

liability for a vendor to pay a commission is when a purchaser has been "introduced" to a property. An extensive body of common law has developed by way of interpretation of this term. Consequently, the term is used in both exclusive listing agreements and open listing agreements. However, the practical application of the term "introduced" and, in particular, the ascertaining of which agent has in fact "introduced" a purchaser to a property is a matter that can result in considerable dispute. In open listing agreements vendors can be presented with multiple claims from agents as to who has "introduced" the purchaser. This can leave unwitting vendors in a position where they become embroiled in disputes involving numerous agents as to who is entitled to a commission. The risk of this occurring is even heightened when different agents have used different forms. However, the danger of this problem arising for vendors is almost entirely avoided when there is an exclusive listing. As the vendor only owes a potential liability to pay a commission to one agent any disputes between agents that might arise as to who has "introduced" a purchaser will usually only arise in a context of conjunctive agreements between the listing agent and other conjunctive agent. The resolution of that dispute becomes a matter for the agents themselves and, in any event, REIWA provides an arbitration services so as to minimise the overall costs to business of those disputes. This results in lower transaction costs and lowers the barriers to entry by agents into the market caused by high business costs.

- 5.23 The use of exclusive listing agreements with the leasing of property also carries with it substantial public benefit. In particular, exclusive property management agreements are, by their nature, long term agreements that result in agents being required to find lessees and manage the ongoing letting of the property, whether that property be commercial or residential. The advantages to lessors, and the subsequent public benefit, of having one agent exclusively manage the leasing of a property are such that it is difficult to imagine a circumstance where any lessor would ever wish to engage numerous agents on a non-exclusive basis. All of the REIWA standard forms involving leasing for

which authorisation is sought involve ongoing property management. If agents did not manage properties on an exclusive basis vendors would be presented with the unworkable situation of having numerous agents all endeavouring to manage a property and, presumably, seeking to charge a fee. The management of rental properties involves more than the mere finding of tenants. It involves the collation of rent, the payment of expenses, liaising with the tenant and various other obligations. Whilst agency agreements for the sale of property are "success fee" based, the property management of leased premises involves the payment of a fee for the performance of ongoing tasks and duties by an agent.

- 5.24 It should be noted that REIWA also does not encourage or stipulate any set period for agreements relating to the management of leased premises. That is a matter for negotiation between agents and lessors.

If agents were prohibited from negotiating fixed terms with lessors for exclusive property management agreements agents could be left in the position where they perform what is usually the most difficult and time-consuming task in property management, that is finding a tenant and negotiating a lease, only to find that the agent is dismissed immediately after a lessee is found and another agent is engaged to perform what is usually a simpler task, the day to day management of the property. The relative security that is given to an agent with a fixed term property management agreement provides the agent with greater incentive to expend effort in obtaining a lessee and, consequently, improve the efficacy of the system of property management in the community. The efficiencies thereby created are in the public benefit.

- 5.25 The efficacy of the exclusive agency agreements and the benefit that those agreements bring to vendors and lessors is illustrated by the fact that almost all properties and businesses sold and properties leased in Western Australia through agents are sold or leased through exclusive agency agreements. It is submitted that vendors and lessors choose this method of appointing agents because it is the most efficient. Paragraph 1.12 of the survey conducted in

June 1998 by Patterson Market Research (annexure "F to these submissions) show that 39% of the group the subject of this survey had sold their property by sole [exclusive] listings; 60% by multiple listings and 2% by auction. All of these listings were therefore pursuant to exclusive agency agreements.

- 5.26 The practice of exclusive agency agreements produces the best chance of achieving a prior possible sale in as short as possible time, whilst still ensuring competition between agents as to commission prices. Very significantly, it is reiterated that the system of using exclusive agency agreements increases the flow of information into the market about properties and businesses that are for sale or lease. Because agents are given maximum incentive to market properties for the period of exclusive agency agreements there is more information put into the market and this increases competition .
- 5.27 The supply by REIWA to member agents of standard exclusive agency forms obviates the need for agents and consumers to negotiate individual contracts with respect to each listing. This practice in turn, reduces transaction costs, ensures that the market operates in accordance with well established procedures and allows consumers to know that they have the protection of a contract prepared by a reputable institute like REIWA. Consumers are therefore less likely to feel the need to incur legal costs consulting their own lawyers in order to check the terms of listing authorities.

#### **Public Benefit -v- Anti-competitive Effect**

- 5.28 REIWA submits that the numerous public benefits created by the use of exclusive agency agreements as set out in paragraphs 5.11 to 5.27 above far outweigh any anti-competitive effect by having exclusive agency agreements. In any event, REIWA's rules do not promote the use of exclusive agency agreements and any anti-competitive effect caused by the use of exclusive agency agreements is not contributed to by REIWA. REIWA believes that any efforts by it to force its members to use open listings in preference to exclusive agency agreements would increase the cost of delivery of real estate

services. Agents, even if they did put as much effort into marketing a property, would be duplicating the delivery of services and, in particular, duplicating the costs involved in marketing properties through such methods as advertisements, home opens and brochures. If agents all sought to absorb those costs themselves, the duplication of those costs would increase the cost for real estate businesses. Those costs would produce a barrier to entry by agents into the market and would increase transaction costs for consumers. If, as an alternative, agents passed on all of those costs to individual vendors, due to duplication the marketing costs for individual vendors would be higher than if the service had been provided by one exclusive agent.

5.29 Any anti-competitive effect caused by vendors only using one agent to market and sell a property or business is mitigated substantially by the following factors:

5.29.1 There is intensive competition between agents to obtain exclusive listings in the first place. Vendors are free to consult with numerous agents before entering into an exclusive agency agreement and often do.

5.29.2 Exclusive listing agreements are for finite periods of time negotiated between the agent and the principal. There is competitive pressure upon a listing agent to sell or lease a property or business during the period of the exclusive agency or the agent will face the prospect of losing the listing entirely. It is reiterated that REIWA does not recommend or set any specific period for exclusive agency agreements and the period of the exclusivity of agreements is a matter for negotiation between an agent and a principal. Further, the abandonment of REIWA's anti-soliciting rules makes it far easier for other agents to approach principals to obtain listings at the expiration of an initial exclusive listing period.

