan and CAPEX and OPEX budgets,

5.8.5 The Masterplan being delivered using a benefit led change programme management construct rather than an outputs driven project management construct.

5.9 In addition, it was identified in the report that a programme approach would help support effective consideration of things such as:

5.9.1 Consolidation of asset and activity management into a single Marina and Land precinct,

5.9.2 Dependency management for infrastructure enhancements enabling new fees and charges and their supporting systems,

5.9.3 Integration of broader outcomes including environmental and social and cultural benefits (Attachment 1, p. 7).

6. Options

Option 1: Council owns and operates Marina (status quo)

6.1 **Description**

6.1.1 Council owns the Marina land and associated assets.

6.1.2 Marina operations are managed by a business unit within the Council, staffed by officers employed by the Council, including the Manager Nelson Marina. The officers act under delegated authority, which has been sub-delegated to them by the Council's Chief Executive.

6.1.3 The Marina's finances are managed through a 'closed account', as the Marina has its own dedicated revenue streams and expenses.

6.1.4 The following stakeholders have a role in the governance of the Marina:

- The Strategic Development and Property Subcommittee has the "Marina Precinct" as one of its areas of responsibility, and the Council has delegated to it the power to make decisions on the development of policies and plan, and to recommend these policies and plans to the Council for its approval.

- The Marina Management Committee, established in 2015, has the purpose of discussing and providing recommendations to the Council about the Marina facility.[1] It provides a forum for communication and co-ordination between the Council, Marina management, and the Marina Berth Holders Association, with its members drawn from all these entities, as well as Port Nelson.

- The Nelson Marina Advisory Group was established in 2017 to work with the Council on the strategic plan for the Marina, but after completion of that plan, was retained to act as the appointed management committee to undertake management duties at the Marina (as described in the strategic plan). Aspirations were to

---

1 The Committee has advisory powers only.

delegate powers for management and financial decisions to the Advisory Group, but its current delegations are limited to making recommendations to the Council only. Its members are individuals with appropriate skills and expertise, who are appointed by, but independent to, the Council.

6.2 **Process**

This option is the status quo, so no process is required. (Although the Council might want to consider whether changes should be made to the Marina Management Committee and Nelson Marina Advisory Group, to perhaps integrate some of their functions.) There is obviously no implementation costs or timing implications of this option.

6.3 **Advantages and disadvantages**

Option 1: Council owns and operates Marina (status quo)	
Advantages	**Disadvantages and Risks**
• No process is required. • The Council retains direct control of all Marina land and assets, and operations. This ensures 'public ownership' of the assets, and that any returns from the Marina ultimately benefit the Nelson community.	• Less commercial or nimble than a private sector agency, as the Council must comply with decision-making requirements in the LGA 2002 and operate with transparency and accountability as required under LGOIMA. • Viewed as less able to respond quickly and effectively by berth holders and other stakeholders. • Given the significant amount of investment that is likely to occur at the Marina over the next 10 years or so, it would be beneficial to have involvement from individuals with expertise and experience in significant capital projects, and the commercialisation of them. Elected members may or may not have such expertise and experience. • Elected members may be more subject to pressure from those opposing increases to fees and charges, as compared to independent non-elected

Option 1: Council owns and operates Marina (status quo)	
	individuals. If pressure campaigns were successful, this could limit the potential returns from the Marina, and the consequent financial benefits for the community. • Management of the Marina is one of many functions carried out by the Council, meaning it may not get as much attention or dedicated focus, as it would under an entity that's sole purpose is to deal with the Marina.
Time to establish	**Costs to establish**
• The model is already established	• There are no costs to establish.

Option 2: Stand-alone business unit within Council (Enhanced Status Quo/SABU option)

6.4 **Description**

6.4.1 Council continues to own the Marina land and associated assets.

6.4.2 The Marina's finances are dealt with through a 'closed account', given the Marina has its own dedicated revenue streams and expenses.

6.4.3 Marina operations and finances are managed by a dedicated business unit within the Council, staffed by officers employed by the Council, including the Manager Nelson Marina. The officers act under delegated authority, which has been sub-delegated to them by the Council's Chief Executive.

