

21 September 2018

By email: adjudication@acc.gov.au

Australian Competition and Consumer Commission
23 Marcus Clarke Street
Canberra ACT 2601

Dear Sir / Madam,

Collective bargaining class exemption – submission

REA Group Limited (**REA**) thanks the Australian Competition and Consumer Commission (**ACCC**) for the opportunity to comment on the issues raised by the ACCC's discussion paper regarding a potential class exemption for collective bargaining conduct (**Discussion Paper**).

1 Summary

- 1.1 REA acknowledges that, in some circumstances, there may be efficiency gains and benefits from a class exemption for collective bargaining. However, given the blanket immunity that would be provided by a class exemption, it is critical that its parameters are carefully defined.
- 1.2 The ACCC must be satisfied that, in all the circumstances, the kinds of conduct specified by the class exemption would not result in a substantial lessening of competition or would have net public benefits. REA submits that the ACCC can only be satisfied of these matters if the exempted collective bargaining conduct is defined narrowly. In particular, any class exemption for collective bargaining conduct should both be targeted at small businesses *and* confined to bargaining group whose combined market shares are low. REA also supports the ACCC's proposed exclusion of collective boycotts.
- 1.3 Without these limits, there is a real risk that any collective bargaining class exemption will permit anti-competitive conduct, including potentially the exercise of market power by bargaining groups to force prices below efficient levels.
- 1.4 REA also considers that transparency measures of the sort raised by the Discussion Paper will provide a necessary check on the misuse of any class exemption. The key limitations in REA's view are:
 - (a) requirements for the bargaining group to notify the target when the group is formed and disclose to the target the scope of the collective bargaining conduct and the basis on which the group believes it is entitled to rely on the class exemption; and
 - (b) restrictions on unnecessary information sharing.
- 1.5 This submission does not attempt to address all of the issues raised by the Discussion Paper. Rather, it focuses on the particular issues where REA's previous experience is most likely to be useful to the ACCC.



2 Background to REA

- 2.1 REA is a Melbourne-based, multinational digital advertising company specialising in property. REA's core business involves advertising properties on behalf of real estate agents and allowing property seekers to search for properties by reference to criteria such as property type, price, location and features.
- 2.2 In Australia, REA operates (among other things) the residential property website www.realestate.com.au and the commercial property website www.realcommercial.com.au, as well as equivalent mobile sites and mobile device and watch apps for the iOS and Android operating systems.
- 2.3 REA currently deals with approximately 15,000 real estate agent offices (comprising approximately 100,000 individual agents) across Australia.
- 2.4 In 2016, REA was the target of an application for authorisation for collective bargaining lodged by Property Media Group Pty Ltd (**PMG**).¹ In broad terms, PMG sought authorisation to collectively bargain on behalf of itself and a large number of real estate agents in relation to the price and non-price terms on which they acquired advertising services from REA and competing digital property advertising suppliers. REA provided the ACCC with substantial evidence of the proposed conduct's detriments and, following the ACCC's publication of a draft determination proposing to refuse authorisation, the application for authorisation was withdrawn.

3 Overall approach to class exemptions

- 3.1 REA agrees that a class exemption should only cover collective bargaining arrangements that pose very little risk to competition and/or lead to overall public benefits.
- 3.2 However, whether or not collective bargaining is pro-competitive or otherwise in the public interest will depend on a wide variety of factors, which are generally best assessed on a case by case basis through the existing authorisation and notification processes. Those processes allow for a thorough, public review of the merits of the particular application, including by the receipt of information from the bargaining group, the target business and interested third parties.
- 3.3 Further, REA's experience in the PMG matter shows that an analysis of the competitive effects and net public benefits of collective bargaining conduct is not always straightforward (particularly where complex and/or differentiated services are involved – REA recognises that the position may be different in respect of, for example, agricultural commodities). To illustrate, in the PMG authorisation matter REA argued (and the ACCC largely accepted in its draft determination) that:
 - (a) lower advertising prices could reduce REA's incentives to invest in improved quality/services;
 - (b) attempts to break down REA's already-flexible contracting structure through a collective negotiation could increase and duplicate transaction

¹ See <https://www.accc.gov.au/public-registers/authorisations-and-notifications-registers/authorisations-register/property-media-group-pty-ltd-authorisation-a91537-a91538>



costs, and reduce transparency for market participants, for little or no efficiency gain;

- (c) collective bargaining could entrench the existing market positions of real estate agents (again for little or no efficiency gain), reduce competition between agents in respect of their commissions, marketing strategies and service levels, and increase barriers to entry for agents (since larger players would inevitably end up with lower prices, whereas REA's existing contracting model treats large and small agents equally); and
- (d) collective bargaining creates an environment in which the risk of co-ordination between competitors, beyond what is necessary to conduct the relevant collective negotiation, is substantially increased.

3.4 The very real risk that a class exemption defined in overly broad terms will permit anti-competitive conduct means that the ACCC should be conservative in setting the boundaries of the exempted conduct. Indeed, unless the ACCC adopts an approach that is analogous to a *de minimis* exception it cannot, in REA's view, be satisfied that, in all the circumstances, the kinds of conduct covered will not result in substantial lessening of competition or would have net public benefits.

