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16 September 2016

By email: david.hatfield@accg.gov.au
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Dear David

Property Media Group Ltd – authorisation applications (A91537 and A91538) – further REA submission after Draft Determination

We refer to:

- the draft determination published by the Australian Competition and Consumer Commission (**ACCC**) on 25 August 2016 in the above matter (**Draft Determination**);
- REA Group Ltd's (**REA**) submissions of 25 May 2016 (**REA's Original Submission**) and 10 August 2016 (**REA's Supplementary Submission**); and
- PMG's response to the ACCC's request for information, dated 26 May 2016 (**PMG's RFI Response**).

This letter sets out REA's submissions on certain issues arising from the Draft Determination.

Introduction

Broadly, REA agrees with the views expressed by the ACCC in the Draft Determination. In particular, REA supports the ACCC's views that:

- there is evidence (REA submits compelling evidence) of competition between REA and Domain, and the threat of entry and competition from others;
- the data does not support PMG's claim that there is insufficient flexibility in REA's contract/pricing model, or that agents are effectively forced to enter into "contract all" arrangements with REA;
- the proposed conduct is unlikely to result in any public benefits as a result of transaction cost savings;
- boycotts are likely to impose significant harms on third parties such as vendors and property seekers; and
- there remains significant uncertainty about how the proposed conduct will operate in practice.

**Property Media Group Ltd – authorisation applications
(A91537 and A91538) – further REA submission after Draft
Determination**

REA does not propose to repeat in detail its previous submissions, the submissions of other parties or all of the respects in which REA's view may differ from the view adopted by the ACCC in the Draft Determination.¹

However, the Draft Determination appears to suggest ways in which the proposed conduct might be modified to promote public benefits and/or mitigate public detriments to some degree. In that context, the purpose of this further submission is to make it clear that REA's position is that, even if PMG were to modify the proposed conduct in the ways suggested, the ACCC could not be satisfied that the modified proposed conduct would be likely to result in public benefits that outweigh the likely public detriments. The reasons for REA's position are set out below and hold equally for PMG's current proposals and any reasonable modification of them.

1 No meaningful public benefit in terms of flexibility

REA supports the ACCC's view that the proposed conduct would not be likely to result in any public benefits from greater flexibility in terms of the contract options available to agents, for the reasons set out in paragraphs 133 to 140 of the Draft Determination.

In addition, REA re-iterates that the data provided to the ACCC (see, in particular, Table 10 on page 52 of REA's Original Submission) also illustrates the diversity of listing decisions that REA observes even among agents choosing to enter into particular depth contracts. That diversity results from the various flexibilities inherent in REA's depth contracts over and above the exception mechanism to which the ACCC refers in paragraph 139 of the Draft Determination.

2 Price signal inefficiencies cannot be avoided

REA agrees that lower prices, even if they could be achieved over the longer term (which REA doubts in respect of its depth listing products – see pages 57 and 58 of REA's Original Submission), would not be efficiency enhancing in many circumstances. For instance, as the ACCC suggests (see paragraph 153 of the Draft Determination on page 32), lower prices would result in inefficiencies if they would, as REA contends, increase transaction costs or distort price signals, rivals' incentives to compete and market outcomes.

Expanding upon the price signal point above, lower prices (even if only achievable in the short term) would send a strong signal to REA and Domain's smaller- and medium-sized competitors, as well as new entrants, that opportunities to compete profitably against REA and Domain are diminished, and any investment in their platforms would be at heightened risk. REA submits that, from a competition policy perspective, it would be preferable for prices and services levels to develop naturally through the entry, expansion and innovations of REA and its rivals, rather than through the application of a relatively inefficient aggregation of buyer power that would result from PMG's intervention.

¹ For example, REA does not agree that public detriments arising from impacts on incentives to invest, impacts on transparency or increased/duplicated costs are likely to be as limited as the ACCC suggests in the Draft Determination

3 PMG’s role as an intermediary necessarily limits any public benefit arising from lower prices

REA supports the suggestion in the Draft Determination that, if PMG were to negotiate lower prices for REA’s services, any resulting benefit would necessarily be offset by the imposition of PMG’s commission on agents (see paragraph 156 of the Draft Determination).

REA also submits that, in practice, PMG is likely to have an incentive and ability to charge a commission that captures a large proportion of any savings. PMG would be the only person authorised by the ACCC to co-ordinate, and deal with REA in respect of, the proposed conduct. As a result, agents would not be in a position to choose from a range of competing providers of PMG’s proposed services and would, in effect, need to acquire PMG’s services to access the benefits PMG’s claims would result from collective action.

4 Agent incentives to favour Domain through boycotts

REA supports the ACCC’s view that agents participating in Domain’s agent equity model may have commercial incentives to boycott REA to benefit Domain (see paragraph 228 of the Draft Determination, page 47).

REA submits that the exacerbating effect that the ACCC identifies in the Draft Determination would remain unless those agents were excluded entirely from PMG’s collective bargaining and boycott activities.