6.4.4 The full Council establishes a "board" to provide direction to the dedicated business unit. The board is, legally, part of the Council and does not have a separate legal status. It is a subordinate decision-making body of the Council, which the Council is empowered to establish under clause 30(1), Schedule 7 of the LGA 2002. A subordinate decision-making body does not have an established statutory regime as a committee or CCO does, so it is necessarily a bespoke body designed wholly by the Council.

6.4.5 The board exercises powers delegated to it by the full Council (under clause 32(1), Schedule 7 of the LGA 2002), enabling it to develop and implement the masterplan for the Marina, as well as manage its day-to-day operations.

6.4.6 The board is comprised of independent individuals with appropriate expertise and experience, who are appointed and remunerated by the Council. They are ultimately accountable to the Council, and can be removed by the Council at its discretion.

6.4.7 The Strategic Development and Property Subcommittee would have oversight of the board, and the board would report to it on a regular basis. The Marina Management Committee and the Nelson Marina Advisory Group would likely not have any involvement.

6.5 Process

Steps to implement Option 2: Stand-alone business unit within Council (Enhanced Status Quo/SABU option)
This process would require three sequential reports going to full Council for decisions. 1. The first report would require Council to make an in-principle decision to pursue the stand-alone business unit option (based on recommendation from the Strategic Development and Property Subcommittee). 2. Following this first Council decision, the Council would need to: a) Develop a draft terms of reference for the board. This would be a bespoke document, involving the creation of a unique subordinate decision-making body. There would be significant work in preparing the terms of reference. Not only would there need to be substantial involvement from lawyers, but officers would also be called on to make decisions about the design of the board. The terms of reference would need to address the role of the board, including the scope of its authority, and set out all its rules for operation (For example, membership, remuneration, meetings, voting, application of LGOIMA, reporting, stakeholder relationships, communications etc.). b) Develop draft terms of appointment for members (effectively serving as a contract between the Council and the members). c) Develop a draft delegation to the board, identifying the powers that should appropriately sit with the board. In doing so, it may be necessary to clarify the Strategic Development and Property Subcommittee's delegations, as the Council's Delegations Register currently provides that any cross-over in delegations must be referred back to full Council.[2] It would also be sensible to consider what, if any, role there should be for the Marina Management Committee and the Nelson Marina Advisory Group going forward.

[2] Paragraph 5.1.5 in the Delegations Register states: "Where matters relate to the areas of responsibility of more than one committee, subcommittee or subordinate decision-making body, the matter will be considered a cross-committee item. Instead of being considered by one or more commits, subcommittees or subordinate decision-making body, the matter will be considered by Council directly."

d) Develop a draft policy for the appointment and remuneration of board members. The Council's policies for appointing and remunerating committee members,[3] and directors of CCOs,[4] would not apply, making it necessary for the Council to develop a one-off policy to apply to the board (covering qualifications, expertise etc.).

e) Organise insurance cover for the board. While the Council should check its own policy, council policies are unlikely to cover this type of arrangement, making it necessary to negotiate and agree an extension to the Council's cover (likely providing an indemnity to board members, equivalent to what is provided to elected members). Given the board would be a unique creation, it is likely that brokers would require additional explanatory material to understand the board's status and role.

3. The second report to full Council would seek, for the purposes of initiating a recruitment process for board members, approval of the draft terms of reference, terms of appointment, and delegation, and also recommend adoption of a policy on the appointment and remuneration of members of the board.

4. Following this second meeting, the recruitment process for board members would commence. It might be necessary to negotiate remuneration, and possibly some of the terms of appointment, with candidates.

5. The third report would ask the full Council to:

- establish the board as a subordinate decision-making body, including giving final approval of the terms of reference;
- appoint the preferred candidates as members of the board, subject to the terms of appointment;
- make appropriate delegations to the board, and effect any necessary consequential changes (For example, amend delegations to the Subcommittee, and amend delegations or dis-establish the Management Committee and Advisory Group).

