

conjunctional agent to the listing agent. On making a conjunctional agreement, the conjunctional agent becomes a sub-agent of the listing agent.

REIWA submission

6.8 Generally, REIWA stated that conjunctional agreements arise when non-listing agents who know of a potential purchaser contact the listing agent. It noted that the use of conjunctional agents for leasing was very rare.⁶⁷

6.9 REIWA referred to an obligation of agents to act in the best interests of their principals except where it would be unreasonable or improper to do so. It submitted that accordingly, listing agents were required in most circumstances to enter into conjunctional agreements when approached by non-listing agents.⁶⁸

6.10 REIWA submitted that the use of conjunctional agreements adds to competition in the real estate market and enables property and businesses to be sold and leased with greater efficiency.⁶⁹ In particular, the existence of conjunctional agents places greater competitive pressure on listing agents to quickly and efficiently find purchasers than would otherwise be the case.⁷⁰

6.11 REIWA further considered that the use of conjunctional agreements increases the efficacy and public benefit associated with the exclusive agency agreement system. In particular, the use of conjunctional agents maximises the exposure of vendors and properties or businesses to numerous agents.⁷¹ Conjunctional agreements also give purchasers an effective method of accessing a wide range of properties.⁷²

6.12 REIWA added that the use of conjunctional agreements is particularly significant for the Multiple Listing System (MLS). Of the 13,619 properties sold in Perth with MLS between 1 July 1999 and 29 February 2000, 31 per cent were sold using conjunctional agreements.⁷³

6.13 Finally, given the importance of conjunctional agreements, REIWA considered there was a substantial public benefit in ensuring that the system operates clearly and efficiently. In particular, it would not be in the interests of vendors or purchasers for agents to be embroiled in disputes with each other over the terms of conjunctional agreements or for non-listing agents to be reluctant to enter into conjunctional agreements because of the potential for disputes or because the system is unwieldy. REIWA noted that over 90 per cent of arbitrations conducted by REIWA concern disputes between agents regarding the terms of conjunctional agreements.⁷⁴

⁶⁶ That is, the agent authorised by the principal to sell the property.

⁶⁷ REIWA submission, 17 July 2000, paragraphs 6.2-6.3.

⁶⁸ Ibid, paragraph 1.6.2.

⁶⁹ Ibid, paragraph 1.6.2.

⁷⁰ Ibid, paragraph 6.12.

⁷¹ Ibid, paragraph 5.19.

⁷² Ibid, paragraphs 6.1 and 6.10.

⁷³ Ibid, paragraphs 6.4 and 6.11.

⁷⁴ Ibid, paragraph 6.13.

Interested party submissions

6.14 The Board⁷⁵ supports the use of conjunctional arrangements because they allow greater flexibility for customers and increase the likelihood of a sale.

6.15 The Board noted that its Code of Conduct effectively requires listing agents to accept conjunctional arrangements. However, in practice, conjunctional arrangements are not always accepted by listing agents because they are reluctant to share the commission. Also, since fees were deregulated, the fee payable to conjunctional agents has been reduced which may act as a disincentive to act as a conjunctional agent in some suburbs.

6.16 The Board further submitted that conjunctional arrangements and the subsequent resolution of fees are a source of industry disputes and that progress towards a standard industry method of dealing with conjunctional arrangements would assist all parties.

6.17 The Law Society of Western Australia (LSWA) considered that many of the claimed benefits of the conjunction system were properly referable to the fact that they mitigate unwelcome features of the exclusive agency system; that is, they expose vendors to a larger market than would otherwise occur with an exclusive agency. To the extent that the Commission was minded to allow exclusive agency arrangements, the LSWA considered that the conjunctional agreement system was useful as it facilitated competitive activity and conferred benefits on the public.⁷⁶

6.18 Mr Patrick Grogan, a Western Australian real estate agent, submitted that, since fee deregulation, conjunctional agents sometimes receive as little as 20 per cent of the fee, which has resulted in conjunctional agents bypassing certain properties in favour of ones where the fee-split is more equitable. He considered this was a widespread problem.⁷⁷

