



EXCLUSORY PROVISION

APPLICATION FOR AUTHORISATION

FORM A

To the Australian Competition and Consumer Commission:

Application is hereby made under subsection 88(1) of the Trade Practices Act 1974 for an authorisation under that subsection

- * to make a contract or arrangement, or arrive at an understanding, where a provision of the proposed contract, arrangement or understanding would be, or might be, an exclusionary provision within the meaning of section 45 of that Act.
- * to give effect to a provision of a contract, arrangement or understanding where the provision is, or may be an exclusionary provision within the meaning of section 45 of that Act.
- * (Strike out whichever is not applicable)

(PLEASE READ DIRECTIONS AND NOTICES ON BACK OF FORM)

1. (a) Name of applicant: THE REAL ESTATE INSTITUTE OF WESTERN AUSTRALIA

(See Direction 2 on the back of this Form)

(b) Short description of business carried on by applicant: AN ASSOCIATION OF REAL ESTATE AGENTS who provide real estate services in Western Australia

(c) Address in Australia for service of documents on the applicant: c/- MCCALLUM DONOVAN SWEENEY
16 Irwin Street, Perth WA 6000

2. (a) Brief description of contract, arrangement or understanding and, where already made, its date:

REIWA'S Articles, Members' Codes of Practice, Multiple Listing Service By-Laws and Standard Form Exclusive Agency Agreements

(b) Brief description of those provisions of the contract, arrangement or understanding that are, or would or might be, exclusionary provisions: N/A

(See Direction 4 on the back of this Form)

(c) Names and addresses of other parties or proposed parties to contract, arrangement or understanding: REIWA and its members, present and future

3. Names and addresses (where known) of parties and other persons on whose behalf application is made:

REIWA'S members, present and future

4. (a) Grounds for grant of authorisation: See attached written submissions

(b) Facts and contentions relied upon in support of those grounds: See attached written submissions

(See Notice 1 on the back of this Form)

This application for authorisation may be expressed to be made also in relation to other contracts, arrangements or understandings or proposed contracts, arrangements or understandings, that are or will be in similar terms to the above mentioned contract, arrangement or understanding.

(a) Is this application to be so expressed? No

(b) If so, the following information is to be furnished:

(i) the names of the parties to each other contract, arrangement or understanding:

N/A

(ii) the names of the parties to each other proposed contract, arrangement or understanding which names are known at the date of this application:

N/A

(See Direction 5 and Notice 2 on the back of this Form)

6. (a) Does this application deal with a matter relating to a joint venture (See section 4J of the Trade Practices Act 1974)? No

(b) If so, are there any other applications being made simultaneously with this application in relation to that joint venture?

N/A

(c) If so, by whom or on whose behalf are those other applications being made? N/A

7. Name and address of person authorised by the applicant to provide additional information in relation to this application:

PAUL DONOVAN, MCCALLUM DONOVAN SWEENEY, 16 Irwin Street, PERTH WA 6000

Signed by/on behalf of the applicant:

(MICHAEL A. GRIFFITH : EXECUTIVE DIRECTOR)

DIRECTIONS

1. Where there is insufficient space on this form to furnish the required information, the information is to be shown on separate sheets, numbered consecutively and signed by or on behalf of the applicant.
2. Where the application is made by or on behalf of a corporation, the name of the corporation is to be inserted in item 1 (a), not the name of the person signing the application and the application is to be signed by a person authorised by the corporation to do so.
3. In item 1 (b), describe that part of the applicant's business relating to the subject matter of the contract, arrangement or understanding in respect of which the application is made.
4. Furnish with the application particulars of the contract, arrangement or understanding in respect of which the authorisation is sought. Those particulars shall be furnished:
 - (a) in so far as the particulars or any of them have been reduced to writing-by lodging a true copy of the writing; and
 - (b) in so far as the particulars of any of them have not been reduced to writing-by lodging a memorandum containing a full and correct statement of the particulars that have not been reduced to writing.
5. Where the application is made also in respect of other contracts, arrangements or understandings which are or will be in similar terms to the contract, arrangement or understanding referred to in item 2, furnish with the application details of the manner in which those contracts, arrangements or understandings vary in their terms from the contract, arrangement or understanding referred to in item 2.

NOTICES

1. In relation to item 4, your attention is drawn to sub-section 90 (8) of the Trade Practices Act 1974 which provides as follows:

(8) The Commission shall not -

(a) make a determination granting-

- (i) an authorisation under sub-section 88 (1) in respect of a provision of a proposed contract, arrangement or understanding that is or may be an exclusionary provision; or
- (ii) an authorisation under subsection 88 (7) in respect of proposed conduct, or
- (iii) an authorisation under subsection 88 (8) in respect of proposed conduct to which subsection 47 (6) or (7) applies; or
- (iv) an authorisation under subsection 88 (8A) for proposed conduct to which section 48 applies

unless it is satisfied in all the circumstances that the proposed provision or the proposed conduct would result, or be likely to result, in such a benefit to the public that the proposed contract or arrangement would be allowed to be made, the proposed understanding should be allowed to be arrived at, or the proposed conduct should be allowed to take place, as the case may be.

(b) make a determination granting an authorisation under sub-section 88 (1) in respect of a provision of a contract, arrangement or understanding that is or may be an exclusionary provision unless it is satisfied in all the circumstances that the provision has resulted, or is likely to result, in such a benefit to the public that the contract, arrangement or understanding should be allowed to be given effect to.

2. If an authorisation is granted in respect of a proposed contract, arrangement or understanding the names of the parties to which are not known at the date of application, the authorisation shall, by sub-section 88 (14) of the Trade Practices Act 1974, be deemed to be expressed to be subject to a condition that any party to the contract, arrangement or understanding will, when so required by the Commission, furnish to the Commission the names of all the parties to the contract, arrangement or understanding.