6. There are no specific consultation requirements in the LGA 2002 for any of these Council decisions, although the Council would be subject to its standard obligation in section 78 of the LGA 2002 to consider the

3 Being: 1) Policy for the Selection, Appointment and Remuneration for External Appointees on Council Committees, 2) Selection, Appointment and Remuneration Policy for External Appointees on Council Subcommittees, and 3) Policy on the appointment and remuneration of jointly-appointed independent members on committees.

4 The Council is required to have such a policy under section 57 of the LGA 2002. The Council has a joint policy with the Tasman District Council for the appointment of directors of the Council's jointly-owned CCOs, and there is also an equivalent policy for those CCOs that are wholly owned by the Council (For example, Nelmac).

views and preferences of interested and affected persons. It is a judgement call for the Council to make, but it would likely be appropriate to carry out some targeted engagement with affected stakeholders (for example, berth holders) on relevant aspects of its proposals. It may also be appropriate to seek advice from the Nelson Marina Advisory Group on the proposals.	
Time to establish	**Costs to establish**
Likely to take about the same amount of time as the management CCO (but less than the owner CCO option). Matters that could have an impact on the timeframe include: • Likely necessary for full Council decisions on at least three occasions. • Creation of all the draft documents plus engagement with stakeholders. • The recruitment process and availability of good candidates. • Negotiations with insurance brokers	Probably similar cost to set up as the management CCO but result has few benefits (so less cost-effective). • The bespoke nature of the board as a subordinate decision-making body could require more work from legal advisors as compared to a CCO establishment. • If the Council were to use consultants for the recruitment process, it would incur consultant costs. • There would be some additional premium costs for the Council's insurance.

6.6 **Advantages and disadvantages**

Option 2: Stand-alone business unit within Council (Enhanced Status Quo/SABU option)	
Advantages	**Disadvantages and Risks**
• The Council retains ownership of all Marina land and assets, and operations. This ensures 'public ownership' of the assets. • In contrast to the status quo, this option would likely allow for greater speed in some decision-making. The board would not be	• Less commercial or nimble than a private sector agency, as the "board" would have to comply with decision-making requirements in the LGA 02. • The board would be a bespoke entity, requiring work to design and establish it.

subject to the meetings requirements in Part 7 of LGOIMA, and so could be nimbler that an equivalent committee could be. • The board would enable the Council to have independent individuals, with relevant commercial expertise and experience, involved in decisions concerning the masterplan for the Marina.	• The Council will still have overall responsibility for the marina. As outlined for option 1 above, this means the marina will still be one of a multitude of functions being carried out by the Council, and there is still some potential for political pressure being brought to bear on elected members in relation to fees and charges. • There is a risk that members of the board, who are not familiar with working in a Council, might not always comply with all the relevant statutory obligations that apply to councils and their subordinate decision-making bodies (eg decision-making requirements in the LGA 02, compliance with relevant council plans and policies etc.). Given the board does not have a separate legal status to the Council, it is the Council that will bear the responsibility (and liability) for any mistakes made by the board. • Having delegated powers to the board, the Council cannot typically unwind or overrule board decisions, but will instead be bound by them (eg it will be bound by any contracts entered into by the board). Again, it is the Council that will bear responsibility (and liability) for the board's actions. • The option cannot be implemented immediately, even though no particular consultation obligations apply. • There are costs to implementing this option, including legal costs, recruitment costs, and insurance

	costs. These to be about the same as for the management CCO option but less than the owner CCO option.

Option 3: Establish a CCO to manage the Marina (Management CCO) – Recommended Option

6.7 **Description**

6.7.1 Council owns the Marina land and associated assets.

6.7.2 The Council establishes a CCO to manage the Marina operations under contract.

6.7.3 The CCO has a board and employs staff (including the Manager Nelson Marina). The staff of the CCO report to the board, and the board is accountable to the Council as shareholder.

6.7.4 The CCO manages the marina's finances (based on the marina's own revenue streams and expenses), with Council input as required (eg through annual budget). Any borrowing for marina development would be Council borrowing (not the management CCO's).

6.7.5 The CCO would incur staff costs, board member fees, some other management costs (such as IT equipment and directors & officers insurance premiums) which it would recover (likely on a breakeven basis) from the Council through the management contract.

