



# Draft Determination

Application for authorisation

lodged by

South Australian Housing Authority and Renewal South Australia

in respect of

arrangements with certain land and property developers for affordable housing in the greater metropolitan region of Adelaide

Authorisation number: AA1000426

Date: 27 September 2018

Commissioners:

Sims

Featherston

## Summary

The ACCC proposes to grant authorisation to enable the SA Housing Authority and Renewal SA to enter into arrangements with land and property developers to increase the rate of supply and therefore the number of affordable houses in the greater metropolitan region of Adelaide.

The ACCC considers that the Proposed Conduct is likely to result in public benefits in the form of an increase in the rate of supply and number of affordable houses. The ACCC considers the Proposed Conduct is unlikely to result in public detriment.

The ACCC proposes to grant authorisation for 10 years.

The ACCC invites submissions in relation to this draft determination before making its final decision.

### 1. The application for authorisation

- 1.1. On 12 July 2018, the South Australian Housing Trust trading as SA Housing Authority and the Urban Renewal Authority trading as Renewal SA (together, the **Applicants**) lodged application for authorisation AA1000426 with the Australian Competition and Consumer Commission (the **ACCC**). This application for authorisation was made under subsection 88(1) of the *Competition and Consumer Act 2010* (the **CCA**).
- 1.2. The ACCC can grant authorisation which provides businesses with an exemption from competition law for arrangements that may otherwise risk breaching the law but are not harmful to competition and/or are likely to result in overall public benefits.

### The Proposed Conduct

- 1.3. The Applicants are seeking authorisation to enter into arrangements with land and property developers where developers may be asked to agree to some or all of the following conditions for developments in the greater metropolitan region of Adelaide:
  - to develop and offer for sale or rental as affordable housing properties or allotments not less than 15 per cent of the total number of dwellings to be created in new or upgraded developments
  - not to sell affordable housing properties or allotments at a price greater than the maximum price (set by the Government of South Australia and published in the South Australian Government Gazette)
  - not sell to any person other than an eligible buyer (as defined in the South Australian Government Gazette) unless reasonable steps to do so within a specified timeframe have been attempted
  - to incorporate a minimum proportion of affordable housing allotments for sale or properties for rental or sale in new or upgraded developments and project sites
  - to fix maximum rental prices in accordance with affordable housing caps
  - to fix maximum sales prices in accordance with affordable housing caps

- to only rent to eligible tenants (e.g. 'key worker' tenants and low-to-moderate income households) who satisfy criteria for access to affordable housing (to the exclusion of those who do not satisfy those criteria)
- to only sell to eligible buyers within specified timeframes (e.g. 'key worker' purchasers, affordable rental providers and low-to-moderate income households) who satisfy criteria for access to affordable housing (to the exclusion of those who do not satisfy those criteria)
- to cap building costs as part of house and land packages offered in conjunction with the SA Housing Authority or Renewal SA
- to only sell house and land packages offered in conjunction with the SA Housing Authority or Renewal SA to eligible owner occupier purchasers (to the exclusion of non-eligible owner-occupiers, and non-owner occupiers) and/ or
- to only build houses to standards approved by the SA Housing Authority or Renewal SA as part of house and land packages offered in conjunction with the SA Housing Authority or Renewal SA and in other SA Housing Authority or Renewal SA developments at other project sites.

For specific projects involving sale of SA Housing Authority or Renewal SA land, those parties may agree:

- to cap land prices as part of house and land packages offered in conjunction with developers
- to only sell house and land packages offered in conjunction with developers to owner occupier purchasers (to the exclusion of non-eligible owner-occupiers, and non-owner occupiers)
- not to actively compete with developers for the rental of properties for an agreed period (e.g. three months) and/or
- not to actively compete with developers for the sale of properties for an agreed period (e.g. three months).

(the **Proposed Conduct**)

## 2. Background

- 2.1. In 2005, the Government of South Australian released its *Housing Plan for South Australia*, introducing a housing affordability target of 15 per cent for all significant new housing developments. The *Housing Strategy for South Australia 2013-18* reconfirmed this target.<sup>1</sup> The affordable housing inclusion policy introduced by the housing plan is mandatory for all government sales and in all developments by government agencies.
- 2.2. The *South Australian Housing Trust Regulations 2010* permits the relevant Minister to determine and publish criteria for determining the concept of affordable housing. The current criteria is defined in the South Australian Government Gazette.<sup>2</sup>
- 2.3. The Applicants currently own land and/or existing housing developments in the greater metropolitan region of Adelaide (see Figure 1 at Annexure 1). As part of their functions, the Applicants may upgrade and/or develop (or re-develop) and sell sites to

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<sup>1</sup> Government of South Australia, *Housing Strategy for South Australia 2013-18*, available: <https://dhs.sa.gov.au/services/sa-housing-authority/publications>

<sup>2</sup> The South Australian Government Gazette, 12 December 2017, pp. 4956-4957, available: <http://governmentgazette.sa.gov.au/>

developers who will upgrade or construct housing on the land and sell them to the public.

