

24 June 2016

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Mr Darrell Channing  
Director, Adjudication Branch  
Australian Competition and Consumer Commission  
By email: [adjudication@acc.gov.au](mailto:adjudication@acc.gov.au)

Dear Sir,

### **A91530 – The St George Region of Councils – Submission by Cleanaway Waste Management Ltd**

We refer to the draft determination issued by the Australian Competition and Consumer Commission (the **ACCC**) on 1 June 2016 in respect of the application for revocation of authorisation A91019 and substitution of authorisation A91530 lodged by Hurstville City Council, Kogarah Municipal Council and Rockdale City Council (the **Applicants**).

For the reasons below, Cleanaway Waste Management Limited (**Cleanaway**) submits that the ACCC should deny authorisation A91530.

#### **1. Background to Cleanaway**

Cleanaway is an ASX-listed waste management company, which operates collection, processing, treatment and landfill assets from over 200 locations across Australia.

Cleanaway has considerable experience in providing waste and recycling collection services (among other services) to local councils across Australia, including in New South Wales. Cleanaway regularly seeks opportunities to bid for municipal waste management contracts, and to improve its service offering to councils and their residents under those contracts.

#### **2. Overview of submissions**

The draft determination proposes to:

- revoke authorisation A91019, which enables the Applicants to jointly tender and contract for the provision of all waste and recycling collection services in their respective local government areas until 30 June 2018 (the **existing authorisation**). This authorisation was granted in accordance with a determination issued on 21 March 2007 (the **2007 Determination**); and
- substitute authorisation A91530, which will enable the Applicants to jointly contract (but not tender) for the provision of all waste and recycling collection services until 2 February 2023 (the **Conduct**). The purpose of the substituted authorisation is to enable the Applicants to extend their waste and recycling collection contracts with SUEZ Recycling & Recovery Pty Ltd (**SUEZ**) for a further five years.

Cleanaway submits that the net public benefit assessment required by section 90 of the *Competition and Consumer Act 2010* (Cth) (the **CCA**) is not satisfied and it opposes the proposed authorisation on the basis that:

- (a) (**public benefit**) there is an insufficient basis for a conclusion that the Conduct will provide cost savings compared to a situation where the Applicants either jointly or individually enter new contracts following the expiry of the existing authorisation in 2018. While Cleanaway is unable to comment on the confidential information provided by the Applicants on which the ACCC relies in its draft determination, Cleanaway submits that:
- (i) if joint or separate tenders were conducted by the Applicants in 2018, those processes may elicit offers on more attractive terms than the Applicants receive under their current contract. A tender process is the only means to quantify the savings or benefits which might be delivered by alternative service providers and those savings or benefits must be taken into account before concluding that the 5 year extension of the current contract will result in any net benefits; and
  - (ii) significant changes have occurred, or are proposed, to the Applicants as part of an ongoing council amalgamation process, which undermines the ability to reliably assess the public benefit of the Conduct.
- (b) (**public detriment**) the lessening of competition constituted by the Conduct is likely to result in substantial public detriment, because:
- (i) it is inefficient to extend waste collection contracts beyond 10 years without a new tender process. A likely deterioration of critical collection equipment and inhibition of technological or process improvements could directly affect the service provided to ratepayers, and may also increase the cost of those services;
  - (ii) the contract for the St George Region of Councils is substantial and simply comparing the number of councils affected by this Determination with the total number of Councils in the Sydney metropolitan area is not a basis for concluding that there is a significant number of other opportunities to bid for collection contracts – the provision of collection services to many councils is not contestable because they undertake collection themselves; and
  - (iii) little, if any, weight should be placed on the submission that the Applicants seek to promote the interests of their ratepayers, in circumstances in which the Applicants have no information about the cost savings and innovations which might result from competition between possible alternative bidders for the collection services in a tender process in 2018.

These submissions are outlined in greater detail below.

