

- (ii) promoting the advantages in, inter alia, expertise, experience and reliability associated with the name and reputation of the agency, the principals and sales representatives employed by the agency and any network to which the agency belongs;
- (iii) providing or endeavouring to provide real estate and business agency services to members of the public at lower cost through competition with respect to fees.

3.12 Competition amongst members of REIWA and real estate agents in Western Australia was analysed in a report prepared by Dr P B McLeod, a senior lecturer at the Department of Economics of University of Western Australia entitled "An Assessment of the Economic Aspects of the Real Estate Market and the REIWA Rules of Practice" ("the McLeod report"). That report was filed by the ACCC in the Federal Court proceedings referred to in paragraph 1.2 above. In his report Dr McLeod made a number of observations regarding the issue of competition with respect to real estate services in Western Australia. Whilst REIWA does not agree with Dr McLeod's views as to a state-wide definition of the market for real estate services in Western Australia, the comments made by Dr McLeod about competition with respect to real estate services in Western Australia apply whether or not the relevant market or markets are identified in the manner referred to by Dr McLeod or in the manner referred to in this section of the submissions. Dr McLeod's findings include the following:

- (i) Real estate agents are brokers. The possibility of other professions - lawyers, finance advisers, accountants - undertaking work performed by real estate agents for clients are limited by market forces. Like any broking activity, specialisation leads to efficiencies. Real estate agents' specialisation is in large part based on the database and support systems to which they have access. That support system includes REIWA services. It is this specialisation that makes it more efficient for most people to use a real estate agent and, therefore, in a basic

market sense there are no close substitutes for the package of services that a real estate agent provides. This market outcome is reinforced by the licensing regime of agents under the *Real Estate and Business Agents' Act, 1978*. However, the licensing only reinforces a situation already inherent in the market place that ensures that there are no close substitutes for the services provided by agents.

See the McLeod report at paras 75 - 78 on page 13.

- (ii) There are no significant barriers to entry into real estate business. At small scale the requirements are approved qualifications (completion of an approved course), office space and secretarial assistance. Courses are not quota driven so that the number of agents is not constrained. Any suitably qualified person can be licensed and can operate. A critical requirement is access to information about houses and sellers and buyers. Entry into business is facilitated by joining REIWA because a number of support services are available. A major consideration for agents is the availability of information on the housing stock that is for sale. This is facilitated by joining the Multiple Listing Service, because an agent can attempt to sell any property listed there. Dr McLeod pointed to the fact that REIWA rules prohibited non-listing agents from soliciting vendors the subject of exclusive listings and indicated that this represented some barrier to entry given that most agents work locally and concentrate on selling properties in their local area. [As an aside, REIWA stresses that substantial amendments have been made to its Articles and the Code since Dr McLeod prepared his report. In particular, the prohibitions upon non-listing agents soliciting vendors that were the subject of the ACCC Federal Court prosecution against REIWA have been deleted. Agents are therefore free to approach vendors who have been the subject of exclusive listing authorities at the expiration of an initial exclusive period so as to compete with former listing agents with respect to the

entering into of new exclusive agency agreements. Further, the system of conjunctional agreements also limits any anti-competitive effect of exclusive agency agreements and enables new entrants into the market to gain access to the stock of houses for sale. Details of the changes made to the REIWA rules dealing with soliciting and the competitive processes inherent in the system of exclusive listings and conjunctional agreements are referred to in detail in section 5 of the submissions]. Notwithstanding Dr McLeod's views that REIWA rules that previously existed at the time of his report had the effect of creating some barrier to entry because a new entrant was restricted with respect to access to the stock of houses for sale, Dr McLeod nevertheless felt that even the previous REIWA anti-soliciting rules were not a "substantial" barrier to entry. Dr McLeod explained that upon entry into business a new agent is really competing for potential sellers in an area. The new agent is competing to get new sellers to choose to list with him or her. The turnover in the housing market and the ability to approach all homeowners who are potential sellers probably means that the previous REIWA rules prohibiting soliciting were therefore not a substantial barrier to entry.

(See the McLeod report at paras 81 - 84 on page 14)

(iii) Dr McLeod was of the opinion that a greater barrier to entry into the real estate business would be anything that hindered the ability of a new agent to compete for new sellers. Real estate agents compete in a number of ways. The major dimensions of that competition appear to be:

- skills based competition - promoting range of services
- success competition - promoting sales record
- reputation effects - brand name and image

- low level (letter drops) and high level (television) advertising focusing on performance and skills and reputation
- geographical location - locating in visible and accessible locations.

Dr McLeod expressed the opinion that, whereas deregulation of real estate agents' fees enables price competition between agents, there are inherent features that militate against fee competition. Barriers to entry into real estate are low. Fixed costs are relatively low and likely to be similar for agents in an area. Fee competition would be easily matched by a rival. Any significant fee reductions by a firm would be easily matched by rivals bringing down the market fees. Such a competitive reduction in fees would not be expected to benefit agents by increasing revenues. There are several reasons for this. Agent services are a derived demand service (derived from the desire to sell a house) and are a small part of the total transaction value. Hence consumers may not be sensitive to small fee variations. Agents vary in non-price attributes (eg size, market coverage, experience, reputation etc). As consumers use the services of a real estate agent infrequently, they may not be in a good position to assess the package and react to price differences. As a consequence of these factors there is little incentive to be aggressive in fee competition. In this context, fee competition is more likely when agents can put together packages involving non-price competition that rivals find it difficult to emulate. However, non-price competition based around incentives to customers has not been prevalent in real estate. Dr McLeod was of the view that this appeared to reflect the previous REIWA rules of practice that discouraged such competition. Real estate agents offer essentially the same services to clients. While essentially selling the same services to property buyers and sellers, they achieve some product differentiation. This differentiation may reflect some real differences in the underlying products or in brand imaging. Each firm experiences general

competitive pressure from the many other firms in the market and some particular market pressure from firms most visible in their area. Fee deregulation offers real estate agents an opportunity to compete directly on fees. However, as with all markets where the product is well defined, fee initiatives are easily noted and matched by competitors. Non-price competition (especially advertising) is a safer form of competition. With fee deregulation achieving some degree of market power, Dr McLeod was of the view that it was important to enable agents to have some discretion, however modest in pricing. This would have to be based on building brand image and non-price strategies. The use of agents by property buyers and sellers is relatively infrequent. This is particularly so for the residential market. As a consequence, the strategy of the real estate agent has to encompass a strong element of creating awareness amongst potential buyers and sellers and attracting clients to the agency for a "one off" transaction. [It is stressed that since Dr McLeod prepared his report substantial changes have been made to REIWA's rules regarding marketing and advertising. As is noted in numerous sections of the submissions, for example paragraphs 4.3.7, 4.5.1, 4.5.2 and 5.15, REIWA has abandoned those rules that previously have acted so as to restrict non-price competition through matters such as advertising and marketing. To the extent that those rules have previously operated so as to create a barrier to entry into real estate business by new agents that barrier has been removed.]

