Draft Determination

Applications for authorisation

lodged by

Property Media Group Pty Ltd and certain real estate agents

to

collectively bargain with online and print real estate advertisers, including collective boycott activities in certain circumstances

Date: 25 August 2016

Authorisation numbers: A91537 – A91538

Commissioners: Sims
Rickard
Schaper
Cifuentes
Court
Featherston

Summary

The ACCC proposes to deny authorisation to Property Media Group Pty Ltd (PMG) in relation to the proposed collective bargaining and boycott arrangements in acquiring real estate advertising.

The ACCC is seeking further submissions in relation to this draft determination before making its final decision. PMG and interested parties may also request that the ACCC hold a pre-decision conference to allow oral submissions on the draft determination.

On 18 April 2016 Property Media Group Pty Ltd (**PMG**), on behalf of itself and a large number of real estate agents and franchisors of real estate groups, lodged applications for authorisation for proposed Australia-wide collective bargaining and boycott arrangements.

PMG has sought authorisation to collectively bargain on behalf of any real estate agent or real estate franchise network with any supplier of real estate advertising (both print and online) in Australia. It also seeks authorisation to engage in collective boycott activities in certain circumstances. Since lodging the application, PMG has clarified that it would only seek to boycott the two largest online platforms – namely, *realestate.com.au* **(REA**) and *domain.com.au* **(Domain).**

PMG has sought authorisation for the proposed conduct because it considers that REA and Domain are 'must haves' for vendors advertising houses for sale. As such, PMG believes these entities have been increasing their prices for online advertising to levels that are unreasonably high and unrelated to the cost of providing the services. PMG reports that agents are offered a take-it-or-leave-it schedule of prices for services, with no real ability to negotiate lower prices or more flexible arrangements. Further, PMG considers the online platforms offer such significant discounts for agents where they commit to listing all properties at the premium level, that agents feel practically forced to enter 'premium all' contracts, which means they are then unable to offer vendors flexibility in the way their property is advertised.

PMG has sought authorisation to cover a broad range of possible conduct, to give it flexibility to tailor approaches to reflect the circumstances of various potential groups of agents it may represent. This includes possibly seeking to negotiate non-price terms and conditions on behalf of its entire national collective bargaining group of agents, collectively negotiating advertising prices on behalf of undefined subsets of its real estate agent client base, and collective boycott activities possibly involving sub-sets or all of the current and future real estate agents across Australia that participate in the arrangements.

Created in 2015, PMG is a private company which is owned and controlled by Mr Anton Staindl. PMG seeks to purchase online and print real estate media in large quantities on behalf of real estate agents.

Unlike many other collective bargaining arrangements considered by the ACCC, contracts would be between PMG and the various real estate advertising platforms, with PMG then holding individual contracts with each of its clients who choose to take the new packages or products offered. That is, PMG would effectively act as an intermediary media buyer. PMG advises that it proposes to charge a 'small commission' if an agent books media through it.

Submissions were received from three interested parties, REA, Domain and Carsales (who operate Homesales, a mid-tier provider). These parties oppose the authorisation and believe that there is real competition in the provision of online real estate advertising – both between the two largest providers, but also by smaller providers as well as the threat of entry by large providers of other services (such as Facebook or Airbnb).

REA and Domain submit that collective bargaining and boycott action is unnecessary given the competition between the two larger providers. Further, REA submits that there is already significant flexibility offered to agents in the contract terms, with agents taking up a variety of contract types. There have also been instances where providers reduce their pricing in order to increase market penetration.

REA and Domain note that in two-sided markets[1] such as real estate advertising platforms, prices typically reflect the value customers place on the service, rather than cost. They submit that they have increased their prices as the number of views of their platform increases – reflecting the higher value of the service they provide.

REA, Domain and Homesales are also concerned that the proposed conduct is so broad that it will have a significantly negative impact on their businesses and potentially harm third parties such as vendors and property seekers.

The ACCC recognises that REA and Domain are highly profitable entities and that their prices have been increasing over time, but sees evidence of competition between REA and Domain and, to some extent, the impact of the threat of entry and competition by other providers. This includes changes in service offerings in response to feedback from agents and price reductions in areas where fewer potential buyers are viewing their platforms. Both REA and Domain continue to offer new functionalities and services to users on their platforms.

The ACCC has been provided with data that shows there is currently a diversity of contracts entered into by agents and that agents are frequently not using the full flexibility already provided in current contracts. PMG's suggestions that there is insufficient flexibility and that agents are effectively forced to enter into 'contract all' arrangements[2] are not supported by the data provided to the ACCC.

The ACCC considers that the proposed arrangements could result in some public benefits from lower, more efficient pricing in some limited circumstances. However, given the significant uncertainty surrounding the operation of the proposed collective bargaining processes, the ACCC is not satisfied that this public benefit is likely to be significant.

Further, even if PMG could negotiate more efficient price reductions, it is not clear what proportion of any savings would be passed through to vendors. In addition, there is some uncertainty about the size of any price reductions, given PMG will charge a commission from agents to act as an intermediary in the process.

A key issue in the ACCC's consideration of this application is the breadth and uncertainty of the arrangements proposed by PMG – for instance, PMG could seek to negotiate terms and conditions, including price, on behalf of a very large national group of real estate agents, including a national boycott of REA or Domain. While PMG has outlined how the collective bargaining processes are *likely* to operate in practice, and

[1] Two sided markets are discussed from paragraph 149.
[2] 'Contract-all' arrangements are discussed from paragraph 122.

what kind of collective boycott action it would be *likely* to direct, there is still a significant degree of uncertainty about how the arrangements will ultimately work in practice.

If the authorisation sought was granted, PMG would have a broad discretion about how to conduct bargaining and boycotts, and in these circumstances, the ACCC must take into account the likely public detriments from the broadest potential conduct for which authorisation is sought.

The ACCC considers the proposed arrangements would allow collective bargaining or boycott groups of such size and composition that they would have enough market power to force prices below efficient levels.

As a result the ACCC considers the proposed arrangements are likely to result in significant detriment by imposing commercial harm on the targets and there is real potential for harm to third parties such as vendors and property seekers.

The ACCC considers that collective boycotts can be in the public interest where they are necessary to achieve the efficiency benefits of collective bargaining. In those circumstances, it may be appropriate to authorise collective bargaining supported by boycott activities. In this instance, however, given the breadth of possible boycott activities and the significant uncertainty about how any boycotts would be implemented by PMG, the ACCC considers there is real potential for significant public detriment, including harm to third parties – a small reduction in the number of property seekers viewing a property could have a very significant impact on the ultimate sale price of a vendor's property.

Therefore, the ACCC is not satisfied that the public benefits of the proposed collective bargaining and boycott arrangements are likely to outweigh the public detriments.

The ACCC proposes to deny authorisation.

The ACCC seeks submissions in relation to this draft determination before making its final decision. The applicant and interested parties may also request that the ACCC hold a pre-decision conference to allow oral submissions on the draft determination.

Contents

Abbreviations and definitions

ACCC	Australian Competition and Consumer Commission.
The Act	*Competition and Consumer Act 2010*.
Carsales	Carsales.com Limited – operates the real estate arm (homesales.com.au) of the Carsales.com network.
Depth contract	A contract offered by REA Group under which a real estate agent pre-commits to upgrading all, or a certain number of its property listings to a certain level (above a Standard listing) – Under these contracts, the agent receives a discounted upgrade fee.
Domain	The Domain Group – the real estate media and services business division of Fairfax Media Limited.
EEA	*Estate Agents Act (EAA) 1980 (Vic*).
Feature, Highlight and Premiere	Are non-standard listings with REA Group (referred to as 'depth listings') which, for an additional fee, include features that make the individual listing stand out to prospective buyers such as larger photos and better positioning in search results.
Group Boycott	A type of boycott proposed under the authorisation application whereby a group of larger multi-state franchised real estate agents boycott an advertiser for all their listed properties.
Listing	Is an advertisement for a residential property that is purchased by a real estate agent from online (or print) advertisers. In most cases, the agent passes this advertising cost to the vendor.
Package Boycott	A type of boycott proposed under the authorisation application whereby real estate agents would boycott the 'premium' package offerings by the relevant advertiser, and purchase the base tier advertising packages instead.
PMG	Property Media Group Pty Ltd
Price Boycott	A type of boycott proposed under the authorisation application whereby agents would boycott the advertiser for all properties with a listed sale price of below a defined threshold value.
REA	REA Group Limited – a multinational digital advertising company specialising in property.

Regional Boycott	A type of boycott proposed under the authorisation application whereby by all agents within specific municipal regions would boycott the relevant advertiser and utilise the services of alternative advertisers within the market.
REIV	Real Estate Institute of Victoria.

The applications for authorisation

1. On 18 April 2016 Property Media Group Pty Ltd (**PMG**), on behalf of itself and a large number of real estate agents and franchisors of real estate groups, lodged applications for authorisation A91537 – A91538 with the ACCC seeking authorisation for the proposed collective bargaining and boycott conduct described below.

2. On 26 May 2016 PMG confirmed that it seeks authorisation to make or give effect to a provision of a contract, arrangement or understanding that may:[3]

   - be a cartel provision within the meaning of the *Competition and Consumer Act 2010* (the Act)
   - be an exclusionary provision within the meaning of section 45 of the Act or
   - have the purpose or effect of substantially lessening competition within the meaning of section 45 of the Act.

3. Authorisation is a transparent process by which the ACCC may grant protection from legal action for conduct that might otherwise breach the Act. 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 ACCC conducts a public consultation process when it receives an application for authorisation, inviting interested parties to lodge submissions outlining whether they support the application or not. Before making its final decision on an application for authorisation, the ACCC must first issue a draft determination.[4]

The conduct

4. PMG seeks authorisation for proposed Australia-wide collective bargaining and boycott arrangements, which will commence within regions of Victoria.[5] In particular, PMG seeks authorisation on behalf of a large number of real estate agents and franchisors of real estate groups to collectively negotiate terms, conditions and fees with any suppliers of online or print residential real estate advertising in Australia.

5. A list of the current real estate agents on whose behalf the application is made is provided at Attachment A.[6]

6. PMG advises that given the current preference and popularity for properties to be advertised online, the supporting submission to the application focuses on online media. However, given 'the packaging of print and online products by some media companies', proposed collective negotiations are likely to cover both forms of advertising.[7]

---

3 PMG's supporting submission to applications for authorisation A91537-A91538, 18 April 2016, p. 8 and PMG's submission, 26 May 2016, p. 1.

4 Detailed information about the authorisation process is contained in the ACCC's Guide to Authorisation available on the ACCC's website **www.accc.gov.au**.

5 PMG's submission, 26 May 2016, p. 2.

6 PMG's supporting submission, 18 April 2016, Annexure L, p. 34.

7 PMG's submission, 26 May 2016, p. 1.

7. At the time of lodging the application, PMG advised that it is seeking authorisation to collectively bargain with advertising media suppliers, including but not limited to what it describes as the 'dominant' suppliers (namely, REA Group and Fairfax Media Limited). PMG also advised that it seeks authorisation to engage in a collective boycott against 'any and all online real estate advertising media suppliers.'[8]

8. PMG's application identifies the following potential targets of the proposed arrangements:[9]

- realestate.com.au – operated by REA Group (**REA**)
- domain.com.au – operated by Fairfax Media Limited (**Domain**)
- onthehouse.com.au
- realestateview.com.au – jointly owned by Real Estate Institutes of Victoria, New South Wales, Tasmania and Western Australia and
- homesales.com.au.

9. On 26 May 2016 PMG clarified that a collective boycott 'is not being sought for parties other than REA Group and Domain'.[10]

10. Participation in the collective bargaining group is voluntary. Regarding the composition of proposed collective bargaining groups, PMG advises that it proposes to collectively negotiate non-price terms and conditions of advertising contracts on behalf of its entire proposed client base of real estate agents (currently around 170 agencies). However, it may also seek to collectively negotiate non-price terms and conditions on an 'individual or agency-group' basis.[11]

11. In relation to advertising rates, PMG submits that it may negotiate on behalf of a smaller sub-group of real estate agents 'according to how the suppliers themselves categorise them, which is…generally based on location.'[12]

12. In relation to proposed collective boycotts, PMG submits that once an agent becomes a member of the collective bargaining group, that agent will be required to boycott if PMG considers it necessary.[13] PMG advises the following scenarios would trigger a boycott:[14]

- a refusal by REA and/or Domain to negotiate with PMG
- a refusal by REA and/or Domain to negotiate in relation to the price charged for specific advertising packages outside the current discounts provided to 'contract all' products and/or

[8] PMG's supporting submission, 18 April 2016, p. 22.
[9] Ibid, p. 9.
[10] PMG's submission, 26 May 2016, p. 1.
[11] Ibid, p.4.
[12] Ibid.
[13] Ibid, p. 9.
[14] PMG's supporting submission, 18 April 2016, p. 24.

- a refusal by REA and/or Domain to negotiate in relation to the 'flexibility of packages offered to PMG and agents.' This would include offering a suite of 'different showcasing options rather than one package for all property offerings within a suburb.'

13. In its supporting submission to the applications, PMG advises that 'the boycott would likely take the form of one of four options, depending on the circumstances of the negotiations':[15]

    - **Package** based boycott – boycotting the 'premium' package offerings by the relevant supplier, and instead, relying on the base tier advertising packages, provided those prices are not inflated in retaliation

    - **Regional** boycott – a boycott undertaken by all agents within specific municipal regions. In this scenario, agents would boycott the relevant supplier and utilise alternative advertising suppliers within the market who 'elect to negotiate fair market prices.' PMG submits it would 'not enact a boycott of more than 30 municipal councils at any one time.'

    - **Price** based boycott – agents would boycott the supplier for all properties with a listed sale price below a defined threshold value and/or

    - **Group** based boycott – a group of larger multi-State franchised real estate agents boycotting the relevant supplier for all their listed properties.

14. PMG seeks authorisation for five years. It also seeks authorisation to add any real estate agent or franchisor of a real estate network within Australia to the proposed collective bargaining and boycott group in the future (see (www) to (yyy) of Attachment A). It submits that the terms of its application are broad to allow it to add future parties to the collective bargaining group to ensure it has sufficient strength to effectively bargain and, if required, enact a boycott.[16]

15. Further examples provided by PMG about how the proposed collective bargaining and boycott processes are likely to work in practice, follows below.

Proposed collective bargaining process

16. PMG advises that it will seek to purchase online and print media in large quantities on behalf of real estate agents. Unlike many other collective bargaining arrangements considered by the ACCC, contracts would be between PMG and the various real estate advertising platforms, with PMG then holding individual contracts with each of its clients who choose to take the new packages or products offered. PMG would effectively act as an intermediary media buyer.[17]

17. The ACCC understands there will be no fee for real estate agents that sign-on to PMG as a client. However, PMG will charge a 'small commission' if an agent books media through PMG. The commission will be included in any rates quoted to agents after PMG has negotiated with real estate advertisers.[18]

[15] PMG's supporting submission, 18 April 2016, p. 25.
[16] PMG's submission, 26 May 2016, p. 2.
[17] Ibid, p. 6.
[18] PMG's website, **http://propertymediagroup.net.au/services/**, viewed on 6 July 2016.