**APPLICATION TO THE ACC BY THE REAL ESTATE
INSTITUTE OF WESTERN AUSTRALIA (INC) FOR
AUTHORISATION OF ITS ARTICLES, MEMBERS' CODES OF
PRACTICE, MULTIPLE LISTING SERVICE BY-LAWS AND
EXCLUSIVE AGENCY AGREEMENTS**

17 July 2000

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INDEX

<u>Section</u>	<u>Subject</u>	<u>Page Number</u>
1.	INTRODUCTION	1
	• Relevant document and provisions	3
	• Public benefit of documents	8
	• General authorisation principles	12
2.	REIWA	17
3.	THE MARKET	21
4.	REVIEW BY REIWA OF ITS ARTICLES, THE CODE, OTHER RULES, FORMS AND DIRECTIVES	36
5.	EXCLUSIVE LISTING AGREEMENTS	50
	• Background	50
	• Previous authorisation decisions	55
	• Public benefit	56
	• Public benefit -v- anti-competitive effect	66
	• Relationship with other REIWA provisions	69
6.	CONJUNCTIONAL AGREEMENTS	70
	• Background	70
	• Previous authorisation decisions	79
	• Public benefit	79
	• Public benefit -v- anti-competitive effect	89

7.	MLS BY-LAWS	89
	• Background	89
	• Previous authorisation decisions	93
	• Public benefit	95
	• Public benefit -v- anti-competitive effect	100
8.	ARTICLE 30 - INSURANCE	102
	• Background	102
	• Public benefit	105
	• Public benefit -v- anti-competitive effect	105
9.	CHANGES TO CONSTITUTION OF FIRM OR CORPORATION	106
	• Background	106
	• Public benefit	108
	• Public benefit -v- anti-competitive effect	109
10.	SUPERVISION OF SALES REPRESENTATIVES AND EXERCISING OF BONA FIDE CONTROL OVER AGENCY BUSINESSES	110
	• Background	110
	• Public benefit	117
	• Public benefit -v- anti-competitive effect	118
11.	SOLICITING	118
	• Background	118
	• Previous authorisation applications	119
	• Public benefit	119
12.	ADVERTISING	120
	• Background	120
	• Public benefit	121
	• Public benefit -v- anti-competitive effect	122
13.	DISPLAYS	122
	• Background	122
	• Public benefit	125
	• Public benefit -v- anti-competitive effect	126

14.	FOR SALE AND MANAGEMENT SIGNS	126
	• Background	126
	• Public benefit	127
	• Public benefit -v- anti-competitive effect	128
15.	CONCLUSION	128

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BY-LAWS AND EXCLUSIVE AGENCY AGREEMENTS**

SUBMISSIONS

1. INTRODUCTION

- 1.1 1.1.1 The Real Estate Institute of Western Australia (Inc) ("REIWA") is an association incorporated under the *Associations Incorporation Act*, 1987. REIWA was incorporated in 1918 as an association of Western Australian real estate agents. Since that time REIWA has provided a multitude of services to real estate agents, business agents and the general public designed to provide an effective method of assisting in the delivery of real estate and business agency services to consumers in Western Australia at the highest level of professional and ethical standards possible.
- 1.1.2 Pursuant to section 88(1) of the *Trade Practices Act*, 1974 ("the TPA") REIWA applies for authorisation of its Articles, Members' Codes of Practice, Multiple Listing Service By-laws and certain exclusive agency agreements referred to in paragraph 1.5 below. Members of REIWA agree to be bound by the terms of REIWA's rules and regulations and, consequently, the documents for which authorisation is sought constitute a contract or, alternatively, an arrangement or understanding between REIWA and its members and between the members inter se. Pursuant to the terms of section 88(6) of the TPA, REIWA seeks authorisation for itself and its present and future members.

- 1.2 On 16 June 1998 a prosecution was launched by the Australian Competition and Consumer Commission ("ACCC") against REIWA with respect to breaches by REIWA of section 45(2) of the TPA. That prosecution was resolved on 8 October 1999 in the Federal Court of Australia when his Honour Justice French made consent orders, inter alia, declaring that rule 39 of the REIWA Rules (Articles), and rules 2.1.2, 2.1.3, 2.6 and 9.2 of the REIWA Rules of Practice (Members' Code of Practice) contravened section 45(2)(a)(i) and section 45(2)(a)(ii) of the TPA. Further, the Court declared that a licence of copyright agreement dated 17 July 1997 breached section 45(2)(a)(ii) of the TPA. The Federal Court made additional orders restraining REIWA and its officers, employees, members and agents from giving any further effect to the offending Rules, Rules of Practice and licence of copyright agreement and ordered that the offending Rules and Rules of Practice be removed. The Federal Court also ordered that notice of the Court's orders be provided to REIWA members and to the general public and that REIWA enter into a trade practices corporate compliance programme in a stipulated form.
- 1.3 The compliance programme ordered to be implemented by the Federal Court was duly implemented by REIWA on 7 January 2000. A detailed manual governing the day-to-day operation of the REIWA trade practices corporate compliance programme is annexed hereto and marked with the letter "A".
- 1.4 Pursuant to the terms of the compliance programme ordered by the Federal Court on 8 October 1999 and the terms of the REIWA compliance programme manual REIWA is required to present to the external Designated Compliance Officer ("DCO") all current articles of association, contracts entered into between REIWA and other training providers and/or TAFE Colleges pertaining to the provision of training services by the non-REIWA contracting parties (excluding contracts of employment or services with persons or entities to provide lecturing services and the like for courses run by REIWA), standard clauses, rules of practice and operating directives for consideration and advice by the DCO, specifically having regard to the provisions of Part IV of the

TPA. Alternatively, REIWA is required to have made application for authorisation of those documents pursuant to the provisions of Part VII of the TPA. The ACCC has agreed with REIWA, in accordance with the terms of the Federal Court's orders, for the time for compliance with those requirements to be extended to 17 July 2000.