6.7.6 The intention would be that the CCO itself would not return any profits to the Council through distributions.

6.7.7 The extent of the CCO's role and powers in relation to the Marina can be well-defined through the drafting of the CCO's constitution, the management contract, and using mechanisms such as the statement of intent. Council oversight could be through the existing Strategic Development and Property Subcommittee.

6.7.8 The CCO could have a direct relationship with the Nelson Marina Advisory Group.

6.8 **Process**

Steps to implement Option 3: Establish a CCO to manage the Marina (Management CCO) – Recommended Option
This process will require two or three decisions by Council (depending on how extensive/complete the first decision is): 1. The first step would require Council to make the decision decide to pursue the management CCO option and begin consultation. 2. Following this first Council decision, the Council would need to: a) Undertake consultation in accordance with the principles of section 82 of the LGA 2002 (as required by section 56) to establish the new CCO including developing a statement of proposal (section 82A of the LGA 2002). b) Arrange for the preparation of a constitution for the new CCO and a Management Agreement to be entered into between the CCO and the Council. c) Review and prepare any changes required to existing policies and delegations in relation to the Marina (including the policy about the appointment of directors to CCOs under section 57 of the LGA 2002). d) Post-consultation (and assuming the outcome of the consultation is favourable to the establishment of the management CCO), a second report to the Council would seek approval of the draft constitution and Management Agreement, any changes required to existing policies and delegations, and for formal approval to establish the CCO (For example, incorporate a new company and become a shareholder of it). 3. Following this second meeting, the recruitment process for board members of the CCO would commence. It might be necessary to negotiate remuneration, and possibly some of the terms of appointment, with candidates. 4. At around the same time, the company would be incorporated, and the management contract could be entered into.

Time to establish	Costs to establish
This option is likely to take about the same amount of time (or less) than the SABU option (and less than the owner CCO option). Matters that could have an impact on the timeframe include:	More costly than the status quo, and about the same cost as the SABU option. Less cost than the Owner CCO option.

• Two or three Council meetings are likely required. • Mandatory consultation (but unlikely to unduly delay the process). • Drafting the constitution, management agreement, and reviewing any changes to the Council's existing policies/delegations. • The recruitment process for the board.	• CCO establishment is relatively straightforward. The drafting of the new company's constitution and the management agreement need not be overly complex or costly because precedents will be available. • If the Council were to use consultants for the recruitment process, it would incur consultant costs.

6.9 **Advantages and disadvantages**

Option 3: Establish a CCO to manage the Marina (Management CCO) – Recommended Option	
Advantages	**Disadvantages and Risks**
• Well-known and established structure used in local government. • More commercially oriented structure (For example, most Council decision-making obligations do not apply to the CCO's board) with flexibility to respond to Council's non-commercial drivers (including through the statement of intent). • LGOIMA applies but not to meetings.	• Consultation required (although this is unlikely to create any undue delay in establishment).[5] • If the CCO is a company then it would be taxable (although if operated at, or near, break-even it would have nil or minimal taxable profit). • The cost of managing the governance of the Marina through the formation of a Board of Directors will increase the operating costs of the Marina.

5 Consultation required under section 56 of the LGA 2002.

• CCO would be able to borrow in its own right (either from the Council or third-party lenders). • Council will be able to appoint board members with relevant expertise and experience. • Process is straightforward and requires less bespoke drafting compared with SABU option (because company law and the CCO provisions of the LGA 2002 provide a clear regime). • In the future if desired the Council could potentially pivot to the "owner CCO" model by transferring the Marina assets to the CCO. • Profits derived through the operation of the Marina will be for the benefit of the asset owners (Council) and will not be subject to corporate tax.	

Option 4: Establish a CCO to own and manage the Marina (Owner CCO)

6.10 **Description**

This option is the same as Option 3 (Management CCO) with the key difference being a transfer of the Marina land and associated assets to the new CCO.

6.10.1 The Council establishes a CCO (For example, a company) specifically to own and manage the Marina assets and operations.

6.10.2 The CCO has a board and employs staff (including the Manager Nelson Marina). The staff of the CCO report to the board, and the board is accountable to the Council as shareholder.

6.10.3 The CCO owns and manages the Marina as an operation separate to the Council. The CCO could borrow in its own right (either from the Council or third parties).