### **3. Public benefits**

#### **3.1. Cost savings estimated by Applicants**

In assessing the public benefit which is likely to result from the Conduct, the draft determination concludes that - in a future without the Conduct - the existing authorisation would run until 30 June 2018, at which time the Applicants would seek a new authorisation to conduct joint tendering and collection services or run individual tender processes.

In comparison to a future in which the Applicants jointly or individually enter new collection contracts, the ACCC has accepted that the Conduct is likely to:

- (a) (**tender costs**) reduce transaction costs, by deferring the expense associated with conducting joint or individual tender processes in 2018; and

- (b) (**other costs**) continue to result in cost savings which have been achieved under the existing collection contracts.<sup>1</sup>

These savings have apparently been quantified in confidential information submitted by the Applicants and the ACCC's reasons in respect of them are brief. Cleanaway is therefore unable to comment on the extent of, or method of calculating, the claimed savings.

Cleanaway accepts that the tendering costs outlined in (a) above would be deferred by extending the contracts. Cleanaway does not know, however, whether or to what extent those savings are off-set by any increase in contract administration expenses during the life of the contract.

However, Cleanaway does not expect that the service model or efficiencies which enable the supposed savings in (b) are unique to the incumbent contractor, SUEZ. It is entirely possible that a competing tenderer would, in 2018, be able to offer a service which delivers greater benefits than the existing contract and provides savings which exceed the transaction costs associated with conducting a tender. In Cleanaway's experience, while the costs of running a tender for municipal collection contracts can be substantial, they typically constitute a small proportion of the total value of a lengthy collection contract.

Ultimately, a tender process is the only means of determining whether SUEZ would provide savings relative to alternative bidders, or a service which is more beneficial for ratepayers, during the period 2018 to 2023. All waste collection companies are under pressure to reduce average costs and the extent and rate of this reduction could not have been foreseen in 2007. In other words the extension of the contract and its current pricing mechanisms, without market testing, deprives the Applicants and their rate-payers of the opportunity to benefit from cost reductions since 2007. Further, even if SUEZ was ultimately able to submit the most attractive offer in a tender process, there is a real prospect that competition from alternative bidders would incentivise it to further reduce its prices or improve services.

### 3.2. Other claimed benefits

In addition to likely cost savings, the Applicants have identified a range of other benefits, which are summarised at paragraph 11 of the draft determination. These include:

- improved services, such as reducing the use of landfill through the application of new technologies;
- joint education programs and public campaigns; and
- environmental benefits.

These categories of benefit are not unique to the current contracting arrangements with SUEZ, and there is no basis upon which to conclude that similar or more beneficial arrangements could not be implemented under contracts with an alternative provider. Further, Cleanaway considers that many of these benefits – such as joint education programs – could be jointly delivered by the Applicants without authorisation A91530.

### 3.3. Amalgamations and uncertainty of benefits

Cleanaway understands that since the application for authorisation A91530 was made, two of the Applicants have ceased to exist and an ongoing amalgamation process has introduced uncertainty about the nature of the collection services which will be required after the expiry of the existing authorisation.

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<sup>1</sup> Paragraphs 16-18 of the draft determination.

On 12 May 2016, a proclamation under the *Local Government Act 1993* (NSW) dissolved two of the Applicant - the councils of Hurstville and Kogarah - and replaced them with a new council, "Georges River Council".<sup>2</sup> Elections are due to be held for this new council on 9 September 2017, and interim administrators and managers have been appointed until the election is held.<sup>3</sup> There is also an ongoing proposal to amalgamate the third Applicant, Rockdale City Council, with the City of Botany Bay.<sup>4</sup>

Cleanaway anticipates that this development will require an amendment to the application in this matter and may also affect the status of the existing authorisation. It is unclear how this affects the existing contract between the Applicants and SUEZ. Even if the application is amended to cover joint contracting by the post-amalgamation entities (ie by the inclusion of the City of Botany Bay) and the SUEZ contract can be extended, the amalgamation process creates considerable uncertainty about the public benefits that might arise from the Conduct. In particular, it is unclear whether:

- (a) the services to be provided to the post-amalgamation councils, and the cost of those services, will change as a result of the amalgamations; and
- (b) the area over which joint services ought to be provided would expand or change, particularly given the possible amalgamation of Rockdale City Council with the City of Botany.