Relevant documents and provisions

1.5 It is in the light of the requirements referred to in paragraph 4 that REIWA now makes application for authorisation of the following documents:

- (i) the REIWA Articles of Association ("the Articles"). The Articles are annexed hereto and marked with the letter "B";
- (ii) the REIWA Members' Codes of Practice ("the Code"). The Code is annexed hereto and marked with the letter "C";
- (iii) the Multi-Listing Service By-laws ("the MLS by-laws"). The MLS by-laws are annexed hereto and marked with the letter "D";
- (iv) standard forms containing standard clauses relating to the appointment by members of the public of real estate agents and business agents on an exclusive basis ("exclusive agency agreements"). The exclusive agency agreements are annexed hereto and marked with the letter "E" and the titles of the individual agreements concerned are set out in paragraph 5.1 below.

1.6 As set out and detailed below in section 4 of these submissions, the documents referred to in paragraph 1.5 for which authorisation is now sought are presented for authorisation in the light of the carrying out of a complete review by REIWA and its legal advisers of all of REIWA's Articles, rules, forms and directives. REIWA has deleted all of the provisions contained in these documents that were the subject of the ACCC prosecution against REIWA in

the Federal Court. REIWA has also revised its documents and procedures so as to remove the anti-competitive provisions identified in the letter sent by the ACCC to REIWA on 23 September 1997 prior to the commencement of the Federal Court prosecution. Further, in addition to addressing the specific problems with its documents and procedures as identified by the ACCC, REIWA has conducted its comprehensive review of its operations to ensure that all of its documents and procedures comply with the terms of the TPA. Whilst REIWA is of the view that the documents that are now presented for authorisation by the ACCC comply with the TPA, REIWA recognises that there might be a possibility that some of the provisions of the REIWA Articles, the Code, the MLS by-laws and the exclusive agency agreements might be considered to have an anti-competitive effect. (Details of the public benefit resulting from these provisions is set out in detail in the body of these submissions below.) In particular:

1.6.1 Forms appointing agents on an exclusive basis. REIWA supplies standard forms to its members that provide for the appointment of real estate and business agents to sell and/or lease properties or sell businesses on an exclusive basis. REIWA stresses from the outset that nothing in its Articles, the Code or any other documents or directive requires agents to be appointed by principals on an exclusive basis or protects the position of exclusive agents. Rather, exclusive agency is but one of a variety of arrangements which may be made between agents and vendors or lessors, as detailed below in paragraph 5.4. Indeed, REIWA also produces standard forms for open listings of property and does not seek to induce members of the public to enter into exclusive agency agreements rather than alternatives such as open listings, except with respect to the Multiple Listing Service (However, the use of the Multiple Listing Service by vendors is in itself optional). REIWA's standard forms for the exclusive listing of agents to sell properties provide an option for vendors to reserve the right to sell the property without having to pay a commission. Previous REIWA rules

that prohibited soliciting, restricted advertising and otherwise protected the position of exclusive listing agents have been removed. However, REIWA also contends that the preserving of the right for vendors to appoint agents on an exclusive basis is vital for the efficient delivery of real estate and business agency services in Western Australia. The appointment of agents on an exclusive basis provides maximum incentive for agents to use all their best endeavours to sell or lease properties or businesses. The system by which agents are appointed on an exclusive basis still produces competition between agents and, in concert with conjunctural sales produces the most efficient way possible of selling or leasing real estate and businesses.

- 1.6.2 **Conjunctural sale rules.** Conjunctural sales occur when an agent who has been appointed by a member of the public to sell or lease a property or to sell a business on an exclusive basis enters into an agreement with another agent who, by virtue of that agreement, becomes entitled to share in the fee paid to the listing agent by the consumer if the conjunctural agent introduces a purchaser or lessee to the property or business concerned. The use of conjunctural agreements in Western Australia adds effectiveness to competition in the Western Australian real estate market and enables property and businesses to be sold and leased with greater efficiency. The use of conjunctural sales in concert with the exclusive listing of properties and businesses produces the most efficient way possible of selling or leasing a property or business. Conjunctural agents contractually become sub-agents of the vendor or lessor who appointed the listing agent. The *Real Estate and Business Agents' Act, 1978* Code of Conduct for Agents and Sales Representatives and REIWA rules require agents to act in the best interests of their principals except where it would be unreasonable or improper to do so. This means that listing agents are required in the vast majority of circumstances to enter into conjunctural agreements when approached by non-listing agents.

The REIWA Code provides for minimum levels of service to be provided by members of REIWA when they act as conjunctional agents and stipulates provisions for the effective operation of conjunctional agreements between members of REIWA, subject to those members being able to agree to the contrary.

1.6.3 The Multiple Listing Service. REIWA provides to members a Multiple Listing Service that can be used by members and their clients in selling properties. The service enables properties to be marketed using a magazine published by REIWA ("The Homebuyer"), the REIWA internet site and the displaying of subject properties in non-listing agents' office windows. The Multiple Listing Service operates so as to result in many properties that are listed using the service being listed on the basis of the listing agent making a unilateral offer to all other agents entitled to use the Multiple Listing Service to enter into a conjunctional agreement with respect to that property. The listing agent is also able to enter into conjunctional agreements with all other real estate agents, whether or not those agents are entitled to use the Multiple Listing Service or are members of REIWA. Provisions creating and regulating the Multiple Listing Service are contained in the REIWA Articles and in the MLS by-laws.

1.6.4 Soliciting. The Code previously contained extensive provisions preventing agents from soliciting other agents' clients and thereby restricted the ability of agents who did not have an exclusive listing agreement with a principal from effectively competing with a listing agent when the term of an exclusive listing expired. Some of those provisions formed the subject of the ACCC prosecution against REIWA determined in the Federal Court on 8 October 1999. However, REIWA has removed those provisions and many other provisions in the Code that restricted soliciting. The Code retains a provision that requires members of REIWA who are soliciting clients

to enquire whether those clients have agency agreements with other agents and to advise clients who have entered into exclusive agency agreements with other agents that they might be liable to pay two commissions. The purpose of the provision requiring agents to enquire whether their clients have agency agreements with other agents is to enable the soliciting agent to issue the warning about the potential liability to pay two commissions.

