REIA RESPONSE TO THE DRAFT REPORT OF THE COMPETITION POLICY REVIEW

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PREPARED BY

Real Estate Institute of Australia (REIA)
PO Box 234
Deakin West ACT 2600
Amanda Lynch
Chief Executive Officer
amanda.lynch@reia.com.au
Ph: 02 6282 4277
@REIANational
REIA

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The Real Estate Institute of Australia (REIA) is the peak national association for the real estate profession in Australia.

The REIA's members are the State and Territory Real Estate Institutes, through which around 75 per cent of real estate agencies are collectively represented. The 2011 Census records the Rental, Hiring and Real Estate Services Industry employment sitting at a total of 117,880. By occupation the key data recorded by ABS Census were 64,699 business brokers, property managers, principals, real estate agents and representatives.

The REIA represents an important element of the broader property and construction sector which together makes a significant contribution to Australia's social climate and economic development. Property contributes $300 billion annually in economic activity.

Importantly, REIA represents an integral element of the small business sector. Some 99 per cent of real estate agencies are small businesses and 11 per cent of all small businesses in Australia are involved in real estate. Only 0.6 per cent of businesses employ 50 or more persons.

REIA is a member of the ACCC's Small Business Consultative Committee which was established ACCC to provide a forum where competition and consumer law concerns related to the small business sector could be discussed by industry and government and academics.

REIA is committed to providing and assisting research and well-informed advice to the Federal Government, Opposition, professional members of the real estate sector, media and the public on a range of issues affecting the property market.

The REIA welcomes the opportunity to provide a response to the Draft Report of the Competition Policy Review.

Introduction

The Draft Report of the Competition Policy Review (Harper Review) makes a number of draft recommendations regarding Australia's competition policy, laws and institutions.

The REIA responds to a number of these draft recommendations and observations made in the Report. Where it has, the page and section number of the Report are identified.

Intellectual Property (Page 30)

The Report notes that Intellectual Property (IP) rights, like all property rights, can potentially be used in a manner that harms competition and then recommends that an overarching review of intellectual property be undertaken by an independent body, such as the Productivity Commission (PC). The review should focus on competition policy issues in intellectual property arising from new developments in technology and markets.

The REIA supports the recommendation and further recommends that one of the areas that the PC should examine is the use of trade marks for website domain names. These in REIA's experience have, or can have a major impact on competition particularly for small business and indeed believe that in some cases the application for a trademark is designed to reduce competition.

A case pertinent to the REIA is the REA group which has applied for a trademark for 'realestate.com.au'. REIA has asked that REA Group withdraw its trademark application as if granted, the trademark could jeopardise the use of the term 'real estate' by other businesses and professional bodies. There are concerns for the potential for REA once it owns the term 'real estate' to oppose a number of other businesses that have the term real estate and .com.au in their name. These concerns extend to the domain name being used to increase the market power of the REA Group.

The REIA believes that to allow a single company to claim trademark rights to a generic term would unfairly hamper competition.

To allow a trademark on a generic term is contrary to the *Australian Consumer Law* as contained in the *Competition and Consumer Act 2010.* In REIA's view it breaches the misleading and deceptive conduct provisions and leads to false representation and in the case where the holder of the trademark has a significant market share enables misuse of market power.

Any increase in the holder's already substantial market power raises the scope for it to eliminate or substantially damage a competitor or prevent the entry of another competitor.

A case study from the USA provides a valuable pointer as to how other jurisdictions view the matter. An attempt to register the trademark “hotels.com” was lost when the U.S. Court of Appeals for the Federal Circuit ruled the trademark was a too generic term for its services (Law360, New York , July 23, 2009). The decision by a three-judge panel of the Appeals Court affirmed the Trademark Trial and Appeal Board's refusal of the registration on the ground that “hotels.com” was a generic term for hotel information and reservations. The Appeals Court further noted that adding the “dot-com” indicated internet commerce and did not convert the generic term.

This US case study is highly relevant as trade mark law is considered to have international precedents.