6.10.4 The Council is able to influence the CCO through well-established channels (including through the statement of intent).

6.10.5 The board of the CCO could establish a relationship with the existing Nelson Marina Advisory Group.

6.11 **Process**

Steps to implement Option 4: Establish a CCO to own and manage the Marina (Owner CCO)
This process will require two or three Council decisions (depending on how extensive/complete the first decision is). 1. The first step would require Council to make a decision to pursue the “owner CCO” option and begin consultation. 2. Following this first Council decision, the Council would need to: a) Prepare and undertake consultation in accordance with the principles of section 82 of the LGA 2002 (as required by section 56) to establish the new CCO including developing a statement of proposal (section 82A of the LGA 2002). b) Arrange for the preparation of a draft constitution for the new CCO and a draft Deed of Transfer (or equivalent document) for the transfer of the Marina land and assets to the new CCO.

c) Review what changes would be required to existing policies and delegations in relation to the Marina (including the policy about the appointment of directors to CCOs under section 57 of the LGA 2002).

3. Post-consultation (and assuming the outcome of the consultation is favourable to the establishment of the "owner CCO"), the Council would then need to deliberate on the results of the consultation, make a decision to approve the draft constitution and Deed of Transfer, and any changes required to existing policies and delegations, and formally establish the CCO.

4. Following the second (or third) meeting, the recruitment process for board members would commence. It might be necessary to negotiate remuneration, and possibly some of the terms of appointment, with candidates.

5. Once the CCO is established, the Deed of Transfer would need to be entered into by the Council and the new CCO, and the Marina land and assets would then be transferred.[6] In relation to the Deed of Transfer and due diligence, there could be some complexities to work through, including the definition of the land (given it involves reclaimed land, the coastal Marina area, and public reserves).

Time to establish	Costs to establish
This option is likely to take the longest (mostly due to any complexities with the transfer of assets). Matters that could have an impact on the timeframe include: • Two or three Council meetings are likely required.	The costliest of the options. • CCO establishment is relatively straightforward. The drafting of the new company's constitution and the Deed of Transfer need not be overly complex or costly. • Some cost associated with any due diligence process required

6 The Nelson Marina is not listed as a strategic asset in the Council's significance and engagement policy. If it were, then transferring the Marina to the new CCO would likely require consultation to amend the long-term plan to provide for the transfer of the Marina to the CCO.

• Mandatory consultation (but unlikely to unduly slow down the process). • Drafting the constitution, Deed of Transfer, and reviewing any changes to the Council's existing policies/delegations. • Recruitment process for the board. • Due diligence process (for transfer of assets).	as part of the transfer of land and assets. • If the Council were to use consultants for the recruitment process, it would incur consultant costs.

6.12 **Advantages and disadvantages**

Advantages	**Disadvantages AND RISKS**
• CCOs are a well-known and established structure used in local government. • More commercially oriented structure (For example, Council decision-making obligations do not apply to the CCO's board) with flexibility to respond to Council's non-commercial drivers (For example, through the statement of intent). • LGOIMA applies but not to meetings. • CCO would be able to borrow in its own right (either from the Council or third-party lenders). • Council will be able to appoint board members with relevant expertise and experience.	• Consultation required by section 56 of the LGA 2002 (although this is unlikely to create any undue delay in establishment). • May be political implications if the transfer of the Marina land the assets has the appearance of "privatisation". • If the CCO is a company or a CCTO (which it would be if it owns and operates the marina on a commercial basis), then it would be taxable • The transfer of land and assets would likely involve more cost and time to achieve (compared with the management CCO option). For example, it may be a complex issue to define the land (because it will likely involve reclaimed land, the coastal marine area, and reserve land etc) and there are

• Process is straightforward and requires less bespoke drafting compared with SABU option. • Marina would be a completely standalone entity able to be dealt with separately from the Council.	requirements in the LGA 2002 about transferring undertakings to CCOs.[7] • There may be complexities around the operation of the Council's bylaws and other regulations if the Marina is owned by a CCO, and the role of the harbourmaster would need to be considered. This would add some cost and time to this option.