18. The process in respect of the collective bargaining and the composition of the bargaining group is as follows:[19]

- PMG would seek to negotiate 'non-price' terms and conditions on behalf of its entire client base. However, there may be conditions that are more relevant to some agents so PMG seeks to retain the right to negotiate on individual, or agency-group, basis. Examples of non-price terms and conditions that PMG may seek to negotiate include:

  – a move away from 'contract all' arrangements to allow agents greater flexibility to offer a range of products to their vendors

  – opportunities for value-adds as reward for loyalty

  – concessions or additional services – for example, the ability to re-advertise when a property fails to sell

  – flexible grouping options when marketing multi-abode developments – that is, currently each apartment requires a separate advertisement to be purchased

  – flexible contract terms and alignment of contract end dates for PMG clients and

  – discretion over whether or not to supply advertising portals with proprietary data – such as sales details or agent profiles.

- When negotiating advertising rates, PMG may seek to negotiate on behalf of sub-groups of its real estate clients on the basis of how Domain and REA categorise them, which is generally based on location. That is, there is unlikely to be a single, collectively bargained price arrangement. Examples of pricing issues PMG seeks to collectively negotiate include:

  – price in relation to existing contracts

  – pricing options that allow a flexible mix of advertising products from the one supplier

  – pricing that corrects any perceived anomalies with regards to how an agency is categorised by the portal

  – price that is more commensurate with the cost of service provided by other online providers

  – different pricing models based on benefits received rather than a notional geographic 'property value' model and

  – if instructed by a large franchise group, it will seek to negotiate a group wide advertising rate in return for a commitment to a certain volume of participation or level of expenditure.

19. PMG advises that during negotiations with any potential targets, it would be necessary to disclose which agents it is representing.[20]

---

19 PMG's submission, 26 May 2016, pp. 4-5.

20. PMG submits that if authorisation is granted by the ACCC (by 1 November 2016), the proposed collective bargaining process will occur in the following stages:[21]

- Stage 1 – PMG would, over the following 2 to 4 months, seek to recruit and settle the members of the bargaining group and have these members commit to the process and appointment of PMG to negotiate on their behalf by entering a contractual arrangement with each.
- Stage 2 – PMG would seek to enter meaningful discussions with online and print advertisers. PMG would seek to have any existing contracts with members ended or be extended (as applicable) to a common end date, say 30 June 2017, while negotiations are undertaken.
- Stage 3a – If negotiations have been successful, PMG would seek to offer the new advertising arrangement to its client base from 1 July 2017. Depending on status of existing contracts and the position of the advertisers, there may be residual contracts in place until end-October 2017.
- Stage 3b – If negotiations are not successful, PMG would seek to establish a targeted boycott of one or both of REA and Domain. This may occur any time from 1 July 2017, depending on the mix and status of clients PMG is representing and the approach taken to negotiations by these advertisers.

Proposed collective boycott process

21. PMG submits that a collective boycott would be used as a tool to ensure that REA and/or Domain bargain with PMG in 'good faith'.[22]

22. In the event that a boycott is triggered, PMG submits that it is 'the intention of the parties….to provide a 21 day notice to the recalcitrant supplier prior to engaging in the boycott, provided that any negotiations have not been in good faith for a period of no less than 6 months.'[23] As noted above, PMG would not be in a position to enact any boycott activities prior to 1 July 2017. PMG submits that within this 6 month period, it would be possible to include mediation, if PMG considers it would be likely to assist the process.[24]

23. PMG submits that it does not seek authorisation for all Australian real estate agents to undertake a boycott of any particular real estate advertiser.[25] As previously mentioned, it proposes that any collective boycott is *likely* to take the form of a 'package based' boycott, 'regional' boycott, 'price based' boycott and/or a 'group based' boycott.

24. PMG advises that it will decide on the type of boycott to use 'depending on the width of the negotiating stance' taken by the target advertiser. Should the breadth of negotiations require and cover multiple regions, it is anticipated that a price based boycott, such as the top tier premium package, might be required and

---

[20] Ibid, p 6.
[21] Ibid.
[22] PMG's supporting submission, 18 April 2016, p. 24.
[23] Ibid, p. 25.
[24] PMG's submission, 26 May 2016, p. 6.
[25] PMG's supporting submission, 18 April 2016, p. 25.

enacted by the parties. Should clients of PMG be regionally based, it would be likely that this is the preferred boycott taken by PMG. [26]

25. In regards to informing property seekers about proposed boycott activities, PMG submits that it 'would be seeking undertakings from any competing portals that they would be investing significantly in marketing activities to ensure target markets are aware of their options when searching for properties.'[27]

26. On 26 May 2016 PMG provided further information about how each of the proposed boycott options are *likely* to work in practice:[28]

Package Boycott

- PMG advises that this is the most likely form of boycott. It also considers that a Package Boycott is likely to be combined with a Regional or Group Boycott (see immediately below).

- Under this boycott option, PMG submits that rather than boycott the target completely, it would involve a refusal to purchase a particular product type (commonly referred to as 'depth contracts' within the industry). That is, the relevant properties would still be advertised on the target advertiser's platform, but not as prominently (that is, on a lower priced package).

Regional Boycott

- PMG submits that under a Regional Boycott, PMG would 'most likely seek to identify several 'zones' within municipalities in each of the main cities' its clients are located – for instance, Melbourne, Sydney and Brisbane.

- By way of example, PMG advises that within Victoria it envisages that a maximum of four municipal councils within a greater metropolitan region would be utilised in a collective boycott by PMG at one time.

Price Boycott

- PMG advises that a Price Boycott would see the agents boycotting the purchase of 'depth' products for properties with an expected sale price under a nominated value. In this form of boycott, advertising may continue 'as-is' for all higher value properties, but only be purchased at the lower levels for all others, maintaining a proportionate marketing investment relative to the sale price.

Group Boycott

- PMG advises that depending on the purchasing power of its client base and the appetite for action by agent-groups, PMG may contemplate a partial boycott of a target advertiser by one or more agency groups.

- Further, PMG submits that 'more than likely, such a boycott would take the form of a package boycott, where the agency group/s elected not to purchase depth products from the target/s.'[29]

---

26 PMG's submission, 26 May 2016, pp. 8-9.
27 Ibid, p. 9.
28 Ibid, pp. 7-9.

The applicant/s

27. **PMG** is a private company created in 2015 and owned and controlled by Mr Anton Staindl. PMG's goal is to provide specialist online media advisory, media consultancy and buying services to the Australian real estate industry.[30]

28. PMG advises that it intends to take advantage of economies of scale by purchasing advertising rights in online (and print) media in large quantities. This will be achieved by it analysing the cost effectiveness and value of the many digital (and print) options available to agents, and then using this analysis to provide individually-tailored recommendations to its client base.[31]

29. At the time of lodging the applications for authorisation, PMG advises that there is no relationship between it and any of the real estate agents or agent groups on whose behalf the application has been made. These agents have simply registered a 'statement of support' for the authorisation application with PMG.

30. The majority of the 170 agencies listed as parties to the application are individual agencies located around Melbourne, a small number of agencies in regional Victoria (such as Ballarat, Wodonga and Beechworth), a small number of agencies in NSW and the following Victorian agency groups:

- Barry Plant Real Estate (support from 54 franchised offices)
- Buxton Real Estate (support from 15 franchised offices)
- Hodges Real Estate (support from12 franchised offices)
- Nelson Alexander (support from 10 franchised offices)
- Biggin and Scott (support from 11 franchised offices)
- Hocking Stuart (head office)
- Marshall White (head office)
- First National (head office)
- RT Edgar (head office)
- Jellis Craig (head office)
- Kay & Burton (head office) and
- Little Property (head office).

[29] Ibid, p. 8.
[30] PMG's supporting submission, 18 April 2016, p. 9.
[31] Ibid.

Background

The Targets

31. PMG advises that the primary targets of the proposed collective bargaining proposal are REA and Domain. However, the ACCC notes that PMG seeks authorisation for collective negotiations with *all* suppliers of online or print media advertising, including, but not limited to, those other suppliers listed in the application. Since lodging the application, PMG has clarified that it only seeks authorisation for collective boycotts of REA and Domain.[32]

32. An overview of Australia's top online real estate advertising platforms' share of the property seeker audience follows:[33]

Entity	Unique monthly audience (000)
Realestate.com.au	5 586
Domain	3 938
OnTheHouse.com.au	983
Gumtree Realestate websites	522
Property.com.au	504

REA[34]

33. REA operates the residential and commercial property listing sites, realestate.com.au and realcommerical.com.au. In regards to residential property, it operates the website (www.realestate.com.au), as well as mobile and watch apps (together referred to as 'REA's platform').

34. REA is a leading digital advertising platform specialising in property. It claims that 95 per cent of all properties for sale in Australia are listed on its online platform'[35] REA claims this is 23 per cent more than its closest competitor, domain.com.au.[36]

35. REA's core business involves advertising properties on behalf of agents (that is, an agent acquires a listing for a property) and providing a platform for property seekers to search for properties by reference to various criteria. It charges real estate agents to list properties on its platform, but it does not charge property seekers to view them.

32 PMG's submission, 26 May 2016, p. 1.
33 Nielsen Digital Ratings (Monthly) – February 2016, **http://www.nielsen.com/au/en/press-room/2016/iab-and-nielsen-launch-digital-ratings-monthly.html**, viewed 28 July 2016.
34 Unless otherwise stated, information appearing under this heading is obtained from REA's submission, 25 May 2016, pages 16-19.
35 REA Group ASX Statement, 5 February 2016, **https://www.rea-group.com/irm/PDF/1809/REAGroupannouncesHY2016results** viewed 28 July 2016.
36 Ibid.

36. REA submits it has invested heavily in developing and promoting its platforms, innovating and advertising to increase its audience. REA advises that 34 per cent of its revenue is earned from other advertisers, such as banks, insurance companies and furniture retailers, promoting their products on REA's platform.

37. In 2015, REA's revenue from its residential property business increased by 21 per cent. Over the same period, there was a decline in the volume of property listings, as well as lower average days on market for properties.[37]

38. REA attributes strong revenue growth in the first half of the FY2016 to the 'success of its Premiere All product (where customers commit to using REA's top tier product for all of their listing) which helped deliver a 24 per cent increase in revenue in the residential business.'[38] In the first half of FY2016, REA reported a 33 per cent increase in listing depth revenue to $251.6 million, while subscription revenue decreased 34 per cent to 21.4 million.

39. In July 2012 REA announced a national marketing alliance with News Limited who, in 2012 had a 61.6 per cent shareholding in REA Group Limited. The alliance put realestate.com.au properties in News Limited print, with a weekly circulation of over seven million, and allows for content syndication on websites such as news.com.au.[39]

40. REA offers a number of different listing options for agents. These include Standard, Feature, Highlight and Premiere listings. A Standard listing on REA's platform is a basic listing that displays a small photo of the property, a small agent logo and typically appears at the bottom of the search results.

41. Feature, Highlight and Premiere listings are enhanced listings (referred to as 'depth' listings) which, for an additional fee, include features that make the individual listing stand out more to prospective buyers - such as larger photos and better positioning in search results.[40]

42. To list properties on REA platforms, agents enter into a subscription with an initial term of 12 or 24 months, and at the end of this term, are automatically renewed for another 12 months unless the agent provides 30 days' notice. The subscriptions are set at a monthly rate and are charged for the entire agency office, not each individual agent.

43. Under a Standard subscription all of the agent's listings are Standard listings by default and are "free" (after the cost of the subscription) and the agent has the option to upgrade a particular listing for a per-listing upgrade fee.

44. Under a Flexi subscription, an agent enters into an associated 'depth contract' under which the agent pre-commits to upgrading all, or a certain number of, its listings to a certain level. Reflecting this pre-commitment, a discounted upgrade fee is applicable to each upgraded listing.

---

37 Ibid.

38 Ibid.

39 ASX Announcement, *REA Group announces national marketing alliance with News Limited*, 23 July 2012

40 RBB Economics, Economic assessment of PMG's application for authorisation, 17 June 2016, p 8.

45. Therefore, REA advises that upon entering into a contract with it, agents have two decisions – whether to hold a Standard or Flexi subscription, and if they enter into a Flexi subscription, which type of 'depth contract' is most appropriate for their business.

46. REA's pricing model allows Agents to pay per-listing fees to upgrade individual listings to a Feature, Highlight or Premiere listing on top of their Standard or Flexi subscription. Agents that have entered a Flexi subscription receive certain discounts on the per-listing upgrade fees and also receive further benefits including access to property market data and analytics tools.

47. REA uses a 'market-based' rate card for depth listings, under which price is partly determined by the area or group of areas ('market zones') in which the listed property is located. The price for any given market zone is determined by reference to a range of factors, including median property prices, demand for particular depth listing types in that market zone, audience and REA's and its competitors' relative share of listings and audience in the area.[41]

48. REA does not offer volume discounts but applies discounts based on the level of pre-commitment made by an agent under a 'depth contract', irrespective of their absolute purchasing levels. REA advises that an agent with a small number of listings will be offered the same per-listing price as an agent with a large number of listings, provided they make the same pre-commitment.

49. REA submits that a Standard subscription is best suited to an agent that requires a low fixed cost service and is willing to accept a relatively high variable cost if and when a 'depth listing' is required. In contrast, a Flexi subscription with an associated 'depth contract' would be more suited to an agent that has a greater need for depth listings and is willing to commit to volume in exchange for lower per-listing upgrade fees.

Domain

50. Domain is the real estate media and services business division of Fairfax Media Limited. Domain provides digital and print media services across different brands on a range of platforms (Domain, allhomes, reviewproperty). It provides online real estate advertising via its website (www.domain.com.au) and in major newspapers (The Sydney Morning Herald, The Age, The Canberra Times and The Australian Financial Review) with a total weekly print media readership of approximately 11.7 million throughout Australia and New Zealand.[42] It also offers print advertising in a range of community publications.

51. As at March 2016, Domain's unique monthly audience was around 3.9 million views (compared to 5.6 million views for realestate.com.au).[43]

---

41 REA Group's submission, 25 May 2016, p. 18.

42 Fairfax Media Limited, What we Print, **http://www.fairfaxprintlogistics.com.au/what-we-print/** Viewed on 10 July 2016.

43 Nielsen Digital Ratings (Monthly) – February 2016, **http://www.nielsen.com/au/en/press-room/2016/iab-and-nielsen-launch-digital-ratings-monthly.html**, viewed 28 July 2016.

52. In FY 2015, Fairfax Media Limited announced strong growth in digital real estate advertising revenue, with domain.com.au's revenue increasing by 30 per cent.[44] For the same period, its print real estate advertising revenue fell by 11 per cent (excluding the acquisition of Metro Media Publishing Holdings). [45]

53. Domain offers a free standard subscription product and then a range of paid 'elite' subscription services.[46] Domain submits that its paid subscription services offer additional value to agents/vendors by way of additional branding, larger photos and prioritisation in search results. Domain advises that its fee based, value-add subscription range is based on two factors: [47]

- the size of the agency purchasing services – to reflect the higher levels of resources required to service the larger number of listings from larger offices, and

- the geographic location of the agency – to reflect median value of properties by region.

