

# MinterEllison

9 May 2019

Darrell Channing  
Director, Adjudication Branch  
Australian Competition and Consumer Commission (**ACCC**)  
23 Marcus Clarke St  
Canberra ACT 2601

Dear Mr Channing

## **Tonsley Precinct Exclusive Dealing Notifications N10000475 & N10000477 – Submission**

### **1. Background**

1.1 We act for Enwave Tonsley Pty Ltd (**Enwave**). We refer to your letter of 18 April 2019 inviting Enwave to make submissions on whether proposed exclusive dealing arrangements notified by Peet Tonsley Apartments Pty Ltd (**Peet**) and the Urban Renewal Authority (**Renewal SA**) (**Relevant Arrangements**):

- (i) have the purpose, effect or likely effect of substantially lessening competition; and
- (ii) will result in likely public benefits which would outweigh any likely public detriments.

### **2. Executive Summary**

2.1 In our view, the Relevant Arrangements do not constitute exclusive dealing.

- (a) Renewal SA has agreed with Enwave to include a covenant in land sale agreements requiring that purchasers negotiate in good faith with Enwave for the provision of utility services. An obligation to negotiate in good faith with a third party falls short of exclusive dealing.
- (b) Peet states in its Notification that it 'will facilitate each purchaser within the Development entering into an agreement or agreements with Enwave'. However, Peet has not agreed with Enwave to facilitate or procure that purchasers enter into contracts with Enwave for utility services.

2.2 As far as Enwave is aware, neither Renewal SA nor Peet is making offers to sell properties in the Tonsley Precinct conditional on the purchaser acquiring services from Enwave. Their conduct therefore does not constitute exclusive dealing.

2.3 In any event, the Relevant Arrangements do not have the purpose, and will not have the effect or likely effect of substantially lessening competition for the following reasons:

- (a) Absent the Relevant Arrangements all water would be supplied directly by the local water monopoly, the South Australian Water Corporation (**SA Water**) in the form of potable water, and each premises would be connected to gas by the monopoly distributor, Australian Gas Networks Limited (**AGN**).



- (b) The Relevant Arrangements have not been put in place for an anticompetitive purpose. The objectives of the Relevant Arrangements are to:
  - (i) develop a recycled water (**rewater**) network to reduce water usage and help achieve a six star Green Star Community Rating; and
  - (ii) leverage countervailing bargaining power arising from the project's scale to negotiate lower retail gas prices for users.
- (c) The rewater network and embedded gas network are of insufficient scale to have a substantial effect on any market. Markets for property, gas and water that could potentially be affected have geographic scopes covering – at a minimum – the Adelaide region. The Relevant Arrangements affect just 850 properties in a single development.
- (d) Agreements between Peet and Enwave:
  - (i) cap rewater usage charges below SA Water's current water usage charges; and
  - (ii) require embedded gas retail prices to be at a specified discount to the average prices charged by the top three gas retailers in Adelaide.
- (e) Third party gas retailers may obtain access to the embedded gas network pursuant to Enwave's User Access Guide, published pursuant to rule 558(1) of the *National Gas Rules (NGR)*. Enwave is willing and able to facilitate third party access to the embedded gas network.
- (f) Enwave is subject to the broad regulatory powers of Essential Services Commission of South Australia (**ESCOSA**), which include the ability to impose licence conditions, regulate prices and mandate third party access to Enwave's rewater and gas infrastructure in the interests of consumers.
- (g) Enwave and Tas Gas Retail Pty Ltd (**Tas Gas**) will also be members of the Energy and Water Ombudsman SA (**Ombudsman**). Tas Gas is a related entity of Enwave that intends to retail the gas distributed by Enwave within the precinct.

2.4 Further, the Relevant Arrangements will result in no material public detriment, and will result in substantial public benefits. Benefits to the public include:

- (a) lower prices as a result of savings made by recycling stormwater and using the Tonsley Project's scale to exercise countervailing bargaining power in the market for retail gas;
- (b) environmental benefits arising from the rewater network, which will recycle stormwater from adjacent wetlands and reduce consumption of water that SA Water draws from the Murray-Darling river; and
- (c) added value and a greater diversity of choice for property purchasers, with Tonsley properties offering distinctive features including a 6-Star Green Star Community Rating, and discounted gas and rewater.

### 3. Relevant Arrangements

- 3.1 Peet and Renewal SA (the **Applicants**), each lodged an exclusive dealing notification (**Notifications**). They are respectively the developer and landholder of the Tonsley Precinct, which is located approximately 11 km South-West of Adelaide. Renewal SA will sell 400 vacant lots and Peet will sell 450 apartments in the Tonsley Precinct.
- 3.2 Enwave intends to distribute and sell recycled water and distribute gas within the Tonsley Precinct. Tas Gas, intends to retail gas distributed by Enwave within the precinct. Tas Gas has applied to the Australian Energy Regulator (**AER**) for a retailer authorisation to enable it to retail gas in the precinct.<sup>1</sup>
- 3.3 Renewal SA has agreed with Enwave to include a covenant in contracts for the sale of vacant lots providing that, to the extent the purchaser has demand for a utility available from Enwave, it must negotiate in good faith the terms on which the purchaser may choose to acquire that utility from

<sup>1</sup> AER, 'Tas Gas Retail Pty Ltd - application for gas retailer authorisation' (15 March 2019), at <[bit.ly/2YdYa1a](http://bit.ly/2YdYa1a)>.