- 5.29.3 There is competitive pressure generally upon agents who have the benefit of exclusive listing agreements to efficiently sell or lease properties. If an agent has a bad record of selling or leasing properties during the period of exclusive listing and, consequently, wasting the time of vendors and lessors there will be a corresponding detriment suffered to that agent's business's goodwill.
- 5.29.4 Other agents are able to participate in the sale of properties or businesses, even where the property or business is listed exclusively, by virtue of the rules promoting conjunctural sales. Excepting where it would not be in the best interests of a vendor, an exclusive listing agent is required to enter into conjunctural agreements with other agents and the conjunctural agent becomes a sub-agent. A conjunctural agent who "introduces" a purchaser to a property becomes entitled to share in the listing agent's commission. The system of using conjunctural agents is particularly valuable in the Multiple Listing system of selling property.
- 5.29.5 A vendor retains the choice to use an open listing to appoint an agent, as distinct from an exclusive listing, if the vendor wishes. REIWA does not encourage agents to use exclusive listing authorities over open listing authorities and, as set out in paragraph 5.4 above, provides standard form open listing authorities for agents to use.
- 5.30 Given the substantial mitigation of any anti-competitive effect of exclusive agency agreements, as set out in paragraph 5.29 above, it is REIWA's submission that any anti-competitive effect of the exclusive agency agreement is small, whilst the public benefit derived from the use of the agreements is substantial.
- 5.31 It is submitted that the use of exclusive agency agreements in Western Australia has not resulted in there being any barriers to businesses entering the relevant markets. This is supported by the statistical data referred to in

paragraphs 3.13 to 3.15 above as to the number of agency operations in Western Australia and the numbers of small businesses that make up those operations.

- 5.32 The use of exclusive agreements has been fundamental to the delivery of real estate and business agency services throughout Australia in modern times. REIWA submits that this is due to the fact that it reflects the most efficient delivery of real estate and business agency services. For the reasons mentioned above any anti-competitive effects caused by this system are substantially minimised and the public benefits of the system are substantially increased by the method in which the system operates in Western Australia with agents who are members of REIWA.

#### **Relationship with other REIWA provisions**

- 5.33 The use of exclusive agency agreements has substantial impact upon the Multiple Listing Service and conjunctional agreements between agents. As mentioned in paragraph 5.5 above, the use of exclusive agency agreements is inherent in the Multiple Listing System. The efficiency of the sale of properties by exclusive agency agreements in the Multiple Listing System and the sale of properties and businesses generally is increased by the use of conjunctional agreements. The inter-relationship of exclusive agency agreements, the Multiple Listing Service and conjunctional agreements produces significant public benefit.

## 6. CONJUNCTIONAL AGREEMENTS

### Background

- 6.1 As detailed in paragraphs 5.19 above, the use of conjunctional agreements by agents in the sale of properties and businesses is a significant advantage in producing sales. It complements the use of exclusive agency agreements so as to ensure that a vendor is exposed to a larger range of agents than would otherwise be the case. The use of conjunctional agreements, notwithstanding the fact that a conjunctional agent is a sub-agent of the vendor's listing agent, also enables purchasers to have an effective method of accessing a wide range of properties.
- 6.2 Conjunctional agreements arise when listing agents have been appointed by vendors on an exclusive basis. Non-listing agents who know of a purchaser who may be interested in buying the property or business make contact with the agent who has the listing of the property and enter into an agreement whereby, if the conjunctional agent introduces a successful purchaser to the property, the conjunctional agent becomes entitled to share with the listing agent the commission to be paid by the vendor. The amount of that share is a matter negotiated by the listing agent and the conjunctional agent.
- 6.3 Although conjunctional agreements can also be used in respect to leases, their use in this area in practice is very rare. This is due to the fact that agents are usually appointed in connection with leases to be managing agents for extended periods of time, as distinct from agents to merely find a tenant. Consequently, the use of conjunctional agreements in residential leasing is virtually non-existent. Their use with respect to commercial leasing is also rare.

- 6.4 The use of conjunctional agreements is particularly significant with the Multiple Listing System. All properties listed with the Multiple Listing System are, if the listing agent agrees, able to be sold pursuant to a conjunctional agreement. Indeed, for properties listed with the Multiple Listing Service where vendors have entered into multi-list exclusive agency agreements, the listing of a property with the Multiple Listing Service amounts to a unilateral offer of a conjunctional sale by a listing agent with all other agents who are entitled to use the Multiple Listing Service. Between 1 July 1999 and 29 February 2000 a total of 13,619 properties were sold after they had been listed with the Multiple Listing Service in Perth. Of these properties, 31% were sold as a consequence of conjunctional agreements between the listing agent and another agent.
- 6.5 As detailed in paragraphs 4.3.3 and 4.3.4 above, the review conducted by REIWA and its legal advisers of the REIWA Articles, rules, forms and directives has resulted in substantial changes being made to the rules that relate to conjunctional agreements. Many previous provisions that may have been anti-competitive in effect have been removed in the manner referred to in paragraphs 4.3.3 and 4.3.4 above. However, REIWA has retained a number of specific rules that relate to conjunctional sales in connection with both the Multiple Listing Service and the general sales of properties and businesses. Those rules that relate to the Multiple Listing Service are referred to in greater detail in section 7 below. This section of the submissions in support of REIWA's application for authorisation under the TPA primarily related to the general rules that appear in the Code that relate to conjunctional sales by members of REIWA.
- 6.6 The relevant general provisions that apply to conjunctional sales conducted by REIWA members are set out in Rules 4 and 5 of the Code. Those rules are as follows:

#### 4.0 CONJUNCTIONAL ARRANGEMENTS

##### *Preamble*

*The listing agent has complete freedom to negotiate the fee for a sale or a lease with the vendor or lessor both as to the method of its calculation and amount.*

*The listing agent also has complete freedom to negotiate the sharing of the fee with other agents participating in the sale or lease.*

##### *Division of Fee in Conjunctional Sales and Leases*

*4.1 Agents entering into conjunctional agreements should ensure that all the conditions of that agreement including, but not limited to, all conditions relating to fees, be clearly agreed. In the absence of any express agreement to the contrary between the Listing Agent and the conjunctional agent, the onus is upon the Listing Agent to propose to the conjunctional agent all the relevant terms of the conjunctional agreement. The conjunctional agent shall then respond to that proposal expeditiously. Should the Listing Agent and the conjunctional agent then agree to the terms of a conjunctional agreement, the onus is upon the conjunctional agent to prepare a written conjunctional agreement, unless agreed otherwise between the parties.*

