

having been convicted of an indictable offence, being a director of corporations who are indebted to REIWA or not being insured.

- 7.22 It should be noted that persons who are not members of REIWA are still able to enter into conjunctional sales with respect to property listed with the Multiple Listing Service. This right is specifically referred to in MLS By-law 2.3.
- 7.23 Clause 2 of the MLS By-laws sets out provisions with respect to the entering into of conjunctional agreements. The provision stipulates what needs to be done by a conjunctional agent in order to share in a commission payable by a vendor, unless the listing agent and conjunctional agent agree to the contrary. Whilst listing agents are free to enter into conjunctional agreements with non-members of REIWA, the provisions that stipulate, subject to agreement to the contrary, what has to be done by a conjunctional agent to obtain a fee with respect to a conjunctional agreement, only apply to REIWA members. The reasons for these provisions and the benefits obtained through them are similar to those produced by Rule 5.2 of the Code with respect to general conjunctional agreements. The terms of the provisions concerned are similar and REIWA repeats the submissions contained in paragraph 6.14.11 with respect to By-law 2 of the MLS By-laws. Indeed, the force of the submissions made with respect to this issue is strengthened by the fact multi-listed exclusive agency agreements amount to unilateral offers by listing agents to all other agents entitled to use the Multiple Listing Service to enter into conjunctional agreements with respect to those properties. It is of significant benefit to the operation of conjunctional agreements associated with the Multiple Listing Service for there to be clarity and certainty with respect to the entitlement of a conjunctional agent to obtain a fee. REIWA is not trying to dictate to agents what should be the terms of conjunctional agreements. Agents are free to contract on the issues as they feel fit. Indeed, By-law 2.6 specifically provides that agents have complete freedom to negotiate the terms of any conjunctional agreement, including, but not limited to, the manner in

which they divide any fee with respect to the sale of the property. However, absent agreement to the contrary, the provisions of by By-law 2 act so as to minimise the chances for dispute. This in turn adds efficiency to the Multiple Listing Service and encourages agents to enter into conjunctional agreements.

- 7.24 By-laws 6.1 and 8.1 of the MLS By-laws describe the forms that are to be used for listings with the Multiple Listing Service. The purpose of these rules is to ensure certainty and consistency with respect to the types of forms used in the Multiple Listing Service. This streamlines the administrative workings of the Multiple Listing Service and provides certainty to agents dealing with the service. This, in turn, assists in the general operation of the Multiple Listing Service and provides subsequent public benefit through reduced transaction costs.
- 7.25 By-law 8.2 of the MLS By-laws requires agents entitled to use the Multiple Listing Service to keep information provided by vendors confidential. This protects the confidentiality of information provided by vendors and preserves the integrity of the Multiple Listing Service. Vendors are consequently provided with a guarantee that information that they provide to agents pertaining, for example, to the security systems of a house are not disclosed to persons who are not authorised to receive that information. It is submitted that this requirement is also in the public benefit.
- 7.26 By-law 11 of the MLS By-laws requires listing agents, except in the case of properties located in certain country regions, to advertise each property listed with the Multiple Listing Service at least once in "The Homebuyer" magazine during the term of the listing agreement. It is reiterated that "The Homebuyer" magazine is the linch-pin of the Multiple Listing Service and it is the method by which the centralised dissemination of information regarding properties with the Multiple Listing Service is effected. If agents were not required to advertise multiple listed properties in "The Homebuyer" magazine much of the advantage of the Multiple Listing Service of using a centralised system of marketing properties to large numbers of real estate agents in an efficient

manner would be lost. The requirement to advertise in "The Homebuyer" therefore is vital to the efficient operation of the Multiple Listing Service and is a requirement that is in the public benefit.

7.27 The requirements that agents must have entered into exclusive listing authorities in order to use the Multiple Listing Service is also inherently necessary to the operation of the Multiple Listing Service. By-law 2.1 of the MLS By-laws stipulates that properties the subject of exclusive plus agreements and multi-list exclusive agency agreements are the properties that are able to be listed with the Multiple Listing Service. The listing of properties through exclusive agency agreements provides the public benefits referred to in paragraphs 5.11 to 5.27 above. The whole purpose of the Multiple Listing Service is to set up a formalised manner in which conjunctional sales are used in association with exclusive listing authorities to sell properties. It is reiterated that it is this system that REIWA submits produces the most efficient method of selling real estate possible. The use of this system in the formalised setting of the Multiple Listing Service provides significant public benefit.

#### **Public benefit -v- anti-competitive effect**

7.28 REIWA submits that any anti-competitive effect caused by the Multiple Listing Service and, in particular, Article 43 of the REIWA Articles and the MLS By-laws is far outweighed by the public benefit derived from the Multiple Listing Service as set out above.

7.29 Any anti-competitive effect caused through the limiting of access to the Multiple Listing Service to members of REIWA is reduced by the fact that approximately 85% of real estate agents in Western Australia are members of REIWA and there is no substantial price barrier to other agents joining REIWA and using the Multiple Listing Service. Further, non-members of REIWA are free to enter into conjunctional agreements with respect to properties listed in the Multiple Listing Service. Use of the Multiple Listing

Service is available to all persons who are members of REIWA and fees for the use of the service are based upon administrative costs rather than an attempt to charge for the value to real estate agents of using the service.