See the McLeod report at paras 85 and 87 - 94 on pages 14 - 16.

- 3.13 It is submitted that the operations of REIWA do not present any barrier to entry into any relevant market. Indeed it is submitted that the services provided by REIWA encourage competition by making it easier for new businesses to operate. REIWA supplies numerous membership services that assist substantially with the establishment of new businesses and the operation of agency practice. These services include, but are not limited to, the

provision of standard forms, discounts on supplies such as stationery and insurance, access to sophisticated data bases and information systems, free legal advice, education and training, the Multiple Listing Service and subsidised dispute resolution, arbitration and disciplinary tribunals. These services lower business costs significantly.

3.14 Evidence of the ease of entry into agency markets in Western Australia and the role that REIWA plays in that process is illustrated by the following statistical data:

- (i) *The Australian Bureau of Statistics Real Estate Services Industry Survey for 1998 - 1999* (No 8663.0 released 24 May 2000), annexed hereto and marked with the letter "G", records that Western Australia had 831 real estate businesses operating in 926 locations and employing 6,341 persons in 1998-1999. This represented 12.2% of the total number of persons employed in real estate in Australia and it is significant to note that Western Australia is recorded in the survey as having 10% of the Australian population. Western Australia had 10.7% of the total number of real estate operations in Australia. This compares with states like Victoria, which has 26% of the population but only employs 21.6% of the total number of persons employed in real estate in Australia and only has 18.3% of the total number of Australian real estate operations. South Australia has 8% of the population but only employs 6.3% of the total number of persons employed in real estate in Australia and has 8.6% of the total number of Australian real estate operations.
- (ii) *The Australian Bureau of Statistics Real Estate Services Industry Survey for 1998-1999* also records that Australian real estate is dominated by small businesses. 96% of businesses employ less than 20 persons and these businesses account for 77% of industry employment. REIWA believes that a domination of small businesses

in the market occurs in Western Australia that is consistent with the Australia-wide statistics.

- (iii) REIWA's own records show that at present REIWA has a membership that covers 759 real estate operations. Members are spread throughout all the regions of the state, including the metropolitan area (600 operations), the south-west region of the state (96 operations), the Kalgoorlie/Esperance region (14 operations), the Geraldton region (26 operations), the Pilbara region (9 operations), the Avon region (8 operations) and the Kimberley region (6 operations). The metropolitan area can be broken down into various other regions, being the northern suburbs (155 operations), the southern suburbs (170 operations), the eastern suburbs (106 operations), the western suburbs (62 operations), the hills suburbs (21 operations) and the inner city suburbs (86 operations). Annexed hereto and marked with the letter "H" is a copy of a list of REIWA corporate members current for 2000 showing the suburbs and country towns where those members' businesses operate. It should be noted that a suburb such as Nedlands has 15 operations of its own and South Perth has 28 operations.

- 3.15 REIWA submits that the above statistical data shows that a very large number of agency businesses operate in Western Australia. The vast majority of these businesses are small in size and those businesses are widely spread throughout the state. REIWA contends these facts support REIWA's view that there are no barriers to entry into the respective agency markets in Western Australia and competition within the industry is healthy. Much of the ability of small businesses to enter into the market and successfully operate is due to the fact the REIWA supplies the services referred to in paragraph 3.13 above and these services assist those businesses enormously.

4. REVIEW BY REIWA OF ITS ARTICLES, THE CODE, OTHER RULES, FORMS AND DIRECTIVES

4.1 Both prior to and following His Honour Justice French making the orders of 8 October 1999 REIWA has conducted a comprehensive review of its Articles, the Code, the MLS by-laws, its standard forms, its directives and relevant contracts entered into between REIWA and other training providers as identified in the Federal Court's orders. On 1 July 1998 REIWA appointed new solicitors and those solicitors have conducted this review in consultation with counsel, Mr Michael Corboy. Significant amendments have been made to the various documents the subject of this review. It is significant to note that all of the issues identified by the ACCC in its initial letter of 23 September 1997 advising REIWA of its concerns regarding REIWA's rules and regulations and all of the issues the subject of Federal Court prosecution against REIWA have now been addressed. Indeed the amendments made by REIWA go well beyond those sought in the letter of 23 September 1997 and the Federal Court proceedings. Details of these amendments are set out below.

4.2 **The Articles.** (Annexed hereto and marked with the letter "I" is a copy of the previous version of the REIWA Articles.) Significant changes actually made to the REIWA Articles or made subject to formal ratification have included the following:

4.2.1 **Article 28 - Institute branches in country areas.** Whilst REIWA's Articles continue to recognise country branches, REIWA now exercises greater control over those branches so as to ensure that anti-competitive conduct does not take place. Whereas branch by-laws previously included provisions that limited advertising, soliciting, marketing and access to the Multiple Listing Service, those restrictions

have now all been removed and the branch by-laws have now all been abandoned. Any future branch by-laws will largely be restricted to administrative matters with the regulation of members being solely dealt with in a state-wide uniform system under the Articles, the Code and the MLS by-laws.

- 4.2.2 **Articles 29 to 31 - Membership.** The requirements of membership of REIWA have been entirely overhauled. The use of subjective criteria for the selection of members based on concepts such as "good character" and "good business reputation" have been removed. Specific objective criteria for membership are now used that include requirements that persons not have been convicted of certain breaches of the *Real Estate and Business Agents' Act, 1978*, not be bankrupt, not be of unsound mind, not have been convicted of an indictable offence, not have been directors of corporations that are indebted to REIWA and be insured
- 4.2.3 **Articles 31 and 32 - Election of members.** The process of electing members of REIWA has also been overhauled. The amendments made to these provisions ensure a more orderly and transparent method of electing members, based on objective criteria. Specific provisions designed to ensure procedure fairness are stipulated. Provisions dealing with the criteria for the election of members in other REIWA rules, regulations and directives have been abandoned. A right of appeal is provided.
- 4.2.4 **Article 35 - Change in constitution of firm or corporation.** This Article provides that REIWA must be notified of any alteration to the constitution of a firm or corporation in the sense of there being a variation to the partners or directors of that firm or corporation. The purpose and public benefit associated with this provision is set out in greater detail below. However, it is significant to note that the clause has been amended substantially from its original form. That original

form effectively left it open for REIWA to subjectively terminate membership if it was not happy with the identity of any new partner or director of a member. Whilst REIWA is still required to be notified of any changes of this nature (in order to avoid persons circumventing the legitimate requirements of membership) REIWA now has to act in accordance with the objective criteria for membership referred to in paragraph 4.2.2 above.