5 Harms to third-party vendors and property are inevitable in the event of a boycott and cannot be justified

REA strongly supports the ACCC’s view that any boycott of REA would necessarily harm vendors (whose properties would be exposed to fewer property seekers) and property seekers (who would find it more difficult to locate suitable properties) (see paragraph 229 of the Draft Determination, page 47). Further, REA submits that these harms are inevitable if boycotts are authorised to any extent, for the following reasons.

- If a boycott involves a complete withholding of listings from REA’s platform (which REA assumes would occur in the event of a “*regional boycott*”), affected vendors will be denied very significant exposure for their properties (since REA’s property seeker audience is relatively large) and the large number of property seekers who use REA’s platform will be denied the opportunity to view affected properties.
- Even if the boycott takes the form of a “*package boycott*”, “*price boycott*” or “*group boycott*” (each of which REA understands would involve a boycott on acquiring REA’s depth products – see pages 7 and 8 of PMG’s RFI Response), affected vendors would be still be denied significant exposure because, as set out in Table 13 of REA’s Original Submission (see page 55), REA’s depth products significantly outperform REA’s standard listings in terms of property seeker views and enquiries.

- Any modifications to the proposed conduct aimed at, for example, reducing the size of the collective bargaining group or clarifying the processes leading up to the implementation of a boycott would in no way address the harms imposed on affected vendors and property seekers.

Further, it seems clear that an agent participating in a boycott would deny affected vendors exposure for their properties with a view to ultimately negotiating new terms with REA that would, for the most part, apply in respect of future vendors. PMG has not made clear why it is appropriate to impose a significant harm on one vendor to potentially (but not necessarily) benefit another vendor at an uncertain future time, and REA is not aware of any objective basis upon which agents could do so. REA considers that this represents a further, significant public detriment.

In these circumstances, REA submits that no boycott, however limited, can be justified – especially in circumstances where no meaningful public benefits would flow from the “*successful*” collective bargaining that a boycott would be intended to support.

REA also notes that the Draft Determination appears to mis-describe the circumstances in which PMG proposes to co-ordinate boycotts. On pages 2 and 3 of the Draft Determination, the ACCC states a boycott may be triggered in various situations in which REA refuses to negotiate with PMG. However, PMG has clearly suggested that a boycott may be triggered if REA *agrees* to negotiate with PMG but “[it] does not engage in *meaningful* negotiation” (our emphasis) or simply because negotiations have not been “*successful*” (see PMG’s RFI Response, pages 4 and 7). REA considers this to be a critical point, as PMG’s actual position – contrary to the suggestion in the Draft Determination – inappropriately allows PMG to unilaterally decide when to initiate a boycott on the basis of highly subjective criteria and adds considerable uncertainty to the collective bargaining process.

6 Raised barriers to entry in agent markets are inevitable

REA notes that the ACCC has not addressed one particularly significant public detriment in the Draft Determination: the fact that PMG proposes to seek special deals for certain groups, such as franchise networks and also presumably larger agent groups, and that those special deals would inevitably undermine new entry in agent markets. In summary, REA’s submissions on this issue are that:

- new entry often occurs by agents operating within a larger agency “branching out” on their own, at which point they will establish new and separate contractual relationships with service providers such as REA;
- as a direct result of REA’s current approach of not offering special deals, new entrants are treated equally and suffer no disadvantage in the acquisition of REA’s services upon entry;
- supported by REA’s existing approach, the rate of new entry in agent markets is currently high; and

16 September 2016

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- if special deals were to be offered via PMG, particularly in the form of the discounts that PMG explicitly proposes, that would inevitably put new entrants at a significant disadvantage and limit the extent to which they would be able to compete with incumbents.

Further detail and evidence on these issues is given in section 4.2 on pages 10 and 11 of REA's Supplementary Submission.

Conclusion regarding public benefits and detriments

In view of the above, REA submits that modifications to the proposed conduct would not be capable of satisfying the net public benefit test.

Obviously, if PMG were to seek authorisation for revised proposals, REA expects that the ACCC would engage in further consultations to ensure that interested parties are given a further opportunity to respond to the detail of those proposals.

Other issues

Finally, REA would like to briefly address two relatively minor issues.

- First, in paragraph 36 on page 9 of the Draft Determination, the ACCC states that "34%" of REA's revenue is earned from display and other third-party (i.e. non-listing) advertising. In Annexure A to REA's Supplementary Submission ("Response to ACCC RFI to REA"), REA noted that it had not intended to imply that figure in its Original Submission. The actual proportion of REA's revenue accounted for by display advertising is given in Annexure A to REA's Supplementary Submission.
- Second, in paragraph 71 on page 15 of the Draft Determination, the ACCC notes agents' legislated duty to act in the best interests of vendors. REA re-iterates its view that it is not clear whether, in view of that duty, a boycott would be lawful. REA submits that it would be appropriate for the ACCC to consider the lawfulness and feasibility of boycotts in the context of its assessment of PMG's application.

Please let me know if the ACCC would like any further information or clarification on any of the issues raised in this letter.

Yours faithfully

Corrs Chambers Westgarth



Mark McCowan
Partner