Conversely, it is likely that there would be far greater clarity about the status of the councils and the most beneficial structure of their collection services in or around 2018, when the existing authorisation is due to expire. This expiry falls shortly after the first post-amalgamation council elections are due to be held in September 2017.

For the reasons above, Cleanaway submits that the ACCC should not be satisfied that net cost savings and other benefits are likely to result from the Conduct, compared to a situation where the Applicants either jointly or individually enter new contracts following the expiry of the existing authorisation. A proper counter-factual analysis by the Applicants would necessarily include their best assessment of potential savings resulting from the competitive tension induced by a competitive bidding process. There is no suggestion that the Applicants have made such an assessment or supplied it to the ACCC.

#### **4. Public detriments**

##### **4.1. Removing tender opportunities**

In paragraph 21 of the draft determination, the ACCC "acknowledges that the current application for authorisation involves conduct that will remove the opportunity for waste collection service providers to compete...for a further five years".

Cleanaway is unable to quantify the anti-competitive detriment associated with this lessening of competition, but observes that:

- competition in the waste management industry, including for municipal waste and recycling collection contracts, is vigorous;
- councils are able to switch between providers of waste collection and other services, and it is not uncommon for incumbent providers to lose tenders following the expiry of a contract period; and

<sup>2</sup> See Local Government (Council Amalgamations) Proclamation 2016 (NSW), section 4 (Amalgamated areas).

<sup>3</sup> Local Government (Council Amalgamations) Proclamation 2016 (NSW), Schedule 6 (Provisions for Georges River Council).

<sup>4</sup> See <https://www.strongercouncils.nsw.gov.au/pending-councils/city-of-botany-bay-and-rockdale-city-council/>

- the contract for municipal collections in the St George region is substantial and Cleanaway expects that it would attract interest from a number of potential bidders (whether joint or individual tenders were conducted at the expiry of the existing authorisation).

#### 4.2. Inefficient contract length

Cleanaway considers that an extension of the contract until 2023 locks out competing providers for a period which is inefficient and detrimental to the public.

The ACCC granted the existing authorisation on the understanding "that a further tender process will be conducted when the proposed contracts end in 2018", which would "create a competitive environment for the provision of waste and recycling collection services as potential suppliers bid for the market".<sup>5</sup> The 2007 Determination also observed that "a 10 year contract is likely to encourage competition by making the tender attractive to a larger pool of industry participants", but that a longer period would not be justified because:

- (a) expensive equipment will need to be replaced; and
- (b) the longer term may inhibit flexibility in responding to new technologies for recovering waste.<sup>6</sup>

Both of these concerns weigh against granting the substitute authorisation.

In relation to the need to replace equipment, Cleanaway submits that:

- the collection vehicles which have been utilised by SUEZ under the current collection contract are likely to require substantial maintenance or replacement before 2023. It is highly unlikely that any collection vehicle would function efficiently for more than 12 years (at a maximum);
- it is not uncommon for municipal collection contracts to be entered into for a five year period, and it is generally efficient for collection contracts to operate for seven to ten years, and certainly no more than 12 years. This aligns with the functional lifecycle of collection vehicles, and is consistent with the ACCC's findings in the 2007 Determination and more recent feedback from market participants on other proposed authorisations;<sup>7</sup>
- in Cleanaway's experience, the extension of the contracts for a period exceeding 10 years is highly likely to lead to a deterioration of the existing service provided to the Applicants as the need to repair and replace vehicles arises; and
- the ACCC should place little weight on the Applicants' submission that the existing collection contract requires SUEZ to provide and maintain sufficient collection vehicles at its cost, and that this cost is factored into planning and contract prices.<sup>8</sup> This obligation does not itself reduce the likelihood that the service to ratepayers will be adversely affected by the need to repair or replace collection vehicles (ie resulting in a sub-optimal experience of the services by consumers in the region). Further, it is surprising that the existing contract prices cover the requirement to maintain or repair vehicles prior to 2023 because that period after 2018 was not part of the tender period. Even if that is correct, it is possible that competing bidders might offer lower prices which need not incorporate this expense.