54. Domain has an 'agent equity' business model. Under this model, there are nine individual companies that are owned 50 per cent by agents and 50 per cent by Domain. Each company is a regionally, state based, or platform based advertising business. Domain advises that in every instance, agent participation is based on their advertising in the various publications or online businesses. Shares are allocated to agents based on their use of the platform prior to allocation.[48]

55. In the Melbourne businesses, Domain advises that it meets regularly with agent shareholders, and in other states, Industry Advisory Boards have been established to represent shareholders on key matters, product development, innovation and marketing. As at 31 April 2016, approximately 1700 agents were shareholders in Domain residential and commercial real estate businesses.[49]

Other Targets

56. The other online real estate advertisers listed in PMG's application are:

- onthehouse.com.au – a property website which differentiates itself by enabling users to calculate the price and value estimate of properties throughout Australia. Agents can also get subscriptions services from portal usage data so they can reach 'vendors to be' before other agents. It is estimated to hold 9 per cent of the unique audience.[50]

- realestateview.com.au – was founded in 2001 by the real estate industry itself. It is owned by Realestateview.com.au Ltd, and claims to have the backing of each state and territory real estate institute, except South Australia. The Real Estate Institute of Victoria (**REIV**) is the parent entity of the business. Realestateview.com.au offers standard, upgraded (to varying

---

44 Fairfax Media Limited, *2015 Results Announcement,* **https://www.fairfaxmedia.com.au/ArticleDocuments/193/2015-08-13_FAIRFAX%20Full%20Year%20Results%20-%20Media%20Release.pdf.aspx?Embed=Y** viewed on 28 July 2016.

45 Ibid.

46 Fairfax Media Limited submission, 30 May 2016, p 3.

47 Ibid, p. 4.

48 Fairfax Media Limited submission, 16 June 2016

49 Ibid.

50 PMG's supporting submission, 18 April 2016, pp 10-11.

levels) and mobile and tablet app monthly subscriptions. It is estimated to hold 4.7 per cent of the unique audience.[51] Over 4200 agents currently advertise their listings with realestate.view.com, and in June 2015, it reported over 1.4 million visits to its site.[52]

- homesales.com.au – was launched in 2009 as the real estate arm of carsales.com Ltd. It aims to differentiate itself in the market by focusing on the investment property market. Its share of the total unique audience is 4 per cent.[53]

57. In addition, REA provided a list of other online media advertisers that it considers would be captured under the scope of PMG's application, including: [54]

- Homely
- Homehound
- Squiiz (owned by the Australian real estate industry)
- Realestateworld (industry owned and operated by Estate Agents Cooperative)
- Aussiehome (operated as part of REIWA since 2010)
- Rent.com.au
- Houseandland (owned by developers and builders) and
- iBuyNew.

Overview of real estate advertising

Participants[55]

58. The key participants in the property industry are consumers (property seekers), vendors, agents and property advertisers.

59. *Property seekers* are prospective buyers or other persons seeking to purchase property, and seeking information about property to aid that search. Generally, property seekers will want to be exposed to as many properties as possible, irrespective of the agent selling them, while minimising their search costs.

60. *Vendors* are the owners of property who are seeking to sell their properties. Vendors typically rely upon the services of an agent to provide advice and conduct the sales process for them. Vendors bear a range of costs in selling a property including advertising costs (called 'vendor paid' advertising), agent commissions and other associated costs. However, the ACCC understands that in some regions, agents pay the advertising costs for a property, rather than vendor paid advertising or pass on part of the costs, absorbing the rest.

51 Ibid, p. 12.
52 Realestateview website: **http://www.realestateview.com.au/sitestats/** viewed on 28 July 2016.
53 PMG's supporting submission, 18 April 2016, p. 12.
54 REA Group's submission, 25 May 2016, p. 23-31
55 Unless otherwise stated, information appearing under this heading is from REA Group's submission, 25 May 2016, pp 8-10.

61. *Agents* are licensed under State and Territory legislation to advise and represent vendors in the property sale process. Agents typically charge the vendor a fee for their services in the form of a commission. As part of their role to the vendor, agents will prepare a proposed marketing schedule that sets out the elements of the advertising campaign that the agent intends to coordinate on the vendor's behalf and the associated costs.

62. Nationally, there are around 65 000 real estate sales agents[56] (with REA advising that it currently deals with around 10 000 agent offices).[57] In 2013, there were 13 903 real estate agents listed in Victoria.[58]

63. PMG submits that when vying for the business of a prospective vendor, agents compete in the following ways:[59]

- commission –typical commissions will range from 3 per cent (lower priced properties) to 1 per cent
- lead generation – agents will often claim to have a detailed database of prospective buyers which they will draw upon to identify potential buyers
- sale process – (that is, public auction, tender or private sale)
- valuation and
- scope and cost of the marketing program.

Advertising options[60]

64. Agents and vendors aim to expose their properties to as many property seekers as possible, in order to increase competition for their properties and, in turn, sale prices. There is a range of different media options for advertising properties. These options include the following:

- **Print** media – includes physically printed materials such as newspapers, magazines and brochures. Some of the advantages of using print media include the ability to target specific consumer groups and the ability to attract "passive" buyers who may browse a magazine even if they were not actively searching for property.
- Physical **signage** – such as billboards and posters are also used to advertise properties to property seekers. For instance, agents might advertise a property by displaying a poster in the agency office window, and by erecting signage at the property to be sold.
- **Digital** media – uses internet and other software-based media to deliver advertising. Digital advertising can consist of integrated desktop and mobile websites and mobile device applications (apps).

56 The Real estate Institute of Australia website, **https://reia.asn.au/agents/number-of-agents/,** viewed on 18 August 2016.
57 REA Group's submission, 25 May 2016, p. 13.
58 The Real Estate Institute of Australia website, **https://reia.asn.au/agents/number-of-agents/** viewed on 18 August 2016.
59 PMG's submission, 26 May 2016, p. 9.
60 Unless otherwise stated, Information appearing under this heading is from REA Group's submission, 25 May 2016, pp. 9-11, 15.

65. Digital advertising has a number of unique benefits that together have made it increasingly popular for both vendors/agents and property seekers. Properties can be added in real time and can describe features in relative detail. Agents can track the performance of an advertisement (number of views/enquiries) and advertised properties can be easily shared via email and social media. The success of a digital property advertising platform lies in its ability to attract property seekers to use it and agents/vendors to advertise on it. These two key factors are inherently related, in that property seekers will derive more value from using platforms that list more properties (other things being equal) and agents/vendors will derive more value from listing on platforms with more active property seekers. For that reason, digital property advertising platforms must serve the interests of both agents (acting on behalf of vendors) and property seekers.

66. REA claim that digital advertising comprises a relatively small part of the overall marketing costs. An example of property advertising costs is described below:[61]

Advertising cost	Typical range
Photography and floorplans	$250-$500
Video	$200-$750
Print advertisement – metropolitan paper	$500 - $5,500 (per publication)
Print advertisement – local magazines and paper	$300-$1,300 (per advertisement)
Print advertorial – local magazines and paper	$300-$1,000 (per advertorial)
Digital property advertising platform advertisement	On average, $120 (standard) to $2,000 (high-end)
Professional photos and floorplan preparation	$300-$700
Signboards	$200-$350
Mail drop	$100-$400

Evolution in real estate advertising

67. Consumers are increasingly looking online when considering purchasing, renting or selling a home. Online research is now the primary tool used by property seekers with REA reporting that 86 per cent of potential buyers use online as their main tool to search for property.[62] The main benefit of digital advertising is that properties can be searched for at any time and free of charge. Property seekers also have access to a great deal of additional information on a property and suburb through online research. A study by Google in 2012 found that real estate searches grew 253 per cent between 2008 and 2012.[63]

61 REA Group's submission, 25 May 2016, pp. 10-11.

62 REA Group, Online advertising stats and facts, **http://sellingguide.realestate.com.au/advertising-your-property/stats-and-facts/** accessed 20 May 2016.

63 Google internal data, Q3 2012 **http://www.realtor.org/sites/default/files/Study-Digital-House-Hunt-2013-01_1.pdf**

68. PMG also submits that unlike in the past, where print advertising was the main external source of real estate advertising, 'online advertising is now the most voluminous and preferred method of advertising.'[64]

Real estate legislation

69. The ACCC understands that each jurisdiction has similar legislation in place to regulate real estate agents. In Victoria, for example, real estate agents are regulated by the *Estate Agents Act 1980 (Vic*) *(EAA)*.

70. Under section 49A of the EEA, real estate agents[65] in Victoria are not able to profit from outgoings (such as advertising, photography or hire furniture) – that is, they are not allowed to add a margin to the costs of these services. Where an agent is unsure of the total price of outgoings, they must inform the vendor that the prices are an estimate and that if that total is not spent by the agent on outgoings the difference will be refunded to the Vendor.

71. The Estate Agent Regulations 2008 states that 'an estate agent must always act in a principal's best interests except where it would be unlawful, unreasonable, improper or contrary to the principal's instructions to do so.'[66]

Submissions received by the ACCC

72. The ACCC tests the claims made by the applicant in support of an application for authorisation through an open and transparent public consultation process.

73. The ACCC sought submissions from around 36 interested parties potentially affected by these applications including real estate advertising platforms, real estate groups (not listed as parties to the applications), industry associations, government and consumer organisations.

74. The ACCC received public submissions from three interested parties, all of which opposed granting authorisation to the proposed collective bargaining and boycott arrangements.

75. An overview of the public submissions received from PMG and interested parties follows. The views of PMG and interested parties are considered in the assessment section of this draft determination.

76. Copies of public submissions may be obtained from the ACCC's **Public Register** on its website.

[64] PMG's supporting submission, 18 April 2016, p 13.

[65] Defined in the EEA as a licensed estate agent (current, expired or cancelled) or director or officer of a corporation which is a licensed estate agent (current, expired or cancelled). **http://www.austlii.edu.au/au/legis/vic/consol_act/eaa1980145/s70.html#estate_agent**.

[66] **http://www.austlii.edu.au/au/legis/vic/consol_reg/eacr2008464/**

PMG

77. PMG considers it is effectively mandatory for vendors and real estate agents to list properties on the two 'dominant' online real estate advertising platforms – namely, REA and Domain. PMG submits that these suppliers do not currently negotiate with individual real estate agents and refuse to allow franchisors or agent groups to negotiate or manage advertising for the agents in their group.

78. In addition, PMG submits that agents have no flexibility in the advertising options they can offer vendors, as the dominant suppliers practically force agents to acquire 'premium contract all' advertising packages by offering substantial discounts. For these reasons, real estate agents are in a weak bargaining position with the dominant suppliers of online real estate advertising.

79. Therefore, PMG submits that the goal of the proposed arrangements are: [67]

- Collective bargaining – to achieve better pricing, more flexible advertising options and to recover the efficiencies of group negotiations.
- Collective boycotts – to be used where the dominant suppliers of real estate advertising do not engage in commercial negotiations, or PMG's desired outcomes are not obtained.

80. On 26 May 2016 PMG provided a submission in response to a request for further information from the ACCC. It also provided a submission in response to issues raised by interested parties on 23 June 2016.

81. On 7 July 2016, PMG also provided a report prepared by **Dr Rhonda Smith.** This report was in response to a report prepared by RBB Economics and provided to the ACCC by REA.. Dr Smith understands the issue that the proposed authorisation is intended to address arises in the context that:

- REA will only negotiate with individual franchisees and not with franchisors
- REA's pricing locks agents into at least its premium advertising option.

82. In this context, Dr Smith considers the proposed conduct will avoid the need for individual real estate agents to allocate resources for negotiating with REA, and these cost savings would be available to be passed through to vendors. Dr Smith also notes that real estate agents paying for the premium package irrespective of whether the vendor prefers the cheaper standard package, reduces the funds available to agents to put together more varied offerings for vendors.

Interested parties

83. A summary of the public submissions received from interested parties follows:

- **carsales.com Limited (Carsales)** – operates the real estate online platform homesales.com.au. It submits that the proposed arrangements do not satisfy the net public benefit test and should not be authorised. It contends that PMG has not demonstrated how creating a wholesaler between online media advertisers and agents will pass benefits of scale onto consumers. It

[67] PMG's supporting submission, 18 April 2016, p. 5

also expressed concern about the lack of detail in PMG's supporting submission regarding how it will operate and how it will address the alleged competitive imbalance between online real estate platforms.

Further, Carsales considers the proposed collective boycott may effectively force vendors to use other online platforms (as opposed to REA or Domain), potentially operated by real estate agents that are party to the application, without vendors having any say in a decision to enact such a boycott. It believes this is contrary to the fundamental principles of agency.

- **Domain** – opposes authorisation. It submits that the real estate advertising market is highly competitive and innovative, with strong competition not only between large players but also with a diverse range of smaller players and new entrants. It believes that the scope of the proposed conduct is unprecedented, and PMG has failed to substantiate any form of market failure and lacks detail about the proposed commercial arrangement between it and real estate agents.

  Domain also submits that PMG has failed to demonstrate how proposed collective bargaining and boycott activities will generate the claimed public benefits. It also considers that the proposal will result in public detriment and reduce the ability of real estate advertisers to respond flexibly and appropriately to the emergence of new technologies.

- **REA** – opposes authorisation of the proposed arrangements. It submits that the digital real estate advertising industry is highly competitive, characterised by 'fierce, close competition' between REA and Domain, aggressive competition from a range of mid-tier competitors, low barriers and frequent new entry, and the ongoing threat of rapid disruption by one of several global players (such as Airbnb, Facebook, eBay and Google). It considers its current contract/pricing model for real estate agents already offers agents choice, transparency and opportunities to effectively and efficiently differentiate their properties.

  In addition, REA considers that the claimed public benefits are illusory or overstated, while the proposed conduct would give rise to significant public detriments. REA also questions the legality of a boycott under Victorian real estate legislation which requires agents to act in the best interests of vendors.

- REA also provided a report prepared by **RBB Economics.** Among other things, the RBB Economics report concludes that although REA is a leading online property platform, it faces competition from its rivals. It also concludes that while REA's prices are unlikely to reflect the marginal cost of providing an additional property listing, they reflect the price that agents and vendors are willing to pay to have their properties listed on realestate.com.au which exposes their properties to a large audience of property seekers.

ACCC assessment

84. The ACCC's evaluation of the proposed collective bargaining and boycott arrangements is in accordance with the relevant net public benefit tests[68] contained in the Act. While there is some variation in the language of the tests, in broad terms, the ACCC is required to identify and assess the likely public benefits and detriments, including those constituted by any lessening of competition, and weigh the two. That is, the ACCC may grant authorisation if it is satisfied that the benefits to the public would outweigh the public detriments.

85. In order to assess the effect of the proposed collective bargaining and boycott arrangements 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 areas of competition

Applicant submissions

86. **PMG** submits that the relevant area of competition is online and print domestic real estate advertising. PMG submits that this area of competition is dominated by two suppliers – REA and Domain.

87. PMG considers REA and Domain face little or no competitive constraint. It submits that while there are other online advertising portals which provide the same service, for a substantially lower price, this does not in reality equate to a competitive alternative. Similarly, traditional print media does not provide a viable alternative to vendors.

