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redlich

12 August 2011

The General Manager
Adjudication Branch
Australian Competition and Consumer Commission
GPO Box 3131
CANBERRA ACT 2601

Partner Donna Bartlett
Direct Line +61 (02) 8083 0420
Email donna.bartlett@holdingredlich.com.au
Our Ref DXB:SCN:1160 0315

Overnight express post

Dear Sir/Madam

Exclusive Dealing Notification: Third Line Forcing

DLL Wilton Pty Limited (the **Applicant**) wishes to submit an exclusive dealing notification (**Notification**) in accordance with section 93(1) of the *Competition and Consumer Act 2010 (Act)* in relation to conduct falling within sections 47(6) and 47(7) of the Act (exclusive dealing).

Please note that the Notification is lodged on the same basis as Notification N93213 which the ACCC allowed to stand on 5 November 2007 (**Previous Notification**).

Under the Previous Notification, the Applicant offered residential lots for sale on the condition that the customer contract with Stream Essential Services Pty Ltd for the provision of sewerage and recycled water services (**Notified Conduct**).

The Applicant wishes to continue with the Notified Conduct:

- 1 but now replace Stream Essential Services Pty Ltd with Veolia Water Solutions & Technologies (Australia) Pty Ltd (ACN 055 254 003) (**Veolia**); and
 - 2 oblige purchasers under the Standard Contract for Sale used at Bingara Gorge to enter into customer contracts with Veolia on or before completion of their purchase,
- as set out in more detail in the Notification.

Previously, Bradcorp Wilton Park Pty Limited (**Bradcorp**), as land owner, also lodged a notification (Notification N93222) in relation to the Notified Conduct. However, we note that the only obligation Bradcorp has under the Standard Contract for Sale is to transfer title to the purchaser as set out in clause 32.3(c) of the Standard Contract of Sale and as further described in the Notification.

Accordingly, we are of the view that the only party engaging in the Notified Conduct is the Applicant.

S:1988190_3 SCN

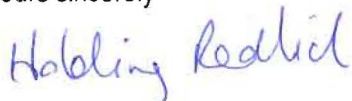
S:1988190

In support of the Notification, we, on the Applicant's behalf, enclose the following:

- 1 a completed Form G for the Applicant (including a detailed submission in support of the Notification in Attachment A); and
- 2 a cheque in the amount of \$100 payable to the Australian Competition and Consumer Commission.

Should you have any queries with respect to the Notification, please contact Szemei Ng by telephone at (02) 8083 0321 or by email at szemei.ng@holdingredlich.com.au.

Yours sincerely

A handwritten signature in blue ink that reads "Holding Redlich". The signature is written in a cursive, flowing style.

HOLDING REDLICH

Enclosures 2



Form G

Commonwealth of Australia
Competition and Consumer Act 2010 — subsection 93 (1)
NOTIFICATION OF EXCLUSIVE DEALING

To the Australian Competition and Consumer Commission:

Notice is hereby given, in accordance with subsection 93 (1) of the *Competition and Consumer Act 2010*, of particulars of conduct or of proposed conduct of a kind referred to subsections 47 (2), (3), (4), (5), (6), (7), (8) or (9) of that Act in which the person giving notice engages or proposes to engage.

1. Applicant

(a) **Name of person giving notice:**

N95516 DLL Wilton Pty Limited (ACN 110 022 976) (DLLW)

(b) **Short description of business carried on by that person:**

DLLW is involved in the business of large scale community developments, residential property sales, property management, project management and co-ordination and other property development.

(c) **Address in Australia for service of documents on that person:**

Donna Bartlett
Partner
Holding Redlich
Level 65, MLC Centre, 19 Martin Place
Sydney, NSW, 2000

2. Notified arrangement

(a) **Description of the goods or services in relation to the supply or acquisition of which this notice relates:**

DLLW continues to develop an area of land known as Bingara Gorge in accordance with the *Community Land Management Act 1989* and the *Community Land Development Act 1989 (Community Schemes Legislation)*. This legislation regulates the subdivision of land by way of a community plan. The development is known as the Bingara Gorge Residential Community Scheme (**Residential Scheme**) and will comprise approximately 1,165 residential lots and association property (comprising approximately 120 Ha of environmentally sensitive bushland).