- 7.30 Any anti-competitive effect caused by the provisions of By-law 2 of the MLS By-laws with respect to stipulation of what needs to be done by a conjunctional agent who is a member of REIWA to gain a conjunctional fee is reduced substantially by the fact that REIWA expressly leaves it open for agents to negotiate their own contractual terms. The purpose of By-law 2 is merely to avoid confusion and dispute if the issues referred to in By-law 2 are not expressly agreed by the agents concerned. The By-law operates to provide a minimum level of service to purchasers and reduces potential transaction costs by minimising possible disputes.
- 7.31 Any anti-competitive effect of the use of exclusive agency agreements in the Multiple Listing Service is lessened substantially by the matters referred to generally with respect to exclusive agency agreements in paragraphs 5.27 and 5.32 above. This includes the fact that there is substantial competition between agents to obtain exclusive listing authorities and competitive pressures are placed upon agents during the period of an exclusive listing to act efficiently in the interests of a vendor so as to sell the property concerned or so as to encourage a vendor to renew the exclusive listing authority at the expiration of the initial term. The requirement to enter into conjunctional agreements also lessens the anti-competitive effect of exclusive agency agreements with respect to the Multiple Listing System. As with all of REIWA'S standard forms for exclusive listing authorities with respect to the sale of property, the exclusive listing authorities applicable to the Multiple Listing Service include a provision whereby a vendor must elect whether or not the vendor will retain the right to sell the property without incurring liabilities to pay a commission.

7.32 REIWA submits that the significant public benefit achieved through the Multiple Listing Service substantially outweighs any anti-competitive effect and justifies authorisation of the MLS By-laws.

## 8. ARTICLE 30 - INSURANCE

### Background

8.1 Prior to the carrying out of REIWA's review of the Articles, the Code, rules, forms and directives REIWA required, pursuant to a provision of its Membership Policy Register (Annexure "N" to these submissions), members to be insured. A revised provision has now been included in Article 30.1 of the REIWA Articles whereby the requirement to insure is made a condition of REIWA membership. Article 30.1 is in the following terms:

*30.1 No person shall be eligible for membership of any of the classes of membership stipulated in article 29:*

*30.1.1 unless that person agrees in writing to abide by the rules, articles, codes, regulations, by-laws, resolutions and policies of the Institute; or*

*30.1.2 if that person:*

*(a) has been convicted of a breach of the Real Estate and Business Agents Act 1978 that has resulted in the Real Estate and Business Agents Supervisory Board penalising that person by cancelling or suspending his or her licence and/or triennial certificate under the Real Estate and Business Agents' Act, 1978:*

- (b) *is an undischarged bankrupt or otherwise is an insolvent under administration within the meaning of the Corporations Law;*
- (c) *is of unsound mind or a person whose person or estate is liable to be dealt with in any way under the law relating to mental health;*
- (d) *has been convicted of an indictable offence;*
- (e) *is a director of a corporation which is indebted to the Institute or, alternatively, is indebted to another member of the Institute pursuant to any arbitration award made under the Institute's Articles, Rules, Codes, By-laws or Regulations UNLESS that person applying for membership pays that debt in full; or*
- (f) *is an ex-director of a corporation which is indebted to the Institute or, alternatively, is indebted to another member of the Institute pursuant to any arbitration award made under the Institute's Articles, Rules, Codes, By-laws or Regulations UNLESS the corporation did not owe that debt at the date the person applying for membership ceased to be a director of that corporation or that person pays the total amount of the debt due at the date the person ceased to be a director.*

*30.1.3 unless in the case of applicants for Ordinary, Corporate, Associate or Affiliate Membership that person supplies to REIWA written proof as required by the REIWA Council that the person is insured pursuant to the terms of a professional indemnity insurance contract that includes the following features:*

- (a) *the policy holder under the insurance contract is a corporate member referred to in clause 30.2.2 below;*
- (b) *the insured pursuant to the insurance contract includes a corporate member referred to in clause 30.2.2 below and that person;*
- (c) *the insurance contract provides a limit of indemnity of at least \$1 million or such other sum as prescribed by the Council from time to time;*
- (d) *the insurance contract includes as insured events as to which the insured is entitled to indemnity under the contract all activities by that person or the corporate member referred to in subparagraph (a) above in respect to the operations of any estate agency business in which that person or the corporate member are involved including, but not limited to, the general provision of real estate services, business agency services and auctions;*
- (e) *the insurance contract includes as insured events as to which the insured is entitled to indemnity under the contract any claims that arise out of, or are in any way related to, the provisions of the Trade Practices Act, 1974;*
- (f) *the policy period of the insurance contract is at least 12 months.*

8.2 REIWA has negotiated, through AON Insurance Brokers, an insurance policy that is advantageous to real estate and business agents. However, agents are

not required by REIWA to use any specific policy and a further four policies exist in Western Australia that agents are free to use.

### **Public benefit**

- 8.3 The sole reason that REIWA requires its members to be adequately insured is for consumer protection. If an agent is insured a consumer who suffers loss as a consequence of any action by an agent, such as negligence, is provided with an avenue of redress. If agents were not insured then consumers would not be able to recover damages from impecunious agents.