88. PMG submits that over 62 per cent of buyers solely use REA when they are searching for properties online. PMG advises that the perception among the participating real estate agents is that vendors consider 'Domain is a competitor in traditionally wealthier suburbs and throughout Sydney.' However, REA has the dominant market share overall. PMG also submits that the smaller advertising platforms (such as onthehouse.com.au, realestateview.com.au and homesales.com.au) combined have around 10 per cent of the total unique audience within the market and are typically used as a complementary product, not a substitute.[69]

89. In this regard, PMG considers that the strong expectation of vendors that properties are listed for sale on the two largest advertising platforms 'means that existing and new website entrants cannot compete for the primary listing, irrespective of their commercial offering.'[70]

90. Further, PMG submits that if a vendor was only to list with one of the smaller mid-tier platforms, it 'would be pointless if potential buyers were not accessing that platform. In order for a smaller competitor to become competitive, it would

68 Subsections 90(6), 90(7), 90(5A) and 90(5B), 90(8). The relevant tests are set out in Attachment B.
69 PMG's supporting submission, 18 April 2016, p. 29.
70 Ibid, p. 4.

require….a very large marketing spend. This would be beyond what can be afforded by the mid-tier competitors and smaller players.'[71]

Interested party submissions

91. In contrast, **Domain** considers that real estate advertising is highly competitive. It competes against REA, as well as a growing list of smaller players. Domain considers it now has 'close to equal listings as REA.'[72]

92. Domain considers the industry is dynamic and driven by innovation, with participants competing across a number of platforms through continual price and product differentiation. For example, Domain submits that in online advertising it competes with a range of comparison and referral websites (such as OpenAgent, Local Agent Finder and RateMyAgent), price aggregator websites (such as OnTheHouse.com.au), State–based real estate institutes (that is, Realestateview.com.au and REIWA.com) and agents' own websites and marketing.[73]

93. Further, Domain contends that new entrants with different and innovative models are entering real estate advertising. In its view, agents have an increasingly diversified choice of real estate advertising platforms available to them, including search engine and social media options (such as Facebook).[74]

94. Similarly, **REA** submits that the digital property advertising industry is highly competitive. It considers there is:[75]

- fierce, close competition between REA and Domain
- aggressive competition from a range of established mid-tier competitors
- low barriers to entry and frequent new entry – for example, REA advises that Homely (a relatively new entrant) has experienced an increase in month-on-month traffic by almost 300 per cent over the last two years; and iBuyNew, which has a niche audience of property seekers purchasing new or off-the-plan properties has sold over 600 properties since its inception and has access to properties across 99 developments, and
- an ongoing threat of rapid disruption by one of several digital 'majors' (such as Airbnb, Facebook, eBay and Google).

95. REA acknowledges that it and Domain account for a large proportion of digital property listings. However, in two-sided markets like digital property advertising, where platforms provide services to both consumers and real estate agents, it considers that a relatively high degree of consolidation is inevitable. Digital property advertising reflects some network effects that result from the utility of a given platform to consumers (and therefore, real estate agents) being positively correlated with the number of property seekers using the platform. In these circumstances, market share will tend to gravitate towards a relatively small number of players, but this level of concentration does not imply that competition is limited. Indeed, REA submits that the 'contest between leading players to

[71] PMG's submission, 23 June 2016, p. 5.
[72] Fairfax Media Limited's submission, 30 May 2016, p. 2.
[73] Ibid.
[74] Ibid.
[75] REA Group's submission, 25 May 2016, p. 32.

benefit from the network effects of being able to claim market leadership, is likely to greatly amplify competition.'[76]

96. In particular, REA submits that it and Domain compete in respect of:[77]

- the number and comprehensiveness of the listings that each offers
- the functionality and useability of their website and app technology
- offering innovations and ancillary services to agents and property seekers and
- price – they offer slightly differentiated pricing models and compete on price to ensure they maintain a strong value proposition to agents.

97. REA submits its current pricing decisions are constrained by competition, which is demonstrated by the following examples:[78]

- between 2013 and 2016, REA's monthly subscription prices decreased, which has lowered the 'entry cost' of agents listing properties on REA's platforms
- in regions where there has been a low take up of its products, REA has reduced its rates – for instance, in Western Australia where there has been a reduction in demand from agents since the end of the mining boom, and in the ACT, where Allhomes has the significant share of the property seeker audience
- in 2015, in response to agent feedback it amended its pricing model to move towards a price structure that links prices to various multi-suburb 'market zones' in which properties are located, rather than to individual suburbs and
- it launched a new 'Premiere All' contract in June 2015 as an opt-in 2 year contract, following feedback that agents wanted 'simplicity and surety over a greater period.'

ACCC view

98. The ACCC considers precise identification of the relevant areas of competition is not required for the purpose of assessing PMG's applications for authorisation. The ACCC can consider the areas of competition in a broad sense when assessing the public benefits and detriments that would likely result from the proposed collective bargaining and boycott arrangements.

99. While much of PMG's supporting submissions focus on online real estate advertising platforms, the ACCC notes that PMG seeks authorisation to conduct collective negotiations in relation to both print and online forms of residential real estate advertising. Therefore, the ACCC considers the key areas of competition relevant to its assessment of the proposed collective bargaining and boycott arrangements are:

---

76 Ibid, p. 33.
77 Ibid, p. 35.
78 Ibid, pp. 40-41.

- competition between providers of online residential real estate advertising
- competition between providers of print residential real estate advertising and
- competition between real estate agents.

100. The ACCC notes that it has previously concluded that the supply of online and print advertising services are largely complementary and not directly substitutable for either vendors or property seekers.

101. Consumers are increasingly looking online when considering purchasing or selling a home. It is reported that 86 per cent of potential buyers use online research as their main tool to search for property.[79]

102. Regarding competition between online real estate advertising providers:

- REA and Domain are clearly the largest providers of online real estate advertising in Australia in terms of online audience (with a unique audience of 4.962 million and 3.538 million in March 2016 respectively). There are also a number of 'mid-tier' platforms (often providing services to niche sectors), as well as real estate agent's own websites and apps (such as LJ Hooker, Century 21 and Raine and Horne) and some small recent entrants.
- A 2014 Nielsen study reported that 57 per cent of survey respondents always or often visit realestateview.com.au when looking for a property and 10 per cent of property seekers visit realestateview.com.au exclusively,[80] REIWA reports that its property listing website attracts more than 1 million visits from over 400 000 unique visits per month.[81]
- Confidential information provided to the ACCC shows that in November 2015 a significant number of property seekers used both realestate.com.au and domain.com.au in the preceding 12 months to find potentially suitable properties.[82]
- During its consultation process, the ACCC found evidence of real estate agents recommending the use of Facebook in marketing strategies to prospective vendors.
- Online advertising suppliers compete to be perceived as the number one portal. There is evidence of both REA and Domain regularly introducing new features to their platforms in order to maintain the attractiveness to users of their products – for example, both businesses introduced Apple Watch and Android Wear platforms to the market in 2015, Agent profiles in 2014, school search functionality in 2015 and Domain introduced 'Facebook Chatbot' in May 2016.
- The significant market presence of REA and Domain makes it difficult for other online real estate platforms to attract a large number of users to their platforms.

---

79 REA Group, Online advertising stats and facts, **http://sellingguide.realestate.com.au/advertising-your-propert/stats-and-facts/ viewed** 20 May 2016.

80 REA Group's submission, 25 May 2016, p. 27.

81 Ibid, p. 29.

82 RBB Economics, *Economic assessment of PMG's application for authorisation,* 17 June 2016, p. 13.

- There is some price competition between the leading real estate advertising platforms, particularly in response to lower demand levels in specific regions in order to increase audience share. For example, REA has lower listing rates in Western Australia and the ACT, where it experiences lower demand for its online listings.

103. Regarding competition between providers of print residential real estate advertising:

- Competition is likely to be regional, and the ACCC is advised that Domain focusses its print distribution through newspapers in Sydney and Canberra, and in newspapers, magazines and community publications in Melbourne.[83]

- Domain advises that print advertising is negotiated separately from online advertising, and print advertising is typically purchased on an ad hoc basis as determined by the needs of a particular agency.[84]

104. Regarding competition between real estate agents, the ACCC notes:

- agents compete on the commission they charge vendors, which typically ranges from 3 per cent (for lower priced properties) to 1 per cent[85]

- there is regional competition between real estate agents. While the leading online platforms' listing prices are location based, there may be some scope for real estate agents to compete for vendors by finding lower cost suppliers of the other components of marketing campaigns (for example, photography) to reduce the cost of the overall advertising package they offer to the vendor

- agents adopt different marketing strategies depending on their location – for example, print advertising may still be preferred in some regional areas, and in the outer suburbs of metropolitan areas there is likely to be less demand for premium listing products and

- real estate legislation generally requires real estate agents to pass through advertising costs (and other defined outgoings) to vendors at cost.

The future with and without

105. The ACCC compares the public benefits and detriments likely to arise in the future where the proposed collective bargaining and boycott conduct occurs, against the future in which the proposed conduct does not occur.

Applicant submissions

106. **PMG** submits that without the proposed conduct the current contracting experiences for real estate advertising will continue. Practically, PMG submits that if there is no collective bargaining process, agents will simply be informed of the advertising rates for the following period on an agent by agent basis by sales

---

83 Fairfax Media Limited submission, 30 May 2016, p. 3.
84 Ibid.
85 PMG's submission, 26 May 2016, p. 9.

representatives from the main advertising portals. Real estate agents will be required to either:[86]

- sign the contract agreeing to the terms and conditions delivering them access to discounted advertising rates or

- refuse to sign the contract and be charged the 'casual' advertising rates, generally three to four times the contracted rate.

107. More generally, PMG considers that online real estate advertising currently has a tendency towards monopolistic behaviour, given the clear dominance of REA and Domain. PMG submits this market dominance is demonstrated by:[87]

- REA and Domain refusing to negotiate with real estate franchisors or agent groups

- there is no real negotiation with individual agencies – advertising rates are provided on a take it or leave it basis

- digital advertising costs have increased significantly and are disproportionate to the cost of providing these services. These price rises are set to continue.

108. Further, PMG submits that without authorisation of the proposed conduct there is currently a lack of flexibility for agents to design marketing packages that best suit their vendors' needs. In particular, agents are effectively 'forced' to enter into premium 'contract all' arrangements because of the significant discounts that are offered if they do so.[88] PMG considers that this lack of flexibility in package choice means that 'all agents (within a similar demographic region) are pushed on to the same level of listing, without receiving any real inter-agent differentiation or listing priority.'[89]

109. On the other hand, under any authorisation from the ACCC, PMG advises that it intends to 'take advantage of economies of scale, by purchasing advertising rights in online (and print) media in large quantities, enabling agents to have access to prices that, as an individual agent, they are unable to themselves achieve and negotiate.'[90]

110. PMG submits that contracts collectively negotiated on behalf of participating agents would ideally contain the following features:[91]

- maximum flexibility for agents to tailor advertising packages to suit their vendors' needs, budget, property type and property price

- advertising rates that are highly competitive

- contracts that fall due simultaneously (for example, on 30 June each year) to enable effective bargaining to occur and

86 Ibid, p. 10.
87 PMG's supporting submission, 18 April 2016, p. 4.
88 Ibid.
89 PMG's submission, 23 June 2016, p. 4.
90 PMG's supporting submission, 18 April 2016, p. 9.
91 PMG's submission, 26 May 2016, p. 6.

- an absence of conditions such as the mandatory provision of sales data or agent profile data by the agent to the real estate platform.

Interested party submissions

111. **Domain** considers that the current market for online advertising is competitive, which would be the future without the proposed arrangements. In this regard, Domain contends that:[92]

    - Domain and REA adopt competitive pricing strategies that currently offer a range of distinct subscription products for agents – for example, Domain offers a free subscription product to all agents, as well as a range of 'elite' subscription options. Therefore, there is a zero price entry point for agents, as well as incremental subscriptions for agents seeking additional value.

    - increases in advertising rates in recent years have been driven by significant investments in product innovation and development and

    - Domain currently consults with a number of industry advisory boards in each state to gain industry feedback on pricing proposals for service offerings.

112. Similarly, **REA** considers that its current contracting model would be the future without the proposed arrangements, and that this model already offers agents and vendors sufficient flexibility to tailor marketing packages to suit their needs. It advises that its subscription prices have decreased in recent years, and its contract prices for its premium listings reflects an efficient allocation of 'scarce screen space' and a means of allowing agents/vendors to differentiate their properties and reflects the size of the audience delivered on its platform.

ACCC view

113. The ACCC considers that in the future without the proposed collective bargaining and boycott conduct, current contracting processes for real estate advertising would continue.

114. Based on the information before it (including confidential information received from REA), the ACCC understands that real estate agents currently enter into a broad mix of contract types – presumably reflecting the demand they anticipate from vendors. There are noticeable differences between metropolitan and regional areas, with a higher proportion of listings at the more expensive Highlight and Premiere levels in metropolitan areas.

115. The ACCC also considers that in the future without the proposed arrangements, agents would continue to deal with advertisers on an individual basis. These interactions are unlikely to consist of detailed individual negotiations with the various advertising platforms that are the targets of this application for authorisation. While it may vary from platform to platform, the future without is likely to continue to involve agents being offered a suite of contract types designed to allow them to choose a package that best suits their business. The ACCC considers platforms are likely to continue to set fees, upgrade fees and discounts such as for 'contract all' equally for all agents within defined regions,

92 Fairfax Media Limited submission, 30 May 2016, pp 3-5.

rather than listing prices varying subject to franchise network or agent-exclusive negotiations.

Public benefit

116. Public benefit is not defined in the Act. However, the 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 principal elements … the achievement of the economic goals of efficiency and progress.[93]

117. In assessing whether the proposed collective bargaining and boycott conduct is likely to result in public benefits, two key questions the ACCC considers are:

    a. Are there structural or behavioural issues in online real estate advertising markets that mean they are not operating efficiently?

    b. If so, would the proposed conduct be likely to improve these market outcomes?

118. Structural or behavioural issues can mean that markets, left to themselves, will fail to achieve the most efficient outcomes that would provide the greatest benefit to society. Authorisation of potentially anti-competitive conduct can be a way to address such market imperfections.

119. **PMG** submits that collective bargaining (supported by collective boycotts where necessary) will result in the following public benefits: [94]

    - cost savings by vendors as a result of being able to select the most suitable advertising package for their specific property and financial situation, rather than being forced to buy a product that all the local agents have already contractually 'locked' into

    - significant savings in the total marketing spend by agents and vendors, or alternatively, a re-allocation of savings for vendors, allowing for investment and spending in other areas and channels (for example, house maintenance and preparation for sale)

    - lowering the costs of buying and selling a house (particularly if prices of on-line services continue to rise in the absence of any constraint)

    - allowing the benefits of economies of scale to be obtained by having agents bargain as a collective group (or in time as a franchise group)

    - cost and volume benefit efficiencies for groups negotiating and buying on behalf of a group

    - assisting small businesses (being individual franchises and independent agency offices) with efficiency benefits otherwise unattainable and

93 *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.

94 PMG's supporting submission, 18 April 2016, p. 31.

- true and fair price for the different packages being available without penalty or financial pressure to upsell to a 'premium' package.

120. The proposed conduct seeks to realise these claimed public benefits by increasing the bargaining groups' bargaining power in its dealings with the targets. In doing so, the applicant seeks to strengthen the competitive process and reduce what it sees as REA's and Domain's market dominance. According to PMG:[95]

> Upon the bargaining process being approved, a strong deterrent force to the market dominance currently enjoyed by the dominant suppliers will be felt. This will enable competition to increase, with the potential for the existing minor players to increase their market share, and for further competitors to enter the market. As a collective, Agents could elect to utilise the cost benefits offered by smaller portals and competitors who offer essentially the same service, however, without the current market reach and saturation.