3.5 In this context, the ACCC is also clearly correct to propose the exclusion of collective boycott conduct from any class exemption due to the high risk of anti-competitive effects.

4 Scope of class exemption

4.1 For the reasons outlined above, any class exemption that is expressed to be generally applicable across the economy (regardless of the competitive dynamics within a particular market or sector) will need to be framed conservatively. Coverage should, at a minimum, be limited by both individual business size *and* the combined market share of the bargaining group.

Individual size of members of the collective bargaining group

4.2 REA considers that any class exemption should be targeted to benefit small businesses because they are most likely to benefit from collective bargaining with the least risk of competitive detriment.

4.3 REA does not have a firm view on how the class of exempted small business should be defined. The ACCC suggests a number of different options in the Discussion Paper, including limitations based on the number of employees, turnover or contract value of group members. Some options broadly align with other legislative approaches to defining small business – such as the thresholds relating to the unfair contract terms regime in the Australian Consumer Law, which combine employee numbers and contract values – and this intuitively makes sense. However, REA would caution against an overly expansive test and notes that a revenue threshold of \$25 million offered by way of example in the Discussion Paper would cover substantial businesses. Equally, in many circumstances, a contract with an annual value of \$3 million would be significant and may provide a buyer significant leverage in negotiations in its own right.

Overall size of the collective bargaining group



- 4.4 In REA's view, it would not be sufficient for a class exemption to be limited by the individual size of the members of the bargaining group without a further limitation to ensure that the combined market share of the bargaining group is low. Without that additional limit, the ACCC simply could not be satisfied that the conduct allowed by the class exemption would not substantially lessen competition or result in net public benefits.
- 4.5 The Discussion Paper indicates that the ACCC has not generally had concerns about collective bargaining applications by groups of small businesses. However, there have been notable exceptions including, for example, the collective bargaining arrangements proposed by PMG in its 2016 authorisation application. In its draft determination in that matter, the ACCC stated that: "*The ACCC considers the proposed arrangements would allow collective bargaining ... groups of such a size and composition that they would have enough market power to force prices below efficient levels.*" (see pages ii and iii).
- 4.6 Put simply, the overall size of the bargaining group in terms of combined market share is equally as important as the size of its individual members, and looking at individual business size alone (whether in terms of employees, turnover or contract value) would result in a significant risk of the class exemption allowing anti-competitive bargaining groups to wield market power.
- 4.7 REA acknowledges that market definition, and measures of market share, can be difficult to determine, are often contentious and may change over time. However, given that the class exemption would provide blanket immunity, it is appropriate to restrict it to those situations where it is very clear that the collective will not be in a position to wield market power. In REA's view, that requires confidence that the collective bargaining group's combined market share is very low.
- 4.8 One further alternative would be to limit the class exemption by reference to the proportion of the target business' sales represented by the bargaining group. However, REA recognises that this option would present challenges for potential bargaining groups because it may be difficult or impossible for members to determine their collective share of the target business' sales, and because this share may also change over time.

5 Alternative to narrow class exemptions

- 5.1 Given the challenges raised by framing a class exemption that is both useful and narrow enough to ensure that it does not permit anti-competitive conduct in some circumstances, the ACCC could adopt a more iterative and bespoke approach in which class exemptions are introduced for specific industries (such as fast-food franchising or horticultural production).
- 5.2 This approach would allow the ACCC to target industries where collective bargaining is more likely to have pro-competitive effects or net public benefits, and would also give the ACCC the opportunity to craft the parameters of a class exemption with greater precision, having regard to the characteristics of the particular market or sector and lowering the risk of permitting anti-competitive conduct. For example, it may be possible to craft an appropriate sector-specific class exemption with relaxed business size or market share limitations on the basis of the particular dynamics within a market or sector.



6 Other issues

- 6.1 REA supports a range of the ACCC's other suggestions, including the following.
- (a) Collective bargaining participants should be required to notify the target when the group is formed, and should also be required to disclose to the target business the scope of the collective bargaining conduct and the basis on which the group believes it is entitled to rely on the class exemption. This would be an important check on inappropriate or illegitimate use of the class exemption, and would lower the risk of collective boycott and/or unnecessary information sharing.
 - (b) Information sharing conduct should be limited, and the limitations should be explicit. REA submits that the ACCC should carefully consider whether it is also appropriate to exclude all class exemption coverage if unnecessary information sharing has occurred. This would create an additional incentive for participants not to allow situations in which anti-competitive information sharing can occur.
- 6.2 However, REA does not support the ACCC's suggestion that all franchisees should automatically be allowed to negotiate with a common franchisor under the protection of a class exemption. Franchisees do not have any unique need for certainty around their collective conduct, the relative bargaining power of franchisees and franchisors is not always in the franchisor's favour, and other issues arising in a franchising context are addressed through already highly prescriptive mechanisms in the Franchising Code of Conduct.

7 Further assistance

- 7.1 REA hopes that this submission is helpful, and REA would be happy to provide any additional information that may assist the ACCC.



Sarah Turner, General Counsel and Company Secretary