- 2.4. The Applicants submit that Australia faces a housing shortage and the current imbalance between supply and demand suggests that housing prices are likely to rise. Accordingly, one of the strategic priorities identified by the Government of South Australia is to ensure that home rental and ownership are within reach of all South Australians.<sup>3</sup>
- 2.5. The proposed target groups for affordable housing include:
  - first home buyers
  - singles/young people (including students)
  - older people
  - low income workers
  - 'key workers'<sup>4</sup>.
- 2.6. The Applicants submit, in the absence of affordable housing, target groups:
  - May devote a greater proportion of their incomes to rental or mortgage payments, potentially reducing available funds for utilities, healthcare and food/clothing.
  - Move into shared housing, which may be impractical, particularly for families or the elderly.
  - Move to cheaper accommodation located at the margins of the greater metropolitan region of Adelaide, further from employment and key healthcare facilities.
- 2.7. On 18 June 2014, the ACCC granted authorisation for five years to Renewal SA to give effect to an arrangement with Investec for the sale, purchase and development of a portion of the South Australian Bowden Project Site on condition that 40 per cent of the dwellings are classified as affordable housing.<sup>5</sup> Under the arrangement:
  - Renewal SA and Investec can agree to fix maximum rental prices and maximum sales prices in accordance with affordable housing caps.
  - Renewal SA and Investec can agree to rent or sell to key workers who satisfy criteria for access to affordable housing.
  - Renewal SA can agree not to compete with the rental and sale of property for a three-month period.

### 3. Consultation

- 3.1. A public consultation process informs the ACCC's assessment of the likely public benefits and detriments from the Proposed Conduct.

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<sup>3</sup> SA Housing Authority and Renewal SA, *Amended application for authorisation*, 24 August 2018, p. 2, Schedule 1, available: [ACCC Public Register](#)

<sup>4</sup> According to the Applicants, 'key workers' is an industry term that generally refers to people in the 'moderate' income category (i.e., those with an annual income of between 80 and 120 per cent of the gross annual median income). Such people generally comprise young professionals and single parents, who are often employed in the health care, social services (including teaching), and administrative support industries.

<sup>5</sup> See Renewal SA authorisation [A91416](#)

- 3.2. The ACCC invited submissions from a range of potentially interested parties including major house and land developers, relevant industry associations and state and local government agencies.<sup>6</sup>
- 3.3. The ACCC received one submission supporting the application. Burbank, a property developer, submits that there is no evidence that similar agreements have resulted in public detriments.
- 3.4. Public submissions by the Applicants and interested parties are on the [Public Register](#) for this matter.

## 4. ACCC assessment

- 4.1. The ACCC's assessment of the Proposed Conduct is carried out in accordance with the authorisation test contained in the CCA.
- 4.2. The Applicants have sought authorisation for Proposed Conduct that would or might constitute a cartel provision within the meaning of Division 1 of Part IV of the CCA. Consistent with subsections 90(7) and 90(8) of the CCA, the ACCC must not grant authorisation unless it is satisfied, in all the circumstances that the conduct would result or be likely to result in a benefit to the public, and the benefit would outweigh the detriment to the public that would be likely to result (authorisation test).

## Relevant areas of Competition

- 4.3. To assess the likely effect of the Proposed Conduct, the ACCC will identify the relevant areas of competition likely to be impacted.
- 4.4. The Applicants submit that the relevant area of competition is the residential real estate market for low cost housing (including sales and rental) for the greater metropolitan region of Adelaide as this is the market for which authorisation is sought.
- 4.5. The ACCC considers that the relevant area of competition is likely to be the provision of low cost residential housing in the greater metropolitan region of Adelaide.