Option 5: Establish a Limited Liability Partnership (LLP)

6.13 This option is similar to Option 4 (Owner CCO) with the key difference being the establishment of a limited partnership in addition to a new company, with the limited partnership to own and control the marina land and associated assets.

6.14 The Council establishes a CCO (eg a company) to become the "general partner" in the limited partnership.

6.15 The Council (as the "limited partner") and the new CCO become partners in a limited partnership. This includes entering into a limited partnership agreement. The limited partnership is itself a separate legal entity (separate from the Council as limited partner and the other CCO as general partner) and therefore a CCO in its own right.

6.16 The Council then transfers the marina land and assets to the newly established limited partnership to own and manage the marina and its operations.

6.17 The CCO general partner has a board and employs staff for the limited partnership (including the Manager Nelson Marina). The limited partnership staff report to the board of the CCO general partner, and the board is accountable to the Council as limited partner in the partnership and shareholder of the CCO general partner.

6.18 The CCO general partner would be responsible for the day-to-day management of the limited partnership (and therefore the marina) and, unless the limited partnership agreement provides otherwise, would be

7 Schedule 9 of the LGA 2002 also sets out certain requirements regarding the transfer of undertakings from a local authority to a CCO.

responsible for all the debts and liabilities of the limited partnership to the extent the limited partnership cannot meet such debts and liabilities.

6.19 The Council as limited partner would not be responsible for the day-to-day management of the limited partnership and would not be responsible for the debts and liabilities of the limited partnership, provided that the Council does not take part in the management of the partnership (in the sense set out in the Limited Partnerships Act 2008).

6.20 The limited partnership owns and manages the marina as an operation separate to the Council. The limited partnership could borrow in its own right (either from the Council or third parties).

6.21 The Council is able to influence the general partner CCO through well-established channels (including through the statement of intent) and therefore influence the way that the general partner manages the operation of the limited partnership. The limited partnership could also establish a relationship with the existing Nelson Marina Advisory Group.

6.22 To maintain the Council's limited liability position, care would need to be taken to ensure that such arrangements would not cause the Council to be viewed as taking part in the management of the limited partnership under the Limited Partnerships Act 2008.

6.23 **Process**

Steps to implement Option 5: Establish a LLP to own and manage the Marina (Owner CCO)
1. This process will require two or three Council decisions (depending on how extensive/complete the first decision is). The first step would require Council to make a decision to pursue the "limited partnership" option and begin consultation. 2. Following this first Council decision, the Council would need to: a) Prepare and undertake consultation in accordance with the principles of section 82 of the LGA 02 (as required by section 56) to establish the new general partner CCO and the limited partnership itself, including developing a statement of proposal (section 82A of the LGA 02). b) Arrange for the preparation of a draft constitution for the new general partner CCO, a draft limited partnership agreement for the limited partnership, and a draft Deed of Transfer (or equivalent document) for the transfer of the marina land and assets to the limited partnership.

c) Review what changes would be required to existing policies and delegations in relation to the marina (including the policy about the appointment of directors to CCOs under section 57 of the LGA 02).

3. Post-consultation (and assuming the outcome of the consultation is favourable to the establishment of the limited partnership), the Council would then need to deliberate on the results of the consultation, make a decision to approve the draft constitution, limited partnership agreement and Deed of Transfer, and any changes required to existing policies and delegations, and formally establish both the general partner CCO and the limited partnership.

4. Following the second (or third) meeting, the recruitment process for board members of the general partner CCO would commence. It might be necessary to negotiate remuneration, and possibly some of the terms of appointment, with candidates.

5. Once the general partner CCO is established, and the limited partnership agreement entered into (with the limited partnership then being formally established), the Deed of Transfer would need to be entered into by the Council and the new limited partnership, and the marina land and assets would then be transferred. In relation to the Deed of Transfer and due diligence, it is expected that there could be some complexities to work through, including the definition of the land (given it may involve reclaimed land, the coastal marina area, and possibly reserves)