- 4.2.5 **Article 36 - Obligations of membership.** Provisions prohibiting members of REIWA from being partners, directors or employees of any firm or company that is not a member of REIWA have been deleted. Other provisions requiring licensees to exercise control over agency businesses are referred to in greater detail in section 10 of these submissions below.
- 4.2.6 **Article 39 - Cessation of membership.** This Article sets out the criteria for the cessation of membership of REIWA. The Article avoids the problems inherent with the previous REIWA Article that dealt with this issue, including the vagueness of some of the criteria for the cessation of membership and the confusing nature of the interaction of this provision with the provisions dealing with the procedure for expelling and suspending members.
- 4.2.7 **Article 41 - Expulsion and suspension of membership and the disciplining of members.** This Article sets out the methods of disciplining members of REIWA. The Article represents a complete overhaul of the provisions dealing with this issue contained in the previous REIWA Articles. In particular, the previous Articles confused the process of providing a forum for arbitrating disputes and providing a mechanism for independently disciplining members. This confusion has now been avoided by there being a clear process for disciplining members that is completely distinct from the provision of forums for arbitrations. Significantly, members of the public and non-

members of REIWA now have a specific right to make complaints regarding members and those complaints must be referred to a professional standards tribunal for hearing. The Article provides for the creation of a Professional Standards Tribunal. The Professional Standards Tribunal has the power to impose upon members a number of sanctions. It also has the power to recommend that a member be expelled or suspended from membership. Such a recommendation is then referred to the REIWA Council. Specific provisions to ensure procedural fairness at hearings before the Professional Standards Tribunal or the REIWA Council are detailed in the Article. A right of appeal is provided.

- 4.2.8 **Article 43 - Multiple Listing Service.** The previous REIWA Article dealing with this issue provided rules for the obtaining of membership of the Multiple Listing Service as if the service was a body that was independent to the operations of REIWA. In fact, this not the case with the REIWA Multiple Listing Service and this misconception in the REIWA Articles has now been abandoned. The Article provides that all members of REIWA are entitled to use the Multiple Listing Service so long as the member has paid the prescribed fee for using the service. All subjective and other criteria entitling a person to use the Multiple Listing Service have been removed from the REIWA Articles. Further, REIWA has taken steps to ensure that the only fees levied with respect to the Multiple Listing Service are fees based on administrative expenses. Fees are not set with any reference to any "goodwill" or value obtained by joining the Multiple Listing Service and, therefore, any fee barrier to the use of the Multiple Listing Service is avoided. In addition, and in order to ensure that the Multiple Listing Service is not used for anti-competitive services, all country branch by-laws effecting the Multiple Listing Service have been abandoned and all fees for the use of the Multiple Listing Service can only be set by the REIWA Council. There is no longer any fee for joining the

service. The only fees charged are fees charged for the ongoing use of the service calculated with reference to the cost of the service. The relatively low fees for the use of the Multiple Listing Services, is detailed in paragraph 7.21 below. Further, any geographic restriction upon the use of the Multiple Listing Service has also been removed. In other words, country members are entitled to use the Multiple Listing Service in the Perth metropolitan area and vice-versa. Further details with respect to the changes to the Multiple Listing Service are set out below with respect to submissions made regarding the MLS by-laws.

4.2.9 **Article 44 - Disputes involving members.** As set out in paragraph 4.2.7 above, the entire process for dealing with the disciplining of members and arbitrations involving members has been overhauled. In particular, the procedures for dealing with these issues have been separated and a specific right is given to members of the public to make complaints. The procedures for the resolution of disputes involving members have been also amended considerably. REIWA's Articles previously sought to force non-members of REIWA to submit to REIWA arbitrations. This has been abandoned. Non-members of REIWA and members of the public are only required to submit to arbitrations involving members if they so agree in writing. On the other hand, members are required to submit to resolution of disputes by arbitration, subject to any rule of law to the contrary. Consequently, members of the public are entitled to force members of REIWA to use the arbitration process if they wish, subject to any rule of law to the contrary and subject to the subject matter of the dispute not exceeding \$20,000.00 and being within the capacity of the arbitration panel concerned. On the other hand, members of the public do not have to use this system should they not wish to. The Article provides for the creation of arbitration panels by REIWA to determine disputes in accordance with the *Commercial Arbitration Act*, 1985. A process for the holding of conciliation conferences is also stipulated and

procedures are provided to be established by the Council in a Dispute Resolution Manual. The current terms of this manual (as reviewed as part of the general review process of REIWA's documents and forms) is annexed hereto and marked with the letter "J". REIWA's procedures for arbitrations involving members provide a cost effective way of resolving disputes. This consequently reduces business costs and reduces barriers to entry by agents into the market. This promotes competition and also operates so as to minimise the risk of consumers being caught up in time-consuming litigation by agents.

4.2.10 Article 45 - Appeals. Appeals from determinations under the REIWA Articles (such as arbitrations, disciplinary determinations and membership determinations) are now determined by an Appeals Board. The Appeals Board is made up of an office bearer member of the REIWA Council, two ordinary members of Council, a member of the Institute who is a qualified arbitrator and a consumer representative. The appointment of a consumer representative is a new initiative for REIWA. This appointment will be by the President of the Australian Institute of Arbitrators and Mediators and is stipulated as being the appointment of a person who is not to be a member of REIWA or a licensed real estate agent or sales representative. Provisions to ensure procedural fairness before the Appeals Board are included in this Article.

4.2.11 Article 46 - Legal representation. The previous REIWA Articles effectively banned legal representation at hearings under the REIWA Articles. The Articles now provide that legal representation will be permitted if it is necessary to enable the parties to the hearing to effectively present their cases and it is otherwise appropriate in the circumstances.