### **Public benefit -v- anti-competitive effect**

- 8.4 REIWA submits that any anti-competitive effect caused through the requirement that agents be insured if they wish to be members of REIWA is outweighed by the public benefit created by the requirement.
- 8.5 Any anti-competitive effect caused by the requirement to insure is minimised by the fact that the particular type of insurance policy required is not onerous. It is therefore submitted that the requirement to insure is not an unreasonable or artificial barrier to joining REIWA. The present limit of indemnity required to be provided by the insurance contract is \$1,000,000.00. The insured events as to which the insured is entitled to indemnity under the insurance contract must include all activities by the insured or the insured's associated corporate member in respect to the operations of any agency business in which that person or the corporate member are involved including, but not limited to, the general provision of real estate services, business agency services and auctions. The insurance contract also is required to include as insured events, any claims arising out of the provisions of the TPA. The policy period of the insurance contract must be at least 12 months. The cost to agents, if agents elect to use the block policy negotiated by REIWA, is \$962.00 per corporate member for the basic cover of \$1 million. Each sales person employed by the agency attracts an additional cost of \$272.00 person. It is submitted that the



cost of this insurance to members represents a relatively modest operating cost and does not represent a barrier to entry into agency business.

## 9. CHANGES TO CONSTITUTION OF FIRM OR CORPORATION

### Background

9.1 Article 35 of the REIWA Articles requires corporate members of REIWA to notify the Executive Director of any change in the partners, directors, or branch managers of a partnership or company within one month of any such change taking place. The membership of the corporate member shall lapse at the expiration of two calendar months from the date of any such change unless any new partner, director or branch manager is a partner or director ordinarily resident outside Western Australia, is an ordinary member or associate member of REIWA or becomes an ordinary member or associate member within two calendar months or such time as may be allowed by the Council. Every corporate member shall advise the REIWA Council within 14 days of the resignation or death of a partner, director or branch manager and the Council shall request such information as it deems necessary to be lodged with the Executive Director in order that it may consider the continuance of the membership of the corporate member. Any person aggrieved by a decision made under this Article may appeal.

9.2 The terms of Article 35 are as follows:

#### *CHANGE IN CONSTITUTION OF FIRM OR CORPORATION*

35. 35.1 *Any member being a Corporate Member shall notify the Executive Director of the Institute of any change in the partners, directors or branch managers of such partnership or company within one month of any such change taking place.*

*The membership of any such corporate member shall lapse at the expiration of two calendar months from the date of any such change in the partners, directors or branch managers thereof, unless that person is a partner or director ordinarily resident outside the State of Western Australia, is an Ordinary Member or Associate Member or becomes an Ordinary Member or Associate Member within such period of two calendar months or within such time as may be allowed by Council.*

*35.2 Every Corporate member shall advise the Council within fourteen (14) days of the resignation or decease of a partner, director or branch manager as the case may be and the Council shall request such information as it deems necessary to be lodged with the Executive Director in order that it may consider the continuance of the membership of the Corporate member.*

*35.3 Any person aggrieved by a decision under this Article may appeal under Article 45.*

9.3 The issue of changes in the constitution of a firm or corporation was in the past dealt with in Article 38 of the previous REIWA Articles (see Annexure "I" to these submissions). That Article has been substantially changed as a consequence of REIWA's review of its Articles. Previously REIWA was able to withhold approval with respect to any change of partners, directors or branch managers. This assessment could have been made by REIWA on subjective grounds and, consequently, could have been used for anti-competitive purposes. The amended provision in REIWA's current articles merely requires that information of the relevant change be provided to REIWA and that any new partner, director or branch manager be an ordinary member or associate member of REIWA. Such a person has the right to apply for membership of REIWA. It is reiterated that eligibility for membership of

REIWA pursuant to Article 30 is now based on objective criteria and the subjective, and potentially anti-competitive, elements of this portion of the REIWA Articles have been deleted pursuant to the recent comprehensive review of the REIWA Articles.

### **Public benefit**

9.4 REIWA ensures that a high level of professional standards for its members is maintained by including certain objective criteria for determining the eligibility for persons for membership of REIWA. For example, members cannot be undischarged bankrupts, be of unsound mind, have been convicted of an indictable offence, have been convicted of certain breaches of the *Real Estate and Business Agents' Act, 1978*, be directors of corporations that are indebted to REIWA and members must be insured. Article 30 provides for various categories of REIWA membership. The principal category of membership of REIWA is that of the corporate member. Pursuant to Article 30.2.2 all corporations, partnerships and natural persons who carry on real estate businesses can be corporate members subject to the requirement that the entity concerned be duly licensed under the *Real Estate and Business Agents' Act, 1978* and subject to the requirements that all directors, partners, branch managers and, in the case of a sole trading real estate business, the owner, or the proposed corporate member must be either ordinary members or associate members (an exception to this rule is provided when directors or partners are ordinarily resident outside the State of Western Australia, the particular partnership does not have its principal place business in Western Australia or the corporation is not registered as a foreign company in Western Australia). Corporate membership is also available for corporations who are licensed and who are incorporated outside Western Australia, the directors of which are resident outside the State but whose branch manager are ordinary members or associate members. Corporate membership is also available to certain licensed agents who are authorised by Parliament to apply for and obtain probate of the will of a testator or which are pastoral companies provided that all directors,