In relation to the inhibition of new technologies, Cleanaway submits that:

<sup>5</sup> 2007 Determination, paragraph 6.30.

<sup>6</sup> 2007 Determination, page 25.

<sup>7</sup> See, for example, the J.J. Richards submission on Authorisation A91520 (Council Solutions & Ors) dated 10 March 2016, page 1; Waste Recycling Industry Association (Qld) Inc submission on Authorisation A91520 (Council Solutions & Ors) dated 11 March 2016, page 7-8.

<sup>8</sup> Draft determination, paragraph 22.

- the extension of the existing collection contract without a tender process is likely to reduce the incentive which SUEZ would otherwise have to seek, propose and adopt new technologies or methods to improve collection services to the Applicants and their ratepayers during the remainder of the contract term;
- the assertion by the Applicants that waste collection technologies have not changed since the commencement of the contracts is, in Cleanaway's experience, incorrect.<sup>9</sup> As the Waste and Recycling Industry Association (Qld) Inc. identified in its 2016 submission on Authorisation A91520 (Council Solutions & Ors), there have been recent and material improvements in the design of vehicles and other equipment which have improved services to councils and ratepayers, including in relation to meeting international emissions standards, accommodating Australian operating conditions, compactor design and capability, vehicle tracking and camera systems.<sup>10</sup> Another innovation which has emerged since the existing authorisation is the use of radio-frequency identification (**RFID**) tags, which allow service providers to record and monitor critical data about collections;
- the ACCC should, on reflection, place little weight on the Applicants' assertion that a clause in the existing collection contract will encourage SUEZ to propose innovative arrangements, which may then be included as a variation to the contract.<sup>11</sup> A clause which merely allows for the possibility of contract variations to account for innovation is unlikely to promote the adoption of new technologies to the same extent as open competition for council tenders (including the threat of competing bids);
- the Applicants' two assertions on this issue (technologies have not changed and SUEZ will have an incentive to offer innovative arrangements) indicate that they have not undertaken the necessary comparison between the future with and without the Conduct. That is, the net effect of rolling over the existing arrangement should be assessed by comparison to the effect of holding a competitive tender in or around 2018. Such a comparison would indicate to the Applicants that waste collection technologies have changed since 2007 and would enable them to "lock in" commitments by bidders to innovative arrangements.

The deterioration of critical equipment and the inhibition of technological or process improvements directly affects the service ultimately provided to ratepayers, and may also increase the cost of those services. Accordingly, Cleanaway considers that the lessening of competition constituted by the Conduct is likely to result in a substantial public detriment.

#### 4.3. Mitigating factors

The ACCC accepted in the draft determination that there are a number of factors which mitigate the anti-competitive detriments associated with the Conduct.<sup>12</sup> Cleanaway submits that little weight should be placed on these considerations.

Firstly, the ACCC accepted that the Conduct applies to only three out of 38 councils in the Sydney metropolitan area and does not remove a significant number of opportunities to bid for waste and recycling collection contracts. Cleanaway notes that:

- the number of councils in the Sydney metropolitan area is now lower than 38 – amalgamations to date have reduced this figure to no more than 30;<sup>13</sup>

<sup>9</sup> Application for authorisation A91530 dated 2 March 2016, Attachment C, page 6.

<sup>10</sup> Page 6.

<sup>11</sup> Draft determination, paragraph 22.

<sup>12</sup> Draft determination, pages 6-7.

<sup>13</sup> As a result of the new and amalgamated Inner West Council (3 former metropolitan councils), Georges River Council (2 former councils), Canterbury-Bankstown Council (2 former councils), Cumberland Council (3 former councils), and Northern Beaches Council (3 former councils).