4.2.12 **Article 47 - Bar to proceedings.** The previous REIWA Articles barred members of REIWA from taking any action against REIWA. These provisions have now been deleted.

4.3 **The Code.** The previous version of the Code is annexed hereto and marked with the letter "K". The amendments made to the Code include the following:

4.3.1 **Rule 2 - Soliciting.** The previous REIWA Code contained extensive provisions restricting the ability of agents to solicit the clients of other agents. The previous clause 2.1.2 of the Code formed part of the subject matter of the ACCC prosecution against REIWA and prohibited agents from contacting principals or otherwise soliciting appointments as agents if an agent was aware of a current agency listing with another agent. All negotiations and inspections with respect to properties and businesses were required to take place through the listing agent. This provision was deleted by REIWA prior to the making of the Federal Court orders on 8 October 1999. Further, provisions contained in this section of the Code that prohibited agents from soliciting when an agent's board was erected on a property or business, provisions that restricted the distributing of marketing material and correspondence and restrictions upon soliciting with respect to strata companies have also been deleted. The amended provision contained in the Code is now headed "Interference with Contracts or Agreements". The provisions reflect the common law in prohibiting agents from inducing a breach of an agency contract. Further, the provisions of this clause require agents to enquire of a prospective principal whether that principal has entered into any prior agency agreement. The clause prohibits agents from soliciting if the agent is aware that another agency is in force that may leave the principal liable for a claim for damages for breach of contract unless the agent gives a prior written statement to the principal that the principal may be liable for two fees or for a claim for damages if the

principal signs a further agency agreement. This very limited prohibition upon soliciting is consistent with the clause 2.5.3 of the Real Estate Institute of Australia Code of Conduct for Members that was authorised by the ACCC on 23 November 1999 (Authorisation No A90354) and serves so as to ensure vendors are aware of their potential contractual obligations.

4.3.2 Rule 3 - Agency agreements. This rule has also been substantially amended. A number of clauses that sought to impose contractual terms into agency agreements between real estate agents and members of the public have been deleted. The clause now is limited to providing consumer protection by requiring agents to fully explain to principals their rights and responsibilities under agency agreements. The rule also prevents agents from claiming a fee under an exclusive appointment if a principal has entered into a subsequent agreement with another agent in circumstances where the original agent did not fully explain the principal's liability under the initial exclusive agreement.

4.3.3 Rule 4 - Conjunctional arrangements. As set out above in paragraph 1.6.2 conjunctional agreements are an effective method of maximising the efficiency of the sale of properties and businesses by agents. Pursuant to the Real Estate and Business Agents' Act, 1978 Code of Conduct agents are required to act in the best interests of their principals. This includes entering into conjunctional agreements with other agents unless this would not be in the best interests of clients. Restrictions upon the right of listing agents and conjunctional agents to agree the split of commission payable by principals deemed to apply in conjunctional agreements have been removed. Otherwise, the provisions contained in this rule are designed to facilitate the orderly use of conjunctional agreements by members of REIWA. Provisions that impose contractual obligations upon agents who are parties to

conjunctional agreements are made subject to the right of those agents to agree to the contrary and apply for the purpose of ensuring the efficient and orderly operation of the conjunctional agreements system. These provisions consequently avoid costly disputes, lower business costs and advance the public benefit arising out of the system of exclusive agencies and conjunctional agreements. Further detail on this issue is set out in section 6 of these submissions.

- 4.3.4 **Rule 5 - Agents dealing with the same prospective purchaser/lessee.** This rule has also been substantially amended in the review process. The previous rule effectively imposed contractual obligations upon agents and members of the public. Indeed, the rule sought to deem the existence of contractual agreements. Portions of the clause were also extremely vague and confusing. The clause has now been re-written so as to make sure that conjunctional agents provide a minimum level of service to purchasers by requiring the conjunctional agent to ensure that reasonable contact is maintained with the prospective purchasers. Further, the paragraph stipulates provisions to be contained in conjunctional agreements between REIWA members unless members agree to the contrary stipulating when a fee is payable to a conjunctional agent. The purpose of these provisions is to ensure the orderly working of the conjunctional agreement system. Further detail on this issue is set out in section 6 of these submissions.
- 4.3.5 **Rule 6 - Engagement to act for buyer or lessee.** This rule previously sought to further restrict the ability of agents to contact members of the public directly. That portion of the rule has now been deleted and the rule merely restates the common law by requiring agents who act for buyers or lessees to look to those parties for remuneration.
- 4.3.6 **Rule 7 - Conflict of interest.** The Code previously contained Rules 7 and 8 that sought to prevent conflicts of interest from arising. Those

provisions were extremely wide and somewhat ambiguous. The rules had the propensity to overly restrict competition by preventing agents and certain associates of agents from participating in the buying and selling of properties and businesses. The Real Estate and Business Agents Act Code of Conduct contains provisions prohibiting agents from conflicts of interest. The previously ambiguous Rules 7 and 8 of the Code have been deleted and the present Rule 7 merely requires agents to follow the requirements of the *Real Estate and Business Agents' Act*, 1978 and the Code of Conduct under that Act with respect to conflicts of interest.

4.3.7 Rule 8 - Advertising. The previous Rule 9 contained in the Code prevented agents from offering gifts, prizes, incentives or inducements. That provision formed part of the subject matter of the prosecution against REIWA by the ACCC and the provision was deleted prior to the Federal Court orders being made on 8 October 2000. The current Rule 8 merely contains general provisions requiring agents to clearly show the agents' full trading name and telephone number in a way that gives those items greater prominence than the names and telephone numbers of sales representatives or other employees. The purpose of this rule is to prevent sales representatives from circumventing the requirements of the *Real Estate and Business Agents Act* 1978 that real estate agents be licensed. Further detail regarding the public benefit derived from this provision is set out in section 12 of these submissions below.

4.3.8 Rule 10 - Conduct of agents. In order to strengthen the consumer protection provisions of the Code, additional provisions have been inserted into the Code regulating the conduct of agents. Matters covered in this rule include requirements that members act in the best interests of principals, that members act in accordance with instructions, that members act fairly and honestly, that members do not

knowingly engage in misleading or deceptive conduct, that members do not engage in harsh or unconscionable conduct and that members act so as to exercise due skill, care and diligence.