partners and branch managers are ordinary members or associate members of REIWA. If REIWA's Articles did not contain the provisions in Article 35 persons could use the corporate membership system so as to avoid the requirement that directors, partners and branch managers be ordinary members or associate members of REIWA. For example, a person who had been convicted of an indictable offence, such as fraud, would not be eligible for membership of REIWA and any corporation of which that person was a director would consequently not be able to become a member. If Article 35 did not exist, that person could orchestrate a corporation to apply for membership and, all things being equal, that corporation would become a corporate member of REIWA provided the person who had been convicted of fraud was not a director or branch manager of that corporation. However, upon the corporation becoming a member of REIWA, if Article 35 did not exist, the person who had been convicted of an indictable offence could then become a director of the company and retake control of the corporation's activities, whilst the corporation remained a member of REIWA. That person would thereby have effectively circumvented REIWA'S membership eligibility criteria. Such a practice would not be conducive to the good operation of REIWA and the professionalism of its members. REIWA therefore submits that preventing this practice assists in the orderly operations of REIWA and maintains the professionalism of its members. These features all produce public benefit.

#### **Public benefit -v- anti-competitive effect**

- 9.5 REIWA submits that any anti-competitive effect created by the requirement that new directors, partners and branch managers be ordinary or associate members of REIWA and that REIWA be notified of any changes to the constitution of the firm or corporation is substantially outweighed by the public benefit created by that procedure.
- 9.6 Any anti-competitive effect caused by this Article has now been eliminated by the deletion of the subjective, and potentially anti-competitive, provisions

contained in the previous rule that could have allowed new directors, partners or branch managers to be disapproved of by REIWA on capricious grounds, thereby effectively revoking the membership of a corporation. The current Articles ensure that membership applications are assessed with regard to objective criteria that are in the public benefit and these criteria are applicable to any consideration of membership that takes place pursuant to the terms of Article 35.

## **10. SUPERVISION OF SALES REPRESENTATIVES AND EXERCISING OF BONA FIDE CONTROL OVER AGENCY BUSINESSES**

### **Background**

- 10.1 Article 37 of the REIWA Articles sets out provisions designed to support the terms of various sections of the *Real Estate and Business Agents' Act, 1978* which require licensed real estate agents to properly supervise and control real estate businesses. The licensing of real estate and business agents under the *Real Estate and Business Agents' Act, 1978* is designed to ensure that agents are properly qualified and are not unscrupulous. In order to avoid the practice of a unlicensed person effectively operating an agency business and misleading the public into thinking that the person is a licensed agent by using a truly licensed person as a figurehead the Act requires persons with bona fide control of agencies to be licensed. The *Real Estate and Business Agents' Act, 1978* requires agents to exercise that bona fide control by giving substantial time and attention to the business.
- 10.2 Without requirements that the person in bona fide control of a real estate or business agency business has to be licensed and to exercise that control by giving substantial time and attention to the business, persons who have had their licences revoked or who have been unsuccessful in applying for a licence

under the provisions of the *Real Estate and Business Agents' Act, 1978* could seek to mislead members of the public into thinking that the person concerned was licensed due to the fact that he or she was clearly in control of the business. This practice is known in the real estate industry as "dummy licensing". An example of "dummy licensing" would be if a person was unable to obtain a licence under the *Real Estate and Business Agents' Act, 1978* because the person had been convicted of fraudulent conduct with respect to real estate transactions. That person may wish to operate a real estate business but would be unable to do so unless another person, who was entitled to obtain a licence, operated the business pursuant to a validly obtained licence. As the sole purpose for involving the licensed person would be for the purpose of allowing the promoter of the business who had been convicted of fraud to operate the business the licensed person would be unlikely to exercise control over the business and much of the protection afforded the public under the licensing provisions of the *Real Estate and Business Agents' Act, 1978* would be lost. REIWA would understandably wish to take action of its own to prevent members being involved in any such sham and it is for this reason that the provisions of Article 37.2 exist. Those provisions mirror the relevant legislative provisions and REIWA wishes to use them, to ensure that its members act properly and, therefore, in the public's benefit.

- 10.3 Further, section 132 of the *Real Estate and Business Agents' Act, 1978* specifically requires the licensee of an agency business to ensure that the work of any unlicensed persons engaged in assisting in the conduct of the business be "constantly supervised and controlled" by a licensee. Again, the purpose of this provision is to provide consumer protection so that the work of unlicensed persons associated with an agency business be properly supervised by a licensed agent. In order to ensure that sales representatives are properly supervised members of REIWA are prevented from employing sales representatives who are also employed by other agents. Further, in order to ensure that the supervision of others associated with real estate agents can be

properly managed, members of REIWA are not entitled to employ other persons who are in the employ of another firm, partnership or company that is an agent, without the consent of that agent. To enforce the provisions of Article 37 REIWA is given the power to investigate members who are regarded as not exercising adequate and proper control and supervision.