Time to establish	**Costs to establish**
This option is likely to take about the same time as the Owner CCO option, but there may be some additional time involved in establishing the limited partnership. Matters that could have an impact on the timeframe include: • Two or three Council meetings are likely required. • Mandatory consultation (but unlikely to unduly slow down the process).	About the same costs to set up as the Owner CCO option, but there would be some additional cost involved in establishing the limited partnership. • The CCO company establishment is relatively straightforward, and the drafting of the new company's constitution and the Deed of Transfer need not be overly complex or costly. • The need for a separate limited partnership agreement and registration of the limited

• Drafting the constitution, limited partnership agreement, Deed of Transfer, and reviewing any changes to the Council's existing policies/delegations. • Recruitment process for the board. • Due diligence process (for transfer of assets).	partnership may add to the cost of this option compared with the Owner CCO option. • Some cost associated with any due diligence process required as part of the transfer of land and assets. • If the Council were to use consultants for the recruitment process, it would incur consultant costs.

6.24 **Advantages and Disadvantages**

Advantages	**Disadvantages and Risks**
Same as for Option 4 Owner CCO, <u>except</u> the following: • Limited partnerships are less common and well-known in the local government sector than simple company CCOs. • The establishment process and overall complexity would be higher than the Owner CCO option.	Same as for Option 4 Owner CCO, <u>except</u> the following: • This option involves the establishment of two CCOs (the general partner and the limited partnership itself), and the application of both company and limited partnership legislation in addition to the LGA 2002, and this adds to the overall complexity of the establishment process and governance arrangements for the marina. • Although the CCO general partner may be operated at, or near, break-even so that it would have nil or minimal taxable profit (comparable to the Management CCO option), the limited partnership itself will likely be a CCO for income tax purposes (Tax CCO) if it is a CCTO under the LGA (if it would own and operate the marina on a commercial basis). This means that marina income attributed to

	the Council (as limited partner under the 'flow through' income tax rules that apply to limited partnerships) would most likely be viewed as taxable income of the Council. The proposed local authority tax changes in the tax bill that is currently before Parliament would not alter this position.

7. Recommended Option Development

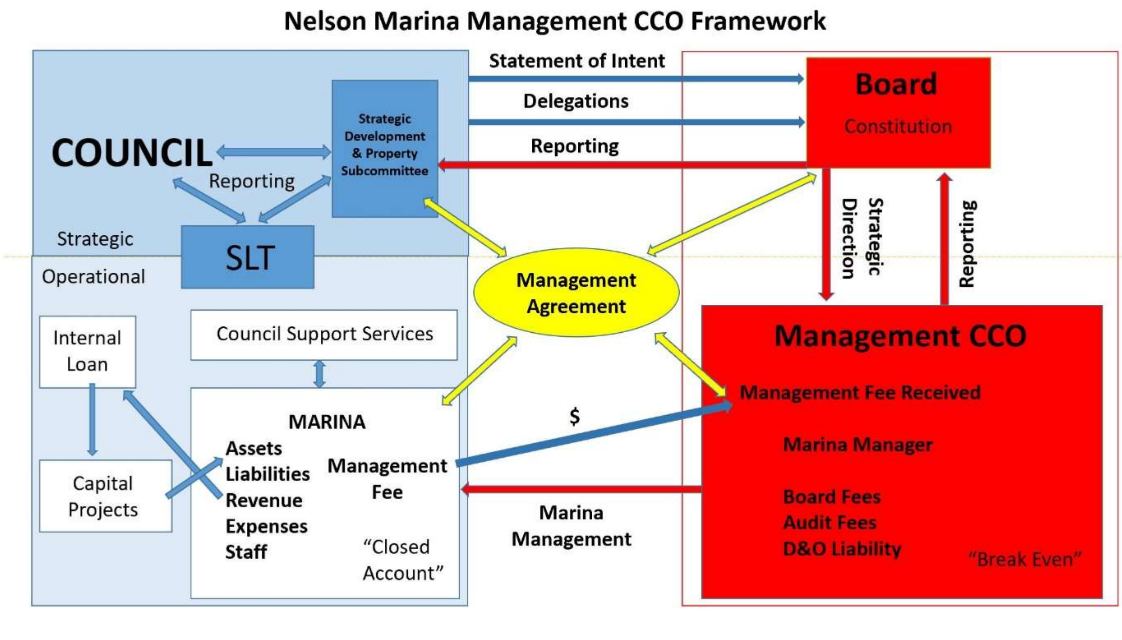
7.1 The recommended option for the future governance of Nelson Marina is through the formation of a Management Council Controlled Organisation (Management CCO) **(Option 3).**

7.2 Option 3 (Management CCO) will provide the Marina with a dedicated board of directors allowing the marina to move forward under the guidance of specialist knowledge and advice through a more dynamic commercially orientated framework.