- 1.6.5 **Requirement to insure.** In the interests of consumer protection, members of REIWA are required by a provision in the REIWA Articles to maintain minimum levels of insurance.
- 1.6.6 **Exercise of control over real estate practices by licensees.** Further to specific provisions contained in the *Real Estate and Business Agents' Act, 1978* and in the interests of consumer protection, REIWA requires its members to ensure that persons licensed under the *Real Estate and Business Agents' Act, 1978* to conduct real estate businesses exercise bona fide control over those businesses and relevant employees. Provisions are contained in the REIWA Articles to ensure that this occurs.
- 1.6.7 **Change in constitution of firm or company.** In order to prevent the avoidance of the membership requirements contained in the REIWA Articles, the REIWA Articles require members to notify REIWA of alterations to the partners in real estate partnerships and alteration to the directorships of real estate companies.
- 1.6.8 **Advertising.** Prior to the comprehensive review of the REIWA Articles, the Code and REIWA's other rules, directives and forms, REIWA imposed a number of restrictions upon advertising. Those restrictions have now all been removed, save for a requirement contained in clause 8 of the Code that requires advertisements by agents to contain the agent's full trading name and telephone number in

a manner whereby those particulars are given greater prominence than any reference to sales representatives or other employees of the agent within the advertisement. The object of this provision is to provide consumer protection through preventing members being involved in the practice of persons who are not licensed under the provisions of the *Real Estate and Business Agents' Act, 1978* seeking to avoid the provisions of that Act by holding themselves out as being licensed agents.

1.6.9 Displays. Clause 11 of the Code prohibits members of REIWA from erecting or maintaining real estate stalls or displays at venues other than premises that are registered under the *Real Estate and Business Agents' Act, 1978* if those stalls or displays are erected or maintained in circumstances that will mislead consumers into believing that those premises are in fact registered under that Act. This provision is designed to protect consumers so as to prevent members of REIWA from being involved in attempts to avoid the provisions of the *Real Estate and Business Agents' Act, 1978*.

1.6.10 "For sale" and management signs. The review of the REIWA Articles, rules, forms and directives has also resulted in the deletion of restrictions upon the use of "for sale" and management signs, save for the provisions of clause 9 of the Code. This clause imposes minimum requirements with respect to the use of these signs that act in the consumers' benefit.

Public benefit of documents

1.7 REIWA is of the view that the REIWA Articles, the Code, the MLS by-laws and the exclusive agency agreements, including the provisions set out in paragraph 1.6 above, all carry with them public benefit and that public benefit outweighs the anti-competitive effect of those provisions such that

authorisation of these documents is warranted. In particular, the public benefit that flows from the documents as a whole includes:

- (i) to the extent that the documents facilitate the continuation of REIWA as an association, they facilitate the continuation of an association that aims to foster professionalism in the practice of real estate and business agency;
- (ii) the documents promote the protection of consumers;
- (iii) the documents promote the orderly and fair resolution of disputes between members and disputes between members and the consumer public;
- (iv) the documents promote higher standards of real estate practice;
- (v) the documents facilitate a private and cost effective mechanism for the enforcement of standards of real estate practice and thereby reduce the need for consumer complaints to be dealt with by government agencies and reduce the need for disputes within the real estate industry to be dealt with by the civil court system;
- (vi) the documents help facilitate an efficient and cost effective method of selling and leasing real estate and businesses in Western Australia;
- (vii) REIWA's membership covers a substantial proportion of the members of the real estate and business agency industry. Subjective criteria for eligibility for membership of REIWA have been deleted from the REIWA Articles (see paragraph 4.2.2 below) and membership fees of the Institute are modest, with corporate membership costing \$450.00 per year and ordinary membership by individuals associated with corporate entities costing \$50.00 per year. REIWA estimates that its members account for approximately 85% of real estate and business

agency businesses in Western Australia. Detailed statistical data of the widespread nature of membership of REIWA in both metropolitan and country areas of Western Australia is set out in paragraph 3.14 below. REIWA's coverage of real estate agents means that the self-regulatory scheme created by REIWA's Articles, the Code and MLS By-laws will be effective;

- (viii) there exist commercially significant incentives for members to comply with the Articles, the Code and the MLS By-laws. Article 41.3 empowers REIWA's Professional Standards Tribunals to impose significant commercial penalties upon members, including monetary penalties of up to \$10,000.00. Further, the Professional Standards Tribunal is able to recommend that a member be expelled or suspended from membership of the Institute and, pursuant to Articles 41.1 and 41.4, the REIWA Council has the power to expel or suspend persons from membership of REIWA upon the occurring of stipulated events. Those events are expressed in the Articles with certainty and are not subjective in character. REIWA has a high reputation in the Western Australian community and membership of REIWA consequently carries with it significant benefits to members' own reputations. Evidence of the significance of membership of REIWA to the consumer public is set out in paragraph 2.8 below. As a consequence of the considerable benefits to reputation enjoyed by agents who are members of REIWA, expulsion from REIWA carries with it the corresponding significant commercial detriment if membership of REIWA is lost;
- (ix) REIWA's Articles provide for industry-based forums for complaint arbitrations and appeals. The significant amendments made to the provisions of REIWA's Articles dealing with the providing of arbitration and reconciliation systems for the resolution of disputes involving members of REIWA, including disputes with members of

the public, and the disciplining of members as a consequence of the receipt of complaints from persons, including members of the public, are detailed in paragraphs 4.2.7 and 4.2.9 below. The provision of rights of appeal is detailed in paragraph 4.2.10 below;

- (x) REIWA's operations provide for public input into the self-regulatory scheme represented by the REIWA Articles, the Code and the MLS By-laws. The public has the right to use the systems provided by REIWA for the resolution of disputes with REIWA members and the public is entitled to make complaints about the conduct of members of REIWA. Indeed, the consumer protection provisions of the Code have been strengthened significantly by a number of provisions detailed in paragraph 4.3.8 below. (It is significant that, as detailed in paragraph 5.20 below, the ratio of 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.) Consumer representation upon REIWA's appeals board is ensured by changes to the Articles detailed in paragraph 4.2.10 below. The changes now require a consumer representative to be appointed by the President of the Australian Institute of Arbitrators and Mediators who is stipulated as being a person who is not to be a member of REIWA or a licensed real estate agent or sales representative. Independent input into the operations of REIWA is also ensured by the provisions of the compliance programme implemented by REIWA on 7 January 2000 and detailed in paragraph 1.3 above. That compliance programme includes regular monitoring by a designated external compliance officer and reviews by the ACCC.

