

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.

PLEASE FOLLOW DIRECTIONS ON BACK OF THIS FORM

1. Applicant

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

(Refer to direction 2)

Burbank Australia Pty Ltd (**Burbank**)

(ACN 007 099 872)

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

(Refer to direction 3)

Burbank operates in Victoria, Queensland, South Australia, New South Wales and the Australian Capital Territory. Burbank enters into home building contracts with customers in each of those States and Territories.

This notification only concerns Burbank's business of entering into home building contracts with residential customers in Victoria.

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

Justin Jones, Partner
Ashurst Australia
Level 26, 181 William Street
Melbourne VIC 3000

2. Notified arrangement

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

The proposed conduct relates to the supply of new residential houses by Burbank, and the provision of building surveyor services to ensure each house has all necessary building and occupancy permits.

(b) **Description of the conduct or proposed conduct:**
(Refer to direction 4)

The conduct – outline

Burbank proposes to supply, or offer to supply, customers with a new house with specified features at a fixed price that includes the cost of obtaining all necessary building and occupancy permits from a private building surveyor, on condition that the customer appoints a private building surveyor Burbank has identified as a "recommended" surveyor (the **Conduct**).

Burbank proposes to recommend private and independent building surveyors in its discretion from time to time, based on Burbank's assessment of the surveyor's knowledge, skills and experience, record, and familiarity with Burbank's home design and construction timetable.

Burbank will closely monitor the performance of building surveyors before and after they are identified as a "recommended" surveyor. In addition, any recommended surveyor would be registered with the Building Practitioners Board in Victoria in accordance with the *Building Act 1993* (Vic).

At the date of the notification, Burbank's primary recommended surveyor is Group Four Building Surveyors. Burbank's other recommended surveyors include Grimbos Building Surveyors, Advance Building Strategies – Building Surveyors and Consultants, Checkpoint Building Surveyors and Reddo Building Surveyors. Burbank may revise its recommended building surveyor or surveyors from time to time in the future.

Role of building surveyors

The role of a building surveyor is set out in the *Building Act 1993* (Vic), regulations made under that Act, and relevant codes and standards. A building surveyor's core functions are issuing building permits (which involves assessing building designs and plans), conducting mandatory inspections of buildings and building work, and (in the case of domestic building work) issuing occupancy permits. Building surveyors (including Burbank's recommended surveyor) are independent of the builder, and must be registered with the Building Practitioners Board in Victoria in accordance with the *Building Act 1993* (Vic).

Efficiencies from using recommended building surveyors

Burbank offers customers quality home designs to choose from, which have been approved and critiqued by experts including building surveyors. A critical part of Burbank's offering to its customers is that it supplies building services to construct homes using those designs within a short construction timetable, at competitive prices.

The fixed price includes the costs of Burbank's recommended building surveyor. If the customer wishes to choose a different building surveyor, then the costs of that building surveyor are likely to be different, and therefore would not form part of the fixed price package.

There are customer benefits in choosing Burbank's recommended surveyor rather than appointing their own. In particular:

- (i) While the building surveyor is appointed by the customer, both Burbank and its customers obtain benefits from the services provided by the building surveyor. This is because building surveyors provide an important "quality assurance" measure in relation to Burbank's and its sub-contractors' building works, and the surveyor's capacity to provide services in a timely way impacts on the overall construction timetable. Burbank values those benefits, and takes these into account when recommending a surveyor to customers. These benefits flow onto Burbank's customers.
- (ii) The process for appointing a building surveyor carries an administrative burden for customers (explained further below). Burbank is able to streamline that administrative process for customers who choose the recommended surveyor by ensuring that the recommended surveyor meets the requirements of the legislation, and having the relevant appointment documents ready and available for the customer.
- (iii) By negotiating fees with recommended surveyors, Burbank is able to offer a fixed price that includes the recommended surveyor's costs. As part of this, Burbank takes responsibility for ensuring the building surveyor is paid. Customers value the convenience of paying a fixed price to Burbank, rather than also having to make separate payment arrangements with their chosen building surveyor.
- (iv) Burbank's construction timetable depends on the building surveyor and its subcontracted tradespeople providing services within an agreed time period, giving Burbank the ability to offer an overall construction timetable that is both fixed and comparatively short. Burbank's ability to achieve its construction timetable is affected in several ways by the identity of the appointed building surveyor, including the following:
 - (A) Burbank is responsible for its building sites and therefore requires any person working on its sites (including a building surveyor) to be assessed from an occupational health and

safety perspective. Burbank would only identify a building surveyor as a recommended building surveyor after it had assessed both their occupational health and safety policies and procedures and their insurance arrangements. If a customer appointed a different building surveyor, these assessments would need to be carried out before the building surveyor could access the site. The time required for these assessments would need to be factored into the construction timetable, as would the cost of conducting that assessment.