- the provision of waste services to many of the remaining councils is not contestable, because they conduct their own waste collection services and do not tender for that service. Cleanaway estimates that between 35% and 40% of collection services for councils in metropolitan Sydney are provided by the councils themselves, rather than external contractors<sup>14</sup>;
- the collection services acquired by the Applicants represents a material proportion of contestable work available for tender in the Sydney metropolitan area. Cleanaway estimates that collection services for the St George Region of Councils accounts for approximately 10% of all contestable work in metropolitan Sydney and approximately 85% of the contestable work due to be tendered in 2018; and
- in practice, opportunities to bid for municipal collection contracts in the Sydney metropolitan area occur infrequently, partly as a result of the typical duration of the relevant contracts.

In these circumstances, permitting a material proportion of the contestable demand for services in the region to "roll-over" for a further five years when market participants were expecting – including on the basis of the 2007 Determination – the contracts to come up for tender again constitutes an ongoing and substantial lessening of competition in the sector.

Secondly, the draft determination observes that it is "unlikely that the Applicants would seek to enter into arrangements that would diminish the welfare of their residents and local businesses". Cleanaway agrees with the proposition provided a critical assumption is met. That assumption is that the Applicants will have undertaken a thorough comparison between the likely costs and benefits of testing the market versus rolling over existing arrangements. There is no evidence that such a cost benefit analysis has been undertaken and, accordingly, Cleanaway considers that very little or no weight should be placed on this consideration. While the Applicants would not deliberately engage in conduct that causes a net detriment to rate-payers, this provides no evidence of the actual detriment that will result from a lessening of competition. Further, it is impossible for the Applicants to appreciate the net effect of the Conduct without any assessment of the benefits of a competitive tender process. Such an assessment need not be based on guesswork. The Applicants could (and, in the interests of rate-payers should) undertake a mini-tender to obtain current market intelligence about approaches to pricing, advances in technology and other aspects of innovation.

## 5. Relevance of similar authorisations and conduct

Cleanaway repeats and supports the observation made by J.J. Richards in its submission dated 5 April 2016 that the ACCC should have regard to the collective impact of joint tendering and contracting arrangements by councils on competition for waste and recycling services. The fact that the ACCC has previously authorised relevant conduct does not remove the need to assess each authorisation application on its merits.

The application for authorisation notes, on multiple occasions, that the ACCC has authorised two other council collection contracts for periods of 15 years or more, being Authorisation A91483 (Maitland City Council & Ors) and Authorisation 91500 (Redlands City Council & Brisbane City Council). Cleanaway submits that the Applicants' reference to these authorisations is misleading and any reliance on them is misplaced, for the reasons that:

- both of these authorisations included a period for a procurement or tender process, in addition to a contract period – the relevant determinations took into account benefits that would arise from joint tendering, including the competitive process that an open tender

<sup>14</sup> This is based on estimates of garbage, recycling, garden and hard waste tenements in metropolitan Sydney. Cleanaway estimates that approximately 4 million tenements are serviced by external contractors and 2 million are serviced by council day-labour.



would entail.<sup>15</sup> In contrast, the present application seeks to enable the extension of an existing contract, which will operate to preclude a tender process which the ACCC has accepted is otherwise likely to occur; and

- Authorisation A91483 (Maitland City Council & Ors), in particular, did not specifically authorise a collection contract period of 15 years or more. It authorised the applicants to enter a contract for processing *and* collection services for a period of 10 or 14 years, with an option for a one year extension. The authorisation provided that the ultimate term of the contract would be determined by the tender process.

## 6. Conclusion

For the reasons above, Cleanaway submits that the application for authorisation A91530 should be denied. In Cleanaway's view, the material supplied to the ACCC by the Applicants does not enable the ACCC to be satisfied that the Conduct would result in public benefits which outweigh the public detriment associated with the clear lessening of competition that will arise from the Conduct.

Yours faithfully,



**David Clancy**  
**NSW General Manager**

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<sup>15</sup> For example, page 4 of the determination for authorisation A91483 dated 9 July 2015 observed that the attractiveness of the tender to potential bidders was likely to encourage increased competition and even encourage new entry or investment in the relevant market.