121. The ACCC considers that PMG's claimed benefits can be grouped into three key potential public benefits: greater flexibility in acquiring online real estate advertising, lowering the price of online real estate advertising and transaction cost savings. The ACCC's assessment of the likely public benefits from the proposed conduct follows.

Greater flexibility in acquiring online real estate advertising

122. **PMG** submits that 'the current market place effectively forces Agents to purchase a 'premium all' service for all of the properties they may list.'[96] PMG considers that this results in market inefficiency because agents are not able to offer vendors any real choice of advertising package. So correcting this inefficiency by collectively bargaining more flexible advertising terms and conditions would result in a public benefit, with 'cost savings by Vendors as a result of being able to select the most suitable advertising package for their specific property and financial situation, rather than being forced to buy a product that all the local Agents have already contractually 'locked' into'.[97]

123. PMG submits that the conduct will result in public benefits from more flexible pricing:

> Ultimately, flexibility in pricing, better pricing and advertising experience will enable [agents] to provide better options to their vendors, and help them better differentiate their vendor proposals from other agents. In this way, agents will also become more competitive and innovative when pitching for work.[98]

---

95 Ibid. p. 23
96 Ibid.
97 Ibid.
98 PMG's submission, 23 June 2016, p.12.

124. **REA** submits that:

> … agents (and, by extension, vendors) already have substantial flexibility to choose the most suitable advertising package and are not, in any sense, "forced" to purchase a premium service from REA. As such, REA considers that the premise of the Application's public benefit claim regarding agent/vendor choice is factually flawed and REA does not consider that collective bargaining by PMG offers any meaningful benefits in this respect.[99]

125. REA provided detailed descriptions of a wide range of (17 different kinds) of contracts that it offers agents. It summarised its offering as follows: [100]

> - REA offers low-cost Standard subscriptions under which an agent can place Standard listings for no additional per-listing fee and a given Standard listing can be upgraded to a Feature, Highlight or Premiere depth listings for an additional per-listing fee; and
> - REA offers Flexi subscriptions with a wide variety of associated depth contract options, each of which facilitates a slightly different level of pre-commitment to depth listing upgrades and is aimed at slightly different agent needs – this allows REA to efficiently approximate the outcomes that would be expected if REA were to individually negotiate bespoke arrangements with agents.

126. REA considers, for example, that its Standard subscription is best suited to an agent that requires a low fixed-cost service and is willing to accept a relatively high variable cost if and when a depth listing is required. A Flexi subscription with an associated 'depth contract' is suited to an agent that has a greater need for depth listings (that is, premium listings) and is willing to commit to volume in exchange for lower per-listing upgrade fees.

127. REA also describes flexibility within its contracts:

- REA's Feature Elect 3, 5 and 10 contracts, and its Highlight Elect 3,5 and 10 contracts allow an agent to cost-effectively deliver Standard listings to the majority of its vendors while also catering to the minority of vendors for whom a higher-level Feature or Highlight depth listing is more appropriate.
- REA's 'Premiere All' contracts allow an agent to downgrade [a proportion] of its listings, at a similarly discounted price. … In this way, REA's 'Premiere All' contracts allow an agent to cost-effectively deliver Premiere listings to the majority of their vendors while also catering to the minority of vendors who are unwilling to pay for advertisings costs or for whom a lower level of listing is more appropriate. Even with this flexibility, REA's internal data show that only [a small proportion] of allotted exceptions are fully utilised by agents under their Premiere All contracts.[101]
- from time to time, REA offers early 'opt-out' arrangements which allow an agency to terminate a particular contract within the first three months if the contract does not suit their needs or the properties of their vendors.[102]

---

99 REA Group's submission, 25 May 2016, p. 47.
100 Ibid.
101 Ibid, p.50
102 Ibid.

128. **Domain** submits that PMG's suggestion that there is a lack of product choice and flexibility available to agents has not been substantiated. In particular, Domain states that:

> Online real estate marketing services offer a range of competing products. … Competition on the basis of product between Domain and REA is intense. In addition to competing through their subscription services on price and value add, Domain and REA compete intensely through their 'depth' product offerings. These products attempt to capture a greater number of listings on Domain's and REA's respective platforms by offering greater value to agents through improved listing visibility and prioritisation at a premium price, reflective of that value.[103]

129. Similarly, **REA** submits that:

> The Application also incorrectly contends that REA's contract/pricing model "forces" all agents to agree to place all listings at the Premiere level. REA does not require any such agreement from agents, and REA observes a wide variety of listing decisions generally and within local areas.[104]

130. **PMG** responded to these submissions by REA, stating that 'the agents represented by PMG deny that the standard or casual (Flexi) options are priced at a level that provides a viable option. As such they feel forced into accepting the 'contract all' offering.'[105] PMG provided an example to illustrate its point, quoting costs for listing a property in Toorak, Victoria as $2 649 under REA's Premiere All compared to $5 298 under REA's Premiere casual. Similarly, PMG quoted equivalent costs for listing with Domain as $1 650 under Premium Plus All, compared to $2 475 under Premium Plus Casual.

131. PMG submits that: [106]

> …as a result of this, agents are still required to pre-commit to packages prior to engaging with vendors. This results in inflexibility for the agents to pick and choose the level of listings for properties depending on their value and/or cost. … Further, all agents contacted by PMG in preparing this response currently utilise either the Premiere ALL or Highlight ALL option, and none have chosen the Flexi option. This is despite their desire to be able to adopt a more flexible approach to purchasing advertising packages appropriate to the property and their vendor's needs. … The incentive for agents to enter 'contract all' arrangements is compelling, to the point where a flexible option would be prohibitively expensive for an agent competing with others who have committed to Contract All options.

132. PMG provided a report from Economist **Dr Rhonda Smith**, in which Dr Smith stated that:

> Such price discrepancy for the same product [between the contract all price and the casual price for a premium listing] removes choice. … Offering the premium advertising package on a stand-alone basis at a significantly higher price when agents agree to purchase at least the premium package is an effective refusal to deal.[107]

---

[103] Fairfax Media submission 30 May 2016, p. 5
[104] Ibid, p. 51
[105] PMG's submission, 23 June 2016, p.6
[106] Ibid, p. 7
[107] Report of Rhonda L Smith, 30 May 2016, pp. 1 and 3.

ACCC view

133. The ACCC accepts that, to the extent that the proposed conduct were to provide greater flexibility for agents in acquiring on-line advertising of real estate and that as a result, vendors were able to acquire advertising that better met their needs, this would be a public benefit.

134. However, based on the information before it, it is not clear to the ACCC that this is the case. REA, and to a lesser extent Domain, has provided detailed information which it submits demonstrates the wide range of contract options already available to real estate agents in acquiring on-line advertising.

135. Both REA and Domain currently price discriminate between agents on the basis of a property's location and thus expected selling price and vendors' willingness to pay. Their price structures also offer discounts to agents who commit to certain levels of 'depth' contracts – that is, a pre-commitment to a certain volume of listings in exchange for lower per-listing upgrade fees.

136. The efficiency effects of price discrimination are ambiguous. However, to the extent that agent's depth commitments are met, vendors would seem to benefit from the lower prices obtained.

137. PMG's claim that agents are effectively forced to acquire online advertising on a 'Premiere All' basis is not supported by the current information before the ACCC. REA provided confidential data to the ACCC which demonstrates that real estate agents currently choose a broad mix of contract types – presumably to reflect their expected demand from vendors. There are noticeable differences between metropolitan and regional areas, with a higher proportion of listings at the more expensive Highlight and Premiere levels in metropolitan areas.

138. Nationally, the data shows a diversity of contract types. The data also shows a diversity of contract types within local areas. For example, having divided metropolitan Melbourne up into 20 local areas, Premiere All comprises less than 50 per cent of the contracts in almost three quarters of the local areas. No single contract type significantly exceeds two thirds of total contracts in any area and there are frequently areas with a reasonably even split between two or more quite different contract types. The ACCC notes that REA claims similar patterns are observed in other metropolitan and regional areas.[108]

139. The submission that agents are effectively forced into acquiring premium listing services that neither they nor the vendors want is also not supported by the low uptake of options to downgrade listings. The ACCC understands that for agents which have committed to a Premiere All contract, a relatively small proportion of the potentially available 'downgrades' are used. This may be due to a number of factors, including that agents are not always aware they have this option, that vendors in those areas generally prefer Premiere listings, or that agents prefer Premiere listings (and recommend them to their vendors) because the agent and agency is more prominently displayed in that level of listing. Whatever the reason, it appears that there is currently flexibility in REA's Premiere All contracts that is not being fully utilised by many agents.

[108] REA Group's submission, 25 May 2016, p. 48.

140. On the basis of the information currently before it, the ACCC is not satisfied that the proposed conduct is likely to result in public benefits from significantly greater flexibility in contract terms for the acquisition of on-line real estate advertising than the current arrangements. The ACCC considers there already appears to be flexibility within current contracting processes, and this range of options is reflected in the diversity of contracts that agents are currently entering into.

Lowering the price of online real estate advertising

141. **PMG** submits that real estate agents have stated that:

> The on-line marketing is ever increasing with a newer "premium" spot every couple of years (given a different name) with a higher price. There appears to be no regard for the underlying cost. Agents fear, as have been borne out by experience, an ever increasing cost. This increased cost is not balanced by increasing enquiry rate or valuable package content.
>
> REA and Domain, whichever are the "must have" listing, can exploit agents by setting their pricing models to effectively mandate higher tier offerings. In this marketplace, which has little viable alternatives, other agents are compelled to match the platforms and packages taken by their competitors. REA and Domain pricing is therefore based on what they can yield from the market, not the value of the product.
>
> The Agents act as agents for the home vendors. In most circumstances, advertising costs are passed through to the home vendors. When passed through, there is no mark up. So, it is the vendors who are being impacted, as the advertising listing costs simply increase the cost of the sale and the net return to the vendor.[109]

142. **Domain** submits that PMG's application does no more than claim that with authorisation, there will be price reductions for the benefit of vendors and agents. In particular, it submits that:

> Lower prices do not, in themselves, amount to a public benefit. This claim is made without any evidence that the current market derived prices are inefficient. … prices are largely driven by the cost of investment, and represent an economically efficient pricing structure. The Application does not disclose the mechanics of how the alleged benefits will flow through to agents and vendors. Further, … it is reasonable to assume that PMG will be charging a fee for their services … Any alleged cost savings derived from the collective bargaining arrangements may therefore amount to a transfer of costs rather than cost savings to agents or vendors.[110]

143. **REA** accepts that if the proposed conduct is authorised, PMG will be in a position to negotiate prices that are lower than REA's current prices. However, REA considers that the supply of digital property advertising services is highly competitive, its pricing is reflective of that competition and REA offers genuine value and efficiency to agents and vendors. REA does not consider that any material public benefit would arise from the proposed conduct's impact on its pricing.[111]

[109] PMG's submission, 23 June 2016, p. 4.
[110] Fairfax media submission 30 May 2016, p. 6.
[111] REA Group's submission, 25 May 2016, p. 53.

144. In response to PMG's submissions that on-line real estate advertising prices are well above reasonable costs of providing the services, REA submits that its pricing, like most if not all advertising businesses, is primarily value-based. REA submits that it has significantly grown the audience to which agents/vendors can expose their properties by investing heavily in developing and promoting its platform. REA also notes that compared to other forms of property advertising, its prices remain low.[112]

145. REA notes that it, like many digital platforms, has a high fixed-cost base. Its current contract/pricing model is not a 'cost-plus' model, but it is nevertheless reflective of REA's cost structure.[113]

146. REA submits that its 'depth listings' tend to outperform Standard listings in terms of the number of views and enquiries they generate, with this additional value justifying their higher prices. In particular, it submits that

> [Depth listings] satisfy unavoidable demand from agents/vendors for services that allow them to differentiate their properties, and allow REA to segment its customer base by reference to willingness to pay.[114]

147. Further, REA doubts that having lower premium listing price points are a sustainable equilibrium. Its current contract/pricing model partly reflects an underlying and persistent demand for listings that are differentiated from standard listings. REA advises that in its experience, there are always at least some agents/vendors willing to bid up REA's differentiated depth listing prices in order to gain a competitive advantage over competing agents/vendors.[115]

148. REA also states that the authorisation application provides no evidence that any cost savings that may arise from collective bargaining would be passed through to the benefit of vendors. It considers that any savings may simply be spent on another form of advertising or absorbed by agents (who sometimes do not pass on the full cost of advertising to vendors).[116]

ACCC view

149. Online media platforms are an example of a 'two-sided' market. A two sided market is characterised by an intermediary (often a platform) that provides goods and services simultaneously to two distinct classes of customers – generally, buyers and sellers. The platform makes it easier for buyers and sellers to find one another and increases the prospect of a successful transaction. For real estate buyers, this means increasing the likelihood of finding a property that best meets their needs. For sellers, this means increasing the likelihood of selling the property for the highest possible price.

150. Two-sided markets exhibit 'network effects'. These arise if the value of the platform to customers on one side of the market depends on participation in the platform by customers on the other side. For example, the greater the number of property seekers who use a particular online real estate platform, the greater the number of agents/vendors that are likely to want to advertise their properties with that platform in order to maximise the exposure of their property to the market.

---

112 Ibid, p. 54.
113 Ibid, p. 56.
114 Ibid, p. 55.
115 Ibid, p. 57.
116 Ibid, p.58.

151. When choosing a price structure, two-sided platform operators have to solve the simultaneous problem of getting participants on both sides 'on board'. It is common for one side of a two-sided market (the more price sensitive side) to be charged a relatively low price, possibly zero, while participants on the other side pay a higher price and effectively subsidises participants on the other side. This is the business model used by REA and Domain. An implication of this model is that prices on both sides of the platform are not directly linked to the cost of providing the service to each side. However, such a pricing structure is not necessarily inefficient.[117] In addition, prices will necessarily be higher than marginal cost given the need to recover high fixed costs.

152. The ACCC considers that the conduct for which authorisation is sought would enable PMG to negotiate lower prices with real estate advertising platforms. These lower prices would result in a public benefit if market outcomes were likely to be more efficient than would likely arise without the conduct. However, the ACCC is not satisfied that PMG's ability to negotiate lower prices as a result of the conduct would result in public benefits in all circumstances. This is because, as noted above, the ACCC is not satisfied that outcomes arising from an increase in PMG's bargaining power, including any reductions in prices, would necessarily be efficiency enhancing.

153. In particular, the ACCC considers that lower prices arising from the proposed conduct would not constitute a public benefit in at least the following circumstances:

   a. The lower prices reduce the target's incentives to invest in innovations that benefit buyers and sellers.

   b. As a result of (a) the value of the target's platform to both buyers and sellers is reduced, thus increasing transaction costs and reducing the opportunities for mutually beneficial trade between buyers and sellers.

   c. The lower prices distort price signals and rivals' incentives to compete with the target, thus distorting market outcomes and reducing the likelihood that those outcomes would be as efficient as possible.

154. The ACCC notes the profitability of the leading real estate advertising platforms and PMG's submissions that REA's and Domain's prices are substantial and have increased significantly.[118] Neither platform charges buyers to search for properties, instead seeking to recover costs from sellers. When setting prices to participants on one side, the portals have to consider the effect of those prices on participants on the other side. For example, charging higher prices to one side would be expected to reduce the number of participants on that side. A reduction in participants on one side will, through network effects, reduce the number of participants on the other side and thus reduce the overall attractiveness of the portal to both sides.