- (B) Burbank would only identify recommended building surveyors who have experience working on Burbank sites, familiarity with Burbank's designs and a track record of providing quality services. As a result, recommended building surveyors are able to provide their services more efficiently than surveyors who are less familiar with Burbank's designs and approach.
- (C) Burbank, like most builders, may use building methods that are alternatives to "standard" methods for some new homes. Burbank has already worked with its recommended building surveyors to critique and approve those alternative methods and would do so for any new recommended surveyors identified in the future. Accordingly, the time required for a recommended building surveyor to assess and decide whether to approve those alternative methods in a particular case is likely to be shorter than the time required by an alternative surveyor. The longer time and additional work required by an alternative surveyor will need to be factored into the construction timetable and costs.

Alternative pricing when a customer appoints a building surveyor who is not a recommended surveyor

The Conduct would not mean that Burbank would refuse to build a home for a customer who did not use one of Burbank's recommended building surveyors. Rather, if a customer wished to appoint a different building surveyor, then the customer could do so and Burbank would refund to the customer the amount that Burbank would have paid to the building surveyor.

The customer would then be responsible for arranging payments to the building surveyor, obtaining necessary permits and arranging inspections.

Burbank would also necessarily require the customer to obtain the following documentation in accordance with clause 11.16 of the Master Builders Association of Victoria Building Contract within seven days of its signing:

- (i) a copy of the building surveyor's current Licence and Registration Number (registration should be in the category of unlimited with performance assessment capabilities);
- (ii) proof that the building surveyor has three or more inspectors within the company;
- (iii) a copy of the building surveyor's current insurances regarding Professional Indemnity for a minimum of \$5 000 000 (in any single claim);
- (iv) a copy of the building surveyor's current insurances regarding Public Liability for a minimum of \$20 000 000;
- (v) a copy of the building surveyor's current Certificate of Currency for insurances regarding Work Cover;
- (vi) a current list of the building surveyor's Disciplinary Register, confirming the building surveyor is not listed;
- (vii) a signed off agreed Service Legal Agreement between the customer and the building surveyor; and
- (viii) a letter from the building surveyor confirming there is no relationship between the customer and the building surveyor and/or any of the employed staff in either the building surveyor's office or engaged inspectors.

In rare cases, Burbank may not be comfortable with proceeding with a new home contract with a proposed building surveyor (for example, if the building surveyor's track record pose an unacceptable risk to Burbank and the other personnel working on its sites). In those cases, Burbank reserves the right to decide that it is not willing to enter into a contract with a customer that involves a building surveyor that does not meet Burbank's standards (as applicable from time to time).

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:**
(Refer to direction 5)

The persons likely to be affected by the Conduct are actual or potential acquirers of new homes from Burbank in Victoria, since they will have a choice between obtaining a fixed price Burbank home if they appoint a

recommended building surveyor, or paying a differently structured price that does not include building surveyor costs if they choose to appoint a different building surveyor.

The conduct is not expected to have a material effect on building surveyors, since they will remain able to compete to supply work to customers of Burbank and to other individuals who are building residential and other buildings.

(b) Number of those persons:

(i) At present time:

Approximately 990 customers for 2019.

(ii) Estimated within the next year:

(Refer to direction 6)

Approximately 990 per year.

(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:

(Refer to direction 7)

The Conduct will enable Burbank to offer a highly competitive, fixed price new home contract, featuring a short construction timetable, which includes the cost and time associated with obtaining necessary building permits.

Burbank expects that the Conduct will result in a number of public benefits. In Burbank's view, the key benefits are as follows:

(i) The Conduct will enable Burbank to set a construction timetable and price that takes advantage of the efficiencies generated from working with the recommended building surveyors. The timetable is potentially shorter, leading to lower construction costs for Burbank and the customer, as time and cost have a direct link in the construction industry.