Enwave. Customers may choose whether to contract with Enwave for rewater or gas. As far as Enwave is aware, Renewal SA does not intend to (and has not indicated to Enwave that it will) make its offers to sell land conditional on the purchaser acquiring any services from Enwave. Its conduct therefore does not constitute exclusive dealing.

- 3.4 Peet and Enwave have agreed to undertake works necessary to build a rewater network and embedded gas network within the Tonsley Precinct. Enwave has agreed with Peet to offer to supply embedded customers with rewater and gas at capped prices. Peet has not agreed to facilitate or procure that customers enter into contracts with Enwave as a condition of the sale of land. Customers may choose whether to contract with Enwave for rewater or gas. Peet's obligations in relation to embedded customers only rise as high as an obligation to provide reasonable assistance to Enwave in the delivery of rewater services. As far as Enwave is aware, Peet does not intend to (and has not indicated to Enwave that it will) make its offers to sell apartments conditional on the purchaser acquiring any services from Enwave.

#### 4. Relevant Markets and Project Scale

- 4.1 The Relevant Arrangements will not materially affect the residential property market. As set out in the Notifications, the market for residential property is broad and the Relevant Arrangements relate to just 850 residential properties.
- 4.2 In past merger clearance applications, the ACCC has considered markets for gas distribution services covering the geographic area that can be serviced by the local gas reticulation network.<sup>2</sup> AGN's gas reticulation network covers greater Adelaide. Similarly, the ACCC has identified State-based markets for gas retailing services.<sup>3</sup>
- 4.3 A water reticulation network has similar characteristics to a gas distribution network. We submit that the relevant market for the retail supply of water covers the area serviced by SA Water's Adelaide water reticulation network.
- 4.4 Considering that 539,842 private dwellings were recorded in the Adelaide region in the 2016 census,<sup>4</sup> the Relevant Arrangements relate to a project that is too small to have a substantial effect on residential water and gas markets, which cover at least the Adelaide region.

#### 5. Effect on Markets for Gas Distribution and Gas Retailing Services

- 5.1 Enwave and Peet have entered into a delivery agreement (**Delivery Agreement**) which provides that Enwave must ensure that its offers to supply gas to end users are priced as follows:<sup>5</sup>
- (a) it must pass through AGN charges for gas distribution on a shadow pricing basis; and
  - (b) it must ensure the retail price for gas is at a specified discount to the average standard residential tariff of the top three gas retailers in South Australia, calculated annually by an external energy advisory firm.
- 5.2 Since Enwave has agreed to shadow price AGN's gas distribution charges, it has effectively agreed to not charge any additional amount for the service of hauling gas within the embedded network. This is consistent with the approach to network charges for embedded electricity networks set out in the AER's Network Service Provider Registration Exemption Guideline.
- 5.3 We refer to AGN's submission to you, which suggests that gas customers within the Tonsley embedded gas network will not benefit from the consumer protections provided by the *National Energy Retail Rules (NERR)*, and will not have access to retail competition.<sup>6</sup>

<sup>2</sup> ACCC, 'SP AusNet - proposed acquisition of Origin Energy Limited's gas infrastructure assets', (7 March 2007, Merger Clearance Register Reference 27006), at <bit.ly/2Vn3Rgf>; ACCC, 'Australian Pipeline Trust (APT) - proposed acquisition of Origin Energy Limited's gas infrastructure assets', (21 February 2007, Merger Clearance Register Reference 27045), at <bit.ly/2vMbhu2>; ACCC, 'APA Group - proposed acquisition of Envestra Limited', (27 August 2013, Merger Clearance Register Reference 51820), at <bit.ly/2vHlwyT>.

<sup>3</sup> ACCC, 'AGL - proposed acquisition of Sun Gas' (11 October 2006, Merger Clearance Register Reference 25729), at <bit.ly/2DUu5f3>; ACCC, 'AGL Energy Limited - proposed acquisition of Australian Power and Gas Company Limited' (12 September 2013, Merger Clearance Register Reference 51756), at <bit.ly/2Yk5sk3>.

<sup>4</sup> Australian Bureau of Statistics, '2016 Census QuickStats: Greater Adelaide' (2016), at <bit.ly/2VUEf9K>.

<sup>5</sup> Delivery Agreement, cl 2.2(a), Schedule 2.

<sup>6</sup> Australian Gas Infrastructure Group, 'Peet Tonsley Apartments & Urban Renewal Authority Notifications N1000475 & N1000477' (6 May 2019), at <bit.ly/2VQd2oM>.