10.4 The terms of Article 37 are as follows:

*37.1 In accordance with the provisions of Section 132 of the Real Estate and Business Agents Act, 1978, which require the work of unlicensed persons engaged in assisting in the conduct of the business of a licensee to be constantly supervised and controlled and for that purpose requires certain persons to give substantial time and attention to businesses:*

*37.1.1 (a) No member shall employ any person who is also in the employ of any other firm, partnership or company which is an agent, without the consent of that agent;*

*(b) No member shall employ a sales representative who is also employed by any other firm, partnership or company which is an agent.*

*37.1.2 If any member who operates as a sole trader or who is the licensee for a partnership or company which is a Corporate member of the Institute is not, in the opinion of the Council, exercising adequate and proper control and supervision in respect of the management of his/her business or that of such Corporate member, then the Council may instruct an Auditor to investigate the affairs of such business in order to determine whether such member is exercising adequate and proper supervision thereof and such member shall make the books and records of such business available to the Auditor and shall*

*furnish him/her with all such information concerning the business and its affairs as he/she may require in connection with such investigation.*

*37.1.3 Any person aggrieved by a decision under this article may appeal against such decision under Article 45 of these Articles.*

*37.2 In accordance with the provisions of Sections 28 and 132 of the Real Estate and Business Agents' Act, 1978, which require persons in bona fide control of real estate and/or business agents' businesses to be licensed under that Act and to exercise that control by giving substantial time and attention to the business:*

*37.2.1 If a member is a person in bona fide control of a real estate or business agents' business operated under a licence issued pursuant to the Real Estate and Business Agents' Act, 1978 that member must be licensed under that Act himself or herself.*

*37.2.2 Where a member who is the licensee under the Real Estate and Business Agents' Act, 1978 of a real estate or business agents' business is not a firm or a body corporate:*

*(a) the licensee member shall give substantial time and attention to the business and shall ensure that the managers of all branch offices of the business respectively give substantial time and attention to the business of the respective branch offices; and*

*(b) any member who is a manager of a branch office of the business shall give substantial time and attention to the business at that office.*



*37.2.3 Where a member who is a licensee under the Real Estate and Business Agents' Act, 1978 of a real estate or business agents' business is a firm or a body corporate:*

- (a) the licensee member and members who are the partners of the firm or the directors of the body corporate, as the case requires, shall ensure that the person in bona fide control of the business gives substantial time and attention to the business;*
- (b) any member who is a person in bona fide control of the business shall give substantial time and attention to the business;*
- (c) the licensee member and members who are the partners of the firm or the directors of the body corporate, as the case requires, and any member who is the person in bona fide control of the business shall ensure that all managers of branch offices of the business respectively give substantial time and attention to the business of the respective branch offices; and*
- (d) any member who is a manager of a branch office of the business shall give substantial time and attention to the business at that office.*

10.5 Sections 28 and 132 of the *Real Estate and Business Agents' Act, 1978* are in the following terms:

*Grant of licence to a firm*

28. *Subject to this Act 2 or more persons constituting a firm who apply to the Board for a licence and pay to the Board the prescribed fee for the*

*licence shall be granted and may hold a licence if the Board is satisfied that —*

- (a) all of the natural persons, if any, by whom the firm is constituted and all of the directors of, and all of the persons concerned in the management or control of, any body corporate by which the firm is constituted are persons of good character and repute and are persons fit to be concerned as directors of, or in the management and control of, an agent's business;*
- (b) the persons by whom or by which the firm is constituted have sufficient material and financial resources available to them to enable them to comply with the requirements of this Act;*
- (c) where the firm is constituted by not more than 3 persons at least one of them is licensed or where the firm is constituted by more than 3 persons at least 2 of them are licensed; and*
- (d) the person in bona fide control of the business operated under the licence is licensed.*

*Supervision and control of unlicensed assistants*

*132 The work of unlicensed persons engaged in assisting in the conduct of the business of a licensee shall be constantly supervised and controlled by a licensee, and for that purpose —*

- (a) where the licensee of the business involved is not a firm or a body corporate —*
  - (i) the licensee shall give substantial time and attention to the business and shall ensure that the managers of all*

*branch offices of the business respectively give substantial time and attention to the business of the respective branch offices; and*

- (ii) the manager of a branch office of the business shall give substantial time and attention to the business at that office;*

*and*

- (b) where the licensee of the business involved is a firm or a body corporate —*

- (i) the partners of the firm or the directors of the body corporate, as the case requires, shall ensure that the person in bona fide control of the business gives substantial time and attention to the business;*

- (ii) the person in bona fide control of the business shall give substantial time and attention to the business;*

- (iii) the partners of the firm or the directors of the body corporate, as the case requires, and the person in bona fide control of the business shall ensure that the managers of all branch offices of the business respectively give substantial time and attention to the business of the respective branch offices; and*

- (iv) the manager of a branch office of the business shall give substantial time and attention to the business at that office.*

**Public benefit**

- 10.6 REIWA submits that substantial public benefit is achieved through the provisions of Article 37. The background to the Article as set out in paragraphs 10.1 to 10.3 above is reiterated. The purpose of the Article is to ensure that the conduct of agency businesses, including the activities of sales representatives and other employees, is properly supervised and controlled by persons duly licensed under the *Real Estate and Business Agents' Act, 1978*. REIWA wishes to be able to act to ensure that this control and supervision occurs. It also wishes to avoid the practice of "dummy licensing" whereby persons who are not licensed agents endeavour to circumvent the requirements of the *Real Estate and Business Agents' Act, 1978* that agency businesses be operated by licensed persons by using persons who are licensed as mere figureheads and otherwise controlling and supervising the business themselves. Such a practice, together with any lack of proper supervision or control of an agency business, represents a danger to consumers. It is submitted that REIWA's efforts to prevent this practice are in the public benefit.
- 10.7 REIWA wishes to prohibit the practice of misleading members of the public through the use of "dummy licences" so as to reinforce REIWA's role as a self-regulator of the industry and to ensure that its reputation is not diminished by members who contravene or seek to avoid these important provisions of the *Real Estate and Business Agents' Act, 1978*. The ability of REIWA to perform its role must be dependent on its standing in the market place. It would be placed in an impossible situation if it could not prohibit flagrant breaches of the governing legislation. The Trade Practices Tribunal has held that rules that reflect the law and supplement the implementation of the law are clearly an important benefit to the public.

