



Australian
Competition &
Consumer
Commission

Determination

Application for authorisation

lodged by

Urban Renewal Authority trading as Renewal SA

in respect of

an arrangement with Investec Bank (Australia) Ltd
for the sale, purchase and development of a
portion of the Bowden Project Site

Date: 18 June 2014

Authorisation number: A91416

Commissioners: Sims
Rickard
Schaper
Cifuentes
Court
Featherston

Summary

The ACCC grants authorisation for five years from the date this authorisation comes into effect to Renewal SA to give effect to an arrangement with Investec for the sale, purchase and development of a portion of the Bowden Project Site on condition that 40 percent of the dwellings (32 in total) are classified as “affordable housing”.

This housing is to be made available to “key workers” who may otherwise find themselves excluded from both the general housing market and social housing. This includes people in the “moderate” income category who are often employed in the health care, social services and administrative support industries.

Under the arrangement, Renewal SA and Investec will fix maximum rental prices and maximum sales prices (in accordance with affordable housing caps), and apply restrictive criteria for eligible participants. Renewal SA also agrees to not compete with the rental and sale of property for a three month period.

The application for authorisation

1. On 28 February 2014 the Urban Renewal Authority trading as Renewal SA (**Renewal SA**) lodged application A91416 with the ACCC seeking authorisation for the conduct described below.
2. Authorisation is a transparent process where the ACCC may grant protection from legal action for conduct that might otherwise breach the *Competition and Consumer Act 2010* (the CCA). The ACCC may ‘authorise’ businesses to engage in anti-competitive conduct where it is satisfied that the public benefit from the conduct outweighs any public detriment.

The conduct

3. Renewal SA has entered into an arrangement with Investec Bank (Australia) Ltd for the sale, purchase and development of a portion of the Bowden Project Site located in Adelaide (with 80 dwellings to be constructed).¹
4. The arrangement involves Renewal SA selling the relevant portion of land to Investec on the condition that Investec construct a number of apartments on the land, 40 percent (32 dwellings) of which would be classified as “affordable housing”² and which would be:
 - subsequently made available to “key workers”³ who meet defined criteria;

¹ Renewal SA currently owns land in Bowden, Adelaide. Renewal SA, in its role as development facilitator, intends to develop and sell the Bowden Project Site in stages (to purchasers who will construct the build form structures on the development lot purchased by that purchaser, and sell built form product, predominantly apartments, to the public), a process which is known as the “Bowden Project”.

² As defined from time to time in the Government Gazette under the South Australian Housing Trust Regulations 2010 (SA).

³ Renewal SA advises that “key workers” is an industry term that generally refers to people in the “moderate” income category (ie with an annual income of between 80 and 120 per cent of the gross annual median income). Such people generally comprise young professionals

- initially rented to those key workers at a discount to the market rate; and
- rented to those key workers on condition that they obtain the right to purchase their dwelling, within three years of its "practical completion", initially at or below the rate gazetted from time to time under the South Australian Housing Trust Regulations 2010 (SA), but, after two months from the date of practical completion, at a fixed annual rate of escalation.

5. Under the arrangement:

- Renewal SA and Investec agree to fix maximum rental prices and maximum sales prices in accordance with affordable housing caps;
- Renewal SA and Investec agree to rent or sell to key workers who satisfy criteria for access to affordable housing; and
- Renewal SA agrees to not compete with the rental and sale of property for a three month period.

6. Renewal SA seeks authorisation for a period of five years.

Background

7. Renewal SA considers that an application for authorisation is necessary because Investec and Renewal SA may be considered competitors.
8. In this regard, Renewal SA notes that it is a statutory corporation with a number of functions, including undertaking activities which promote an increase in the supply of affordable housing in South Australia. While it does not actively seek to position itself as a landlord or vendor of property, it may adopt that role in respect of some developments in which it is involved.
9. Investec provides banking, advisory and investment products and services to private, corporate and institutional clients, and is involved in property investment and development in Australia.