There is a standard contract for sale used for the sale of residential lots within the Residential Scheme (**Standard Contract**).

Anyone who purchases a residential lot within the Residential Scheme (**Precinct Development Lot**) must comply with the Community Management Statement registered at the office of the Land and Property Information in connection with the Residential Scheme (**Residential CMS**). The Residential CMS is a legal instrument created in accordance with the Community Schemes Legislation. It governs participation in the Residential Scheme.

The Standard Contract and the Residential CMS are intended to be the key mechanisms used to create, amongst other things, a contractual basis upon which purchasers of Precinct Development Lots can be billed individually for the sewerage and recycled water services they receive to their Precinct Development Lot.

Veolia Water Solutions & Technologies (Australia) Pty Ltd (ACN 055 254 003) (**VWS**) is the Water Industry Competition Act (**WICA**) licence holder to operate and maintain the Recycled Water Treatment Plant (**RWTP**) and the network and has the retail supplier licence to provide the sewerage and recycled water services to each Precinct Development Lot. Initially, DLLW will maintain ownership of the infrastructure for reticulation and treatment of the sewerage and recycled water services.

(b) Description of the conduct or proposed conduct:

The Standard Contract will require all purchasers of Precinct Development Lots to enter into a tri-party customer contract with the WICA licence holder for the provision of the sewerage and recycled water services (**RWTP Services**) to their Precinct Development Lot.

This arrangement is reinforced by the operation of By-law 19.4 in the Residential CMS.

Pursuant to clause 66 of the Standard Contract, DLLW will not sell a block of land in the Residential Scheme to a prospective purchaser who will not agree to enter into a tri-party customer contract with the WICA licence holder and DLLW.

Purchasers of Precinct Development Lots will not be permitted to install their own individual or private septic systems separately from the RWTP Services provided by the WICA licence holder.

Refer to Attachment A for further details.

3. Persons, or classes of persons, affected or likely to be affected by the notified conduct

(a) Class or classes of persons to which the conduct relates:

The class of persons to which the relevant conduct relates are the persons who will be prospective registered proprietors, lessees, occupiers or mortgagors in

possession of Precinct Development Lots (**Owners and Occupiers**) in the Residential Scheme.

(b) Number of those persons:

(i) At present time:

There are currently 160 owners of Precinct Development Lots in the Residential Scheme. There are currently 6 exchanged contracts with purchasers of Precinct Development Lots.

(ii) Estimated within the next year:

It is estimated that there will be at least 100 Precinct Development Lot sales over the next 12 months.

(c) Where number of persons stated in item 3 (b) (i) is less than 50, their names and addresses:

Not applicable.

4. Public benefit claims

(a) Arguments in support of notification:

DLLW is requiring that Owners and Occupiers enter into a tri-party customer contract with the WICA licence holder and DLLW as authorised person under that licence to ensure that there is the safe and sanitary disposal of sewage within all parts of the Residential Scheme. This is necessary to protect residents from environmental and health hazards.

The concept of having a centralised sewer service for the development is already supported in the rezoning documentation and in existing Council approvals.

Critical mass and economies of scale are also fundamental to operating the RWTP on an economical basis to ensure that the RWTP Services are provided at a reasonable cost for residents. As the sewerage services are not a metered service, it is impractical to make allowances for any Precinct Development Lots that might claim not to require such a service.

Refer to Attachment A for further details.

(b) Facts and evidence relied upon in support of these claims:

Refer to Attachment A.

5. Market definition

Provide a description of the market(s) in which the goods or services described at 2 (a) are supplied or acquired and other affected markets including: significant suppliers and acquirers; substitutes available for the relevant goods or services; any restriction on the supply or acquisition of the relevant goods or services (for example geographic or legal restrictions):

There is no dominant provider of residential properties in the Wilton area. If a potential buyer wishes to purchase a lot in the wider region, there are numerous choices available. Apart from the numerous new developments, there are also established homes and redevelopment opportunities on offer in the area.