Whilst REIA has used the case of ‘realestate.com.au’ for the purpose of illustrating the importance of IP on competition it is not an isolated case. REIA understands that its concerns are also shared by others representing small business such as the Pharmacy Guild. In this case at issue are frequent attempts by competitors to register the generic term ‘pharmacy’, leading to costly legal battles.

REIA recommends that an overarching review of Intellectual Property and its impact on competition, particularly as it relates to small business, be undertaken by an independent body, such as the Productivity Commission.

REIA further recommends that one of the areas that the Productivity Commission review should examine is the use of trade marks for website domain names.

Governance (Page 56)

In making Draft Recommendation 45 the Report notes that competition and consumer functions should be retained within the single agency of the ACCC. The Report notes that having a single body, amongst other things, ensures that the issues of small business are not overlooked, as could be the case if the competition and consumer functions were separated into different bodies.

The REIA concurs with the Draft Recommendation and notes that the importance of competition and consumer functions are duly recognised by the ACCC which has established the Small Business Consultative Committee (SBCC) – one of seven Consultative Committees - to provide a forum where competition and consumer law concerns related to the small business sector are discussed by industry and government. Members, including the REIA, are drawn from a range of areas including small businesses, industry associations, business advisory groups, academics and government agencies (including the ATO, Treasury and the Small Business Commissioner), with a focus on ensuring membership represents the broader interests of the small business sector.

Being a member of the SBCC, the REIA is able to make a critical assessment on its success in achieving its stated goals.

The REIA can unequivocally say that the objectives of the Panel of "bringing an 'outsider's view' of policy and decision making, and providing an opportunity to bring business, consumer and academic perspectives to bear"…."to benefit governance" are already being met more than satisfactorily. Indeed of the many government/industry committees that the REIA participates in we consider the SBCC to be the role model.

Accordingly the REIA strongly opposes the Report's suggestion to either replace the current Commission with a Board comprising executive members, and non executive members with business, consumer and academic expertise (with either an executive or non executive Chair of the Board); or adding an Advisory Board, chaired by the Chair of the Commission, which would provide advice, including on matters of strategy, to the ACCC but would have no decision making powers.

The current arrangements provide the mechanism to not only have the views of business discussed but also to influence ACCC's priorities and resource allocation.

REIA's experience with the proposed Advisory Board structure is that a power imbalance inevitably develops where the views of particular groups have a disproportionate influence on outcomes and the Board becomes dysfunctional and unworkable. As a result the anticipated benefits from the Harper Report's suggested structure will not be achieved.

The REIA recommends that the current governance structure of the ACCC is maintained.

Small Business (Page 65)

The Report notes that there is broad support for the exemption process for collective bargaining by small business which is designed to recognise unequal bargaining power between parties to a business transaction. The Report goes on to note that the current process of exemption through notification should be capable of addressing a number of the issues raised by small business in their dealings with big business yet the provisions are not being used as frequently as they might be.

In suggesting that improvements could be made the Report recommends (Draft Recommendation 50) that the *Competition and Consumer Act 2010* should be amended to introduce greater flexibility into the notification process for collective bargaining by small business. One change would be to enable the group of businesses covered by a notification to be altered without the need for a fresh notification to be filed.

With small business often involved in transactions – both buying and selling – where there is asymmetric bargaining powers REIA supports any attempt to make the process for notification of collective bargaining more efficient. Accordingly REIA supports the Report's Draft Recommendation 50.

REIA recommends that the Competition and Consumer Act 2010 be amended to introduce greater flexibility into the notification process for collective bargaining by small business.

Recommendations

REIA makes the following recommendations:

- ***That an overarching review of Intellectual Property and its impact on competition, particularly as it relates to small business, be undertaken by an independent body, such as the Productivity Commission.***
- ***One of the areas that the Productivity Commission review should examine is the use of trade marks for website domain names.***
- ***The current governance structure of the ACCC is maintained.***
- ***The Competition and Consumer Act 2010 be amended to introduce greater flexibility into the notification process for collective bargaining by small business.***