See *Re Media Council of Australia (No 2)* supra at pp 48,440 - 48,442.

**Public benefit -v- anti-competitive effect**

10.8 REIWA submits that any anti-competitive effect caused by Article 37 is substantially outweighed by the public benefit caused by the Article. It should be noted that Article 37.2 largely mirrors the provisions of section 132 of the *Real Estate and Business Agents' Act, 1978* and it is submitted that the provisions of Article 37.1 are a procedural extension of the requirements of section 132 so as to ensure that the supervision and control required by that section is achieved. Subsequently, REIWA contends that the provisions of Article 37 do not materially alter the obligations upon persons operating agency businesses imposed by the relevant legislation. Rather, REIWA wishes to ensure that its members comply with those requirements and this is a matter that is in the public benefit.

**11. SOLICITING****Background**

11.1 As detailed in paragraph 4.3.1 above, REIWA has made substantial changes to the rules surrounding the issue of soliciting. In effect, REIWA has withdrawn the prohibition previously contained in the Code upon agents soliciting the clients of other agents.

11.2 REIWA has now adopted a rule that appears as rule 2.3 in the Code in the following terms:

*2.3 An agent must not solicit or accept any agency if the agent is aware that any other agency is in force which may obligate the vendor/lessor to pay two fees or expose the vendor/lessor to a claim for damages for breach of contract in the event of a sale or lease taking place, unless*

*the agent gives a prior written statement to the vendor/lessor that the vendor/lessor may be liable for two fees or for a claim for damages for breach of contract if the vendor/lessor signs a further agency agreement.*

### **Previous authorisation applications**

- 11.3 A rule in an identical form to rule 2.3 of the Code has been approved with respect to the application for authorisation by the Real Estate Institute of Australia of its Code of Conduct for Real Estate Agents. That code was authorised on 23 November 1999 (Authorisation No A90354). Rule 2.5.3 of the REIA Code of Ethics was in the same terms as REIWA's rule 2.3 in the Code.
- 11.4 In authorising the REIA Code of Conduct the ACCC noted *"The commission considered that adoption of the Code by the REIA and its affiliated State and Territory real estate institutes is likely to result in a benefit to the public through the promotion of professional standards for member real estate agents and the adoption of the various State and Territory real estate institutes of a nationally consistent set of standards of service."*

### **Public benefit**

- 11.5 Although clause 2.3 is expressed in terms that purports to prohibit soliciting, the clause in fact authorises soliciting so long as an agent gives a prior written statement to a vendor/lessor that the vendor/lessor may be liable for two fees or a claim for damages for breach of contract if the vendor/lessor signs a further agency agreement with the agent named in the rules. Consequently, the provision is one designed to protect the public by making vendors aware of their potential contractual obligations and is in the public benefit.
- 11.6 Clause 2.2 of the Code requires agents to enquire of principals whether the vendor or lessor concerned has entered into a prior agency agreement that

imposes a potential obligation upon that principal to pay a fee. This provision, in concert with clause 2.3 of the Code, ensures that agents are made aware of any situation that may leave a principal liable to pay two commissions and, if so, to warn principals of that risk. Those provisions of the Code ensure that vendors and lessors are provided with sufficient information to enable them to protect their interests.

## 12. ADVERTISING

### Background

- 12.1 As set out in paragraph 4.5.2 above, REIWA has abandoned the vast majority of its rules and regulations relating to advertising on the basis that those rules may have been anti-competitive.

REIWA has retained a regulation upon advertising in Rule 8 of the Code. That rule is in the following terms:

#### *8.0 ADVERTISING*

*Advertisements by agents must at all times show clearly the agent's full trading name together with the telephone number of the agent's principal licensed office or relevant branch office.*

*All materials used for advertising and marketing purposes must display the agent's business name, plus address or telephone number(s) and any other corporate identification in a way that gives these items greater prominence than the names and telephone numbers, whether after hours, pager or mobile telephone numbers of sales representatives or other employees of the agent.*

**Public benefit**

- 12.2 Much of the purpose behind Rule 8 of the Code is identical to the purpose of the requirement of control and supervision contained in Article 37 as detailed in section 10 of these submissions. REIWA submits that significant public protection is provided by ensuring that those seen to be operating agency businesses are licensed under the *Real Estate and Business Agents' Act, 1978*. This is consistent with the provisions of section 28 and 132 of that Act. The requirement that agency businesses be conducted by persons who are licensed is substantially undermined if advertisements appear that give greater significance to the name and identity of persons such as sales representatives than the licensed estate agent himself or herself. Such a practice has the tendency to mislead members of the public into assuming that sales representatives and others are in fact conducting real estate agency businesses when those persons are unlicensed and not conducting such businesses. Such a practice would lend support to any person who was not licensed but who sought to operate an agency business using a licensed person as merely a "figurehead". As is set out in paragraph 10.6 above, this is known as the practice of operating businesses through "dummy licences". It is therefore submitted by REIWA that Rule 8 provides consumer protection and is in the public benefit.
- 12.3 REIWA restates that it wishes to prohibit the practice of misleading members of the public through the use of "dummy licences" so as to reinforce its role as a self-regulator of the industry and to ensure that REIWA's reputation is not diminished by members who contravene or seek to avoid these important provisions of the *Real Estate and Business Agents' Act, 1978*. The ability of REIWA to perform its role must be dependent on its standing in the market place. It would be placed in an impossible situation if it could not prohibit flagrant breaches of the governing legislation. The Trade Practices Tribunal has held that rules that reflect the law and supplement the implementation of the law are clearly an important benefit to the public.