7.3 Option 3 (Management CCO) structure does not produce any tax implications to Council (not subject to company tax).

7.4 The increased cost of operating a management CCO is estimated at approximately $107,000 per annum, this would be offset by increased efficiency and operating revenue.

7.5 Management Agreement – under a management agreement the new CCO would operate the Marina on behalf of Council's interests as the asset owner. The agreement would have a specific Statement of Intent and provide Delegations from Council to the Board of Directors of the CCO. The Board of Directors would report back to the Strategic Development and Properties Subcommittee and/or Council directly and Council would still have ultimate control over the management of their assets.



8. Conclusion

8.1 The recommended option for the future governance of Nelson Marina is through the formation of a Management Council Controlled Organisation (Management CCO) **(Option 3).**

9. Next Steps

9.1 If the recommended option is approved by the Council, then Officers will undertake the steps as outlined above.

9.2 This would include consultation with community and stakeholders, as per Section 56 of the LGA 2002.

9.3 Further updates will be reported to upcoming Strategic Development and Property Sub-committee meetings.

9.4 Present to Council an analysis and recommendation for the best asset owning company structure for further analysis.

Author: **Nigel Skeggs, Manager Nelson Marina**

Attachments

Attachment 1: Marina Governance s17a Review - Infracure - Final

Important considerations for decision making

1. Fit with Purpose of Local Government

Approving the recommended change to a Management CCO will support local democratic decision making and action to promote the social, economic, environmental, and cultural well-being of the Nelson community.

2. Consistency with Community Outcomes and Council Policy

The recommendation is consistent with Council's objectives to provide effective governance of community assets.

It will also allow the Marina to enhance the community Marina assets and provide a return to the shareholders (Nelson rate payers). The board of the Marina will still be guided by and accountable to the Council. Council will still retain full ownership of the assets.

3. Risk

The primary risks for Council in not changing the Governance model of the Marina to a Management CCO are both financial and reputational.

Having a suitably qualified, commercially orientated Board of Directors with direct responsibility for financial performance of the Marina will significantly reduce these risks to Council.

A Management CCO model will allow for accountability of performance through a third party to Council and ensure that a model is in place to be dynamic enough to achieve said goals in the desired timeframes.

As the Marina develops prices charged for services will increase. Having a commercial board will help to shelter elected members from the likely political pressure exerted by some customers who do not want to see change or prices increase.

4. Financial impact

The immediate costs of setting up a Management COO will come through the cost of consultants, additional Council staff hours, internal legal advice and outside legal counsel. This will be offset by improved financial and operational performance into the future.

Ongoing additional costs will come in the form of Directors Fees, Company Secretary fees and the costs associated with running the board.

5. Degree of significance and level of engagement

This matter is of medium significance as it requires the formation of a new Governance structure to manage and control a rate payer owned asset.

Regardless of the perceived level of significance however, consultation is required under Section 56 of the Local Government Act before a Council Controlled Organisation (CCO) is established.

6. Climate Impact

This decision does not have an impact on climate change. Responsiveness to climate impact would become a performance measure for a new Board.

7. Inclusion of Māori in the decision making process

No engagement with Māori has been undertaken in preparing this report. Iwi would be advised of any upcoming consultation through usual avenues.

8. Delegations

The Strategic Property and Development Subcommittee has the following delegations to consider the future Governance of Nelson Marina:

Areas of Responsibility:

- *Marina Precinct*

Delegations:

- *Powers to decide the developing, monitoring and reviewing of strategies, policies and plans, with final versions to be recommended to Council for approval.*

Powers to Recommend to Council:

- *Approval of final versions of strategies, policies and plans;*
- *All other matters within the areas of responsibility or any other matters referred to it by Council.*