155. The ACCC considers that REA and Domain each have a degree of market power in a number of regions, and it is likely that their current pricing reflects this market power. However, the ACCC considers that there is some scope for competition between market participants and thus REA's and Domain's prices send important signals to those participants about profitable opportunities to compete by offering

[117] Rochet, J-C and J Tirole, 2003, "Platform competition in two-sided markets", *Journal of the Economic Association*, Vol. 1, pp. 990-1029.

[118] PMG's supporting submission, 18 April 2016, p. 19.

alternatives that better meet buyers' and sellers' needs at potentially lower cost and prices.

156. Finally, it is not clear that even if PMG could negotiate efficiency-enhancing price reductions, that these would ultimately be passed through to vendors. Agents do sometimes absorb part of the cost of advertising a property, so may well retain any cost savings to reduce this impact. Further, the ACCC considers the ultimate size of any price reduction is uncertain where an intermediary, such as PMG, imposes commissions on the negotiating and contracting services it provides.

157. Therefore the ACCC considers that the proposed conduct could result in some public benefits from lower, more efficient pricing in some limited circumstances. However, given the significant uncertainty surrounding the operation of the proposed collective bargaining processes, the ACCC is not satisfied that even if this public benefit were to be achieved, that it would be likely to be significant.

Transaction cost savings

158. One of the public benefits **PMG** submits will result from the proposed conduct is essentially transaction cost savings:

> Allowing the benefits of economies of scale to be obtained by having Agents bargain as a collective group (or in time as a franchise group), not as individual Agents or franchisees.[119]

159. **Dr Smith**, in an expert report commissioned and provided by PMG, considers that:

> The ability to engage in collective bargaining, supported by the right to boycott, does not merely result in a transfer between the parties, referred to as a pecuniary benefit. REA's conduct has the effect that agents are unable to reduce transaction costs by having their franchisor negotiate with REA on their behalf. The conduct for which authorisation is sought would avoid the need for individual real estate agents to allocate resources for this purpose. These cost savings would be available to be passed on in full or in part in the form of lower commissions negotiated by vendors.[120]

160. **REA** submits that the proposed conduct will not result in any transaction cost savings:

> Neither REA nor agents are subject to material transaction costs. … the terms upon which agents purchase listings on the REA platform are not negotiated between REA and individual agents. Rather, REA offers all agents a contract/pricing model that includes a wide variety of contract options from which they can choose an appropriate package. Collective negotiations would not assist agents to reduce any material negotiation costs. Further, from REA's perspective, no particular inefficiencies arise from it contracting with each agent.[121]

[119] Ibid, p. 31.
[120] Report of Rhonda L Smith, 30 May 2016, p. 4
[121] REA Group's submission, 25 May 2016, pp. 58-59.

161. **Domain** submits that:

> The Application does not disclose the mechanics of how the alleged benefits will flow through to agents and vendors. Further, the Application does not disclose what the commercial arrangements between PMG and the relevant real estate agents are or will be. It is reasonable to assume that PMG will be charging a fee for their services, whether by way of commission or otherwise. Any alleged cost savings derived from the collective arrangements may therefore amount to a transfer of costs rather than cost savings to agents or vendors.[122]

ACCC view

162. Transaction cost savings are a common public benefit of collective bargaining. Collective bargaining can reduce transaction costs and enable contracts to be negotiated that more fully capture mutually beneficial opportunities for trade between the parties.

163. The service offering by the leading advertising platforms in this instance is quite different to many of the collective bargaining applications considered by the ACCC, where typically, a relatively small number of entities wish to form a collective bargaining group in circumstances where they otherwise face a single service being offered by a single provider on a take it or leave it basis at a fixed price and with standard terms and conditions.

164. The leading online platforms, REA and Domain, offer real estate agents a range of contract types and prices from which they can choose in order to best match their business. In other words, REA and Domain currently present agents with a range of online advertising service options and associated prices, but with very limited scope to negotiate variations.

165. The ACCC considers there is some scope for the proposed arrangements to reduce transaction costs in some circumstances. This may enable some contracts to be negotiated that better reflect the circumstances of both the members of the bargaining group and the relevant online platform. For example, the arrangements may facilitate negotiation of more nuanced common terms and conditions for groups of agents with similar preferences to the benefit of both parties to the negotiation. However, any potential benefits may be limited by the diversity of preferences of agents across Australia and the range of services already offered to agents by REA and Domain. Therefore, the ACCC considers the proposed arrangements are unlikely to result in a public benefit as a result of transaction cost savings.

166.

ACCC conclusion on public benefits

167. On the information currently before it, the ACCC is not satisfied that the proposed collective bargaining arrangements (supported by collective boycotts where necessary) are likely to result in public benefits as a result of transaction cost savings or increasing flexibility in contract choice for real estate agents. Any potential benefits in this regard would appear to be limited given the diversity of interests of a potentially national bargaining group of real estate agents, and the

[122] Fairfax media submission, 30 May 2016, p. 6.

degree of flexibility inherent in the range of services already offered to agents by REA and Domain.

168. The proposed arrangements could result in lower and more efficient advertising rates for members of the collective bargaining group(s) in some limited circumstances. However, the ultimate size of any price reduction is uncertain where intermediaries, such as PMG, impose commissions for the contracting services they offer. Further, given the significant uncertainty surrounding the operation of the proposed collective bargaining processes, the ACCC is not satisfied that this public benefit from lower advertising rates is likely to be significant.

Public detriments

169. Public detriment is also not defined in the Act 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.[123]

170. Generally, the ACCC considers that collective bargaining arrangements between competitors can lessen competition and efficiency in some circumstances. In assessing the size of any public detriments from collective bargaining arrangements, the ACCC typically considers:

- the effect on competition from collective rather than individual negotiations, including the potential impact of any proposed collective boycott activities (discussed further immediately below)
- the effect on competitors outside the collective bargaining group
- the effect on barriers to entry – for instance, if price discounts are only available to members of a collective bargaining group, this may have the effect of raising barriers for otherwise efficient businesses
- the potential for collective bargaining to facilitate coordinated behaviour beyond the terms of any authorisation
- the size of the proposed collective bargaining group relative to the market and
- whether the proposed collective bargaining arrangements are voluntary.

171. **PMG** considers the proposed collective bargaining conduct will not result in any ‘noteworthy public detriments’.[124] In particular, it considers the following features of the proposed arrangements limit the extent of any anti-competitive detriment:[125]

- the current level of negotiations between individual members and the targets (predominantly REA and Domain) is low

123 *Re 7-Eleven Stores* (1994) ATPR 41-357 at 42,683.
124 PMG’s supporting submission, 18 April 2016, p. 32.
125 Ibid, pp. 32-33.

- participation in the collective bargaining arrangement is voluntary and there is no obligation for parties to the application to utilise PMG's services. Any participating real estate agent can elect to opt-out of the collective bargaining arrangement and individually bargain with real estate advertisers

- the composition of the bargaining group is initially limited to those agents listed within the authorisation application (however, any individual agent in Australia or real estate franchisor may elect to join the group in the future) and

- there will be no detriment to real estate agents that are outside the collective bargaining group.

172. The ACCC's assessment of the likely public detriments from the proposed collective bargaining and boycott arrangements follows.

Scope and size of the collective bargaining group

173. PMG submits that the scope of the collective bargaining conduct is initially limited to the (170) individual real estate agencies listed within the application for authorisation. However it notes, that it also seeks authorisation for any real estate agency or franchise network to become a member of the collective bargaining group in the future.

174. Interested parties have expressed concerns regarding the scope of the proposed arrangements. In particular, while PMG submits that the proposed collective boycotts are likely to take place in subsets, **Carsales.com Limited** submits that there is 'clearly scope under the application for a significant number of agencies to be involved in a collective boycott against particular online platforms.'[126]

175. **Domain** submits that the scope of the application, which seeks authorisation to collectively bargain on behalf of any real estate agent in Australia with any print and online real estate advertiser, is unprecedented.

176. In addition, Domain submits that while the proposed conduct relates to both online and print forms of real estate advertising, the authorisation only:

> …provides information and (limited) analysis in relation to online advertising. No information is provided in relation to print or other property sales advertising. The Application is therefore deceptive in scope and seeks authorisation for conduct broader than could be justified given the information provided.[127]

177. Similarly, **REA** submits that the authorisation application is not expressed to be limited in terms of the size of the collective bargaining group. That is, PMG seeks authorisation to collectively bargain on behalf of any real estate agent or real estate franchise network in Australia. REA considers that potential distortions to competition in online real estate advertising as a result of the proposed collective bargaining arrangements are 'compounded by uncertainties regarding how, and in whose interests, PMG will operate.'[128]

178. Further, REA considers that while PMG proposes certain limitations on collective boycott activity (namely, they will *likely* be package, regional, price or group based

---

126 Carsales.com Limited submission, 13 May 2016, p. 3.
127 Fairfax Media Limited submission, 30 May 2016, p. 3.
128 REA Group's submission, 25 May 2016, p. 64.

boycotts), the proposed limitations are inadequate. REA considers that each of the boycott options will have a significant impact on its business. This is discussed in further detail from paragraph 218 below.

ACCC view

179. The ACCC notes that the scope of the proposed conduct is very broad, and the size of the potential bargaining group is very large. Effectively, PMG seeks authorisation to represent any real estate agent or real estate franchise network in Australia in negotiations with any print and online real estate advertiser in Australia.

180. In regard to the composition of any collective bargaining group and the collective bargaining process itself, PMG advises that it currently envisages that it may seek to negotiate non-price terms and conditions on behalf of its entire client base of real estate agents. In regards to advertising rates, it envisages that it may be more efficient to conduct negotiations by grouping its clients according to how advertisers group real estate agents, namely by location. [129] PMG also envisages potentially negotiating a group-wide advertising price (for example, a discount off the 'rack rate') on behalf of a franchise network.[130]

181. While PMG initially sought authorisation to engage in collective boycotts against 'any and all online real estate advertising media suppliers', it subsequently clarified that a collective boycott 'is not being sought for parties other than REA Group and Domain'.[131] PMG also provided more information about how collective boycott activities are likely to operate (as described in paragraph 26).

182. Nonetheless, the ACCC considers there is still insufficient clarity around the potential size and composition of any group of agents that could be involved in boycott activities under PMG's proposal. PMG would have a broad range of potential boycott activities available to it under the proposed conduct. For example, the application could allow PMG to arrange for all participating agents (potentially across Australia) to boycott a particular advertiser, or for an entire national real estate franchise network to remove their entire property listings from a particular advertiser.[132] On a geographically smaller scale, the application could allow PMG to organise agents located in four municipal councils to all agree not to acquire the premium property listing from a particular advertiser.[133]

183. Collective bargaining (supported by boycotts) can result in the bargaining group using its market power to force prices below efficient levels, which is a public detriment. The ACCC considers the larger the size of any collective bargaining group (including with the ability to collectively boycott), the larger the size any potential public detriment is likely to be. In the current circumstances, there is significant uncertainty about the likely size and composition of any collective bargaining or boycott group. As such, the ACCC considers that the proposed arrangements are likely to result in significant public detriment.

---

129 PMG's submission, 26 May 2016, p. 4.
130 Ibid, p. 5
131 PMG's submission, 26 May 2016, p. 1.
132 PMG's supporting submission, 18 April 2016, p. 25.
133 PMG's submission, 26 May 2016, p. 8

Competition between real estate advertisers

184. **Domain** submits that the proposed collective bargaining (and boycott) arrangements would reduce competition between it and REA. It considers that:

> The creation of a single purchaser such as PMG…would be likely to have the effect of reducing Domain's ability to respond flexibly to competitive conditions in an innovative and technology driven market with many new entrants.[134]

185. Similarly, **REA** considers that the proposed collective bargaining arrangements will result in 'distortions of competition in digital advertising markets'.[135] In particular, REA submits that:

> PMG seeks authorisation to negotiate using the combined buying power of potentially large blocs of agents. That aggregation of buying power would significantly distort normal competitive outcomes and price signals…[136]

186. Further, REA expressed concerns that if agents who participate in Domain's agent equity model are included in a PMG bargaining group, 'they are likely to have incentives to encourage collective bargaining outcomes that favour Domain (and their own financial interests via the equity model) rather than REA.'[137]

187. REA also considers the proposed collective bargaining arrangements will reduce incentives for online advertisers to innovate, therefore reducing competition between platforms. In particular, REA contends that:[138]

- PMG proposes to seek a reduction in REA's revenues under the proposed collective bargaining arrangements. Such a reduction would significantly reduce its ability to invest in IT-related improvements to its platform

- its advertising rates are partly informed by the size of the property seeker audience that REA delivers to agents and vendors. In the current competitive environment, it has an incentive to enhance the functionality and usability of its platform. The proposed collective bargaining arrangements are likely to force reductions in REA's prices, and those prices will become less reflective of REA's audience and REA will have less of an incentive to innovate, and

- under the proposed arrangements, PMG contemplates seeking greater agent input into the 'appearance and content of listing'. REA advises that it has developed its platform over many years and has expertise in what property seekers value from their website. It submits that the proposed arrangements will restrict and delay innovation if agents must be consulted on potential modifications or changes to its platform.

---

134 Fairfax Media Limited submission, 30 May 2016, p. 6.
135 REA Group's submission, 25 May 2016, p. 5.
136 Ibid, p. 63.
137 Ibid, p. 64.
138 Ibid, pp. 64-65.

188. In its report prepared on behalf of REA, **RBB Economics** submits that:

> Both collective bargaining and collective boycott in the current context could lead to inefficiency in price signals in an otherwise competitive market. Collective boycotts could directly damage the REA platform, preventing it from earning a return on its investment….[139]

ACCC view

189. As previously discussed, while the leading advertising platforms (that is, REA and Domain) clearly have a degree of market power in a number of regions, the ACCC also considers there is some evidence of competition between them. For instance, there is some evidence of REA reducing its rates in specific market zones where it has relatively low consumer audience share (for example, Canberra), in order to increase market penetration. The ACCC also notes that the leading platforms have a history of introducing new features to their platforms, suggesting there is ongoing competition to win market share through improvements to the quality and usability of their websites and app functionality.

190. Collective bargaining by PMG on behalf of potentially very large groups of real estate agents would likely lead to lower listing prices in the short run for vendors who contract with the bargaining group. To the extent that this reduced REA's and Domain's profits this could result in public detriments if it reduced incentives to invest in developing new features for their platforms. However, the ACCC considers the size of any such detriment is likely to be mitigated by ongoing competition between the platforms to be seen as the 'number 1 portal', including through continuing improvements and additional functionality being delivered on their website or app. As such, any public detriment from a lessening of competition between real estate advertisers is unlikely to be significant.

191. The ACCC considers that some public detriment may arise from inefficient distortions in competition due to a number of real estate agents having shareholdings in Domain entities, such that those agents may have a commercial incentive to favour Domain in any negotiations, or boycott REA for the benefit of Domain.

Increased/duplicated costs

192. **REA** submits that the proposed conduct would result in it having to change the way it currently negotiates and contracts with real estate agents and that this would result in detriments from consequent increased costs:

> Currently, REA does not have a large-scale function dedicated to negotiating prices with the approximately 10,000 agencies in Australia. Such a function would be necessary to properly negotiate pricing with PMG and with agents not participating in a collective negotiation on a one-to-one basis if the current transparent pricing model was broken down by PMG.[140]

193. REA submits that there would be necessary additional expenditure on IT systems to manage different contract types, as well as additional training and resourcing of its contract managers to deal with more bespoke customer requirements.