*4.2 (a) Subject to agents who are parties to a conjunctional agreement agreeing to the contrary, if an agent has a prospective purchaser or lessee for a property and/or business and requests the Listing Agent to conjoin, the prospective customer must be first identified to the Listing Agent.*

*The Listing Agent should agree to act in conjunction with a fellow agent unless satisfied that it is not in the best interests of the vendor or lessor.*

*Subject to agents who are parties to a conjunctive agreement agreeing to the contrary, any conjunctive agreement made between agents will remain in force with respect to the prospective purchaser or lessee the subject of the conjunctive agreement until the listing agent's authority to sell or lease the property or business comes to an end.*

*Given that when a Listing Agent enters into a conjunctive agreement with another agent, that other agent becomes a sub-agent of the Listing Agent and therefore owes corresponding fiduciary duties to the Listing Agent, unless agents who are parties to a conjunctive agreement agree to the contrary, during the term of a conjunctive agreement the conjoining agent is precluded from approaching the relevant vendor or lessor for a listing of the property or business the subject of the conjunctive agreement PROVIDED THAT if the vendor or lessor approaches the conjoining agent during the term of the conjunctive agreement there shall be no restriction upon the ability of the conjunctive agent to enter into a listing agreement with respect to the property or business the subject of the conjunctive agreement.*

- (b) Unless agents or parties to a conjunctive agreement agree to the contrary, during the period of a conjunctive agreement the listing agent must not directly contact the prospective purchaser or lessee who*

*is the subject of the conjunctive agreement. Unless agents who are parties to a conjunctive agreement agree to the contrary, if the prospective purchaser or lessee the subject to the conjunctive agreement initiates an approach to the listing agent, then the listing agent may negotiate with that prospective purchaser or lessee directly regarding the relevant sale or lease.*

#### **4.3 Listings by Former Conjoining Agents**

*If, at the expiration of a conjunctive agreement, a former conjoining agent enters into an exclusive listing agreement with a vendor with respect to the property or business the subject of that former conjunctive agreement, the former conjoining agent shall, as a matter of courtesy, advise the Listing Agent within two business days of entering into that selling agency agreement that such an agency agreement has in fact been entered into. This requirement that a former conjunctive agent give notice to a former Listing Agent shall not apply if the exclusive selling agency agreement entered into by the former conjunctive agent is entered into 60 days or more after the end of the exclusive listing period contained in the initial agreement between the vendor and the former Listing Agent.*

#### **4.4 Procedure for Negotiations**

*Unless agents who are parties to a conjunctive agreement agree to the contrary, a conjunctive agent shall, during the period of the conjunctive agreement regarding the sale or lease of the property or business concerned, conduct all negotiations with the vendor or lessor through the listing agent.*

#### 4.5 *Procedure for Presentation of Offers*

*The Listing Agent must, within twenty-four (24) hours of receiving an offer from the conjoining agent, present it to the vendor or lessor for consideration and notify the conjoining agent that the offer has been so presented. If it is not possible to present the offer within twenty-four (24) hours, the Listing Agent must explain to the conjoining agent the reasons for the delay. Should the offer be rejected, the Listing Agent must promptly return it to the conjoining agent with written notification of rejection signed and dated by the vendor or lessor.*

#### 4.6 *Processing of Contracts for Sale*

*The conjoining agent must forward to the Listing Agent without delay the original offer and acceptance together with, if the offer and acceptance provides that the deposit monies are to be paid to the vendor or lessor's agent, all deposit monies received. If the conjoining agent has not received the deposit monies nominated in the offer and the offer provides that the deposit monies are to be paid to the vendor's agent, the Listing Agent must be notified immediately of the position regarding such deposit monies.*

#### 4.7 *Payment of Conjunctional Agreement Fees*

*The conjoining agent shall provide to the listing agent any tax invoice that the conjoining agent is required to issue within one business day of settlement. The listing agent shall forward to the conjoining agent the fee agreed to in the conjunctional agreement within two business days of settlement or, if the conjoining agent fails to issue to the listing agent any tax*

*invoice that the conjoining agent is required to so issue, the listing agent shall not be required to forward the fee agreed to in the conjunctive agreement until two business days after the listing agent receives such a tax invoice.*

**5.0 AGENTS DEALING WITH THE SAME PROSPECTIVE PURCHASER/LESSEE**

**5.1 (a) If:**

*(i) an agent has entered into an agency agreement or a conjunctive agreement with respect to the sale or lease of a property or business,*

*and*

*(ii) that agent proposes claiming a fee pursuant to that agency agreement or conjunctive agreement on the grounds that the agent has introduced a prospective purchaser or lessee to the vendor, lessor, listing agent, property and/or business concerned,*

*THEN that agent shall ensure that reasonable contact is maintained with that prospective purchaser or lessee.*

*(b) For the purpose of sub-clause 5.1(a) the expression "reasonable contact" includes, but is not limited to, when reasonably practical:*

*(i) in the case of the sale or lease of a property other than a business, speaking to the prospective purchaser or lessee or a*

*representative of that purchaser or lessee in person or by telephone or making contact in writing no less than once in the 14 day period prior to the purchase or lessee entering into a relevant contract to purchase or lease the property;*

*(ii) in the case of the sale or lease of a business, speaking to the prospective purchaser or lessee or a representative of that purchaser or lessee in person or by telephone or making contact in writing no less than once in the 28 day period prior to the purchase or lessee entering into a relevant contract to purchase or lease the business;*

*(iii) when reasonably practical, carrying out at least one inspection of the property or business concerned in the presence of the prospective purchaser or lessee, or, in the case of a purchaser or lessee which is a corporation, a representative of that purchaser or lessee.*

*(c) The purpose of this sub-clause is to stipulate a level of service to be provided by agents when dealing with prospective purchasers or lessees. However, nothing in this sub-clause is intended to provide the parties to an agency agreement or a conjunctional agreement with contractual rights outside the provisions of the relevant agreement itself.*

