

Comments on RBB's Submission on behalf of REA

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The issue that the authorisation is intended to address, as I understand it, arises in the context that:

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

REA offers a number of different listing options, including a standard package and other superior packages. RBB refers to REA as offering two different subscriptions: Standard and Flexi (p.8). In order for a real estate agent to be able to offer the premium package to a vendor, it must agree to pay at least the premium price for all of its clients. If it does so, currently the cost to the client is \$2,649 (contract all); otherwise the cost on a one-off or casual basis is \$5298 (reduced from \$8000).¹ Such a price discrepancy for the same product removes choice. Should a client select the standard package rather than at least the premium package, the agent is left to fund the difference. RBB correctly indicates that product differentiation on the part of REA enables real estate agents to differentiate their offering to vendors – but this is only true if the parties are free to choose between options.

The RBB report discusses price discrimination at some length, highlighting the fact that such conduct is not necessarily anti-competitive and may be efficiency enhancing. However, the reason for the authorisation application is not price discrimination but rather the restrictions on entities in bargaining and indeed on the accepted role of a franchisor.

Price discrimination is used by firms to increase profits compared with what they would be if all consumers were charged the same price. This is achieved by transferring consumer surplus to producer surplus (monopoly profits) by setting prices as close as possible to the individual consumer's willingness to pay, leaving consumers worse off than in a competitive

¹ Prices may vary from locality to locality and are subject to any updated contracts.

market. It represents an exercise of market power, but not necessarily for an anti-competitive purpose.

RBB's claim that price discrimination may be efficient is, of course, correct. For first degree price discrimination no deadweight loss results from the conduct. It is not true of second or third degree price discrimination in so far as it reduces supply. In addition, it may damage the competitive process – the effective requirement that all of the agents' clients will pay for the premium package locks those clients into REA and REA's rivals will only gain business where the client is prepared to advertise on more than one site. This may foreclose existing rivals and/or raise barriers to entry, including barriers to expansion.

The relevant type of price discrimination for the present matter is third degree price discrimination. The distinctive feature of REA's arrangement is that it is not a means of identifying the willingness to pay of consumers, as is an early bird special, for example. All consumers, being real estate agents and ultimately consumers, are provided with a bundled offer – the premium advertising package for all of their clients. The agents are unable to react, that is, select the price category into which they fall, this because REA refuses to negotiate with franchisors as noted above and the 'a la carte' access to the premium package is commercially unrealistic. Although economists frequently state that transfers are not relevant – the focus is on total welfare – competition policy and more particularly, consumer policy is concerned with harm to consumers.

The effect of REA's product offer is to reduce the bargaining power of franchisees because the loss of any individual franchisee by REA is insignificant and each agent recognises the insignificance of its own business to REA - each agent considers their position in isolation. This is despite REA's need to sell its advertising space to real estate agents and hence its unwillingness to lose sales to a significant number of agents.

As a result, assuming that REA possesses substantial market power because it is a 'must have' service for the real estate agent to be able to offer to vendors, REA is able to charge above the competitive price. Contrary to the implication of the RBB Report, the competitive price is not equated with marginal cost. If the market were contestable, arguably REA's conduct would not be of concern because it would attract entry which would force down prices and improve the service offering. However, as explained below, in my opinion, the

market is not contestable. REA's conduct is unlikely to contravene s.46 of the Competition and Consumer Act (CCA) as REA's purpose would be said to be to increase its profits which is not prohibited under the CCA. Nor is the conduct a boycott or exclusive dealing because REA has not engaged in the conduct on the basis of an agreement with a competitor.

I now turn to some of the specific comments in the RBB report. At a high level, it can be said that the Report implicitly assumes that agents are free to negotiate for the supply of advertising when clearly they can only negotiate in relation to the package that REA chooses to offer. It has long been accepted that offering a non-commercial price for supply is in effect a refusal to deal. 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.

RBB argues that the market is competitive (see for example p.5, first dot point). It does not concede that the relevant market relates to online advertising, but that is the focus. RBB rejects the claim that REA is dominant in the market. In particular, it is claimed that REA cannot be dominant given the presence of Domain (p.15). As a general statement it is incorrect to say that in a competition law context only one firm can be dominant – in the EU, for example, there has been acceptance of a concept of joint dominance for many years. Specifically, in relation to REA and Domain, while Domain may be dominant in some market segments, in my opinion REA is dominant in others and overall.

It is claimed that REA is subject to competitive constraint from Domain and from other suppliers of online platforms. This is correct. However, the issue is not the existence of constraint but the strength of that constraint. Factors that are relevant in assessing that are the percentage of vendors who advertise on REA's website – 95%. The significance of that is not reduced because a proportion of vendors also choose to advertise on other websites as well. The relevant information is the proportion of vendors who would choose to sell on other websites rather than on that of REA. It appears that advertising on other websites is not a close substitute for advertising on the RBB website and so the constraint imposed by the existence of those competitors is not very great.

Nevertheless, market shares may not be a good indicator of market power – a firm may be a monopoly and possess no market power or a firm may have a small but strategic market

share and be able to influence market outcomes. The most important determinant of market power is the height of barriers to entry. RBB assumes that these are relatively low. The report explains, in unnecessary detail, the operation of two sided platforms and suggests that in two sided markets, multi-homing 'reduces the impact of indirect network effects and lowers barriers to entry and expansion...' (p.12). However, multi-homing, at least in relation to real estate advertising, indicates complementarity of products, not substitutability.

Multi-homing may allow rivals to remain in the market but may be insufficient to constrain a dominant firm. In relation to the competitiveness of markets, barriers to entry are assessed in terms of the likelihood of entry, the effectiveness of entry (the extent to which it constrains) and the timeliness of entry – known as the LET Test. RBB admits that despite multi-homing, vendors may 'have a preferred platform' (p.13). Yet it appears that in relation to property sales the view of vendors is that they *must* have their property advertised on REA's site – this is not merely a preference, it is a necessity. Given this, the second of the LET conditions is not satisfied. In addition, the economies of scale associated with the operation of web-based businesses, reputation and trust and network effects are such that the first, or sometimes the second, mover advantage is such that later entrants are unlikely to offer a significant competitive constraint, even though they may survive in the market.

Contrary to RBB's view, ability to engage in collective bargaining, supported by the right to boycott, does not merely result in a transfer between 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. It should be recognised that even a reduction of a commission from say 3.0 to 2.9 per cent may be significant given its application to the sale price of the property. Alternatively, savings may be used to develop better/more attractive offerings for vendors.

Second, if agents regard advertising on REA's website as an essential input into successfully selling a property, then 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.