See *Re Media Council of Australia (No 2)* supra at pp 48,440 - 48,442.

- 12.4 The provisions of Rule 8 also produce the public benefit of enabling members of the public to ascertain who is behind an advertisement or other promotion so that those consumers can make complaints about that person if they so wish.

#### **Public benefit -v- anti-competitive effect**

- 12.5 REIWA believes that any anti-competitive effect produced by Rule 8 is minimal. REIWA is not trying to limit or prevent advertising, save so as to prevent sales representatives and other non-licensed agents from having priority in advertisements to licensed agents. Such a practice would go some way to undermining the significance of the licensing of real estate agency businesses. It is submitted that it is appropriate that the licensed business that is in fact the agent conducting the sale be identified in advertisements and that the licensed agent's description not be overshadowed by the description of sales representatives or others.

### **13. DISPLAYS**

#### **Background**

- 13.1 Reference has already been made in sections 10 and 12 of these submissions to the significance of the licensing of real estate agents under the *Real Estate and Business Agents' Act, 1978* and the provisions contained in that Act designed to ensure that persons do not circumvent the licensing requirements of the Act.
- 13.2 Sections 36 and 37 of the *Real Estate and Business Agents' Act, 1978* require licensees to have a registered office for the carrying on of the agent's business and the agent is required to register any branch offices of the agent's business.

Branch offices are required to be managed by other licensees who are not to carry on business as agents on their own account.

- 13.3 The terms of Sections 36 and 37 of the *Real Estate and Business Agents' Act*, 1978 are as follows:

*Registered office*

36. (1) *A licensee shall, on and after the day on which he commences to carry on business as an agent, and for so long as he carries on that business, have a registered office in the State.*

*Penalty: \$1 000.*

- (2) *Any summons, notice, order, or other document to be served on a licensee, may be served by leaving it at his registered office or by sending it by registered post addressed to the licensee at that office.*

- (3) *An office may be registered by giving written notice of the situation of the office to the Registrar and a registration may be transferred from one office to the other by written notice given to the Registrar.*

*Branch office*

37. (1) *A licensee shall register any branch office of his business by giving written notice of the situation of the office to the Registrar on or before the day on which he commences to carry on business at that branch office.*

*Penalty: \$1 000.*

- (2) *A licensee shall nominate, and have at all times in his service at a registered branch office, as manager of that office, another licensee who is the holder of a current triennial certificate.*

*Penalty:\$1 000.*

(3) *The manager shall not be a licensee nominated as manager by any other licensee or in respect of any other office, and shall not carry on business as an agent on his own account.*

13.4 It is submitted that the purpose of having a system of the registration of places where agents carry on businesses and to have branch offices managed by persons who are licensed is to further protect the public from any endeavour by persons to conduct real estate or business agency businesses when those persons are not licensed. If such provisions did not exist persons who were not licensed agents could seek to effectively run their own real estate businesses by setting up an office and claiming that the office was a branch of an agency practice conducted by a licensed person.

13.5 An example of the type of conduct that a person could undertake in an effort to thwart the licensing provisions of the *Real Estate and Business Agents' Act, 1978* and the inherent dangers that could result to the public is if an unlicensed person endeavoured to sell real estate by setting up stalls or displays at non-registered premises. This could take the form of the erection of a display in, say, a country town's butcher's shop at which real estate was sold. The display could be held out as being the display of a licensed real estate business but could in fact be the carrying on of an agency business by a person who is in fact trained to be a butcher. Such a practice would remove from consumers in the area serviced by such an activity the protection afforded consumers by the licensing provisions of the *Real Estate and Business Agents' Act, 1978*. In particular, persons who were untrained, unqualified and, potentially, unscrupulous could, in effect, be carrying on the business of real estate agents.

13.6 In an effort to provide further consumer protection and as an extension of Sections 36 and 37 of the *Real Estate and Business Agents' Act, 1978*, REIWA has Rule 11 in the Code. That rule is in the following terms:

*11.0 DISPLAYS*

*Members are prohibited from erecting or maintaining real estate stalls or displays at venues other than premises that are registered offices or branch offices under Sections 36 and 37 of the Real Estate and Business Agents' Act, 1978, if those stalls or displays are erected or maintained in circumstances where persons will be misled or deceived or be likely to be misled or deceived into believing that those premises are in fact registered offices or branch offices under the provisions of Sections 36 and 37 of the Real Estate and Business Agents' Act, 1978.*

- 13.7 Rule 11 in the Code replaces a provision dealing with displays in the now abandoned REIWA Guidelines to Professional Standards. That provision could have been used to stop or limit proper advertising and was potentially anti-competitive.