Conclusion

6.19 The scope of REIWA's application for authorisation does not extend to determining whether conjunctional agreements *per se* provide a public benefit outweighing any associated public detriment. The Commission has only been asked to consider whether the rules in the Codes regulating the making of conjunctional agreements by REIWA members provide a net public benefit. However, it is relevant to this issue to note that conjunctional agreements play a significant and beneficial role in the Western Australian real estate industry, particularly given the high incidence of exclusive agency agreements. Consequently, the Commission would be concerned if any provisions in the Codes restricted the use or effectiveness of conjunctional agreements.

Fee negotiation

6.20 Listing agents are free to negotiate:

- the fee for a sale or lease with the vendor or lessor both as to the method of calculation and amount; and

⁷⁵ Board submission, 27 September 2000, pages 7-8.

⁷⁶ Law Society of Western Australia submission, 12 October 2000, page 2.

⁷⁷ Submission, 22 August 2001, page 2.

- the sharing of the fee with conjoining agents.

Conclusion

6.21 Generally, the Commission considers that any attempt by an industry association or group of businesses to set or restrict prices constitutes a significant public detriment. Given that the real estate industry has been associated with price restrictions in the past, the Commission considers that there is a public benefit flowing from the above provision, albeit one that is diminishing with the passage of time. It notes that, unlike REIWA's standard agency agreements which contain an equivalent provision to the above, vendors/lessors are unlikely to read the Codes.

Relations between agents, vendors/lessors and purchasers/lessees

6.22 The Codes provide that:

- agents entering into conjunctional agreements should ensure that all the conditions of that agreement are clearly agreed. Unless otherwise agreed, the onus is on:
 - listing agents to propose the terms of the agreement to conjunctional agents; and
 - conjunctional agents to prepare a written agreement.
 - *REIWA submission*: REIWA submitted that these provisions are designed to avoid vagueness with respect to the terms of conjunctional agreements and thereby avoid disputes;⁷⁸
- unless otherwise agreed, if an agent has a prospective purchaser or lessee and requests the listing agent to conjoin, the prospective purchaser or lessee must be first identified to the listing agent;
 - *REIWA submission*: REIWA submitted that this provision aims to avoid any disputes about whether or not the listing agent had earlier contact with the prospective purchaser and introduced that person to the property. It stated that the requirement is often determinative of whether a conjunctional agent is entitled to a fee or not;⁷⁹
- unless otherwise agreed, conjunctional agreements remain in force with respect to the prospective purchaser or lessee until the listing agent's authority to sell or lease the property or business expires;
 - *REIWA submission*: REIWA submitted this provision avoided the potential for disputes caused by uncertainty about when a conjunctional agreement expires. In particular, if such uncertainty exists, it might be possible for a listing agent to argue that a conjunctional agent is not entitled to a fee because the agreement expired after a prospective purchaser was introduced to a property but before the contract for sale was signed;⁸⁰

⁷⁸ REIWA submission, 17 July 2000, paragraph 6.14.2.

⁷⁹ Ibid, paragraph 6.14.3.

⁸⁰ Ibid.

- listing agents should agree to act in conjunction with fellow agents unless satisfied that this is not in the best interests of the vendor or lessor;
 - *REIWA submission*: REIWA submitted that this encourages the use of conjunctional agreements;⁸¹
- unless otherwise agreed or if the vendor or lessor approaches the conjunctional agent, the conjunctional agent is precluded during the term of a conjunctional agreement from approaching the vendor or lessor for a listing of the property or business;
 - *REIWA submission*: REIWA submitted that it would be a breach of the conjunctional agent's fiduciary duties to the listing agent to approach the vendor/lessor directly. It further noted that the provision was consistent with vendors' choosing to enter an exclusive agency agreement and thereby deal with one agent only.⁸²