Submissions received by the ACCC

10. The ACCC tests the claims made by the applicant in support of an application for authorisation through an open and transparent public consultation process.
11. The ACCC sought submissions from 19 interested parties potentially affected by this application, including local governments, developers and industry bodies.
12. The ACCC received two submissions, from the City of Charles Sturt and CIC Australia, both supporting the application.
13. The ACCC invited submissions from interested parties following the release of the draft determination and did not receive any.

and single parents, who are often employed in the health care, social services (including teaching) and administrative support occupations.

14. Copies of public submissions may be obtained from the ACCC's website www.accc.gov.au/authorisationsregister.

ACCC evaluation

15. The ACCC's evaluation of the proposed arrangements is in accordance with the relevant net public benefit tests⁴ contained in the CCA. In broad terms, under the relevant tests the ACCC shall not grant authorisation unless it is satisfied that the likely benefit to the public would outweigh the detriment to the public constituted by any lessening of competition that would be likely to result.
16. In order to assess the effect of the proposed arrangement and the public benefits and detriments likely to result the ACCC identifies the relevant areas of competition and the likely future should authorisation not be granted.

The relevant area of competition

17. Renewal SA submits the relevant area of competition is the market for low cost housing (both rental and sale) in the greater metropolitan region of Adelaide.
18. The ACCC does not consider it necessary to precisely identify the relevant areas of competition in assessing this application. However, the ACCC considers that the relevant areas of competition likely to be affected include the provision of housing in metropolitan Adelaide.

The future with and without

19. To assist in its assessment of the conduct against the authorisation tests the ACCC compares the likely future with the conduct that is the subject of the authorisation to the likely future without the conduct that is the subject of the authorisation. The ACCC will compare the public benefits and detriments likely to arise in the future where the conduct occurs against the future in which the conduct does not occur.
20. Renewal SA considers that it would be difficult to reach an agreement with an alternative developer on terms similar to those with Investec for the construction of affordable housing at the Bowden Project Site, particularly as Investec is making the dwellings available for rent with a right to purchase the dwelling at a discount to the market rate at a later date. Therefore, Renewal SA submits that without the proposed arrangement the percentage of dwellings that would be made available to key workers at a discount to the market rate would reduce.
21. However, Renewal SA notes that with or without the proposed arrangement the Government of South Australia will continue to pursue its goal of increasing the supply of affordable housing in South Australia.
22. The ACCC considers it unlikely that Renewal SA would proceed with an arrangement of this type (with Investec or any alternative property developer) without authorisation due to the risk of breaching the CCA.

⁴ Subsection 90(5B). The relevant tests are set out in Attachment A.

23. The ACCC also considers it unlikely that, without authorisation, Renewal SA itself would undertake the development of affordable housing at the Bowden Project Site, in light of its submission that it does not actively seek to position itself as a vendor or landlord of property.
24. Therefore, the ACCC considers that in the likely future without the conduct that is the subject of authorisation, the development of affordable housing at the Bowden Project Site would be unlikely to occur.

Public benefit

25. Public benefit is not defined in the CCA. However, the Australian Competition Tribunal has stated that the term should be given its widest possible meaning. In particular, it includes:

...anything of value to the community generally, any contribution to the aims pursued by society including as one of its principle elements ... the achievement of the economic goals of efficiency and progress.⁵

26. Broadly, Renewal SA submits that the public benefits of the proposed arrangement 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 (ie. Renewal SA's) through the involvement of private developers;
- redevelopment of disused land;
- promotion of social diversity;
- revitalising of the surrounding communities; and
- the attraction of workers with key skills to live in and around the metropolitan area.

27. The ACCC considers that the proposed arrangement is likely to result in a number of public benefits including:

- a. an increase in the supply of affordable housing;
- b. greater flexibility in the delivery of affordable housing;
- c. reduced financial commitment and risk for public funds (ie. Renewal SA's) through the involvement of private developers;

⁵ *Re 7-Eleven Stores* (1994) ATPR 41-357 at 42,677. See also *Queensland Co-operative Milling Association Ltd* (1976) ATPR 40-012 at 17,242.