## Future with and without the Proposed Conduct

- 4.6. In applying the authorisation test, the ACCC compares the likely future with the Proposed Conduct that is the subject of the authorisation to the likely future in which the Proposed Conduct does not occur.
- 4.7. The Applicants submit that in the absence of the Government of South Australia taking steps to require affordable housing to be included in new developments and upgrading of existing residential areas, it is unlikely that private developers will voluntarily create sufficient levels of affordable housing.<sup>7</sup>
- 4.8. The Applicants intend to include provisions in contracts with developers that promote affordable housing and facilitate the delivery of affordable housing in accordance with Government policy. However, these provisions may be anti-competitive. The Proposed Conduct has the likely potential to increase the supply of affordable homes.

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<sup>6</sup> A list of the parties consulted and the public submissions received is available from the ACCC's public register [www.accc.gov.au/authorisationsregister](http://www.accc.gov.au/authorisationsregister).

<sup>7</sup> SA Housing Authority and Renewal SA, *Amended application for authorisation*, p.6, Schedule 1, available: <https://www.accc.gov.au/public-registers/authorisations-and-notifications-registers/authorisations-register/sa-housing-authority-renewal-sa>

4.9. The ACCC considers that without the Proposed Conduct, the supply of affordable housing is likely to increase as it has been since the establishment of the affordable housing policy, albeit at a slower rate than with the Proposed Conduct.

## Public benefits

4.10. The CCA does not define what constitutes a public benefit. The ACCC adopts a broad approach. This is consistent with the Australian Competition Tribunal (the **Tribunal**) which has stated that the term should be given its widest possible meaning, and includes:

*...anything of value to the community generally, any contribution to the aims pursued by society including as one of its principal elements ... the achievement of the economic goals of efficiency and progress.*<sup>8</sup>

4.11. The Applicants submit that the Proposed Conduct will allow it, in conjunction with engaged developers, to make affordable housing available for rent or purchase by a section of the public who would otherwise be excluded from the market. Broadly, the Applicants submit that the likely public benefits include:

- an increase in the supply of affordable housing
- greater flexibility in the delivery of affordable housing
- reduced financial commitment and risk for public funds (i.e. Renewal SA's) through the involvement of private developers
- redevelopment of disused land and revitalisation of existing housing developments
- promotion of social diversity
- revitalisation of the surrounding communities
- attraction of workers with key skills to live in and around the metropolitan area.

## Increasing the rate of supply of affordable housing

4.12. The ACCC notes that the 15 per cent target for affordable housing in South Australia has been in place for some time and the supply of affordable housing has been increasing each year but is still below the target.

4.13. Normal commercial factors are incompatible with affordable housing incentives resulting in insufficient affordable housing in developments, particularly given the high underlying land values in the greater metropolitan region of Adelaide.

4.14. The Proposed Conduct is likely to encourage the development of properties that meet the affordable housing criteria published in the South Australian Government Gazette. As a result, the ACCC considers that it is likely that the Proposed Conduct will increase the supply of affordable housing at a greater rate than it is currently being provided.

4.15. Accordingly, the ACCC considers the Proposed Conduct is likely to result in public benefits from an increase in the rate of supply of, and therefore the number of affordable houses in the greater metropolitan region of Adelaide.

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<sup>8</sup> Queensland Co-operative Milling Association Ltd (1976) ATPR 40-012 at 17,242; cited with approval in Re 7-Eleven Stores (1994) ATPR 41-357 at 42,677.

## Public detriments

4.16. The CCA does not define what constitutes a public detriment. The ACCC adopts a broad approach. This is consistent with the Tribunal which has defined it as:

*...any impairment to the community generally, any harm or damage to the aims pursued by the society including as one of its principal elements the achievement of the goal of economic efficiency.<sup>9</sup>*

4.17. The ACCC has considered the following public detriments.

### Creation of artificial pricing

4.18. The Proposed Conduct will result in the sale and rental prices for certain land/houses being capped (at a lower level) than if those prices were determined by market forces. However, the ACCC considers that this is unlikely to result in public detriment.

4.19. In particular, the Proposed Conduct relates to only a small subset of all developments in the greater metropolitan region of Adelaide.

4.20. An increase in the supply of affordable housing may have the effect of a decrease in the supply of all other housing, in circumstances where total supply is constant. To the extent this had the effect of increasing the price of all other housing, this would result in detriment for consumers. In these circumstances, however, any potential detriment is limited because affordable housing is a small proportion of all housing.