- 5.4 Gas will be retailed by Tas Gas within the Tonsley Precinct pursuant to the retail authorisation it is seeking under the *National Energy Retail Law (NERL)*, meaning that embedded gas customers will enjoy all of the consumer protections that would apply if the customers were directly connected to AGN's distribution network.
- 5.5 Third party retailers are able to access the network pursuant to Enwave's User Access Guide, published in accordance with rule 558(1) of the NGR. The User Access Guide sets out a process by which Enwave will negotiate in good faith with third parties seeking access to Enwave's embedded gas network. The guide reflects the access scheme set out in Part 23 of the NGR for non-covered gas pipelines. Enwave is committed to facilitating third party access to its gas network. To that end, Enwave has liaised with the Australian Energy Market Operator (**AEMO**) to understand how to identify child meters within the embedded gas network.
- 5.6 Until a third party retailer seeks access to Enwave's embedded gas network, embedded gas customers will only be able to acquire gas from Tas Gas. They will have less retail choice than would exist but for the Relevant Arrangements.
- 5.7 However, the price benchmarking terms of the Delivery Agreement referred to in paragraph 5.1(b) above ensure that customers receive the benefits of price competition between gas retailers. Whilst some gas retailers may offer temporary sign-up bonuses or discounts from time to time, search costs in the form of effort and time, and switching costs in the form of disconnection and connection fees, act as a disincentive for consumers to switch. The Delivery Agreement ensures that customers receive discounted prices on an ongoing basis without needing to constantly switch providers.
- 5.8 The quality of the services must comply with technical standards imposed by the Officer of the Technical Regulator, customer service obligations under the NERL and NERR, and any further obligations or conditions imposed by ESCOSA or the AER.

## 6. Effect on markets for the retail supply of water

- 6.1 Enwave and Peet have entered into a Tonsley Residential Precinct ReWater Scheme Operations Agreement (**ReWater Agreement**) which:
- (a) caps the prices that Enwave may charge for rewater at a discount to SA Water's current inclining block tariff rates, inflated by CPI increases each year; and
  - (b) provides for prices to be amended to reflect any price review determined by ESCOSA.
- 6.2 But for the rewater network, all water supplied to Tonsley residents would be potable water supplied by the local monopoly supplier, SA Water. As such, Enwave's rewater network introduces environmental benefits and competitive tension to the supply of water to Tonsley Precinct customers, for those use cases for which rewater is appropriate.
- 6.3 Enwave undercuts SA Water to ensure its rewater offering is competitive. Using rewater reduces a household's use of the most expensive marginal tariff block applicable to the customer's supply from SA Water. For use cases that do not require potable water, households can substitute water supplied by SA Water at prices as high as \$3.652/kL with cheaper rewater supplied by Enwave.

## 7. Regulatory Oversight

- 7.1 In addition to contractual price caps, ESCOSA licensing requirements and the threat of price and third party access regulation constrain Enwave's freedom to raise prices or lower quality.
- 7.2 Enwave cannot distribute gas or sell rewater within the Tonsley district without holding appropriate licences.<sup>7</sup> ESCOSA is currently considering Enwave's applications for gas distribution and rewater retail licences under the *Gas Supply Act 1997 (SA)* and *Water Industry Act 2012 (SA)*.<sup>8</sup>
- 7.3 ESCOSA may impose any licence condition it considers appropriate when granting the licences, or at a later time on reasonable notice to the licensee, including in relation to access or pricing.<sup>9</sup>

<sup>7</sup> *Gas Supply Act 1997 (SA)*, s 19; *Water Industry Act 2012 (SA)*, s 18.

<sup>8</sup> ESCOSA, 'Water retail licence application – Enwave Tonsley Pty Ltd' (7 February 2019), at <bit.ly/2VQjllT>; ESCOSA, 'Gas distribution licence application – Enwave Tonsley' (7 February 2019), at <bit.ly/2LuJOrl>.

<sup>9</sup> *Gas Supply Act 1997 (SA)*, ss 25(3), 29; *Water Industry Act 2012 (SA)*, ss 25(4), 28.

Further, ESCOSA can make a determination to regulate gas or rewater prices within the embedded network at any time.<sup>10</sup>

7.4 In performing its functions, ESCOSA must:<sup>11</sup>

- "(a) have as its primary objective protection of the long term interests of South Australian consumers with respect to the price, quality and reliability of essential services; and
- (b) at the same time, have regard to the need to—
  - (i) promote competitive and fair market conduct; and
  - (ii) prevent misuse of monopoly or market power; and
  - (iii) facilitate entry into relevant markets; and
  - (iv) promote economic efficiency..."

7.5 In summary, Enwave will be subject to ESCOSA regulatory oversight in the same manner as other licenced gas distributors and water retailers in South Australia. ESCOSA's oversight and powers limit Enwave's ability to act contrary to interests of end users within the Tonsley precinct.

7.6 In addition to the above, gas retailers can seek access to Enwave's gas distribution network under Chapter 6A of the *National Gas Law*, and under Part 23 of the *National Gas Rules*.

Please feel free to contact us if you have any further questions.

Yours faithfully

**MinterEllison**



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<sup>10</sup> *Essential Services Commission Act 2002 (SA)*, s 25; *Gas Supply Act 1997 (SA)*, ss 18B, 33; *Water Industry Act 2012 (SA)*, ss 17, 35.

<sup>11</sup> *Essential Services Commission Act 2002 (SA)*, s 6.