*5.2 Unless agents who are parties to a conjunctional agreement agree to the contrary, it shall be a pre-requisite to the*

*entitlement of the non-listing agent to claim a fee pursuant to that conjunctive agreement that the non-listing agent has performed the following tasks with respect to the purchaser or lessee who the non-listing agent claims gives rise to an entitlement to a fee:*

- (a) the non-listing agent shall introduce the purchaser to the property or the business the subject of the conjunctive agreement;*
- (b) the non-listing agent shall provide the listing agent with the name of the purchaser or lessee concerned;*
- (c) in the case of the sale or lease of a property other than a business the non-listing agent shall speak to the purchaser or lessee, or a representative of that purchaser or lessee, in person or by telephone or shall make contact in writing no less than once in the 14 day period prior to the purchase or lessee entering into a relevant contract to purchase or lease the property;*
- (d) in the case of the sale or lease of a business, the non-listing agent shall speak to the purchaser or lessee, or a representative of that purchaser or lessee, in person or by telephone or shall make contact in writing no less than once in the 28 day period prior to the purchase or lessee entering into a relevant contract to purchase or lease the property or business;*
- (e) the non-listing agent shall carry out at least one valid inspection of the property or business concerned in the presence of the prospective purchaser or lessee, or a representative of that prospective purchaser or lessee,*

*prior to the purchaser or lessee entering into a relevant contract to purchase or lease the property or business.*

### **Previous authorisation decisions**

6.7 The public benefit associated with conjunctional sales in real estate transactions has been recognised in previous applications for authorisation. In particular, it has been accepted that conjunctional sales in this setting produce a public benefit in that the vendor is exposed to a larger market for the sale of a property than could be reached if only a single agent was involved in a transaction. Further, purchasers are given access to a wider selection of properties.

*See Re The Real Estate Institute of South Australia (supra) at p 57,340 and Re The Real Estate Institute of Queensland (supra) at p 55,224.*

### **Public benefit**

6.8 REIWA submits that the use of conjunctional agreements by agents produces a more efficient system for the sale of properties and businesses and this produces public benefit.

6.9 Clause 2 of the *Real Estate and Business Agents' Act, 1978* Code of Conduct requires agents to act in the best interests of his or her principal except where it would be unreasonable or improper to do so. Rule 10.1 of the REIWA Code requires members of REIWA to act in the best interests of the member's principal except where it would be unreasonable or improper to do so. Rule 4.2(a) of the REIWA Code states that a listing agent should agree to act in conjunction with a fellow agent unless satisfied that it is not in the best interests of the vendor or lessor. Consequently, agents must enter into conjunctional agreements with other agents except where unusual circumstances exist. A conjunctional agent becomes a sub-agent of the listing agent and therefore owes fiduciary duties to the vendor.

- 6.10 Consequently, notwithstanding the fact that the vast majority of sales of property and businesses in Western Australia take place in the context of exclusive agency agreements, vendors effectively have access to a system which, in practice often results in large numbers of agents searching for purchasers for any particular property or business. Vendors therefore have their properties and businesses marketed far more extensively than one single agent could achieve. Consequently, conjunctional agreements act as a means by which information is more widely disseminated in the market. Conjunctional sales are a cost effective means of providing an incentive to other agents to work towards obtaining a sale of a property. This results in a substantial public benefit.
- 6.11 Further, the efficiencies caused by the use of conjunctional agreements to the sale of properties and businesses in Western Australia carry benefits to those persons purchasing real estate or businesses. Purchasers seeking properties or businesses can go to agents and have those agents assist the purchaser in locating a suitable property or business. Although the conjunctional agent ultimately owes a fiduciary duty to the vendor, a purchaser obtains the benefit of being able to have a qualified agent assist them in locating a suitable property or business without having to pay that agent any fee. The agent approached by the purchaser has a commercial incentive to locate a suitable property for the purchaser because the introduction of that purchaser to the property or business will entitle the conjunctional agent to share in the commission payable by the vendor to the listing agent. These benefits to purchasers result in additional public benefit.
- 6.12 Public benefit through the use of conjunctional agreements is also achieved by virtue of the fact that agents have competitive pressures upon them to locate successful purchasers. A listing agent is under competitive pressure to find a successful purchaser because if the agent fails to find the purchaser himself or herself, the rules requiring listing agents to enter into conjunctional agreements will mean that the listing agent will lose a substantial portion of

the commission payable the vendor on the transaction. Further, non-listing agents retain an interest in endeavouring to find a purchaser for a property even if those agents do not have an exclusive listing with respect to that property. Non-listing agents therefore act in competition with each other to find purchasers for those properties as quickly and efficiently as possible.

- 6.13 Given the significance of the system of conjunctive agreements to the sale of properties and businesses in Western Australia, there is substantial public benefit in ensuring that the conjunctive agreement system operates clearly and efficiently. It would not be in interests of either purchasers or vendors for agents to be embroiled in disputes with each other as to the terms of conjunctive agreements or for non-listing agents to be reluctant to enter in conjunctive agreements on the basis that the system is one that produces disputes or that is unwieldy. Disputes between agents have the potential to substantially increase the costs of conducting real estate businesses and, consequently, the cost of real estate transactions for the consumer. Over 90% of arbitrations conducted by REIWA concern disputes between agents regarding the terms of conjunctive agreements. REIWA submits that the application of rules designed to give certainty to conjunctive agreements will limit those disputes and provide cost savings to agency businesses that will contribute to the efficiency of the delivery of agency services to consumers. It should be noted that the provisions in clause 4 and 5 of the Code relating to the contractual terms of conjunctive agreements can all be varied if the agents who are parties to the conjunctive agreements wish. Further, with conjunctive agents often being entitled to substantial shares in the payment of commissions, it is in the general interests of consumers that conjunctive agents be required to provide a minimum level of service. It is for these reasons that REIWA believes that it is appropriate for there to be rules applicable to conjunctive agreements entered into by its members.

As set out in paragraphs 4.3.3 and 4.3.4 above, REIWA has eliminated a number of rules that could produce undue restraints upon competition.

