

13 May 2016

By E-mail

The General Manager
ACCC
adjudication@acc.gov.au

Attention: Ms Jaime Martin

Dear Ms Martin

A91537 and A91538 - Property Media Group - Submission

- 1 We refer to the ACCC's 22 April 2016 request for submissions on the authorisation applications by Property Media Group (**PMG**) to enter into collective bargaining and boycott arrangements (**Application**).
- 2 Carsales.com Limited (**Carsales**) welcomes the opportunity to make the below submission in response to the ACCC's request.

Summary

- 3 For the reasons set out below, we do not believe that the Application satisfies the relevant test for authorisation, which requires the likely public benefits flowing from the proposed conduct to outweigh the likely public detriments.
- 4 In particular, the Application does not demonstrate how the proposed conduct will benefit the public, and not simply PMG and the real estate agents listed as parties to the Application.

Property Media Group

- 5 PMG is described as a newly established private company owned and controlled by Mr Anton Staindl, which will purchase media advertising in large quantities on behalf of predominately real estate agencies. The Application provides little information about PMG.
- 6 There is also very little information about the proposed operation of PMG and how it will address the alleged competitive imbalance. The Application states that PMG "does not have any commercial agreement with any Parties at the time of making this application", but that "...PMG can be engaged by individual Agents on commercial terms (which are to be negotiated) as media buyer".
- 7 PMG has not articulated what these "commercial terms" will be, whether they will vary between online media businesses and how they will benefit consumers. As discussed in more detail below, these arrangements will not be of benefit to the public (being vendors and purchasers of houses).

Public benefit

- 8 The public benefits alleged in the Application include shifting the market back to the end consumer, increased competition between providers, and increased efficiency within the advertising market for both providers and ultimately end consumers. We disagree with these claims.

Shifting the market back to the consumer

- 9 The Application asserts that cost-savings will be passed on to consumers as a result of being able to select the most suitable advertising package rather than being “forced” to buy a product that their agent is contractually locked into. It is said that this will reduce the market spend by consumers and vendors, reallocate vendors’ savings and will lower the price of buying a house.
- 10 In the absence of detailed information about the proposed commercial arrangements between PMG and its clients, and how those arrangements will benefit consumers, it cannot be said that the authorised conduct will shift the market back to the consumer.
- 11 Commission-based sales structures, fee scales and contractual obligations are elements along the distribution chain that can detrimentally impact consumers. Even if the Application was able to demonstrate the cost benefit alleged to arise from the collective bargaining (which it has not), there is no guarantee that this will not simply be absorbed by those elements, with the different players in the distribution chain ‘clipping the ticket’ along the way.

Competition and efficiency

- 12 The Application suggests that the collective bargaining and boycott arrangements will deliver more efficient and competitive outcomes to consumers including by:
- (a) enabling agents and vendors to have greater choice in selecting an advertising package that suits them;
 - (b) allowing benefits of scale to be passed on through collective bargaining by agents; and
 - (c) providing true and fair prices for the different packages being available without penalty or financial pressure to upsell the current model.
- 13 These arguments are flawed.
- (a) Choice: the majority of prospective house buyers and sellers are likely to prefer a quality platform with the largest range of properties, rather than being forced to utilise multiple disparate and possibly substandard and/or incompatible platforms.
 - (b) Economies of scale: the Application does not explain how creating a wholesaler in between the online media advertisers on the one hand, and agents and vendors on the other, who is unconstrained by the laws to which other market participants are subject, will pass benefits of scale onto consumers. The ACCC has previously said it “*does not consider that an increase in bargaining power is a public benefit if it simply leads to a*

*redistribution of the existing surplus or 'economic pie' between the negotiating parties."*¹

- (c) A fairer market: the Application does not provide any credible evidence to support its assertion that the proposed conduct will benefit consumers by creating a "fairer market", or explain how this will be the case. Nor does the Application provide evidence in support of the unfair pricing and sales practices alleged to be a feature of the market.

Public detriment

14 The onus is on the applicant to satisfy the ACCC that the authorisation should be granted. PMG has not provided sufficient evidence in support of its allegations about the online advertisers' conduct or the alleged lack of competition. The veracity of those statements must be tested.

15 By way of example, PMG argues that:

- (a) The level of negotiation between the parties currently is low, as REA, and to a lesser extent Domain, utilise "standard form contracts where no negotiation takes place". However, there is no evidence to suggest that negotiation of such contracts is not possible.
- (b) Participation in the collective bargaining arrangement is voluntary. There are substantial enterprises party to the agreement including Barry Plant, Buxton, Nelson Alexander, Biggin & Scott and Hocking Stuart. These are sophisticated enterprises with their own countervailing power that do not need, and should not be allowed, to collude. There is a significant risk that their collective conduct may place undue influence to participate on parties who do not agree to join in their arrangement, or who decide later to opt out.
- (c) There are restrictions on the coverage and composition of the bargaining group. Annexure L names 74 parties to the Application and also includes any business within Victoria operating under the control of an officer in effective control as defined under the *Estate Agents Act 1980 (Vic)* in (www), any registered real estate agency who contracts with, engages with and utilises the services of a media advertising company within Australia in (xxx), and any company whose main form of business is to act as an intermediary between vendors and buyers of real estate/real property within Australia in (yyy). While the Application stipulates that boycotts would likely take place in subsets (e.g. based on packaged based offerings, region, price or group), there is clearly scope for a significant number of agencies to be involved in a collective boycott against particular online platforms.