Public detriment

28. Public detriment is also not defined in the CCA but the Tribunal has given the concept a wide ambit, including:

...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.⁶

29. Renewal SA does not consider the proposed arrangement will result in any public detriments.

30. The ACCC considers that the proposed arrangement is likely to result in little if any public detriment since:

- a. the development is limited to only 80 dwellings;
- b. the maximum rental and sale prices are fixed by SA Government regulations;
- c. Renewal SA and Investec are unlikely to be close competitors; and
- d. in metropolitan Adelaide there will remain multiple suppliers of new or existing houses and apartments.

Balance of public benefit and detriment

31. For the reasons outlined in this determination the ACCC is satisfied that the likely benefit to the public would outweigh the detriment to the public including the detriment constituted by any lessening of competition that would be likely to result.

32. Accordingly, the ACCC is satisfied that the relevant net public benefit test is met.

Length of authorisation

33. The CCA allows the ACCC to grant authorisation for a limited period of time.⁷ This allows 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.

34. In this instance, the ACCC grants authorisation for five years from the date this authorisation comes into effect as requested by Renewal SA.

⁶ *Re 7-Eleven Stores* (1994) ATPR 41-357 at 42,683.

⁷ Subsection 91(1).

Determination

The application

35. On 28 February 2014 the Urban Renewal Authority trading as Renewal SA lodged application for authorisation A91416 with the ACCC. Application A91416 was made using Form B Schedule 1, of the Competition and Consumer Regulations 2010. The application was made under subsection 88(1 and 1A) of the CCA to:

- Give effect to an arrangement between Renewal SA and Investec Bank (Australia) Ltd for the sale, purchase and development of a portion of the Bowden Project Site (with 80 dwellings to be constructed). The arrangement with Investec involves Renewal SA selling the relevant portion of land to Investec on the condition that Investec construct a number of apartments on the land, 40 percent (32 dwellings) of which would be classified as "affordable housing" as that term is defined from time to time in the Government Gazette under the South Australian Housing Trust Regulations 2010 (SA)

36. Renewal SA seeks authorisation of these arrangements as they may contain a cartel provision and may have the effect of substantially lessening competition within the meaning of section 45 of the CCA.

The net public benefit test

37. For the reasons outlined in this determination, the ACCC considers that in all the circumstances the proposed conduct for which authorisation is sought is likely to result in a public benefit that would outweigh the detriment to the public constituted by any lessening of competition arising from the conduct.⁸

Conduct for which the ACCC grants authorisation

38. The ACCC grants authorisation to Renewal SA to give effect to an arrangement with Investec whereby Renewal SA sells the relevant portion of land to Investec on the condition that Investec construct a number of apartments on the land, 40 percent (32 dwellings) of which would be classified as "affordable housing", as defined from time to time in the Government Gazette under the South Australian Housing Trust Regulations 2010 (SA). Under the arrangement:

- Renewal SA and Investec agree to fix maximum rental prices and maximum sales prices in accordance with affordable housing caps;
- Renewal SA and Investec agree to rent or sell to key workers who satisfy criteria for access to affordable housing; and
- Renewal SA agrees to not compete with the rental and sale of property for a three month period.

⁸ Subsection 90(5B).

39. The proposed authorisation is in respect of the contract between Renewal SA and Investec as it stands at the time authorisation is granted. Any changes to the agreement between Renewal SA and Investec during the term of the proposed authorisation would not be covered by the proposed authorisation.
40. The ACCC grants authorisation for a period of five years from the date this authorisation comes into effect (that is, until 10 July 2019).

Date authorisation comes into effect

41. This determination is made on **18 June 2014**. If no application for review of the determination is made to the Australia Competition Tribunal, the determination will come into force on **10 July 2014**.

Attachment A - Summary of relevant statutory tests

Subsection 90(5B) provides that the ACCC shall not authorise a provision of a proposed contract, arrangement or understanding that is or may be a cartel provision, unless it is satisfied in all the circumstances that:

- the provision has resulted or is likely to result, in a benefit to the public; and
- that benefit outweighs or would outweigh the detriment to the public constituted by any lessening of competition that has resulted or is likely to result from giving effect to the provision.