(ii) By enabling Burbank to offer a competitive, fixed price new home product, the Conduct may generate a public benefit by encouraging further competition in the competitive Victorian residential homes market, which will promote lower prices for new home contracts.

(iii) More generally, Burbank's customers will generally have limited exposure to working with domestic building, and building surveyors

in particular, and therefore may not have the experience or expertise to assess whether a building surveyor has the necessary knowledge, skills and experience to perform its services to a high standard, and in a timely manner. As mentioned above, Burbank will have already conducted due diligence on its recommended building surveyors to ensure they have the necessary knowledge, expertise and resources to properly discharge their obligations for the benefit of the customer. This due diligence provides an assurance that if there is a problem arising from the building surveyor's services in the future, the building surveyor will have the financial resources to properly deal with the claim.

- (iv) The Conduct will therefore benefit Burbank's customers by removing the burden of conducting due diligence into building surveyors in circumstances where many customers may lack understanding of the appropriate means by which to assess whether a building surveyor has the necessary knowledge, skills and experience.
- (v) Burbank's customers will not be prevented from appointing a different building surveyor, and can choose a different building surveyor.

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

Please refer to the matters in paragraph 2(b) above.

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):

(Refer to direction 8)

The market or markets for new residential houses in (at least) Victoria.

The market or markets in which building surveyor services are supplied for residential houses in Victoria.

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:**

(Refer to direction 9)

Burbank does not believe that there will be any public detriments resulting, or likely to result from, the Conduct.

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

- (i) A customer is under no obligation to buy a new home from Burbank. There are a number of competing builders that customers can choose from in the highly competitive Victorian industry.
- (ii) The Conduct would allow Burbank to offer a fixed price product that includes building surveyor costs.
- (iii) The Conduct would not prevent customers from appointing a different building surveyor on a Burbank home, or a home built by another builder.

7. Further information

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

Justin Jones, Partner
Ashurst Australia
Level 26, 181 William Street
Melbourne VIC 3000

Dated 1 October 2019

Signed on behalf of the applicant



(Signature)

Justin Duncan Jones
(Full Name)

Ashurst Australia
(Organisation)

Partner
(Position in Organisation)

DIRECTIONS

1. In lodging this form, applicants must include all information, including supporting evidence that they wish the Commission to take into account in assessing their notification.

Where there is insufficient space on this form to furnish the required information, the information is to be shown on separate sheets, numbered consecutively and signed by or on behalf of the applicant.

2. If the notice is given by or on behalf of a corporation, the name of the corporation is to be inserted in item 1 (a), not the name of the person signing the notice, and the notice is to be signed by a person authorised by the corporation to do so.
3. Describe that part of the business of the person giving the notice in the course of the which the conduct is engaged in.
4. If particulars of a condition or of a reason of the type referred to in section 47 of the *Competition and Consumer Act 2010* have been reduced in whole or in part to writing, a copy of the writing is to be provided with the notice.
5. Describe the business or consumers likely to be affected by the conduct.
6. State an estimate of the highest number of persons with whom the entity giving the notice is likely to deal in the course of engaging in the conduct at any time during the next year.
7. Provide details of those public benefits claimed to result or to be likely to result from the proposed conduct including quantification of those benefits where possible.
8. Provide details of the market(s) likely to be affected by the notified conduct, in particular having regard to goods or services that may be substitutes for the good or service that is the subject matter of the notification.
9. Provide details of the detriments to the public which may result from the proposed conduct including quantification of those detriments where possible.

Declaration by notifying party

Authorised persons of the notifying party must complete the following declaration.

The undersigned declare that, to the best of their knowledge and belief, the information given in response to questions in this form is true, correct and complete, that complete copies of documents required by this form have been supplied, that all estimates are identified as such and are their best estimates of the underlying facts, and that all the opinions expressed are sincere.

The undersigned are aware that giving false or misleading information is a serious offence and are aware of the provisions of sections 137.1 and 149.1 of the *Criminal Code (Cth)*.


Signature of authorised person

Partner, Ashurst Australia (on behalf of Burbank Australia Pty Ltd)

Office held

Justin Duncan Jones

(Print) Name of authorised person

This 2nd day of October, 2019

Note: If the Notifying Party is a corporation, state the position occupied in the corporation by the person signing. If signed by a solicitor on behalf of the Notifying Party, this fact must be stated.