6.14 The remaining provisions contained in Rules 4 and 5 of the Code deal with the following issues:

6.14.1 The preamble to rule 4 of the Code makes it clear that the listing agent retains complete freedom to negotiate a fee for a sale or a lease with a vendor or lessor. Further, a listing agent also has complete freedom to negotiate the sharing of that fee with other agents participating in the sale or lease. The Code therefore does not seek to restrict in any way the ability of an agent to negotiate the terms of a listing with a member of the public or to restrict the sharing of a fee with another agent in a conjunctive agreement. Indeed, the rule that previously was contained in the Code that deemed conjunctive fee splits to be on a 50-50 basis has been deleted. The removal of minimum or stipulated fee splits overcomes a concern expressed in previous authorisation applications such as *Re United Real Estate Agents Group Ltd* (1994) ATPR 50 - 146.

6.14.2 Rule 4.1 of the Code seeks to ensure that the terms of conjunctive agreements are clearly agreed to by listing agents and conjunctive agents. Agents are required to ensure that all the conditions in a conjunctive agreement are clearly agreed. Further, subject to any express agreement to the contrary, the onus is upon a listing agent to propose all the relevant terms of a conjunctive agreement. The conjunctive agent is required to respond to that proposal expeditiously. Subject to agreement between the parties, if the terms of a conjunctive agreement are agreed to by the parties, the onus is upon the conjunctive agent to prepare a written conjunctive agreement. This rule is designed to avoid vagueness with respect to the terms of conjunctive agreements and the consequential risk that market participants and, in particular, vendors will become caught up in disputes between vendors.

6.14.3 Rule 4.2(a) of the Code requires a conjunctional agent who requests that a listing agent enter into a conjunctional agreement, subject to the right of agents to agree to the contrary, to identify the prospective purchaser or lessee. The purpose of this provision is to make it clear to the parties who the prospective purchaser or lessee is, in an endeavour to avoid any later disputes between the listing agent and the conjunctional agent as to that identity and, consequently, whether or not the listing agent had earlier contact with that person and introduced that person to the property or business. This is often determinative as to whether the conjunctional agent is entitled to share in the commission.

This rule also contains a provision that the listing agent should agree to act in conjunction with a fellow agent unless satisfied that it is not in the best interests of the vendor or lessor. As set out in paragraph 6.9 above, this encourages the use of conjunctional agreements.

The rule provides that any conjunctional agreement made between agents shall remain in force with respect to the purchaser or lessee the subject of the conjunctional agreement until the listing agent's authority to sell or lease the property comes to an end. This provision is expressly made subject to the right of agents to agree to the contrary. However, absent such agreement to the contrary, it avoids the potential for disputes to arise between agents where there might be uncertainty about the length of conjunctional agreements. Where such uncertainty exists it might be possible for a listing agent to argue that a conjunctional agreement, and the obligation to share a fee with the conjoining agent, has come to an end in circumstances where the conjoining agent has introduced the purchaser but the contract of sale is not entered into until after the date upon which the listing agent contends the conjunctional agreement expired. Such a result would present a commercial disincentive for non-listing agents

to enter into conjunctional agreements. It is noted that the continuing nature of the conjunctional agreement is expressly limited to the purchaser or lessee the subject of the conjunctional agreement. This enables agents to have freedom to agree differing terms for the continuing of a conjunctional agreement depending on the identity of a particular purchaser.

The rule also provides that, as a conjunctional agent becomes a sub-agent of the listing agent, the conjunctional agent, subject to the right of agents to agree to the contrary, is precluded from approaching the relevant vendor or lessor to obtain a listing authority from the principal during the period of the conjunctional agreement. As the conjunctional agent has become a sub-agent of the listing agent as a consequence of the conjunctional agreement the conjunctional agent owes fiduciary duties, including duties of fidelity, to the sub-agent's principal, the listing agent. It would be a breach of that duty for the conjunctional agent to act against the interests of the listing agent by approaching the vendor or lessor directly. Further, vendors who appoint agents exclusively have chosen to enjoy the benefit of only needing to deal with a single agent. This portion of rule 4.2(a) is therefore consistent with this election by the vendor. There is nothing stopping the conjunctional agent from entering into a listing agreement with the principal when the conjunctional agreement comes to an end and conjunctional agents are also expressly free to enter into listing agreements with respect to the relevant property or business at any time before or after the expiration of the conjunctional agreement should that agent be approached by the vendor or lessor.

- 6.14.4 Rule 4.2(b) of the Code, subject to the parties to a conjunctional agreement agreeing to the contrary, requires a listing agent who has granted a conjunctional agreement to another agent to not directly

contact the prospective purchaser or lessee. On the other hand, if the prospective purchaser or lessee approaches the listing agent, then the listing agent may negotiate directly with the purchaser or lessee. In the circumstances of a conjunctive agreement, if listing agents made direct contact with potential purchasers or lessees who had been introduced by the conjunctive agent, the position of the conjunctive agent may well be undermined and there would be greater potential for disputes to arise as to whether or not the particular purchaser concerned had in fact been "introduced" to the property by the conjunctive agent. Such a risk would detract from the commercial attractiveness of conjunctive agreements to non-listing agents.

6.14.5 Rule 4.3 of the Code requires former conjoining agents who have entered into subsequent listing authorities with principals to give notice of the new listing of the subject property or business to the former listing agent within two business days of the execution of the new agency agreement with the former conjunctive agent. The purpose of this rule is merely to ensure that former listing agents involved in conjunctive agreements are provided the professional courtesy by the previous conjunctive agent of being advised of the fact that a new listing agreement has been granted to another agent so that the former listing agent does not waste his or her time trying to negotiate a new listing with the principal when that effort may be pointless. Such an unnecessary approach by an agent would probably result in an unnecessary waste of time for the principal as well.

6.14.6 Rule 4.4 of the Code, subject to the right of the parties to a conjunctive agreement to agree to the contrary, requires negotiations with a vendor to be conducted by the listing agent. The purpose of this provision is to ensure that the listing agent, who owes

the principle fiduciary duty to the principal, is properly able to exercise care in acting for the principle. The provision ensures that negotiations are conducted in an orderly manner through the agent originally specifically appointed by the vendor or lessor exclusively to conduct those negotiations. It should also be remembered that the conjunctional agent is a sub-agent of the listing agent.