[139] RBB Economics, *Economic assessment of PMG's application for authorisation,* 17 June 2016, p. 5.
[140] REA Group's submission, 25 May 2016, p. 67.

194. In order to properly represent and contract with the agents it represents, REA submits that PMG will need to develop a significant sales force and related IT infrastructure. REA submits that this would largely duplicate the existing equivalent functions within REA and other platforms and the imposition of these further costs on agents and vendors would be inefficient.[141]

ACCC view

195. The ACCC considers that the proposed conduct could result in some public detriment to the extent that it results in increased costs and unnecessary duplication. For example, it could result in increased costs from any additional resources that would need to be deployed by (1) real estate advertisers who do not currently devote significant resources to individually negotiating rates and conditions; and (2) costs associated with PMG's role in negotiations. However, the magnitude of such detriments would likely be reduced by competitive pressure on both sides to keep costs low.

Flattening contract pricing models and reduced transparency

196. **REA** submits that under the proposed arrangements, PMG will seek to negotiate for agents to 'access depth products on an uncommitted basis at lower prices' than those currently offered by it. REA considers this if its premium listings are made cheaper, every agent will purchase them and as a result, these listings will become undifferentiated. If digital property advertising becomes more homogeneous, REA considers that agents will be unable to differentiate property listings which will lessen competition between them.[142]

197. Further, REA advises that its various contract types are currently offered equally to agents in a given geographic zone. Listing prices are not subject to franchise network or agent-exclusive negotiations that might otherwise result in some agents gaining an advantage over others in the same region when competing for vendors.[143]

198. REA considers the proposed arrangements will also reduce the transparency of its advertising rates. In particular, REA submits that if PMG is able to negotiate a 'special deal' on behalf of a particular group of agents (or franchise network) under the proposed arrangements, the transparency of its advertising rates (currently available equally to all agents through its platform) would be immediately reduced. REA considers the terms of any 'special deal' negotiated by PMG are unlikely to be publicly available to all agents and advertising prices would be impacted by the fees and margins imposed by PMG. Over time, REA considers this would lead to a 'break-down in REA's contract/pricing model.'

ACCC view

199. Among other things, PMG advises that the purpose of the proposed arrangements is for it to negotiate lower advertising rates on behalf of participating real estate agents. Given the diversity of contract types and listing decisions that currently exists between agents, the ACCC considers that PMG is likely to seek to negotiate lower advertising rates across the entire range of products on behalf of participating agents.

---

141 REA Group's submission, 25 May 2016, p. 67.
142 Ibid, p. 66.
143 Ibid.

200. If the outcome of collective negotiations was that the price of premium listings was reduced, compared to other ('lower grade') listings, the ACCC considers agents are likely to purchase more premium listings from online platforms. However, given ongoing demand by agents and vendors for some form of product differentiation from standard listings, it is unlikely that listings would be 'flattened' longer term. Therefore, the arrangements are not likely to result in significant public detriment from preventing agents from being able to differentiate their vendors' properties.

201. However, the ACCC considers that the proposed arrangements are likely to reduce the transparency of REA's current pricing. The ACCC is advised that REA's suite of subscriptions and per-listing upgrade fees are able to be accessed by all agents in a given area through REA's website.[144] The ACCC is also advised that REA offers particular contract offers equally to all agents in a particular area at the same time, and for the same period of time – that is, the offers are not made to particular agents, or members of a particular a franchise group for example.[145]

202. To the extent agents in PMG's collective bargaining group are able to secure prices and other terms and conditions outside REA's current contract models, this may impact the terms and conditions offered to agents outside the group. The potential impact on competition between real estate agents is discussed in further detail below. REA considers that if there were separate prices for members of the PMG collective bargaining group, 'this would require duplication of REA's entire pricing infrastructure.'[146] To the extent this occurred, the ACCC considers it would contribute to the increased costs discussed above.

Reduced competition between agents

203. As previously discussed, **PMG** considers that the proposed arrangements are unlikely to result in public detriment because, among other things, agents' participation in the proposed arrangements is voluntary. It submits that any participating real estate agent can elect to opt-out of the collective bargaining arrangement and individually bargain with real estate advertisers.[147]

204. In addition, PMG believes the proposed arrangements will have no impact on real estate agents outside the collective bargaining group. PMG did not provide further information to support this claim.

205. **REA** considers that the proposed collective bargaining and boycott arrangements will reduce competition between real estate agents in the following ways:[148]

- entrenchment of existing scale with no efficiency gains – volume discounts would favour agents (or franchise networks) that purchase greater volumes of listings from PMG, making it more difficult for the smaller agents in the same local area to compete for vendors. REA considers that any volume discounts negotiated by PMG would simply represent negotiating leverage, and not productive efficiencies.

144 REA Group's submission, 10 August 2016, Annexure A, p. 29.
145 Ibid, p. 30.
146 Ibid, p. 38.
147 PMG's supporting submission, 18 April 2016, p. 33.
148 REA Group's submission, 25 May 2016, p. 68.

- since many agents simply pass on the cost of advertising to vendors, agents do not compete strongly in relation to the listing prices for REA's platform. Instead, agents compete in relation to commissions, marketing strategies and service levels. REA considers this current level of competition would be reduced if its current contract model was unwound.

- increased barriers to entry for agents – REA submits that in the event that digital listing prices were related to the size of a real estate agency or network, new agencies would be placed at 'an inherent scale disadvantage and would be unable to make price competitive proposals to vendors.'

206. **RBB Economics** submits that collective bargaining (and collective boycotts) may reduce competition between real estate agents. In particular, it submits that agents currently work with REA to develop packages that allow them to achieve the best results for their vendors in their local area. For example, it notes that the introduction of 'market zones' and 'Premiere All' contracts were introduced by REA following discussions with agents. RBB Economics considers that introducing PMG as an 'agent' between REA and real estate agents is likely to impede the introduction of such changes.[149]

207. Further, RBB Economics considers that the proposed arrangements could harm those real estate agents outside the collective bargaining group. In particular, RBB Economics submits that the terms and conditions of supply to agents outside the group could be reduced – for example, if the collective bargaining group obtains lower prices, REA may increase advertising prices for agents outside the collective bargaining group in order to try to cover their overall costs and maintain their investment in product development and innovation. RBB Economics considers the broader the coverage of any proposed collective bargaining group, the greater the potential for harm to agents outside the group.[150]

ACCC view

208. The ACCC considers that in some cases collective bargaining can lessen competition and efficiency. The ACCC notes that any bargaining group is unlikely to be homogenous in composition and the application of a 'one size fits all' collectively negotiated contract could lead to inefficient outcomes if it results in arrangements that reflect the 'average' member of the group rather than catering to individual needs. In these circumstances, inefficient agents within the bargaining group may be advantaged. In the current circumstances, PMG contemplates potentially negotiating non-price terms and conditions for its entire client base of real estate agents. Having said this, PMG also contemplates seeking to collectively negotiate non-price terms and conditions on behalf of particular agency groups within its client base, given that some terms and conditions may be more relevant for certain agents than others.[151]

209. In this regard, the ACCC considers there would be a very diverse range of interests between inner city real estate agents compared to a smaller real estate agent in a regional area. As previously discussed, there is currently a lack of clarity surrounding the size and composition of any collective bargaining group under PMG's applications for authorisation. Collective negotiations could potentially reduce any existing diversity of non-price terms and conditions across a national collective bargaining group of agents (and potentially with any print and

[149] RBB Economics, Economic assessment of PMG's application for authorisation, 17 June 2016, p. 25.
[150] Ibid, pp. 25-26.
[151] PMG's submission, 26 May 2016, p. 4.

digital advertisers). To the extent this occurred, this would likely lessen competition between real estate agents, which is a public detriment. However, the ACCC considers this is unlikely to be a significant public detriment because any agents disadvantaged by the loss of diversity would be unlikely to remain part of such a broad collective bargaining group.

210. The potential for increased coordination between members of a collective bargaining group outside the terms of the proposed authorisation can also result in public detriment. PMG advises that if authorisation is granted by the ACCC, it will 'most likely' exchange information to its clients in written and verbal form, including through meetings focused on the following issues:

- desired outcomes of negotiations
- progress reports on negotiations and
- proposed action stemming from the negotiation process.

211. Based on current information before it, the ACCC considers it is unclear what level and type of interaction agents will have via any such meetings of collective bargaining groups arranged by PMG, as well as any processes that would be introduced to limit discussions to the terms and conditions for which authorisation is sought. Coupled with the potential scope and uncertainty surrounding the conduct for which authorisation is sought, the ACCC is concerned that the close interaction between real estate agents as part of a bargaining group may increase the risk of, or facilitate, coordination outside of the scope of the authorisation. This concern would be magnified if PMG was representing a national bargaining group of agents or alternatively most agents in a particular geographic area.

212. The ACCC considers that any harm to agents outside the bargaining group that arose from anti-competitive conduct facilitated by the exchange of information between members of the group would be a public detriment.

213. The ACCC notes the potential for real estate agents outside the collective bargaining group to be harmed by the proposed conduct if it results in members of the bargaining group negotiating more efficient contracts and thus conditions of supply of online real estate advertising. However, in these circumstances, the ACCC would not generally consider this to be a public detriment as the harm would arise from enhanced competitive conduct by members of the bargaining group. The ACCC notes that agents who are outside the bargaining group may be able to mitigate any potential competitive harm by joining the group.

Impact of proposed collective boycotts

214. **PMG** submits that any public detriment from proposed collective boycott activities is limited because any required action for agents to collectively boycott a particular real estate advertiser is unlikely to involve all of the participating real estate agents. PMG advises that:

> At this stage, … any boycott would include the 'package-based' option which would ensure that properties were still listed on the major portals, albeit at a much lower package.[152]

215. Further, PMG submits that it will provide 21 days' notice of intended boycott action to the relevant advertiser. Given that PMG would not be in a position to enact any collective boycott prior to 1 July 2017, it also considers that this would provide sufficient time to include mediation if this would assist the negotiation process.

216. In relation to third parties, PMG submits that even if it directed a collective boycott of the leading online real estate advertisers, any public detriment would be limited. In particular, it submits that:

> Vendors have alternate package levels or portals to choose. Potential buyers will still be able to find their houses on alternate sites.[153]

217. Further, PMG submits it would address any concerns about providing property seekers with sufficient notice of intended boycott activities in the following way:

> PMG would be seeking undertakings from any competing portals that they would be investing significantly in marketing activities to ensure target markets are aware of their options when searching for properties.[154]

218. **Carsales** considers that the right to impose a collective boycott could enable a collective bargaining group to inflict significant commercial damage on a target of collective bargaining. In particular, it submits that:

> The proposed boycott outlined in the Application may effectively force property vendors not to use realestate.com.au and domain.com.au in favour of other online platforms, potentially operated by the parties to the Application, without the vendors having a say in that decision.[155]

219. **REA** submits that there is no certainty under PMG's application that a collective boycott would be limited in the ways suggested by PMG. In any event, REA considers that each kind of collective boycott proposed by PMG would have a significant impact on its business. In particular, it submits that:[156]

- premium-package based boycotts – an effective premium-based boycott would be likely to substantially reduce REA's revenues from its 'depth listing' products.

[152] PMG's submission, 26 May 2016, p. 9.
[153] PMG's supporting submission, 18 April 2016, p. 5.
[154] PMG's submission, 26 May 2016, p. 9.
[155] Carsales.com Limited submission, 13 May 2016, p. 4.
[156] REA Group's submission, 25 May 2016, pp. 71-72.

- regional-based boycotts – REA notes PMGs submission that any such boycott would be limited to 30 municipal councils at any one time. REA highlights that the greater Melbourne area consists of 31 municipal councils and greater Sydney comprises 38 municipal councils. As such, REA submits that the effective withdrawal of a large number of listings across all, or almost all, of a metropolitan area would be likely to significantly reduce the utility of REA's platform for property seekers.

- price-based boycotts – REA notes that PMG's supporting submission to the application refers to a boycott for 'all properties with a listed sale price of below a defined threshold value.' REA submits there is nothing to prevent that threshold being set at such a high level as to apply to the vast majority of listed properties.

- group-based boycott – a group-based boycott involving franchisees would substantially decrease REA's revenue and listings volume.

220. Further, REA questions the lawfulness of proposed collective boycotts under State real estate legislation. In particular, REA notes that under such legislation, real estate agents have a legal duty to act in the best interests of vendors. It also submits that these obligations are, to some extent, reflected in the national Real Estate Institute of Australia Code of Practice. In particular, REA submits that:

> In view of the negative impacts on individual vendors that would necessarily result, it is unclear whether an agent could lawfully participate in a boycott, which would be intended to serve either the agent's own interests or potentially the interests of the agent's future vendor clients.[157]

ACCC view

221. A collective boycott involves two or more competitors agreeing not to acquire goods or services from, or not to supply goods or services to, a target with whom a collective bargaining group is negotiating, unless the target accepts the terms and conditions sought by the group.

222. In certain circumstances, the ACCC considers that an ability to threaten and/or engage in a collective boycott can be an efficient negotiating tool, and may be necessary to enable the efficiency benefits of collective bargaining to be realised. However, there are also circumstances where a collective boycott would be detrimental to efficiency.

223. The ACCC considers a range of factors when assessing the potential public detriments of proposed collective boycott activities, including:

- the size of the bargaining group – where the size of the proposed bargaining group is limited, the detriments from a boycott may be reduced

- the size of the target, including relative to the bargaining group – a collective boycott may be an effective way to bring the target to the negotiating table in the first instance, and to enable better terms to be negotiated between the collective bargaining group and the target

- the volume, quality and variety of goods that are represented by the bargaining group

[157] REA Group's submission, 25 May 2016, p. 70.

- whether there are other targets that the bargaining group can supply to or acquire from – where the collective bargaining group is unable to supply or acquire from other targets this is evidence of a lack of bargaining power

- whether there are other suppliers or acquirers (including other collective bargaining groups) that the target can deal with – if the target can deal with other businesses outside the collective bargaining group, then the detriment from the proposed boycott may be reduced

- competition in downstream markets in which the target operates

- the potential for harm to third parties and the duration of that harm – any benefits of collective bargaining with a collective boycott may be offset if third parties are harmed as a result of a collective boycott

- outcomes of previous collective bargaining – previous unsuccessful collective bargaining attempts to deliver better contractual arrangements, may make the case for a collective boycott stronger

- the notice period that will be given to the target before boycotting can occur – providing adequate notice of an intention to boycott prior to engaging in the boycott activity can help to reduce the cost of a boycott to the target and

- whether mediation is proposed before boycotting can occur – independent mediation after collective negotiations fail but prior to engaging in boycott activities may increase the chances for a negotiated outcome without having to engage in a boycott.

224. As previously highlighted, the boycott conduct described in PMG's application for which it seeks authorisation is potentially very broad. In order to maintain some flexibility in structuring any boycott arrangements, PMG has essentially sought authorisation for the ability for it to organise boycotts of REA and Domain by groups of real estate agents – potentially involving all real estate agents that are party to the application across Australia,[158] or nearly all real estate agents in metropolitan Sydney or Melbourne[159], or any number of real estate franchise groups across Australia.[160]

225. The ACCC acknowledges that since lodging its application for authorisation, PMG has attempted to clarify how proposed collective boycott activities would work in practice. In this regard, PMG has provided further examples of how such boycotts are *likely* to be implemented. Nonetheless, the ACCC considers there is significant uncertainty surrounding the breadth of potential boycott activities that PMG could direct agents to engage in, which makes it difficult for the ACCC to be satisfied that there would not be significant public detriment as a result of proposed collective boycotts.