Specific issues of public benefit that arise out of the individual provisions referred to in paragraph 1.6 above and the extent to which that public benefit outweighs any anti-competitive effect of those provisions is set out in greater detail below.

1.8 REIWA submits that the documents the subject of this application for authorisation are vital for the efficient delivery of services by REIWA to its members and the public and are vital for the efficient operation of real estate and business sale transactions in Western Australia. The documents give certainty to the practices in the real estate and business agency markets, enabling vendors and purchasers to deal with reasonable knowledge of those practices. The documents and forms concerned provide for an efficient and cost effective delivery of services in the real estate and business agency industry to consumers. The procedures carry with them the public benefits referred to in paragraph 1.7 above and the various specific public benefits detailed in the submissions below. These efficiencies in the delivery of real estate and business agency services lower transaction costs as they provide numerous public benefits and provide a standard form set of documents. It is inevitable in this type of market that providers of the service concerned will use standard form documents. REIWA submits that it is far preferable for these documents to be developed as part of a self-regulating scheme. The reduced transaction costs benefit all participants in the market, including consumers. Further, settled market practices are likely to result in a better informed market and, again, in lower transaction costs as it will be unnecessary for participants in the market to individually incur expenses in seeking advice on the terms of contracts or on how the market operates. It is therefore submitted that the operations of REIWA, as provided for in its Articles, the Code, The MLS By-laws and standard form exclusive agency agreements, result in a better-informed market that operates more efficiently and is more competitive.

General authorisation principles

1.9 1.9.1 This application for authorisation by REIWA is made pursuant to section 88(1) of the TPA with respect to contracts, arrangements or understandings, provisions of which may have the effect of substantially lessening competition within the meaning of section 45 of

the TPA. The test for granting authorisation in this case is that contained in section 90(6) of the TPA. The ACCC shall only grant authorisation if it is satisfied in all the circumstances that:

- (i) the provisions of the subject arrangement have or are likely to result in a benefit to the public; and
- (ii) any such public benefit outweighs any anti-competitive detriment flowing from the arrangements.

1.9.2 The ACCC and the Trade Practices Commission has commented upon the worth of self-regulatory schemes in industry, in general, and with respect to the real estate industry, in particular, on a number of occasions. It has been acknowledged that the major thrust of the TPA is to encourage competition and thereby create a climate for efficiency to develop and grow. Self-regulatory schemes have the potential to play a key role in this process. The Commission has encouraged self regulatory schemes where such schemes:

- (i) enhance the efficient operation of industry by putting beyond doubt the machinery and procedural matters of the trade and enabling buyers and sellers to avoid the cost of being concerned with those matters so as to enable them to focus their attention on the main price and service aspects of the bargains being struck between them;
- (ii) contribute to quality and safety in goods or services and serves as reminder to business people of their obligations to customers;
- (iii) make business people and consumers better informed;

- (iv) assist in promoting honesty and fairness in trading and/or encourage compliance with the law (eg the consumer protection provisions of the TPA).

1.9.3 Self-regulatory schemes would normally only risk breaching the TPA if they:

- (i) restrict price competition;
- (ii) restrict those non-price matters that are an important part of the usual bargaining process in the industry;
- (iii) prohibit or inhibit advertising as opposed to guarding against deceptive advertising;
- (iv) limit entry to the trade.

See Applications for Authorisation by the Real Estate Institute of South Australia (1988) ATPR 50 - 075 at pp 57,335 - 57,336; *Re The Real Estate Institute of Tasmania* (1987) ATPR (Com.) 50 - 062 at p 57,211; *Re The Real Estate Institute of the Australian Capital Territory* (1985) ATPR (Com.) 50 - 087 at p 55,102 and *Re The Real Estate Institute of Queensland* (1983) ATPR (Com.) 50 - 057 at pp 55,219.

1.10 1.10.1 It has previously been indicated that acceptable self-regulatory schemes would be expected to contain the following elements:

- (i) coverage of a substantial proportion of the members of the industry;
- (ii) commercially significant incentives to comply with the Code of Practice;

- (iii) industry based forums for complaint arbitration including appeal;
- (iv) a window for public input, provided that proposals for public participation should be tempered by the desired results and the association's right to independence.

See *Re Quilted Products Manufacturers' Association of Australia* (1988) ATPR (Com) 50 - 070.

1.10.2 The Trade Practices Tribunal has set out the following principles in connection with codes of ethics:

- (i) rules that reflect the law are clearly of benefit in their application and, subject to certain qualifications, result in no significant detriment;
- (ii) rules that reflect views which most Australians would probably endorse are essentially in the public interest, provided the system for their formulation, interpretation and enforcement works properly and effectively;
- (iii) rules which are uncertain, ambiguous, internally inconsistent or which, on their face, are unable to work properly in the public interest should not be authorised;
- (iv) rules should provide a clearly express, well-defined and fair appellate structure which should include participation by outsiders.

See *Re Media Council of Australia (No2)* (1987) ATPR 40 - 774

1.11 REIWA submits that, for the reasons set out in paragraphs 1.7 and 1.8 above, the required features of self-regulatory schemes and codes of ethics are

contained in the documents the subject of this application for authorisation by REIWA.

- 1.12 1.12.1 The test to be applied in determining an application for authorisation is the "future with-and-without test". In considering public benefits and detriments, the ACCC should compare the position that would or would be likely to exist in the future if the authorisation were granted with the position if the authorisation were not granted. When dealing with the constituent documentation under which an organisation seeking authorisation operates, the correct approach is to ask whether the particular features of that documentation which are thought to be anti-competitive are essential to the operation of the organisation as an efficient organisation. It is only if a particular feature is not essential that it would be appropriate to consider whether the feature, standing alone, has a net public benefit.