4.3.9 Rules 11 and 12 - Spotter's fee and contract documents, deposit responsibilities and rates/taxes adjustments. These provisions contained requirements that may have amounted to restrictions upon competition. The provisions have been deleted.

4.3.10 Rule 13 - Rights of managing agents. This previous rule contained in the Code sought to confer various contractual rights and benefits upon managing agents of strata titled developments. These provisions imposed contractual obligations upon agents and members of the public that were anti-competitive. The rule has been deleted in its entirety.

4.3.11 Rule 14 - Complaints and disputes. As referred to previously in these submissions, the REIWA Articles, Code, by-laws, rules and directives resulted in many procedural matters and matters of principle being dealt with in numerous documents. As part of the review process, the multitude of provisions regarding various matters contained in numerous documents have been deleted in favour of a more limited number of documents and provisions. As part of this process, the provisions of the Code dealing with complaints and disputes have been deleted and the procedures relating to these matters are now solely contained in the Articles and the Dispute Resolution Manual.

4.4 The MLS by-laws. The previous version of the MLS By-laws is annexed hereto and marked with the letter "L". The changes made to the MLS by-laws include, but are not limited to the following:

- 4.4.1 The previous MLS by-laws were vague as to exactly what amounted to a Multiple Listing Service listing and the different types of agency agreements contained within the Multiple Listing system. The MLS by-laws now deal with those issues clearly.
- 4.4.2 The previous MLS by-laws were also vague as to what entitlement conjunctional agents had to share in selling commissions. This issue is particularly significant with the Multiple Listing Service given that the unique feature of the Service is that these listings can amount to a unilateral offer by a listing agent to other MLS agents entitled to use the Multiple Listing Service of a conjunctional sale. It is therefore vital that the terms of the conjunctional agreement and the entitlement of conjunctional agents to a fee are clearly identified. Those matters are now all clearly identified in the definitions section and clause 2 of the MLS by-laws. These provisions are consistent with the terms of Rule 5 of the Code.
- 4.4.3 As set out in paragraph 4.2.8 above, the use of the MLS system in country regions has been altered so as to ensure that REIWA retains greater control over the operations of the Multiple Listing Service in country regions so as to prevent any risk of anti-competitive conduct. Clause 5 of the MLS by-laws makes it clear that country regions will no longer have the power to make any by-laws of their own and will only serve an administrative function. Further, there is no longer any restriction upon REIWA members who are entitled to use the Multiple Listing Service participating in any of the Multiple Listing regions in the state. The removal of restrictions upon REIWA members using the Multiple Listing Service in different parts of the Western Australia enhances competition by enabling agents to participate in markets across regions and by disseminating information about listed properties throughout the state. It is also reiterated that under Article 43 of the REIWA Articles the Council retains the sole power to set Multiple

Listing Service fees. Those fees are to be set based on purely administrative charges and are not to include any "goodwill" fee or fee based on the value of the service so as to be a barrier to the use of the service. All REIWA members who pay the requisite administrative fees are entitled to use the service and, unlike the previous multi-listing system, there is no separate qualifying requirement for the use of the service.

4.4.4 Many of the provisions of the previous MLS by-laws referred to impose contractual terms upon members of the public. For example, the previous by-laws imposed a deemed listing period into agency agreements of 90 days. The previous by-law number 16 limited the extent to which the period listing authorities could be extended. The previous by-law 18 appeared to provide the Multiple Listing Service with a discretion as to whether it would accept some listings and refuse others. The previous by-laws 23 to 27 sought to impose pricing controls upon the listing of properties. The previous by-laws 32 to 34 imposed restrictions upon the soliciting of listings. The previous by-laws 20 and 43 sought to impose a disciplinary system separate to that contained elsewhere in the REIWA Articles and the Code. The previous by-law 45 sought to impose a requirement that listing agents give their "approval" to offers made by members of the public. All of these previous by-laws have been deleted.

4.5 The review process undertaken by REIWA and its solicitors has also included a review of various REIWA directives. Those directives have been included in documents such as the "REIWA Guidelines to Professional Standards" and the "Membership Policy Register". The Guidelines to Professional Standards are annexed hereto and marked with the letter "M" and The Membership Policy Register is annexed hereto and marked with the letter "N". Both of these documents have now been abandoned by REIWA. They previously contained a number of provisions that could have been anti-competitive.

4.5.1 The Guidelines to Professional Standards. The document contained a number of restrictions upon advertising and marketing that were considered by REIWA's legal advisers to be potentially anti-competitive. To the extent that the document contained provisions dealing with displays and the exercising of legitimate control by licensees over real estate and business agents' businesses it was considered appropriate that those provisions not be included in a series of different documents but be incorporated into the Code and the Articles. Additional provisions contained in the policy guidelines relating to the holding of contracts, serving of 48 hour notices, notifications to managing agents, tenancies and advice as to market price are largely matters of contract between members of REIWA and members of the public. All of these provisions have been abandoned.

4.5.2 Membership policy register. The Membership Policy Register sought to impose obligations and proscribed conduct for the running of companies, the requirements of licence holders, the qualifications needed for membership, the running of business premises and the use of signs, correspondence and newspaper advertisements. REIWA's legal advisers considered that many of these provisions could be regarded as being anti-competitive. Alternatively, many of the provisions conflicted with other provisions contained in the REIWA Articles and the Code. Consequently the membership policy register has been abandoned entirely, save for there now being a requirement for compulsory insurance contained in the Articles as referred to in detail in section 8 of these submissions below.

4.6 REIWA and its legal advisers have also conducted a thorough review of REIWA's standard forms and agreements. These agreements have been amended in numerous instances so as to avoid matters of vagueness and uncertainty. Further, exclusive agreements for the sale of property or businesses now include provisions whereby vendors are able to specifically

elect whether or not they will retain the right to sell properties themselves and avoid the liability to pay a commission to the agent concerned. This is consistent with previous decisions regarding applications for authorisation by real estate institutes under the TPA including *Re The Real Estate Institute of Queensland* (1983) ATPR (Com.) 50 - 057 and *Re The Real Estate Institute of Tasmania* (1987) ATPR (Com.) 50 - 062.