- 6.14.7 Rule 4.5 of the Code requires a listing agent to, where possible, present offers obtained from a conjoining agent to a vendor or lessor. The purpose of this rule is to prevent listing agents from endeavouring to circumvent the requirement that listing agents enter into conjunctional agreements by avoiding presenting offers to vendors or lessors. Such action by a listing agent would not be in the best interests of the consumers, whether they be vendors, purchasers, lessors or lessees.
- 6.14.8 Rule 4.6 of the Code requires the conjunctional agent to forward to the listing agent the original offer and acceptance and, subject to the terms of the contract between the vendor and lessor, any deposit monies payable to the listing agent as stakeholder without delay. This rule is designed to ensure the efficient processing of the agreement between the vendor and purchaser.
- 6.14.9 Rule 4.7 of the Code requires a listing agent to forward the fee agreed to be paid to the conjunctional agent under a conjunctional agreement expeditiously. This rule is also designed to ensure that performance of the conjunctional agreement takes places expeditiously.
- 6.14.10 Rule 5.1 of the Code is a clause that stipulates a level of service to be provided by conjunctional agents when dealing with prospective purchasers or lessees. The purpose of the clause is expressly stated in rule 5.1(c) and it is made clear that nothing in the sub-clause is

intended to provide the parties to an agency agreement or a conjunctional agreement with contractual rights outside the provisions of the relevant agreement itself. The purpose of the rule is to ensure that an appropriate level of service is provided by conjunctional agents and to avoid the practice of conjunctional agents merely providing a listing agent with a name and then taking no further action. Such a practice by conjunctional agents does little to facilitate sales in the interests of vendor and does little to advance the interests of purchasers. The reasonable contact required under the rule is the carrying out of an inspection of the property or business concerned with a purchaser prior to the sale or lease taking place and continuing to make contact with the purchaser or lessee or a representative of that purchaser or lessee prior to the entering of any relevant contract to purchase or lease the property or business. This provision provides protection to consumers in that minimum levels of service to be provided to purchasers are specified.

- 6.14.11 Rule 5.2 of the Code stipulates what a conjunctional agent must do in a conjunctional agreement in order to claim a fee. Whilst this provision seeks to define the contractual rights and duties of agents in conjunctional agreements it is expressly stipulated to be subject to any agreement to the contrary by the parties concerned. The purpose of the rule is to avoid the problems and disputes that arise when listing agents and conjunctional agents do not address precisely what a conjunctional agent must do to entitle the conjunctional agent to the payment of a fee. Notwithstanding the requirement of rule 4.1 of the Code that conjunctional agreements be put in writing, it is REIWA's experience that many agents do not record the terms of conjunctional agreements in writing or, alternatively, if the terms of the agreements are recorded in writing, they do not address the fundamental issue as to what a conjunctional agent must do in order to obtain a fee. Rule 5.2 stipulates, subject to the parties agreeing to the contrary, that a

conjunctional fee is payable if a conjunctional agent introduces a purchaser to the property or business concerned, the conjunctional agent provides the listing agent with the name of the purchaser or lessee concerned, a value inspection of the property or business (as defined in the definitions section of the Code) by the conjunctional agent and the purchaser or lessee concerned takes place prior to the entering into the relevant contract and the conjunctional agent maintains a minimum level of contact with the purchaser or lessee concerned prior to the entering into of that contract. It is significant to reiterate that the requirement upon an agent to claim a commission with respect to real estate or businesses is commonly expressed, as set out in paragraph 5.21 above, to be a requirement that the agent "introduce" a purchaser or lessee to the property or business concerned. That, in REIWA's experience, is also the usual basis upon which the real estate and business agency industries in Western Australia agree to provide for the payment of conjunctional fees when the agents concerned turn their minds to the issue. Provisions in clause 5.2 largely articulate what is the usual arrangement and custom with the conjunctional agreements in Western Australia. However, that is not to say that REIWA has a preference for agents to use such terms when stipulating the requirements upon conjunctional agents and this is not the purpose of the rule. Rather, it is reiterated that REIWA is merely trying to provide certainty with respect to the terms of conjunctional agreements and thereby avoid delays and disputes within the conjunctional agreement system. This in turn provides consumer protection because it minimises the chances of members of the public becoming caught up in disputes between agents. Agents are free to agree to terms outside of those referred to in rule 5.2.

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

6.15 Whilst REIWA concedes that the articulating of contractual terms within rules, carries with it the possibility of some anti-competitive effect. However, the submission contained in paragraph 6.14 above is reiterated. The conjunctional agreement system operates to the benefit of the public and the rules contained in rules 4 and 5 of the Code are designed to facilitate the efficient implementation of the conjunctional agreement system. The rules are designed to ensure that a minimum level of service is provided by conjunctional agents and seek to provide, as far as is reasonable, some certainty and clarity into those conjunctional agreements so as to avoid costly disputes between agents and any corresponding reluctance by agents to use the conjunctional agreement system. An orderly implementation of the conjunctional system of selling property and the avoidance of costly disputes keeps agency business costs down and this enables an efficient and cost effective delivery of services to consumers. It is again stressed that agents who are parties to conjunctional agreements are free to agree whatever terms they wish. The contractual terms referred to in clauses 4 and 5 of the Code can all be varied if the parties to the conjunctional agreement desire. REIWA submits that the substantial benefit that results from an orderly application of conjunctional agreements outweighs any anti-competitive effect of the rules concerned.

**7. MLS BY LAWS****Background**

7.1 The Multiple Listing Service is a system of marketing properties whereby details of particular properties are provided to all agents entitled to use the service. Two types of listing are accepted for the multi listing service, being

exclusive plus agency agreements and multi-list exclusive agency agreements. Explanations of the significant features of both of these types of agreements are set out in paragraph 5.3 above. When properties are listed with the Multiple Listing Service details of those properties are included in a REIWA publication "The Homebuyer" and the REIWA internet site. Vendors may agree to provide open access to the relevant property by agents entitled to use the Multiple Listing Service through a security locking system provided by REIWA. A Listing of a property through a multi-list exclusive agency agreement amounts to a unilateral offer by a listing agent to all other agents entitled to use the Multiple Listing Service to enter into conjunctional agreements. Agents are also free to enter into conjunctional agreements should they wish with other agents with respect to exclusive plus listing agreements or multi-list exclusive agency agreements, whether or not those other agents are members of REIWA or entitled to use the Multiple Listing Service. Vendors who enter into multi-listing exclusive agency agreements authorise other real estate agents who are entitled to use the Multiple Listing Service to display a photograph of the relevant property in their office window.