See Re Australasian Performing Right Association (1999) ATPR 41 - 701

- 1.12.2 In these submissions REIWA has sought to detail the numerous public benefits that flow from the documents the subject of this authorisation application and, in particular, the provisions in those documents that might be considered to have an anti-competitive effect. Consequently, it is submitted by REIWA, given the public benefits that flow from the provisions and forms concerned, those provisions and forms are essential to the operation of REIWA as an efficient organisation. Given those numerous public benefits and using the "future with-and-without test" it is submitted by REIWA that if the provisions and forms concerned were not authorised the detriment that would be suffered by the public, in the sense that the benefits resulting from those provisions and forms would be lost, would be very significant and would deleteriously change the manner in which real estate and business agency services are provided in Western Australia.

2. REIWA

2.1 REIWA was incorporated in 1918 under the *Associations Incorporation Act* 1895 (legislation now superseded by the *Associations Incorporation Act*, 1987). REIWA's mission statement, unchanged in concept since the founding of REIWA, is:

"To constantly foster the professionalism of real estate agency practice, the protection and goodwill of agents' clients and the business environment in which agents operate."

2.2 REIWA's governing council comprises of fourteen councillors elected by membership, with eleven being elected by members at large and three being elected by country based members. The Council appoints chapters/divisions, committees and branches to cater for the professional and local needs of members, with those bodies then having direct representation back to the Council through its designed Councillor.

2.3 REIWA members make up approximately 85% of the real estate industry in Western Australia. These members, in turn, represent approximately 85% of real estate transactions and 85% of business agent transactions in Western Australia. Detailed statistical data setting out the wide-spread nature of the membership of REIWA is set out in paragraph 3.14 below. Further, REIWA records for the period 1 July 1999 to 29 February 2000 show that, in the Perth Metropolitan Area, 32.7% of sales occurred through the Multi Listing Service system. Almost 100% of sales of real estate in the Perth metropolitan area occurred through the use of exclusive listings.

- 2.4 The Institute is represented in the national context by the Real Estate Institute of Australia and REIWA nominates a representative to the REIA executive.
- 2.5 The main areas of membership service provided by REIWA are:
- 2.5.1 **Professional development services.** These services include the provision of training to real estate agents and representatives, the formulation of rules and ethical standards, the provision of arbitration services, the provision of professional indemnity insurance, the provision of a telephone enquiry service to members of the public, the maintenance of a complaints and disciplinary system for the use of members of REIWA and members of the public, the provision of a telephone advice service to members of REIWA provided by qualified legal practitioners and the production of standard legal forms for the use of members.
- 2.5.2 **Marketing services.** To assist in the marketing of properties REIWA provides members with the Multiple Listing Service, "The Homebuyer" magazine, internet services, computerised information and statistics and research.
- 2.5.3 **Commercial services.** REIWA provides members with printing services, stationery, photography, fuel and vehicle discounts and insurance services.
- 2.6 All members of REIWA at the time of its incorporation and all new members of REIWA after the date of its incorporation agreed to be bound by the REIWA Articles, the Code and all other rules and regulations. The Articles, the Code and the MLS By-laws, as amended from time to time, constitute a contract or, alternatively, an arrangement or understanding between REIWA and its members and between the members inter se.

- 2.7 As a consequence of the operations of the REIWA Professional Standards Committee, the Marketing Services Committee and the Documents and Forms Committee the Articles, the Code, the MLS by-laws and the exclusive agency agreements referred to in these submissions are constantly reviewed.

The Professional Standards Committee is a committee created by the REIWA Council that includes, as part of its duties, the constant review and monitoring of REIWA's Articles and the Code and to recommend amendments or additions to those documents. The Marketing Services Committee is a committee created by the REIWA Council whose duties include the monitoring of the Multiple Listing Service and the MLS by-laws. That committee recommends amendments or additions to the MLS by-laws to the REIWA Council. The Documents and Forms Committee is a further committee created by the REIWA Council. That committee's role includes the monitoring and reviewing of standard documents and forms, and the preparation and presentation to the REIWA Council of any additional documents and forms and alterations to existing documents and forms.

- 2.8 The significance of the activities of REIWA and the confidence generated in the minds of the Western Australian public is evidenced by the results of a survey conducted by Patterson Market Research in June 1998. A copy of the survey is annexed to these submissions and marked with the letter "F". The survey found (in paragraph 1.3) that 50% of persons had checked to see that the agent being used was a member of REIWA and 38% did not make such a check because they assumed that all agents were members. Only 2% of the persons the subject of the survey reported that they did not believe that REIWA membership was important.

- 2.9 The legislative framework within which real estate and business agents practice in Western Australia is primarily governed by the provisions of the *Real Estate and Business Agents' Act, 1978*. That Act and its associated regulations and code of conduct provide the basis of the conducting and governing of real estate and business agency practice. Many of REIWA's

Articles and provisions of the Code are designed to compliment consumer protection provisions of the *Real Estate and Business Agents' Act*, 1978. For example, the provisions of Article 37 which is designed to ensure effective supervision of sales representatives and the exercising of bona fide control over agency businesses by a licensed agents (see section 10 of these submissions), Rule 8 of the Code which provides public protection by ensuring that those advertise as operating agency businesses are licensed under the *Real Estate and Business Agents' Act*, 1978 (see section 12 of these submissions) and Rule 11 of the Code that protects members of the public from persons who erect or maintain real estate stalls or displays in a manner that is misleading or deceptive (see section 13 of these submissions) are provisions that either reflect or further the implementation of sections 28, 36, 37 and 132 of the *Real Estate and Business Agents' Act*, 1978. This is consistent with previous authorisation determinations which have found that rules which reflect and enhance the law are clearly of public benefit and result in no significant detriment.

The implementation and enforcement of the provisions of the *Real Estate and Business Agents' Act*, 1978 is largely conducted by the Real Estate and Business Agents Supervisory Board and the Board's power and functions are set out in part II of the *Real Estate and Business Agents' Act*, 1978.