5. EXCLUSIVE LISTING AGREEMENTS

Background

5.1 REIWA seeks authorisation of the exclusive agency agreements defined in paragraph 1.5 above. In particular, those exclusive agency agreements are as follows:

- (i) authority to auction, including provision for exclusive agency;
- (ii) residential exclusive agency selling agreement;
- (iii) multi-list exclusive plus services selling agency agreement residential (including appointment options of exclusive agency, exclusive plus agency or multi-list exclusive agency);
- (iv) exclusive selling agency agreement for rural property;
- (v) exclusive selling agency agreement for commercial and industrial property;
- (vi) exclusive appointment of agent to sell/offer to sell a business;

- (vii) exclusive authority to act as managing agent for residential premises for short term/holiday accommodation;
- (viii) exclusive authority to act as managing agent of residential premises;
- (ix) exclusive authority to act as managing agent for residential premises for short term/holiday accommodation;
- (x) exclusive appointment to act as agent manager of a strata company;
- (xi) exclusive authority to act as managing agent for commercial/industrial property;

5.2 Exclusive agencies can generally be stated to be appointments by principals of agents to sell or lease a property or business on the basis that if a sale or lease of the property or business occurs during the term of the exclusive agency, whether or not that sale or lease takes place as a result of the introduction by the agent of a purchaser or lessee, the agent will be entitled to the agreed commission. REIWA makes available to its members standard forms that include the forms referred to in paragraph 5.1 above that appoint agents on an exclusive basis. However, it is stressed that REIWA does not compel the adoption of exclusive agency appointments. Indeed, REIWA produces standard forms for alternative types of listings and does not seek to induce members of the public to use any particular form of appointment. Evidence of these matters is provided in paragraph 5.4 below.

5.3 The exclusive agency agreement used in the REIWA Multiple Listing Service provides vendors with the option of choosing an exclusive agency agreement, an exclusive plus agency agreement or a multi-list exclusive agreement. The difference between those terms is defined in the contract itself. In particular:

5.3.1 Exclusive agency agreement is defined as meaning a listing agreement whereby the agent is appointed to sell a property on an exclusive basis and the vendor agrees to pay a selling fee to the agent if:

- (i) during the term of the agency listing the property is sold or transferred;
- (ii) if at any time an entity introduced during the term of the agency listing to the principal or to the property contracts procures another to contract to buy or to be the recipient of a transfer of the property or business or otherwise becomes a legal or beneficial owner of the property or business;
- (iii) the property is sold, transferred or leased in any of the circumstances referred to in sub-paragraphs (i) or (ii) above and the sale, transfer or lease is not completed owing to the fault of the vendor.

5.3.2 An exclusive plus agency agreement is defined as having the same meaning as an exclusive agency agreement save and except that the agent and vendor agree that the property:

- (i) will be marketed using the REIWA Multiple Listing Service; and
- (ii) except for a property located in country regions specified by the relevant REIWA Council, will be marketed using the REIWA internet site and "The Homebuyer" magazine and the vendor may authorise the use of a security locked box that enables secure access to be gained to the property by agents entitled to use the Multiple Listing Service.

- 5.3.3 Multi-listing exclusive agency agreement is defined as meaning the same as an exclusive plus agency agreement save and except that the agent and vendor agree that the agent will offer conjunctional agreements to all agents entitled to use the Multiple Listing Service and the vendor authorises other real estate agents who are entitled to use the REIWA Multiple Listing Service to display a photograph of the property in their office window.
- 5.4 The alternative to using exclusive agency agreements for the sale or lease of a property or business is an open agency agreement. An open agency agreement means that a vendor or lessor is not obliged to pay a commission to a particular agent unless the ultimate sale or lease is effected by that agent introducing a purchaser to that property or business during a particular period. REIWA does not encourage the use of exclusive agency agreements over open agency agreements, except in the case of listings using the Multiple Listing Service (the use of this service by vendors is in itself optional). REIWA produces standard form open listing authorities for the sale of residential property, vacant land and rural property. Copies of these documents are annexed hereto and marked with the letter "O". REIWA does not produce open listing authorities for property management as the nature of property management is such that it would be impractical to have more than one agent involved in the management of a property. REIWA does not seek to induce members of the public to provide listings to agents on an exclusive basis as distinct from alternatives such as open listings. An example of this is found in a standard brochure containing advice to consumers produced by REIWA. A copy of this brochure is annexed to these submissions and marked with the letter "P". The section of the brochure entitled "Listing Agreement" sets out the various options available to vendors, including open and exclusive agreements, but does not seek to promote any specific type of agreement.
- 5.5 The Multiple Listing Service is based on the notion of exclusive agency agreements, supplemented by the use of conjunctional agreements with other

agents. The listing of a property the subject of a multi-list exclusive agency agreement amounts to the making of a unilateral offer by the listing agent to all other agents entitled to use the Multiple Listing Service to enter into a conjunctive agreement with respect to that property. The listing of a property the subject of an exclusive plus agency agreement does not amount to the making of a unilateral offer by the listing agent to enter into a conjunctive agreement with respect to that property but the listing agent is entitled to agree to enter into conjunctive agreements with other agents regarding that property should they desire. Properties listed through exclusive plus agreements and multi-list exclusive agency agreements are all entitled to be listed with the Multiple Listing Service.

- 5.6 Wherever appropriate, exclusive agency agreements contain provisions that specifically allow principals to elect to be able to sell the property or business concerned themselves without incurring a liability to pay the agent a commission. Indeed, principals are specifically required to make an election in the standard forms as to whether or not they wish to retain this right. Consequently, all of the exclusive agency agreements referred to in paragraph 5.1 above that relate to the sale of properties or businesses include the making of such an election by the principal. Documents relating to the leasing of property do not include such an election because those agreements are in the nature of appointments of ongoing property managers rather than for the purpose of achieving a single event such as a sale.
- 5.7 REIWA records evidence that total property sales in the Perth Metropolitan Area between 1 July 1999 and 29 February 2000 amounted to approximately 31,300 sales of dwellings and approximately 5,000 sales of land, being a total of 36,300 sales in total. REIWA calculates that virtually all sales of property in the Perth metropolitan area take place pursuant to exclusive agency agreements, rather than open agency agreements. The percentage of sales conducted by exclusive appointments of agents is slightly less given the less formal nature of dealings between agents in those smaller country areas. One

of the significant public benefits of the use of exclusive agency agreements is that, given the incentive provided to agents to market properties vigorously, an effective method of providing information of the fact that a property is on the market is achieved. In smaller country towns, where there are relatively more intimate business connections between different agents and information regarding listings is more easily provided to the market there is some evidence of greater use of open listing agreements. For example, in a relatively large commercial centre like Bunbury, REIWA calculates that virtually all sales are by exclusive agency agreements. However, in Northam approximately 25% of sales are achieved using open listings.