---

158 PMG applications for authorisation A91537-A91538, Form A, 18 April 2016, section 2(a).
159 PMG's supporting submission, 18 April 2016, p. 25.
160 Ibid.

226. Collective boycotts can result in public detriments, including from imposing significant commercial harm on the target(s), the collective bargaining group and third parties (such as property seekers and vendors) and by making substantial changes to the market structure. The ACCC considers that if a market is workably competitive to begin with, collective boycotts are more likely to produce significant public detriments by distorting market outcomes.

227. While PMG intends to provide a notice period to boycott targets, as well as indicating that it would contemplate the possibility of a mediation process (at least in the first 6 months of any collective negotiations), this is balanced against the potential large size of the group of agents involved in potential boycott activities and the volume, quality and variety of listings that these agents may represent. For example, PMG advises that it is envisaged that a maximum of four municipal council areas of Melbourne would be engaged in a collective boycott (possibly combined with an agreement to still list properties with the target, albeit not premium listings). However, PMG's application also contemplates the possibility of enacting a boycott involving all the real estate agents listed as parties to the application,[161] or a regional-based boycott where participating agents in up to 30 municipal councils (representing almost all of local councils in Sydney or Melbourne) would 'utilise alternative advertising suppliers.'[162] Further, PMG's application also proposes a boycott involving a group of larger multi-state franchise operators boycotting a target advertiser 'for all their listed properties.'[163]

228. The ACCC considers that concerns about potential public detriments are magnified due to real estate agents' ownership interests in Domain. In particular, the ACCC considers that some agents, through PMG, could have a commercial incentive to boycott REA to benefit Domain.

229. As well as harm to the potential targets, the ACCC considers that the proposed collective boycott activities are likely to harm third parties – in particular, some vendors and property seekers. For example, if PMG directs its clients to boycott *realestate.com.au* and switch to an alternative platform, vendors that would otherwise have listed their property on REA's website are likely to have a significant reduction in the number of potential buyers viewing their property given REA's leading position in the market. The ACCC considers that the absence of even one or two interested buyers at an auction can have a significant impact on the final sale price of a property. Similarly, property seekers that use *realestate.com.au* will be harmed by a reduction in the number of properties on that platform, which makes it harder to find suitable properties without incurring additional costs of searching on multiple platforms. The potential harm to vendors will depend to some extent on whether the 'mid-tier' real estate advertising platforms that agents are likely to switch vendors' properties to are close substitutes for REA's and Domain's platforms. On balance, the ACCC considers that buyers and vendors are likely to suffer some detriment if properties are switched from the leading platforms to a 'mid-tier' platform as a result of a boycott.

230. Given the breadth of the boycott conduct for which authorisation is sought, and the uncertainty surrounding how any such boycott activities would be imposed, the ACCC considers that the proposed arrangements are likely to result in significant public detriment – impacting both providers of on-line real estate advertising and third parties such as vendors and property seekers.

---

161 PMG applications for authorisation A91537-A91538, Form A, 18 April 2016, section 2(a).
162 PMG's supporting submission, 18 April 2016, p. 25.
163 Ibid.

ACCC conclusion on public detriments

231. The ACCC considers that the proposed conduct is likely to result in significant public detriments. In particular, the conduct would allow collective bargaining or boycott groups of such size and composition that they would have enough market power to force prices below efficient levels.

232. To the extent that the proposed arrangements reduced incentives for real estate advertising platforms to invest in developing new features for their platforms, this would result in a public detriment.

233. The proposed arrangements are also likely to reduce the transparency of current pricing models and may reduce competition between real estate agents. However, the ACCC considers that any such detriments are unlikely to be significant.

234. The ACCC recognises that collective bargaining by PMG with providers of on-line real estate advertising is likely to be more effective with the viable threat of collective boycotts. However, given the breadth of the boycott conduct for which authorisation is sought, and the uncertainty surrounding how any such boycott activities would be imposed, the ACCC considers it is likely to result in significant detriment – impacting both providers of on-line real estate advertising and third parties such as vendors and property seekers.

Balance of public benefit and detriment

235. In general, the ACCC may grant authorisation if it is satisfied that, in all the circumstances, the proposed conduct is likely to result in a public benefit, and that public benefit will outweigh any likely public detriment, including any lessening of competition.

236. In the context of applying the net public benefit test in subsection 90(8)[164] of the Act, the Tribunal commented that:

> … something more than a negligible benefit is required before the power to grant authorisation can be exercised.[165]

237. A key issue in the ACCC's consideration of this application is the breadth of the proposed collective bargaining and boycott arrangements and uncertainty about how PMG would ultimately implement them – for instance, PMG could seek to negotiate terms and conditions, including price, on behalf of a very large national group of real estate agents, including arranging a national boycott of REA or Domain.

238. Further, one reason for PMG lodging the application is that it considers agents are effectively being forced to purchase a 'premium all' service for all of their properties from the leading real estate platforms, which prevents agents from offering vendors any real choice about advertising packages. Therefore, PMG submits correcting this inefficiency by collectively bargaining more flexible advertising terms and conditions would result in a public benefit. Contrary to this,

[164] The test at subsection 90(8) of the Act is in essence that conduct is likely to result in such a benefit to the public that it should be allowed to take place.

[165] *Re Application by Michael Jools, President of the NSW Taxi Drivers Association* [2006] ACompT 5 at paragraph 22.

the ACCC has received data which shows that there is currently a diversity of contracts entered into by agents and that agents are frequently not using the full flexibility already provided in current contracts.

239. Based on the information before it, the ACCC is not satisfied that the proposed collective bargaining arrangements (supported by collective boycotts where necessary) are likely to result in public benefits as a result of transaction cost savings or increasing flexibility in contract choice for real estate agents.

240. The ACCC considers that the proposed arrangements could result in some public benefits from lower, more efficient pricing in some limited circumstances. However, given the significant uncertainty surrounding the operation of the proposed collective bargaining processes, the ACCC is not satisfied that this public benefit is likely to be significant.

241. Further, even if PMG could negotiate more efficient price reductions, it is not clear what proportion of any savings would be passed through to vendors. In addition, there is some uncertainty about the size of any price reductions, given PMG will charge a commission from agents to act as an intermediary in the process.

242. The ACCC considers the proposed arrangements would allow collective bargaining or boycott groups of such size and composition that they would have enough market power to force prices below efficient levels, which would be a significant public detriment. .

243. The ACCC recognises that collective bargaining by PMG with online real estate platforms is likely to be more effective with the viable threat of collective boycotts. However, given the breadth of the boycott conduct for which authorisation is sought, and the uncertainty surrounding how any such boycott activities would be imposed, the ACCC considers that the proposed arrangements are likely to result in significant public detriments, impacting both real estate advertising platforms and others such as vendors – a small reduction in the number of property seekers viewing a property could have a very significant impact on the ultimate sale price of a vendor’s property.

244. To the extent that the proposed collective bargaining arrangements reduced incentives for real estate advertising platforms to invest in developing new features for their platforms, this would result in a public detriment. The proposed arrangements are also likely to reduce the transparency of current pricing models and may reduce competition between real estate agents. However, the ACCC considers that any such detriments are unlikely to be significant.

245. For the reasons outlined in this draft determination, the ACCC is not satisfied that the likely benefit to the public would outweigh the detriment to the public including the detriment constituted by any lessening of competition.

246. Accordingly, the ACCC is not satisfied that the relevant net public benefit tests are met.

Draft determination

The applications

247. On 18 April 2016 Property Media Group Pty Ltd (PMG) lodged application for authorisation A91537 and A91538 with the ACCC. Application A91537 was made using Form A Schedule 1, of the Competition and Consumer Regulations 2010. Application A91538 was made using Form B Schedule 1, of the Competition and Consumer Regulations 2010.

248. PMG Made these applications under subsection 88(1) and 88(1A) of the *Competition and Consumer Act 2010* (the Act) Act on behalf of itself and for a large number of real estate agents and franchisors of real estate networks. PMG has sought authorisation to collectively bargain with advertising parties, including but not limited to, online and print advertisers.

249. PMG also seeks authorisation to engage in collective boycott activities in in certain circumstances. On 26 May 2016 PMG advised that it only seeks authorisation to collective boycott REA Group or Domain.

250. PMG 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 Act. The arrangements may also contain an exclusionary provision within the meaning of section 45 of the Act.

251. Subsection 90A(1) requires that before determining an application for authorisation the ACCC shall prepare a draft determination.

The net public benefit test

252. The relevant tests for consideration of this application for authorisation are set out in subsections 90(5A), 90(5B), 90(6), 90(7) and 90(8) of the Act.

253. For the reasons outlined in this draft determination, the ACCC is not satisfied that 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.

254. The ACCC therefore **proposes to deny** authorisation to applications A91537 and A91538.

255. This draft determination is made on 25 August 2016.

Further submissions

256. The ACCC will now seek further submissions from interested parties. In addition, the applicant or any interested party may request that the ACCC hold a conference to discuss the draft determination, pursuant to section 90A of the Act.

<u>Attachment A</u> – parties to the applications for authorisation

a) Barry Plant Real Estate (support confirmed from 54 franchised offices)
b) Buxton Real Estate (support confirmed from 15 franchised offices)
c) Hodges Real Estate (support confirmed from 12 franchised offices)
d) Nelson Alexander (support confirmed from 10 franchised offices)
e) Biggin & Scott (support confirmed from 11 franchised offices)
f) Hocking Stuart, Head Office
g) Marshall White, Head Office
h) First National, Head Office
i) RT Edgar, Head Office
j) Jellis Craig, Head Office
k) Kay & Burton, Head Office
l) Little Property, Head Office
m) Phillip Webb, Doncaster East
n) Kastelan & Associates, Toorak
o) McConnell Bourn, Lindfield (NSW)
p) Frost Real Estate, Lower Plenty
q) Thomas De Garis and Clarkson Stock and Station Agents, Tarpeena (SA)
r) Little Real Estate, South Yarra
s) Professionals Real Estate, Geelong
t) Waller Realty, Castlemaine
u) Darren Jones Real Estate, Greensborough
v) Brian Phegan Real Estate, Albury (NSW)
w) WB Simpson & Son, North Melbourne
x) AE Gibson & Co, Glenroy
y) Devlin Real Estate, Beechworth
z) Century 21, Beaumaris and Frankston
aa) Great Ocean Road Real Estate, Torquay
bb) Melbourne Asset Management, Kew
cc) Smith Agri International, Essendon
dd) Axis Property, Caulfield North
ee) REOM, Real Estate of Melbourne, Melbourne
ff) Harcourts, Melbourne
gg) Bells Real Estate, Sunshine
hh) Doepel Lilley & Taylor, Ballarat
ii) RT Edgar, Brighton
jj) Reliance Real Estate, Point Cook
kk) MJ Docking & Associates, Vermont South
ll) Stockdale & Leggo, Bundoora
mm) Us Real Estate, Frankston
nn) Planinsek Property Group, Melbourne
oo) Ray Mascaro & Co, Reservoir

pp) Abercromby's, Armadale
qq) Bowman & Co, Mornington
rr) Whitehouse Real Estate, Clifton Hill
ss) Haughton Stotts, Ivanhoe
tt) PILOR Real Estate Agents, Mornington
uu) McNally Property Management, Warrnambool
vv) Woodards, Elsternwick
ww) Flannagan Peressini & Shaw, Lower Plenty
xx) Gunn & Co, Williamstown
yy) Bell Real Estate, Emerald
zz) RE/MAX Real Estate Solutions, Ballarat
aaa) Whiting and Co, St Kilda
bbb) Triwest Real Estate, Werribee
ccc) Robert Pedersen Real Estate, Heidelberg
ddd) Finders Keepers Property, Maribyrnong
eee) Maxwell Collins, Geelong
fff) LJ Hooker, Wallan
ggg) Real Estate Gallery, South Yarra
hhh) Methven, Croyden
iii) PRD Nationwide, Melton
jjj) Frank Parnell Real Estate, Ballarat
kkk) Peninsula Property Group, Pearcedale
lll) Bosisto Commercial, Melbourne
mmm) Connolly Roberts Estate Agents, Mordialloc
nnn) Dixon Kestles and Co, South Melbourne
ooo) Neville A Sanders, Docklands
ppp) Newton Real Estate, Caringbah
qqq) Wodonga Real Estate Best Agents, Wodonga
rrr) First National Neilson Partners
sss) Fletches, Yarra Ranges and Mornington Peninsula
ttt) Smyth Real Estate, Lorne
uuu) William Batters Real Estate, South Yarra
vvv) Carter Real Estate, Ringwood
www) Any business within Victoria which operates under the control of an officer in effective control as defined under the *Estate Agents Act 1980 (Vic)*
xxx) Any registered real estate agency who contracts with, engages with and utilises the services of a media advertising company within Australia and
yyy) Any company whose main form of business is to act as an intermediary between vendors and buyers of real estate/real property within Australia.

<u>Attachment B</u> - Summary of relevant statutory tests

Subsections 90(5A) and 90(5B) provide 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, in the case of subsection 90(5A) would result, or be likely to result, or in the case of subsection 90(5B) has resulted or is likely to result, in a benefit to the public; and
- that benefit, in the case of subsection 90(5A) would outweigh the detriment to the public constituted by any lessening of competition that would result, or be likely to result, if the proposed contract or arrangement were made or given effect to, or in the case of subsection 90(5B) 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.

Subsections 90(6) and 90(7) state that the ACCC shall not authorise a provision of a proposed contract, arrangement or understanding, other than an exclusionary provision, unless it is satisfied in all the circumstances that:

- the provision of the proposed contract, arrangement or understanding in the case of subsection 90(6) would result, or be likely to result, or in the case of subsection 90(7) has resulted or is likely to result, in a benefit to the public; and
- that benefit, in the case of subsection 90(6) would outweigh the detriment to the public constituted by any lessening of competition that would result, or be likely to result, if the proposed contract or arrangement was made and the provision was given effect to, or in the case of subsection 90(7) has resulted or is likely to result from giving effect to the provision.

Subsection 90(8) states that the ACCC shall not:

- make a determination granting:
    i. an authorization under subsection 88(1) in respect of a provision of a proposed contract, arrangement or understanding that is or may be an exclusionary provision; or
    ii. an authorization under subsection 88(7) or (7A) in respect of proposed conduct; or
    iii. an authorization under subsection 88(8) in respect of proposed conduct to which subsection 47(6) or (7) applies; or
    iv. an authorisation under subsection 88(8A) for proposed conduct to which section 48 applies;

    unless it is satisfied in all the circumstances that the proposed provision or the proposed conduct would result, or be likely to result, in such a benefit to the public that the proposed contract or arrangement should be allowed to be made, the proposed understanding should be allowed to be arrived at, or the proposed conduct should be allowed to take place, as the case may be; or

- make a determination granting an authorization under subsection 88(1) in respect of a provision of a contract, arrangement or understanding that is or may be an exclusionary provision unless it is satisfied in all the circumstances that the provision has resulted, or is likely to result, in such a benefit to the public that the contract, arrangement or understanding should be allowed to be given effect to.