Refer to Attachment A for further details.

6. Public detriments

- (a) Detriments to the public resulting or likely to result from the notification, in particular the likely effect of the notified conduct on the prices of the goods or services described at 2 (a) above and the prices of goods or services in other affected markets:**

There are no detriments to the public resulting or likely to result from the notification.

The nature of a community scheme requires purchasers of Precinct Development Lots to accept the nature of the common facilities and to accept the common future choices made together in meetings of the residential community association.

By making the choice to purchase a Precinct Development Lot in the Residential Scheme, purchasers are choosing to accept the RWTP Services in the form and subject to the limitations that have been determined by DLLW to be the most advantageous for the members of the Residential Scheme as disclosed in the Residential CMS.

Refer to Attachment A.

- (b) Facts and evidence relevant to these detriments:**

Refer to Attachment A.

7. Further information

- (a) Name, postal address and contact telephone details of the person authorised to provide additional information in relation to this notification:

Donna Bartlett
Partner
Holding Redlich
Level 65, MLC Centre, 19 Martin Place
Sydney, NSW, 2000

Telephone: (02) 8083 0420

Dated 12 August 2011

Signed by/on behalf of the applicant

(Signature) *Donna Bartlett*

DONNA BARTLETT
(Full Name)

HOLDING REDLICH
(Organisation)

PARTNER
(Position in Organisation)



ATTACHMENT A

Submission to the Australian Competition and Consumer Commission in Support of Notification under section 93(1) of the *Competition and Consumer Act 2010* (Cth)

Introduction

1. This submission is in support of the notification lodged by DLL Wilton Pty Limited (ACN 086 388 212) (**DLLW**) under section 93(1) of the *Competition and Consumer Act 2010* (**Act**) in relation to conduct falling within sections 47(6) and 47(7) of the Act.
2. The notification and this accompanying submission are lodged on the same basis as Notification N93213 which was allowed to stand on 5 November 2007. Notification N93213 is no longer applicable as DLLW now wishes to substitute the RWTP operator named in Notification N93213 (Stream Essential Services Pty Limited) with Veolia Water Solutions & Technologies (Australia) Pty Ltd (ACN 055 254 003) (**RWTP Operator**).
3. The tests to be applied by the Commission are set out at section 93(3A)(b) of the Act, which requires that the Commission assesses whether the public benefits associated with the relevant conduct outweigh any likely public detriment.

Bradcorp

4. Bradcorp is part of the Bradcorp Group. The Bradcorp Group has expertise in building and developing urban housing projects throughout Australia.
5. Bradcorp has been established as the special purpose developer of a project known as Bingara Gorge being developed at Wilton, NSW (**Project Land**).
6. The Project Land is being developed in accordance with a State Development Agreement between the NSW Minister for Planning and Bradcorp dated 14 September 2005.
7. Bradcorp, as the land owner, has appointed DLL Wilton Pty Limited (**DLLW**) as the developer of the first phase of the Project Land, being the eastern portion of the Project Land, under the Project Development Agreement between Bradcorp, Delfin Lend Lease Limited and DLLW dated 15 August 2005 (**PDA**).
8. Bradcorp, as land owner, is a party to the Standard Contract, however, we are of the view that Bradcorp is not the party engaging in third line forcing by virtue of clause 32 of the standard contract of sale.
9. Under clause 32.1 of the Standard Contract, DLLW will perform all of the obligations of Bradcorp under the Standard Contract, such that all references to Bradcorp under the Standard Contract will be taken to be references to DLLW. The only obligation that Bradcorp has under the Standard Contract is to execute and

deliver to the purchaser those documents necessary to transfer title to the purchaser, pursuant to clause 32.3(c) of the Standard Contract.

DLLW

10. DLLW is a part of the Lend Lease Group. The Lend Lease Group has expertise in building and developing urban housing projects throughout Australia.
11. DLLW has been established as the special purpose developer of the Project Land for the purposes of the PDA.