- 5.8 It should be noted that the exclusive agency agreements produced by REIWA do not provide for any set terms for any period of exclusive agency.
- 5.9 It is reiterated that previous rules that protected the position of listing agents in exclusive agreements by prohibiting soliciting by non-listing agents and restricting non price competition such as marketing and advertising have been removed by REIWA.

Previous authorisation decisions

- 5.10 5.10.1 It has previously been accepted in TPA authorisation applications that there may be advantages to vendors in appointing agents on an exclusive agency basis and pursuant to common forms of appointment. The practice of whether or not vendors enter into exclusive agency agreements should be a matter for negotiation between a client and an agent without recommendations by an institute. In the past, exclusive agency agreements have been authorised under the TPA (see *Re The Real Estate Institute of South Australia* (supra) at p 57,334; *Re the Real Estate Institute of Tasmania* (supra) at p 57,211; *Re The Real Estate Institute of the Australian Capital Territory* (supra) at p 55,114 and *Re The Real Estate Institute of Queensland* (supra) at p 55,225.

5.10.2 It should also be noted that the use of exclusive agency agreements has been recently considered in the context of an application for authorisation with respect to a multiple listing service in New South Wales in *Re The Estate Agents' Co-Operative Limited* (26 April 2000, Authorisation No. A90678). It is noteworthy that in that case, authorisation was sought of a rule that made it mandatory for all members of a multiple listing service who entered into exclusive agency agreements with vendors (as distinct from open selling agency agreements) to list that particular property in the multiple listing system concerned. Authorisation of that rule was provided by the ACCC, notwithstanding that the use of exclusive agency agreements formed an integral part of the multiple listing service.

5.11 It has been noted by the Trade Practices Commission that it is permissible for a vendor to specifically bind himself not to sell as a principal without paying a commission to an agent (see the *Re The Real Estate Institute of Queensland* (supra) at p 55,225). However, forms should not as a matter of course favour one party over another and these types of forms should provide a choice to vendors between providing agents with the sole right to sell a property or reserving the right to a vendor to sell a property himself or herself without paying a commission (see *Re The Real Estate Institute of Tasmania* (supra) at p 57,209 and *Re The Real Estate Institute of Queensland* (supra) at p 55,225). As set out in paragraph 5.6 above this option is now expressly provided for in the relevant REIWA standard forms.

Public benefit

5.12 The sale of properties and businesses in Western Australia invariably occurs with real estate and business agents being paid commissions upon the successful sale of the property or business taking place. Both exclusive listings and open listings provide for commissions be paid upon the successful sale of the property or business concerned. Agents are therefore not paid for the time that they expend on behalf of a vendor in effecting a sale. Rather,

agents are paid a "success fee". If an agent spends large amounts of time and money in marketing a property or business and does not have an exclusive agency listing, the agent may be the person who does the most to market the property or business and may do the most to bring the benefits of the property or business to the attention of the public but the agent may not be the person who finally introduces the ultimate purchaser to the property. For example, Agent A may have an open listing for a property, together with a number of other agents. Agent A may spend far more time and money than those other agents in marketing the property. Agent A may spend large amounts of money in preparing brochures and placing advertisements and may spend a lot of time in organising "home opens" for members of the public to inspect the property. However, Agent B may have spent little or no money or time on marketing the property, excepting by displaying details of the property in that agent's office window. A purchaser may have initially become attracted to the property through the efforts of Agent A but may use the services of Agent B to place a formal offer because, notwithstanding Agent A's efforts, the purchaser may have little personal knowledge of the identity of Agent A and may have seen that Agent B had a connection with the property by virtue of the fact that Agent B's office is in the purchaser's local shopping centre. If the purchaser's offer was accepted it is likely that, in an open listing situation, Agent B would successfully obtain the commission for the sale. Unless Agent A could show some direct connection with the purchaser, it would be difficult for Agent A to prove that he had "introduced" the purchaser to the property and Agent B would be paid the commission by the vendor. On the other hand, if Agent A was acting pursuant to an exclusive agency agreement he would not lose the commission for the sale so long as the property was sold during the period of the exclusive agency.

Consequently, without exclusive agency agreements, agents have little incentive to spend large amounts of time, effort and/or money in marketing a property or business. Agents are at risk of not being rewarded for their efforts. An exclusive agency agreement provides agents with incentive to use their

very best efforts to sell properties and businesses and avoid the risk of an agent doing all of the work in successfully marketing a business but not being paid.

5.13 5.13.1 The exclusive agency agreement system provides the best incentive possible for agents to endeavour to sell properties and businesses vigorously. This, in turn, increases the likelihood of a property or business being sold and brings about the most efficient system possible of marketing real estate and businesses. It is axiomatic that the more effort that an agent puts into selling a property or business the greater the likelihood that the property will sell quickly and for the highest possible price. Ultimately, of course, that is the aim of all vendors. Maximising the efficiency of the sale of properties and businesses through the exclusive agency agreement system therefore maximises the efficiency of the entire industry of selling real estate and businesses and consequently provides public benefit. It is stressed that vendors are not compelled to make exclusive appointments. Rather, vendors are free to appoint agents exclusively if they so wish.

5.13.2 One of the prime benefits of providing incentives to agents to endeavour to sell properties and businesses vigorously and thereby providing a more efficient system of marketing real estate and businesses is that information regarding a property or business is more widely disseminated into the market. This effect is obviously pro-competitive. If exclusive agency agreements were prohibited it is likely that individual vendors would be required to carry much greater responsibility for promoting their own properties. Either vendors would have to place their own advertisements at their own cost with respect to properties or, alternatively, would have to pay numerous agents to place similar advertisements. That is likely to be less efficient and more expensive for vendors.

5.14 A further advantage to a vendor of the use of the exclusive agency agreement system, and therefore a matter of public benefit, is that a vendor has an

identifiable source for the listing of the property or business concerned. In other words, when an exclusive agent is appointed that agent becomes solely responsible for the marketing and selling of the property. Unless the vendor wishes, the vendor does not have to go to the trouble of speaking and dealing with numerous agents and/or purchasers. The time and effort needed to sell a property or business is borne by the exclusive agent.