- 7.2 Article 43 of the REIWA Articles establishes the Multiple Listing Service of WA. Subscriptions, charges and dues with respect to the Multi Listing Service are set, pursuant to Article 43.5, by the REIWA Council. REIWA reiterates that it recognises that any charges levied for the use of the Multiple Listing Service should not be based on any value of the earning capacity to be derived from the use of the Multiple Listing Service by an agent. Rather, fees are set with reference to purely administrative costs.
- 7.3 Under Article 43.4 all ordinary members and corporate members of REIWA are entitled to use the Multiple Listing Service provided they pay the appropriate subscriptions, charges or dues.
- 7.4 The Multiple Listing Service represents a popular method of selling property in Western Australia. For the period 1 July 1999 to 29 February 2000 there

were 36,300 sales of dwellings and land in the Perth Metropolitan Area. 11,874 of these sales took place through the Multiple Listing Service, resulting in the Multiple Listing Service having a market share of property sales in the Perth metropolitan area of 32.7%. However, it should be noted that the proportion of Multiple Listing Service sales varies from region to region within the Perth metropolitan area. Generally, there is a greater number of Multiple Listing Service sales in the middle to lower price ranges and in locations where there are large numbers of home unit sales. For instance, in Armadale the Multiple Listing Service is very popular with 94% of sales occurring through the Multiple Listing Service but in Nedlands only 1% of sales are Multiple Listing Service sales. The average time that it took for a property listed with the Multiple Listing Service to achieve a sale in the six months to December 1999 was 44 days. During the period 1 July 1999 to 29 February 2000 31% of properties sold through the Multiple Listing Service were sold by conjunctural agreements.

- 7.5 The Multiple Listing Service also operates in a number of country areas in Western Australia, in particular Mandurah, Geraldton, Bunbury and Albany.
- 7.6 REIWA records show that approximately 770 REIWA businesses are members of REIWA. Approximately 430 of these businesses, or 61%, use the Multiple Listing Service.
- 7.7 REIWA supplies significant financial support and subsidisation for the Multiple Listing Service. Elements of REIWA's infrastructure used to support the Multiple Listing Service include management, administrative staff, reception facilities, account staff, information technology staff, public enquiry services, REIWA premises, computer hardware, telephone systems, legal advice and public relations. Whilst it is difficult to quantify exactly the value of that support, REIWA calculates that the total financial support supplied by REIWA to the Multiple Listing Service with reference to an estimate of the percentage of staffing costs associated with the Multiple Listing Service, being \$200,000.00, plus on-costs of 12% making a total of \$224,000.00. Further,

REIWA estimates that the portion of rental costs attributable to the Multiple Listing Service would be \$25,000.00 and the portion of other REIWA costs attributable to the Multi Listing Service (approximately 22% of total REIWA overheads) amounts to \$238,000.00 for the 1999-2000 financial year. This adds up to a total financial support of \$462,000.00 per annum. Net income from the Multi Listing Service is paid into the REIWA general revenue and in past financial years this net income has been between \$70,000.00 to \$200,000.00. However, in the 1999-2000 financial year the Multi Listing Service will run at a net loss of approximately \$20,000.00.

- 7.8 REIWA estimates that if the Multiple Listing Service was operated outside of REIWA by an independent body solely responsible for such a service, the costs of running the service would increase markedly. REIWA estimates that those costs would rise from the \$462,000.00 estimate referred to above to an amount of \$600,000.00. REIWA calculates this figure with a reference to \$200,000.00 for appropriate staffing costs (including reception staff, accounts staff, chief executive officer, secretaries, information technology staff and the provision of research and arbitration facilities) and an amount of \$400,000.00 for other costs such as rental on premises, computer systems, programmers, insurances, legal fees and general expenses.

As a consequence of the cost estimates contained in this paragraph, REIWA submits that much of the financial viability of the Multiple Listing Service rests upon the service being provided by REIWA. Without REIWA's financial support for the system the administrative costs of the service, and therefore the attractiveness of the service for agents and consumers, would decrease markedly.

- 7.9 It is reiterated that substantial changes have been made to Article 43 of the REIWA Articles and the MLS by-laws. Details of those changes are detailed in paragraphs 4.2.8 and 4.4 above. In short, REIWA has removed a significant number of anti-competitive features of the Multiple Listing Service and has taken steps to ensure that the use of the system by members of REIWA is not

restricted by the practice of setting fees and subscriptions with reference to a perceived value to agents of using the system, as distinct from charging for administrative costs. Partially for this reason, the independence of the Multiple Listing Service in country areas has been withdrawn, together with previous Multiple Listing Service country by-laws. The REIWA Multiple Listing Service throughout Western Australia is now governed by the same by-laws.

### **Previous authorisation decisions**

- 7.10 7.10.1 Previous authorisation decisions have recognised that significant public benefit is achieved through multiple listing services. It has been determined that any anti-competitive effect resulting from multiple listing systems has been outweighed by the public benefit of those systems. It has been accepted that a multiple listing service is, in principal, an extension and rationalisation of conjunctional selling commonly engaged in by estate agents generally. It is one of a number of methods of marketing real estate. More complex systems of multiple listing services require rules of procedure and efficient central office management to control and expedite the operation. In a multiple listing system the vendor of a property, while retaining the services of one agent, has access to a wider market provided by other participating agents. A prospective buyer is able to obtain access to all properties which are multiple listed by contacting only one agent. A multiple listing service thus attempts to reduce market imperfections by more efficiently bringing vendors and purchasers of real property together. In doing this, it also expands and stimulates competition in a locality by giving more agents access to a greater number of listings than they could individually obtain. Thus market efficiency is enhanced. (See *Re The Real Estate Institute of South Australia* (supra) at p 57,334 and 57,344; *Re The Real Estate Institute of Tasmania* (supra) at p 57,212; *Re The Real Estate*

*Institute of the Australian Capital Territory* (supra) at p 55,105; *Re United Real Estate Agents Group Ltd* (1994) ATPR (Com.) 50-146 at p 55,172 and *Re The Real Estate Institute of Queensland* (supra) at p 55,227).