Anti-competitive effects of collective boycott activity

16 Collective boycott conduct can significantly increase the potential anti-competitive effects of collective bargaining arrangements, and it is unlikely to allow protection from legal action to such conduct in most cases.² Such effects may include lost revenue, reduced efficiency and reduced overall market outcomes.

¹ ACCC Draft Objection Notice to Collective Bargaining Notifications CB00284 & CB00285 (26 February 2014), p6.

² ACCC, Guide to Collective Bargaining Notifications (2011), p37.

- 17 In addition, the right to impose a collective boycott could enable a collective bargaining group to inflict significant commercial damage on those that it negotiates with.³ Therefore, strong justification is required to support an application for immunity for proposed collective boycott activity.
- 18 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 any say in that decision. That is contrary to the fundamental principles of agency. It is also clearly the sort of conduct that is intended to be outlawed by the cartel and exclusionary provisions.
- 19 The ACCC noted in its draft objection to the collective bargaining notifications lodged by the Australian Wagering Council in respect of collective bargaining and boycotting of the National Rugby United League that the use of a collective boycott as a negotiation tool may be effective where it creates an incentive for the stronger party to reveal necessary information.⁴ However, there is no evidence in this case that the so-called “dominant suppliers” are withholding particular market information to restrict the negotiation of efficient contracts.

Alternatives to the proposed conduct

- 20 The Act contains multiple alternative mechanisms by which better market outcomes could be achieved, without the need to authorise collective bargaining or boycott arrangements.
- 21 These include the provisions preventing misuse of market power, unconscionable conduct and unfair contract terms, and the cartel conduct exceptions for joint ventures and the collective acquisition of goods and services.

- (a) **Misuse of market power:** PMG refers to the relevant market as the platform of online advertising of property sales, conducted predominantly on websites but with related mobile apps and other technical means. PMG identifies REA and Domain as dominant suppliers with “self-perpetuating” market dominance.

If it is accepted that the REA and Domain have a substantial degree of market power (which is disputed), the section 46 prohibition on the misuse of market power could address REA's and Domain's alleged deterrence or prevention of other parties engaging in competitive conduct within the market, without resorting to the need to authorise cartel conduct.

It is, however, doubtful that the claimed market dominance of REA and Domain is real. The ACCC has previously recognised that there are low barriers to entry into the market for online real estate advertising and that real estate agents hold countervailing power.

- (b) **Unconscionable conduct:** PMG could alternatively address its concerns through the *Australian Consumer Law (ACL)* unconscionable conduct prohibitions in section 20 and in section 21 (regarding the provision of goods and services).

³ Ibid, p32.

⁴ ACCC Draft Objection Notice to Collective Bargaining Notifications CB00284 & CB00285 (26 February 2014), p8.

- (c) Unfair contract terms: As PMG acknowledges, parties to the Application may benefit from the expansion of the ACL provisions on unfair contract terms to small businesses, taking effect in November 2016.

The Application states that “the vast majority of contracts offered that agents are compelled to enter are ‘take it or leave it’ propositions”. It also states that “well-known media advertisers, REA and Domain, customarily will not negotiate with or enter into contracts with anyone at a franchise level”. If the claims by PMG are correct and the parties are small businesses, the unfair contract term provisions may make void particular unfair terms in the parties’ contracts with the alleged “dominant suppliers”.

Conclusion

- 22 The authorisations sought by PMG essentially seek permission to engage in what would otherwise be cartel conduct, which Australia regards as serious enough to warrant 10 year jail sentences.
- 23 If there is a genuine need, PMG and the parties to the Application could act collaboratively as part of a joint venture to operate their own competing platform. Under sections 44ZZRO and 44ZZRP of the Act, a legitimate joint venture will be exempt from the Act’s cartel provisions. Additionally, section 76C removes joint ventures from the per se application of the exclusionary provisions prohibition in section 45. Also, the Act allows for the collective acquisition of goods and services in certain circumstances.
- 24 We submit that PMG has failed to demonstrate that the public benefit of the proposed conduct will outweigh any potential detriments and anti-competitive outcomes. Authorising the arrangements, in particular the collective boycott conduct, is not a desirable method of achieving better market outcomes where there are less extreme measures available.

Yours sincerely



Ajay Bhatia
carsales.com Ltd