- 5.15 The public benefit brought about by the exclusive agency agreement system is heightened by the competition between agents that is involved in the obtaining of an exclusive listing in the first place. Prior to entering into an exclusive listing agreement with a particular agent a vendor is able to consult with numerous agents and assess those agents' levels of commission, qualifications, experience and proposed marketing strategies for the property or business. It is submitted that the most significant motivating factor for a vendor of a property or business is the prospect of maximising the price achieved for the sale of a property or business and minimising the time it takes to achieve that sale. To that degree, the reputation and perceived skill of the agent concerned is the significant motivating factor in selecting an agent, as distinct from the fee charged by that agent. This is supported by the results of a survey conducted on behalf of REIWA in June 1998 by Patterson Market Research. The survey was referred to in paragraph 2.8 above and is annexure "F" to these submissions. Paragraph 1.2 of that survey sets out reasons given by members of the public for their choice of a particular agent. The most significant factors all appear to be matters that would be influenced by marketing or advertising in that they are all factors that relate to the perceived skill of the agent and matters of non price competition. Those factors are: prior experience (30% of the survey group listed this as being a significant factor in their choice), word of mouth/friends (21%), the agent is well known in the area (19%), the agent is part of a reputable group (10%), the agent seemed professional/trustworthy (10%), the agent is known personally (7%), the agent's sign is common (5%), convenience/agent situated locally (4%), free appraisal/valuation (4%), the agent approached the principal (3%), the agent sent out mail-outs/fliers (3%).

vendor the agent will lose the listing of the property and receive no reward whatsoever for the agent's efforts. Prior protection given to listing agents from competition from other agents due to the banning of soliciting and restrictions upon advertising and marketing have now been removed by REIWA. As such, as referred to in paragraph 3.12 above, the use of exclusive agency agreements does not create a barrier to entry by agents into the market.

- 5.17 The limited term of an exclusive agency agreement provides further benefit to vendors in that agents have pressure placed upon them not to over-inflate the value of properties or businesses in an endeavour to successfully obtain the initial listing of the property. It is common practice for vendors to consult with numerous agents before listing a property or business for sale. Usually vendors request that those agents provide appraisals as to the value of the property. Any incentive that an agent may have to over-inflate the value of a property or business in an effort to obtain a listing authority would be tempered substantially by the fact that the agent will only have a limited time to sell the property or business and if the property or business is marketed at too high a price the chances of that sale occurring during the period of the exclusive agency will be severely limited. Further, the failure of an agent to be able to sell a property at a price approximating the value the agent initially placed upon the property will often lead to disgruntled clients who, it would be expected, would have no hesitation in taking a listing away from an agent and giving it to another agent at the expiration of the exclusive period.
- 5.18 The efficacy of the competition pressures upon agents during the period of exclusive agency agreements has now been heightened considerably by the changes referred to above that have been made to the Code. In particular, there effectively is no longer any brake upon vendors entering into exclusive listing agreements with a different agent at the expiration of the initial listing.
- 5.19 The use of conjunctional selling arrangements also increases the efficacy and public benefit associated with the exclusive agency agreement system. As referred to in paragraph 1.6.2 above, real estate and business agents are

required by virtue of the Code of Conduct proclaimed under the *Real Estate and Business Agents' Act, 1978* and by the terms of Rule 10 of the REIWA Code to always act in the best interests of principals. As a consequence of these rules, exclusive listing agents are required to enter into conjunctional agreements unless it would not be in the best interests of a vendor or lessor to do so. These rules are reinforced by Rule 4.2(a) of the REIWA Code that requires listing agents to act in conjunction unless satisfied that it is not in the best interests of the vendor or lessor to do so. Conjunctional agreements are agreements whereby an exclusive listing agent enters into an agreement with a non-listing agent in which the non-listing agent shares in the commission paid by the vendor in return for introducing a purchaser to the property or business. The use of conjunctional agents maximises the exposure of vendors and properties or businesses to numerous agents. The use of conjunctional agreements in the Multiple Listing Service is particularly significant, as referred to in paragraph 4.4.1 above. The use of exclusive agency agreements maximises the efficiencies of the exclusive agency agreement system. In particular, the agent who has the benefit of an exclusive agency agreement, given the knowledge of the particular circumstances of a sale inherently obtained through being that exclusive agent, is in a unique position to effectively obtain conjunctional agreements with other agents. Those conjunctional agents become sub-agents of the listing agent and owe corresponding fiduciary duties to the vendor.

- 5.20 It is submitted by REIWA that the use of the exclusive agency system, together with the rules requiring conjunctional sales and the general REIWA rules requiring professionalism in real estate have produced a particularly effective method of selling real estate and businesses that satisfies the requirements of consumers. This is reflected in the fact that substantiated complaints made against real estate agents to the Real Estate and Business Agents' Board and REIWA is less than 0.5% of residential real estate transactions. This statistic has been calculated by REIWA comparing the total number of substantiated complaints made to REIWA and the Real Estate and

Business Agents' Board with the total number of residential sales and property management agreements made through agents. The Real Estate and Business Agents' Supervisory Board annual report for 1998 - 1999 records that a total of 299 complaints were received from the public which were investigated as being possible breaches of the *Real Estate and Business Agents' Act, 1987*. The 1999 REIWA annual report shows that during the 1998 - 1999 financial year REIWA processed 194 complaints from the public. During the 1998 - 1999 financial year the Western Australian Department of Land Administration records showed that there were 56,600 residential dwelling sales or land sales in Western Australia. Australian Bureau of Statistics figures record that during the 1998 - 1999 financial year there were approximately 47,000 managed residential rentals in Western Australia. Therefore, the ratio of public complaints in residential real estate transactions was 493:103,600 - less than 0.5%.

- 5.21 It is submitted that the use of the exclusive agency system in the sale of properties and businesses and the corresponding incentive given to agents to use all their efforts to market properties and businesses has resulted in a climate that encourages specialisation amongst real estate and business agents. Consequently, agents in Western Australia frequently specialise in the type of properties they sell and, for example, there are agents who specialise in the sale of commercial properties, shops, service stations and business broking. This further increases the efficiency of the selling of real estate and businesses and produces further public benefit.
- 5.22 The use of the exclusive agency system also operates so as to make the contractual position of the vendor with respect to real estate agents clear. Where a vendor has a contractual relationship with only one agent the person to whom the vendor may owe a liability to pay a commission is clear. If a vendor, on the other hand, has a series of open agency agreements with various agents the identity of the person to whom the vendor owes a duty to pay a commission may be less clear. Traditionally, the event that gives rise to the