Description of the Project Land

12. The major component of the Project Land is a community scheme comprising residential lots and community property (**Residential Scheme**). There may be additional community schemes for residential, retail and industrial uses within the Project Land. Each community association will be governed by a Community Management Statement (**CMS**). Some of the community associations will be further divided into precincts governed by Precinct Management Statements (**PMS**).
13. The Residential Scheme will comprise the development of 1,165 new residential dwellings in precincts within the Residential Scheme (**Precinct Development Lots**). The residential part of the Project Land will have an eventual population of approximately 3,500 residents. The rights of the Precinct Development Lot owners within the Residential Scheme are governed by the CMS registered at the office of the Land and Property Information in connection with the Residential Scheme (**Residential CMS**).
14. The Residential CMS contains by-laws and plans that regulate the management and operation of the Precinct Development Lots within the Residential Scheme.
15. The terms of the Residential CMS are binding on each person who is a registered proprietor, lessee, occupier or mortgagor who is in possession, of a Precinct Development Lot within the Residential Scheme (**Owners and Occupiers**).

RWTP

16. The Project Land is being developed on the basis that it incorporates a self-sufficient sewerage and recycled water service dedicated to the service and benefit of each of the lot owners and the community associations within the Project Land, including the Owners and Occupiers.
17. The RWTP will provide the sewerage and recycled water services to each lot owner of each community association within the Project Land, including the Owners and Occupiers.
18. The RWTP Services are proposed to be provided in stages via differing forms of service infrastructure that correspond to the demand arising from the actual

progression and expansion of the development and of the construction of houses on the Project Land. The planned stages are:

- (a) **Stage 1:** This stage covers the period until the RWTP is operational in accordance with the WICA licences. During this period, sewage will be transferred by gravity to a central pump station and removed off-site for treatment by a licensed sewerage contractor;
- (b) **Stage 2:** This stage covers the period between the establishment of the initial RWTP (Eco Disk) to the ultimate RWTP (MBR – Membrane Bioreactor). The initial Eco Disk plant has been designed and constructed in stages, with the first stage plant intended to begin operation in August 2011, which will have 150kL/day capacity to service approximately 300 lots. This plant will be producing recycled water to service the golf course for the first three years. The second stage of the Eco Disk plant will be to expand the plant by an additional 300kL/day, taking the total lots serviced to 600. It is proposed that this plant will continue to provide recycled water to the golf course for irrigation purposes. At some point in time the rising main between the gravity collection well and the RWTP will need to be upgraded to the ultimate capacity and the WICA licence amended as the current licence is only approved to 400kL/day capacity; and
- (c) **Stage 3:** This is the final stage and will be achieved when the ultimate RWTP (**MBR**) has been completed, which will service the remaining lots from 600 to 1,165. The commissioning of the MBR plant will provide the water supply to be supplied back to the residential homes. It is anticipated on projected lots growth for the development, that this will occur sometime in financial year 2015. At this point in time the Eco-Disk plant servicing 600 lots will continue to provide irrigation recycled water to the golf course and the MBR plant will be providing recycled water to the 1165 residential lots.

Standard contract for sale used for the sale of a Precinct Development Lot

19. The standard contract for sale used at Bingara Gorge regarding the sale of a Precinct Development Lot contains the following relevant conditions:

- “66 The Purchaser acknowledges and agrees that:
- (a) the Purchaser has read and understood the disclosures set out in paragraphs 1.1 to 1.9 in the Schedule of Disclosures regarding the STP Services; and
 - (b) the Purchaser must execute and deliver to the Vendor, on or before completion and as a condition of completion, the Customer Contract and must connect to the STP Service Infrastructure.

Customer Contract means a contract in or substantially in the form of attachment I.

STP Services means the services provided by the STP Operator in relation to the removal of sewage and the production and delivery of recycled water throughout the Community Parcel.