#### **Public Benefit**

- 13.8 The aim of Rule 11 is to protect the consumer public by preventing persons who are not licensed to be real estate or business agents carrying on such businesses notwithstanding the fact that they are not licensed.
- 13.9 The effect of Rule 11 of the Code is to prevent members of REIWA from erecting or maintaining real estate stalls or displays at venues other than those that are registered offices or branch offices under Sections 36 and 37 of the *Real Estate and Business Agents' Act, 1978* if those stalls or displays are erected in such a manner that persons will be misled into thinking that the relevant premises are in fact registered offices or branch offices under the Act. The provision thereby prevents misleading and deceptive conduct. The rule ensures that proprietors of real estate businesses can be identified and traced. This operates to protect consumers and is in the public benefit.
- 13.10 REIWA repeats the submission contained in paragraph 10.7 above that it wishes to prohibit the practice of members of the public being misled by the practice whereby licensed agents only act as figureheads whereby the licence is just a “dummy licence”, the licensee has little to do with the business and

the real operator of the business is not licensed. REIWA needs to be able to prevent this practice in order to protect the public, reinforce its role as a self-regulator of the industry and to ensure that its reputation is not diminished by members who contravene or seek to avoid these important provisions of the *Real Estate and Business Agents' Act, 1978*. The ability of REIWA to perform its role must be dependent on its standing in the market place. It would be placed in an impossible situation if it could not prohibit flagrant breaches of the governing legislation. It is reiterated that the Trade Practices Tribunal has held that rules that reflect the law and supplement the implementation of the law are clearly an important benefit to the public.

See *Re Media Council of Australia (No 2)* supra at pp 48,440 - 48,442.

#### **Public Benefit -v- anti-competitive effect**

13.11 REIWA submits that the public benefit derived from Rule 11 of the Code also substantially outweighs any anti-competitive effect of the provision. Any anti-competitive effect is minimised by the fact that the provision does not seek to ban or restrict the legitimate erecting or maintaining of real estate stalls or displays. Rather, the provision merely prevents misleading or deceptive conduct in that the provision prohibits those stalls or displays being erected on premises in such a manner so as to mislead persons into believing that the premises are registered offices or branch offices under the *Real Estate and Business Agents' Act, 1978*.

## **14. FOR SALE AND MANAGEMENT SIGNS**

### **Background**

14.1 Prior to the comprehensive review of REIWA'S Articles, rules, forms and directives by REIWA and its legal advisers, REIWA imposed upon members a

number of rules in documents such as the Members' Policy Register and the Guidelines to Professional Standards that sought to regulate the use of "for sale" and property management signs. Those provisions have now been abandoned, save for the provisions of Rule 9 of the Code.

14.2 Rule 9 is in the following form:

*9.0 "FOR SALE" and "MANAGEMENT" SIGNS*

*9.1 A "For Sale" or "For Lease" sign or "Auction" sign may only be erected if valid written authority has been granted by the principal and must be taken down on or before the day of settlement.*

*9.2 All signs should be kept in good order and condition so as not to detract from the value of the property and/or business concerned or the properties and/or businesses in the immediate vicinity.*

*9.3 Where an agent is engaged by a strata company and manages the strata company only, that agent may, with the authority of the strata company, erect a sign which must clearly convey that the authority is limited to the management of the strata company*

*9.4 An agent must not erect a standard managing agency sign on any part of a strata titled building or common property unless the agent manages 100% of the managed properties and/or businesses in that complex.*

**Public benefit**

14.3 The provisions of Rule 9 impose the following obligations upon members:

- (i) agents' signs for the selling, leasing or auctioning of a property can only be erected upon the provision of valid written authority and must be taken down on or before the settlement of the subject sale or lease of the property;

- (ii) signs are required to be kept in good order and condition;
- (iii) agents engaged by strata companies to manage those companies can erect signs with the authority of the strata company and must convey that the authority is limited to the management of the company;
- (iv) an agent must not erect a standard managing agency sign on a strata titled property unless the agent manages all of the properties or businesses in the complex.

14.4 The purpose and effect of the provisions of Rule 9 of the Code are to ensure that signs are only erected with the authority of principals, signs are removed in a timely fashion following the relevant sale or lease, signs are kept in good order or condition and signs with respect to the management of strata titled properties are erected in a manner that does not mislead the public with respect to the extent of the agent's authority. These provisions are all designed to protect the consumer public and are in the public benefit.

#### **Public benefit -v- anti-competitive effect**

14.5 It is submitted that any anti-competitive effect caused by the provisions of Rule 9 of the Code is limited substantially by the fact that the provisions provide consumer protection. REIWA submits that the public benefit derived from the provisions far exceeds any anti-competitive effect.

## **15. CONCLUSION**

15.1 For the reasons set out in these submissions, REIWA submits that authorisation under the TPA of its Articles, the Code, the MLS By-laws and the exclusive agency agreements is warranted. In particular, any anti-competitive effect of these documents is outweighed considerably by the resulting public benefit.

- 15.2 REIWA seeks authorisation of its Articles, the Code, the MLS By-laws and the exclusive agency agreements on an indefinite basis.
- 15.3 REIWA reiterates that it has conducted, in concert with its legal advisers, a comprehensive review of all its Articles, rules, forms and directives in the light of Part IV of the TPA. Should the ACCC wish to discuss any of the provisions of the documents the subject to this application for authorisation or should the ACCC require any further information the ACCC is invited to contact REIWA or its legal advisers, McCallum Donovan Sweeney.