Part III of the *Real Estate and Business Agents' Act*, 1978 provides a licensing scheme for agents in Western Australia. It is submitted that those licensing requirements are relatively straightforward. Indeed, as submitted in paragraphs 3.14 and 3.15 of these submissions, the combined effect of the number of agents operating in Western Australia, the relatively straight forward requirements for obtaining a licence, the low capital cost of establishing an agency, the use of a commission basis for selling, the removal by REIWA of previous restrictions upon marketing and soliciting and the comprehensive business support systems provided by REIWA ensure that there are no significant barriers to entry into the real estate industry in Western

Australia. It is submitted that the market is characterised by a large number of agents who strongly compete for listings and business.

- 2.10 It is emphasised that the Articles, the REIWA Code and the MLS By-laws constitute a self-regulatory scheme. Given the high level of membership of REIWA, that scheme can be effectively implemented for the industry as a whole in Western Australia through the operations of REIWA.

3. THE MARKET

- 3.1 There is some difficulty in defining the appropriate market for the purposes of this application for authorisation. As Deane J said in *Queensland Wire Industries Pty Ltd -v- Broken Hill Pty Ltd* (1989) 167 CLR 177:

"The identification of relevant markets and the definition of market structures and boundaries ... involves value judgments, about which there is some room for legitimate differences of opinion. The economy is not divided into an identifiable number of discreet markets into one or other of which all trading activities can be neatly fitted. One overall market may overlap with one or more others. The outer limits ... of a particular market are likely to be blurred"

- 3.2 3.2.1 The Australian Competition Tribunal said of the concept of "market" in *Re Media Council of Australia* (1996) ATPR 41-497:

"For trade practices adjudication, the market is the network of actual and potential transactions between buyers and sellers of goods and services that are, or could be, in close competition ... The choice of market definitions, ie the specification of relevant markets in the particular case, must depend upon the issues for determination. For the Tribunal's purposes it is the

identification of a market or markets that best enables it to evaluate the likely effects of authorised conduct ..."

- 3.2.2 The Trade Practices Tribunal said of the concept of "market" in *Re Queensland Co-Op Milling Association Ltd and Defiance Holdings Ltd* (1976) ATPR 40 - 012 at p17,247:

"We take the concept of the market to be basically a very simple idea. A market is the area of close competition between firms or, putting it a little differently, the field of rivalry between them ... Within the bounds of the market there is substitution - substitution between one product and another, and between one source of supply and another, in response to changing prices. So a market is the field of actual and potential transactions between buyers and sellers amongst whom there can be strong substitution, at least in the long run, if given a sufficient price incentive ... Whether such substitution is feasible or likely depends ultimately on customer attitudes, technology, distance, and cost and price incentives."

- 3.3 The following comment about geographic dimensions made by Von Kalinowski in *Anti-Trust Laws and Trade Regulations* (Matthew Bender, New York, 1981), Volume 3, para 18-96, was cited in the *Australia Meat Holdings Pty Ltd -v- Trade Practices Commission* (1989) ATPR 40-932:

"Any geographic market ... must be one that corresponds to the commercial realities of the industry and represents an economically significant trade area. Because the geographic market determination looks to actual trade patterns, it is not required that geographical boundaries be drawn with exactitude ..."

3.4 The relevant principles to apply in defining a particular market were set out by the Australian Competition Tribunal in *Re Tooth & Co Ltd; re Tooheys Ltd* (1979) ATPR 40-113. Those principles are as follows:

- It is first necessary to identify the areas of close competition relevant to the matter under consideration.
- The market should comprehend the maximum range of business activities and the widest geographic area within which, given a sufficient economic incentive, buyers can switch from one supply source to another and sellers from one production flow to another.
- The long-range substitution possibilities are important rather than the short-term transitory ones.
- At the extremities of the market there is such a break in substitution possibilities that firms within its boundaries would collectively possess substantial market power.
- Within the bounds of the market substitution possibilities may be more or less intense and more or less immediate; the field of substitution is not necessarily homogeneous but may contain within its submarkets such that their competitive relationship have a wider effect upon the function of the market as a whole.
- The market is a multi-dimensional concept - with dimensions of product, functional level, space and time.

3.5 The concept of submarkets was analysed in *Dowling -v- Dalgety Australia Ltd* (1992) ATPR 41-165:

"The distinction between markets and submarkets can be merely one of degree. Submarkets are the more narrowly defined, typically registering some discontinuity in substitution possibilities. Where the defining feature of a

market is the existence of close substitutes (whether in demand or supply) the defining feature of a submarket is the existence of still closer and more immediate substitutes. Submarkets may be especially useful in registering the short-run effects of change; but they may be misleading if used uncritically to assess long-run competitive effects. The indicia of submarkets listed in the American case Brown Shoe Co Inc -v- United States 370 US 294 (1962) are suggestive: 'The boundaries of such a submarket may be determined by examining such practical indicia as industry or public recognition of the submarket as a separate economic entity, the product's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialised vendors.' But although it might be helpful to refer to such a list, it does not follow that it is exhaustive, nor that an area or product must meet all or a large number of these points to be classified as a submarket; Re Queensland Co-Operative Milling Association Ltd; Re Defiance Holdings Ltd (1936) 25 FLR 169 at 191; cited with approval in Queensland Wire Industries Pty Ltd -v- BHP Ltd (1989) 1674 FLR 177 at 199 per Dawson J.

- 3.6 3.6.1 Given the tests referred to in the authorities set out above, it is submitted that, in Western Australia, there are a number of markets for the provision of real estate and business agency services. Substitution possibilities in the real estate and business agency industry, for practical purposes, only exist within the localised areas within which agency businesses operate. The provision of real estate and business agency services in Western Australia is characterised, it is submitted, by those services being delivered on a localised basis. Consequently, country areas of Western Australia are made up of a number of different regions for the purposes of the delivery of real estate and business agency services, as is the metropolitan area of Perth. For example, it is submitted that there is little or no competition or substitution possibilities between agents operating in Broome and Albany or Quinns Rock and Fremantle. Whilst some agencies may

form part of franchise groups, those franchise groups are made up of a number of different businesses and whilst some of those businesses may operate in competition if they are located in similar geographic areas, the businesses do not compete against each other if they are located in separate regions.