20. The Schedule of Disclosures contains the following relevant disclosures:

- “1.1 The Purchaser is required under the contract and under the Community Management Statement to enter into a Customer Contract, in relation to the provision of the STP Services, on or before completion of this Contract.
- 1.2 The Independent Pricing and Regulatory Tribunal of New South Wales may review the fees and charges payable in relation to the provision of sewerage services under the Customer Contract.
- 1.3 In addition to the ongoing fees and charges payable under the Customer Contract, the Purchaser must also pay the RWTP Operator the Connection Fee and Account Initiation Fee on or before completion of this contract.”

Residential CMS

21. The Residential CMS contains the following relevant conditions:

- “19.4 The registered proprietor at any time of a *Precinct Development Lot*:
 - (a) is taken to be in a contractual relationship with the *STP Operator* on the terms set out in the form of the agreement from time to time adopted by the *Community Association* for the purposes of this by-law 19.4 (**STP Agreement**); and
 - (b) must, if so requested by the *STP Operator*, execute and enter into a written agreement with the *STP Operator* in the form of the agreement referred to in by-law 19.4(a).
- 19.5 The *Community Association* has the power under this by-law 19.5 to include in the form of the agreement referred to in by-law 19.4, provisions to the effect that:
 - (a) the fee for providing the relevant *Service* can be invoiced directly to the person to whom the *Service* was provided by the person who provided the *Service*; and
 - (b) if a person to whom the relevant *Service* is provided does not promptly pay the invoiced fee for such provision, the *Community Association* may on demand pay the invoiced fee to the person who provided the *Service* and then recover the amount so paid from the person who has not paid the invoiced fee.

- 19.12 An *Owner or Occupier* of a *Precinct Development Lot* must not install or allow to remain in their lot a private Sewerage disposal service, eg, a septic system.
- 19.13 An *Owner or Occupier* of a *Precinct Development Lot* must ensure that their lot:
- (a) is and remains connected to the *STP Network*; and
 - (b) is not connected to any service for the removal of Sewerage other than the *STP Network* or to any private Sewerage disposal service installed in their lot.
- 19.14 An *Owner or Occupier* of a *Precinct Development Lot* must ensure that their lot is and remains connected to the *STP Network*.”

Description of the relevant conduct

22. The standard contract for sale of a Precinct Development Lot will be executed by each of Bradcorp, DLLW and the purchaser. Bradcorp is a party as it is the legal owner of the Project Land. DLLW is a party as it has been delegated all of the obligations to implement the contract for sale on behalf of itself and Bradcorp in accordance with the PDA.
23. As stated above in paragraphs 8 and 9, although Bradcorp is a party to the standard contract of sale, given that clause 32 requires DLLW to perform all of Bradcorp’s obligations under the Contract (subject to clause 32.2) we are of the view that DLLW is the sole party engaging in the relevant third line forcing conduct.
24. The standard contract for sale will require all purchasers of Precinct Development Lots to enter into a tri-party customer contract with the RWTP Operator for the provision of the RWTP Services to their Precinct Development Lot.
25. DLLW will not sell a Precinct Development Lot to a prospective purchaser who does not agree to this obligation.
26. To ensure that the whole Project Land, including the Residential Scheme and each Precinct Development Lot, retains its integrity and remains environmentally safe and sanitary, DLLW and Bradcorp have drafted the Residential CMS so that purchasers of Precinct Development Lots are required to connect to and remain connected to the RWTP Services to the exclusion of all other forms of sewerage removal or treatment services, including private septic systems.
27. Under the Residential CMS, Bradcorp and DLLW require that the RWTP Operator be the sole provider of the RWTP Services for Owners and Occupiers and that Owners and Occupiers:
- (a) connect to the RWTP infrastructure;