7.10.2 The significant public benefits associated with the use of Multiple Listing Services has recently been affirmed by the ACCC on 26 April 2000 with respect to an application for authorisation by the *Estate Agents' Co-operative Limited*. (Authorisation No A90678).

7.11 It has previously been determined that the public benefit advantages of multiple listing systems are not outweighed by the compulsory use of exclusive agency agreements as part of the multi listing service provided that the relevant institute inserts a clause within those exclusive agency agreements whereby the principal acknowledges whether or not he or she wishes to retain the right to sell the property on his or her own without incurring the obligation to pay a commission.

See *Re The Real Estate Institute of Queensland* (supra) at p 55,227 and *Re The Real Estate Institute of South Australia* (supra) at pp 57,334 and 57,344.

7.12 The significance of joining fees for the use of multiple listing systems being based on contributions to the administrative costs of establishment and development of the system, as distinct from being based on any assessment of a value of the earning capacity to be derived from the use of the system, is a significant issue in assessing public benefit. Joining fees based on values of earning capacities to be derived from the use of a multiple listing service can constitute an unreasonable barrier to entry.

See *Re The United Real Estate Agents Group Ltd* (supra) at p 55,174.

**Public benefit**

- 7.13 REIWA submits that the public benefits associated with conjunctional sale agreements in general as outlined in paragraphs 6.8 to 6.14 above apply equally to the Multiple Listing Service.
- 7.14 A multiple listing system provides vendors with the advantage of having the benefits of exclusive listing agreements as outlined in paragraphs 5.11 to 5.27 above but also having access to a wide number of other agents who are prepared to participate in the sale of the property by the use of conjunctional agreements. Vendors consequently have their property presented to a greater proportion of the market than if they had only dealt with one agent. This, in turn, increases the efficiency of the sale of real estate and acts in the public benefit. Further, the Multiple Listing Service and the use of conjunctional agents also has benefits for prospective purchasers as purchasers are able to consult with agents and have those agents locate properties suitable for purchasers without the purchasers incurring a fee. It is emphasised that the removal of previous restrictions upon REIWA members using the Multiple Listing Service in different parts of Western Australia enhances competition by enabling agents to participate in markets across regions and by disseminating information about listed properties throughout the state. For the reasons set out in paragraph 6.9 with respect to conjunctional sales generally, non-listing agents who enter into conjunctional agreements become sub-agents of the listing agent and therefore owe fiduciary duties to the vendor. However, the ability of a conjunctional agent to share in the commission payable by the vendor provides commercial incentive to non-listing agents to introduce purchasers to properties. The benefits to purchasers of a multiple listing service are also significant and this amounts to additional public benefit.
- 7.15 The Multiple Listing Service attempts to reduce market imperfections by more efficiently bringing vendors and purchasers of real property together. It consequently expands and stimulates competition in a locality by giving more agents access to a greater number of listings than they could individually

obtain. Therefore market efficiency is enhanced and greater information is provided to the market. The efficiencies caused by maximising the flow of information into the market increases competition.

- 7.16 The Multiple Listing Service extends the general benefits that are obtained through conjunctional selling agreements by providing a centralised, cohesive and well resourced method of marketing properties. Both buyers and sellers are therefore exposed to very large numbers of real estate agents.
- 7.17 The Multiple Listing Service results in ensuring that the needs of a buyer and seller are more readily matched, thus increasing the efficiency of the sale of properties and reducing the time taken for vendors to sell and purchasers to buy properties.
- 7.18 Listings that form part of the Multiple Listing Service are made under the rules of procedure contained in the MLS By-laws. These rules are designed to assist in the efficient delivery of the Multiple Listing Service and ensure that transactions occur at the highest level of professionalism possible.
- 7.19 The Multiple Listing Service provides a centralised database of current market information, together with extensive statistical data. Further, market information supplied through the Multiple Listing Service ensures that agents and their clients, and therefore the public, are well informed.
- 7.20 Areas of the Perth Metropolitan Area and the State of Western Australia, particularly where the use of the Multiple Listing Service is high, are provided with a constant inventory of available residential property.
- 7.21 The size of REIWA and the economies of scale that result from REIWA's involvement with the Multiple Listing Service result in a substantial cost saving in the operations of the Multiple Listing Service. Those costs savings were detailed in paragraphs 7.7 and 7.8 above. The involvement of REIWA in the Multiple Listing Service enables sophisticated technological services such

as internet listings and the use of security boxes for agents to gain access to properties to be delivered as part of the Multiple Listing Service. REIWA also produces a magazine that forms the linch-pin of marketing properties through the Multiple Listing Service, "The Homebuyer". The involvement of REIWA in the Multiple Listing Service also enables users of the service to benefit from the substantial institutional back-up provided by REIWA, including legal services, professional rules and regulations, documents and forms, printing, education, training and general administrative assistance. Therefore, whilst the use of the Multiple Listing Service is limited to the members of REIWA, it should be noted that it is the resources of REIWA that effectively allow the system to exist. Further, approximately 85% of real estate agents in Western Australia are members of REIWA. The vast bulk of the real estate market in Western Australia therefore has access to the Multiple Listing Service. Indeed, membership fees of REIWA are modest with corporate membership costing \$450.00 per year and ordinary membership by individuals associated with corporate entities costing \$50.00 per year. The fees charged of members to use the Multiple Listing Service are set with reference to the administrative costs of the service and are currently a fee of \$105.00 per month for each office using the service; \$10.00 per month for each registered sales representative in an office using the service and \$6.00 for each listing lodged with the service. (The \$10.00 per month fee charged of sales representatives entitles each representative to a copy of the REIWA weekly publication "Properties for Sale"). Therefore, REIWA submits that there is no price barrier for agents joining REIWA and accessing the Multiple Listing Service. Only persons who are ineligible for membership of REIWA pursuant to the terms of Article 30 of the REIWA Articles are therefore prevented from joining REIWA and using the Multiple Listing Service. The review of the REIWA Articles has resulted in those persons who are ineligible to join REIWA being limited to persons who do not meet objective criteria such as having been convicted of certain breaches of the *Real Estate and Business Agents' Act*, 1978, being an undischarged bankrupt, being of unsound mind,