The Commission's Draft Determination raised concerns about whether this provision was necessarily in the best interests of vendors/lessors. In response,⁸³ REIWA proposed to replace the provision with provisions:

(i) prohibiting conjunctional agents breaching their common law duty of fidelity to listing agents including, unless agreed to the contrary, a requirement that conjunctional agents not use for their own personal benefit, to the detriment of the listing agent, information acquired in the course of their employment as the conjunctional agent; and

(ii) entitling conjunctional agents to make direct contact with vendors, both during and after the period of the conjunctional agreement, but requiring that all offers to purchase the relevant property must be either put to the vendor through the listing agent or, alternatively, the listing agent must be informed by the conjunctional agent of the fact of such an offer being put to the vendor prior to the vendor's acceptance of that offer.

REIWA submitted that suggested provision (i) reflects the common law duty upon a conjunctional agent that already exists and make it clear to agents what their obligations in this respect are. This minimises the risk of disputes arising between agents. Provision (ii) ensures that the interests of a vendor are protected.

REIWA noted that a conjunctional agent's duty of fidelity to a listing agent includes not misusing the relationship so as to gain advantage for the sub-agent at the detriment of the principal agent. It considered that making direct contact with a vendor during the currency of the conjunctional agreement would appear to breach that fiduciary duty.

REIWA also highlighted practical dangers associated with allowing conjunctional agents to present offers to vendors directly. In particular, it noted that vendors usually provide listing agents with a large amount of information and discuss various issues,

⁸¹ Ibid.

⁸² Ibid.

⁸³ REIWA submission, 29 August 2001, pages 13-15.

such as any special conditions that might need to be placed on the final contract. Very often, the conjunctive agent will not have been privy to this information. Further, a conjunctive agent will often not be aware of other offers or potential offers. Consequently, unless a conjunctive agent presents a particular offer to a vendor through the listing agent or, at the very least, with reference to the listing agent, there is a danger that the interests of the vendor will not be served (for example, the best sale price will not be obtained);

Interested party submissions: The Board submitted that it was aware of occasional situations where a listing agent had withheld a conjunctive agent's offer so as to avoid sharing the commission. While tempted to support allowing conjunctive agents to contact vendors directly, it considered that the common law situation should be maintained.⁸⁴

The Real Estate Employers' Federation of Western Australia (REEFWA) submitted that allowing conjunctive agents to approach vendors directly was impractical given that listing agents would generally have a better understanding of the vendor's needs. It added that the main concern of conjunctive agents was whether their offers had been put to the vendor. It proposed that this could be addressed by having listing and conjunctive agents jointly present offers.⁸⁵

Mr Patrick Grogan, a Western Australian real estate agent, submitted that, in his experience, real estate sales staff are largely not properly supervised or trained. Consequently, it would not be in the public interest to allow such staff to liaise with another agent's vendor, given that vendors rely on agents to prepare the necessary contractual documentation. He proposed that agents not be permitted to put proposals in writing to another agent's vendor without that agent's permission.⁸⁶

The Real Estate Institute of Victoria submitted that conjunctive agents were generally closer to the purchaser than the vendor and therefore it was essential that the listing agent be present at negotiations between buyer and seller or at least be notified of them. Further, particularly in a strong market, a conjunctive agent may not be aware of all available offers for a property.⁸⁷

- unless otherwise agreed or if the prospective purchaser or lessee the subject of the conjunctive agreement approaches the listing agent, during the term of a conjunctive agreement, the listing agent must not directly contact that purchaser or lessee;
 - *REIWA submission:* REIWA submitted that, without this rule, the position of the conjunctive agent would be undermined. In addition, the potential for disputes as to whether the conjunctive agent had introduced the purchaser or lessee would be increased, which would reduce the commercial attractiveness of conjunctive agreements.⁸⁸ Further, the provision prevents purchasers from having to deal with multiple agents. REIWA also noted that listing agents have a commercial incentive to

⁸⁴ Board submission, 27 November 2001, page 2.