- (b) remain connected to the RWTP infrastructure;
 - (c) not connect to any service for the removal of sewage other than the RWTP infrastructure; and
 - (d) not install or maintain private systems of sewage disposal, such as septic systems.
28. To reinforce the obligations within the standard contract for sale, the Residential CMS provides that all Owners and Occupiers:
- (a) are taken to be in a contractual relationship with the RWTP Operator for the provision of the RWTP Services on the terms set out in the form of the agreement from time to time adopted by the Community Association; and
 - (b) will be required, if requested by the RWTP Operator, to execute and enter into a written agreement with the RWTP Operator for the provision of the RWTP Services.
29. The requirement that the Owners and Occupiers exclusively contract with the RWTP Operator for the RWTP Services breaches sections 47(6) and 47(7) of the Act, as it is conduct commonly known as third line forcing.
30. For the purpose of this notification, DLLW considers that the relevant market is the residential real estate market in the Wollondilly, Camden and Campbelltown local government areas of NSW.

Public Benefits

31. The relevant conduct is of benefit to the public for the following reasons:
- (a) it ensures that there is a safe and sanitary disposal of sewage waste in the Project Land by a single reputable operator of the RWTP;
 - (b) it ensures that the RWTP Services will be provided throughout the Project Land by one system and by one operator in a consistent manner;
 - (c) it minimises any risks associated with individual private septic systems within the Project Land that are not serviced by the RWTP Operator, including risks of:
 - water leakage, leading to wastage of a precious community and environmental resource;
 - sewage leakage into the ground, causing contamination of land and water systems, including neighbouring land;
 - cost and practical difficulties of repairing faulty or leaking individual private septic tanks;

- frustration and dissatisfaction of affected residents in the Community Association; and
 - health risks, including possible disease;
- (d) it ensures that the RWTP Operator will have the knowledge of the Project Land site constraints and will be able to take into account the environmental requirements of the individual lots in providing the RWTP Services; and
- (e) it will ensure that the provision of the RWTP Services complies with all municipal, state and federal laws.
32. The system of sewage removal to be used by the RWTP Operator in the RWTP Services is an environmentally sound method.

No Public Detriment

33. The relevant conduct does not result in any public detriment for the following reasons:
- (a) it is necessary and a requirement of WICA that the RWTP Operator is in a financial position to provide the infrastructure to service the entire Residential Scheme;
- (b) the relevant conduct is not designed as a way for DLLW or any of their associates to gain profit at the expense of Owners and Occupiers. In particular:
- the RWTP Operator will be providing the RWTP Services on an arm's length basis as the DLLW will:
 - (i) use its own capital to design, build and maintain the infrastructure necessary to provide the RWTP Services;
 - (ii) recover a portion of its capital expenditure from Owners and Occupiers as part of the fee provision or providing the RWTP Services but only to the extent that the independent third party expert agrees is commercially fair and reasonable; and
 - (iii) given the involvement of independent third party expert review, be limited in charging a price that is a market price or better for the provision of equivalent services;
- (c) the relevant conduct has been adopted by DLLW to minimise any potential environmental damage, health risks or inconvenience to the

Owners and Occupiers and the other residents of the Residential Scheme.
In particular:

- the Residential Scheme has been designed and developed to a high environmental level with the intention that environmentally minded purchasers consider buying lots;
 - central to the sales pitch is that there will be a high level of environmentally friendly services, including sewerage removal services;
 - sewage removal services can only be achieved within this standard if they are centrally and consistently provided by one operator in one system;
 - the standard cannot be achieved if Owners and Occupiers are permitted to remove or treat their sewage outside of the RWTP Services; and
 - the community property within the Residential Scheme will comprises approximately 120 Ha of environmentally sensitive bushland; and
- (d) the property market in the area is highly competitive and the land packages offered by DLLW in the Residential Scheme will compete with an array of alternative residential developments and dwellings, including the offerings of other residential property developers. The adoption of a single, mandated, provider of the RWTP Services in the Scheme provides significant comfort to potential purchasers that they will be purchasing in a well managed and environmentally safe and efficient development that will not be changed or threatened in the future by the actions of individual residents.

Conclusion

DLLW submits that the facts advanced in this notification demonstrate that:

- (a) the relevant conduct will not result in any public detriment; and
- (b) the likely public benefit will outweigh any detriment likely to result from the relevant conduct.