4.21. While capping prices may have an impact on the profitability of developers, the affordability is predominantly achieved through the delivery of smaller lot sizes or smaller dwellings and therefore lower construction cost. Developers are likely to be able to build houses at low enough cost to make a profit at the affordable house price.

4.22. Further, developers are not limited to developing affordable housing for the Applicants, they are free to choose the development projects they commence and the Proposed Conduct will affect only a small proportion of housing built in the greater metropolitan region of Adelaide.

### Agreement not to compete for the rental and sale of properties

4.23. The Proposed Conduct includes terms whereby for specific projects involving the sale of the Applicants' land, the Applicants and developers may agree not to compete for the rental and sale of built properties for an agreed period. This will provide a greater opportunity for developers to sell or offer affordable housing for rent for a short period.

4.24. The ACCC considers that this restriction provides an opportunity for developers to market affordable housing to targeted groups for a short period. This is likely to create an additional incentive for developers to supply affordable housing.

4.25. The ACCC understands that this type of restriction on competition was successfully used for the Bowden Project where the buyer of land agreed to enter into a contract where affordability was achieved in the form of rent to buy housing.

4.26. The ACCC considers that public detriment arising from the Applicants and developers agreeing not to compete for the rental and sale of specified properties for an agreed short period is unlikely to result in public detriment.

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<sup>9</sup> Re 7-Eleven Stores (1994) ATPR 41-357 at 42,683.

## Balance of public benefit and detriment

4.27. For the reasons outlined in this draft determination, the ACCC is satisfied that the Proposed Conduct is likely to result in a public benefit and that this public benefit would outweigh any likely detriment to the public from the Proposed Conduct.

## Length of authorisation

4.28. The CCA allows the ACCC to grant authorisation for a limited period of time.<sup>10</sup> This enables the ACCC to be in a position to be satisfied that the likely public benefits will outweigh the detriment for the period of authorisation. It also enables the ACCC to review the authorisation, and the public benefits and detriments that have resulted, after an appropriate period.

4.29. In this instance, the Applicants seek authorisation for 10 years. The Applicants submit that the promotion and delivery of affordable housing is a long-term project and will continue for many years. A 10-year authorisation period provides the Applicants with some certainty and long-term risk mitigation so that they can make long-term plans for affordable housing.

4.30. Given the long-term nature of housing investment and the benefits of affordable housing, the ACCC proposes to authorise the Proposed Conduct for 10 years.

## 5. Draft determination

### The application

- 5.1. On 12 July 2018 the Applicants lodged application AA1000426 with the ACCC, seeking authorisation under subsection 88(1) of the CCA.
- 5.2. Subsection 90A(1) of the CCA requires that before determining an application for authorisation the ACCC shall prepare a draft determination.

### The authorisation test

- 5.3. Under subsections 90(7) and 90(8) of the CCA, the ACCC must not grant authorisation unless it is satisfied in all the circumstances that the Proposed Conduct is likely result in a benefit to the public and the benefit would outweigh the detriment to the public that would be likely to result from the Proposed Conduct.
- 5.4. For the reasons outlined in this draft determination, the ACCC is satisfied, in all the circumstances, that the Proposed Conduct would be likely to result in a benefit to the public and the benefit to the public would outweigh the detriment to the public that would result or be likely to result from the Proposed Conduct, including any lessening of competition.
- 5.5. Accordingly, the ACCC proposes to grant authorisation.

### Conduct which the ACCC proposes to authorise

- 5.6. The ACCC proposes to grant authorisation AA1000426 to enable the Applicants to enter into arrangements with developers, which may have the effect of capping prices for some land or existing structures on land, agreeing to rent or sell to specified

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<sup>10</sup> Subsection 91(1).



tenants or purchasers, agreeing to cap building costs in certain circumstances, and the Applicants and developers agreeing not to compete for the rental and sale of property for a defined period as described in paragraph 1.3 and defined as the Proposed Conduct.

- 5.7. The Proposed Conduct may involve a cartel provision within the meaning of Division 1 of Part IV of the CCA.
- 5.8. The ACCC proposes to grant authorisation AA1000426 for 10 years.
- 5.9. This draft determination is made on 27 September 2018.

## 6. Next steps

- 6.1. The ACCC now invites submissions in response to this draft determination. In addition, consistent with section 90A of the CCA, the applicant or an interested party may request that the ACCC hold a conference to discuss the draft determination.

# Annexure 1

Figure 1: Map of the greater metropolitan region of Adelaide



Source: SA Housing Authority and Renewal SA, Application for authorisation p. 11.