- 3.6.2 On the other hand, it should be noted that the localised character of the relevant markets in Western Australia and the consequential lack of substitution possibilities reflects a short term perspective. In the long term, given the lack of barriers to entry into the relevant markets, there is no reason why, for example, a Perth real estate agent could not establish an agency practice in country towns if thought profitable. There is nothing contained in the Articles, the Code or the MLS By-laws which prevent market participants from moving into different geographic markets. In paragraphs 3.12 to 3.15 below the lack of barriers to entry into the real estate markets of Western Australia is highlighted. Whilst previously barriers may have been created by the prohibition upon soliciting with respect to exclusive agency arrangements and provisions restricting advertising and marketing, those provisions have now been deleted and there is nothing in the Articles or the Code that entrenches exclusive agency arrangements. It should also be noted that exclusive agency appointments further competition amongst real estate agents and promote public benefit as detailed in section 5 of these submissions. Exclusive agency agreements are usually for a limited period so the fact that a number of vendors may have appointed one agent as their exclusive agent at a particular point of time does not preclude other agents from moving into the same locality. Competition also follows from the very nature of the market in that the sale of houses is turned over quickly so that new listings are becoming available all of the time. Indeed, statistics kept by REIWA in relation to the Multiple Listing Service show that for the period of six months to 31 December 1999 properties took an

average of 44 days from the initial provision of a listing to sell. The significance of the high turnover of properties and the ability of agents to approach all homeowners who are potential sellers is set out in greater detail in paragraph 3.12 below.

- 3.7 It is submitted that the conclusion that there is a number of markets within Western Australia, based on geographical areas, for the delivery of real estate services is more appealing than defining the market with reference to Western Australia as a whole and referring to the local geographical areas as being submarkets. Given that, in the words of *Dowling -v- Dalgety Australia Ltd* (supra), where the defining feature of a market is the existence of close substitutes, the defining feature of a submarket is the existence of still closer more immediate substitutes, to define Western Australia as being the "market" is to ignore the fact that close substitutes do not exist throughout such a wide geographical area. It is submitted that it is highly unlikely that a vendor in Kalgoorlie would use the services of a real estate agent from Albany to sell a property in Kalgoorlie no matter what commission benefits or other services might be offered by the Albany agent. It is submitted that the primary motivating factor for the users of real estate or business agency services is to achieve the highest and quickest sale or lease possible. That aim is most obviously satisfied by using an agent with a local knowledge. Consequently, sellers of real estate and businesses use agents who operate locally. However, as set out in paragraph 3.6.2 above, the short-term requirements of sellers and the effect this has on the defining of the market with localised characteristics does not mean that, in the longer term, agents are themselves presented with any barriers to setting up businesses in those local areas.
- 3.8 Support for the view that the appropriate definition of the relevant market in this case is one that is local in character is found in the recent ACCC determination with respect to and application for authorisation by *The Estate Agents' Co-operative Limited* in relation to its multiple listing service (dated 26 April 2000. Authorisation No A90678).

In that authorisation application, the Estate Agents' Co-operative Limited ("the EAC") argued that the relevant market for the provision of real estate agency services in New South Wales was state-wide. The ACCC considered that the "practical field of rivalry" between real estate agents (in applying the concepts outlined in *Re Queensland Co-Op Milling Association Ltd and Defiance Holdings Ltd* (supra) referred to in paragraph 3.2.2 above) and, therefore, the relevant market, was much narrower than that claimed by the EAC. The ACCC regarded the field of rivalry between real estate agents as being highly localised. The ACCC found that the market for real estate agency services for the sale of residential properties in New South Wales was characterised by the large number of small, local real estate agencies. There were considerable practical constraints on the ability of these real estate agencies to compete across a wide geographic area. Since most real estate agents in New South Wales market properties primarily by personally showing potential buyers through the property, real estate agents are unlikely to market many properties that are too far away from their office to enable them to offer such a personalised service. For the same reason, vendors of residential property are unlikely to seek the marketing services of real estate agents that are located a long distance from their property. The ACCC also noted that the market for residential real estate itself in New South Wales has highly localised characteristics. The nature, quality and price of residential properties varies considerably from region to region and even from suburb to suburb. Vendors are likely, therefore, to value highly the expertise of local real estate agents and are unlikely to seek the services of a real estate agent that has little experience selling property in the vendor's location. The ACCC found that before a state-wide market definition could be accepted, it would need to be convinced that, as a matter of commercial reality, real estate agencies across New South Wales from Eden to Broken Hill and Byron Bay compete directly with each other for the listing and sale of residential properties across New South Wales. (See *Re The Estate Agents' Co-Operative Ltd* (Authorisation No A9068 dated 26 April 2000) at pp 16 - 17).

It is submitted by REIWA that identical considerations apply when identifying the relevant markets in Western Australia as applied when the relevant markets in New South Wales were considered. As set out in paragraph 3.14 below, as with New South Wales, the markets for real estate agency services for the sale of residential properties in Western Australia are characterised by a large number of small local real estate agency businesses.

- 3.9 Whether or not the relevant market for the provision of real estate services is the whole of Western Australia, with various local submarkets, or, alternatively, local geographical areas within Western Australia, probably does not have great effect upon the matters the subject of these submissions. Further, there is no doubt that, geographically, REIWA provides services to members that operate throughout Western Australia. It is emphasised that the REIWA Articles, the Code and MLS By-laws do not impose any barriers to entry into the market.
- 3.10 In addition to geographic based markets, it is submitted that various specialty markets exist within Western Australia for the delivery of agency services. These include markets for rural services, commercial property services, business broking and leasing.
- 3.11 In Western Australia licensed agents, including members of REIWA are in competition with each other to provide real estate and business agency services to members of the public. The way in which licensed agents and members of REIWA compete include:
- (i) providing a better and more comprehensive level of service to members of the public and, in particular, more effective and more innovative marketing and promotion services for the sale and leasing of properties and the sale of businesses on behalf of members of the public;