⁸⁵ Record of pre-decision conference, 31 August 2001, page 14.

⁸⁶ Submission of 28 August 2001.

⁸⁷ Record of pre-decision conference, page 13.

⁸⁸ REIWA submission, 17 July 2000, paragraph 6.14.4.

assist conjunctive agents and would likely be in breach of the requirement in the statutory Code of Conduct to act in the best interests of their clients if they didn't.⁸⁹

- *Board submission*: The Board noted that, under this provision, the conjunctive agent would be performing the marketing and liaison work. It submitted that it was difficult to conclude whether or not this assisted the conjunctive process. A possible risk to the purchaser was that the conjunctive agent was not as familiar with the property as the listing agent;⁹⁰
- unless otherwise agreed, conjunctive agents must conduct negotiations with the vendor or lessor through the listing agent;
 - *REIWA submission*: REIWA highlighted that the listing agent owes the principal fiduciary duty to the vendor/lessor and submitted that this rule ensures the listing agent is properly able to exercise care in acting for the vendor/lessor. The rule also ensures that negotiations are conducted in an orderly manner;⁹¹
- listing agents must within 24 hours of receiving an offer from a conjoining agent, present it to the vendor or lessor and notify the conjoining agent that the offer has been presented. The listing agent must provide an explanation to the conjoining agent if an offer is not presented within 24 hours. If an offer is rejected, the listing agent must return it to the conjoining agent with written notification of the rejection signed and dated by the vendor or lessor;
 - *REIWA submission*: REIWA submitted that this rule protected the interests of vendors, lessors, purchasers and lessees;⁹²
 - *Board submission*: The Board noted that its Code of Conduct requires agents to present offers to clients as soon as possible. It considered the above provision benefited vendors by defining 'as soon as possible'.⁹³

General REIWA submission

6.23 Generally, REIWA submitted that the provisions outlined above are designed to facilitate the orderly use of conjunctive agreements. It also highlighted that, as appropriate, the provisions were made subject to the right of agents to agree to the contrary. It considered that the provisions avoided costly disputes, lower business costs and advance the public benefit arising out of exclusive agencies and conjunctive agreements.⁹⁴

Conclusion

6.24 Subject to the following conditions, the Commission considers that the provisions outlined above provide a public benefit that outweighs any public detriment by facilitating

⁸⁹ REIWA submission, 7 December 2000, paragraph 17.

⁹⁰ Board submission, 27 September 2000, page 8.

⁹¹ REIWA submission, 17 July 2000, paragraph 6.14.6.

⁹² Ibid, paragraph 6.14.7 (see also 7 December 2000 submission at paragraph 18).

⁹³ Board submission, 27 September 2000, page 8.

⁹⁴ REIWA submission, 17 July 2000, paragraph 4.3.3.

the effective and efficient operation of the conjunctive agreements system. The conditions are that:

- the relevant paragraph of Clause 4.2(a) be replaced with provisions:
 - (i) prohibiting conjunctive agents breaching their common law duty of fidelity to listing agents including, unless agreed to the contrary, a requirement that conjunctive agents not use for their own personal benefit, to the detriment of the listing agent, information acquired in the course of their employment as the conjunctive agent; and
 - (ii) entitling conjunctive agents to make direct contact with vendors, both during and after the period of the conjunctive agreement, but requiring that all offers to purchase the relevant property must be either put to the vendor through the listing agent or, alternatively, the listing agent must be informed by the conjunctive agent of the fact of such an offer being put to the vendor prior to the vendor's acceptance of that offer;
- Clause 4.4 (requiring negotiations by conjunctive agents with vendors to be conducted through listing agents) be made subject to the above-mentioned new clause;
- the first paragraph of Clause 4.2(a) be amended to prevent a listing agent who has been informed of a prospective purchaser by a prospective conjunctive agent from approaching that purchaser if a conjunctive agreement is not subsequently entered into, unless the listing agent has previously introduced the purchaser to the relevant property;
 - the Commission considers that this amendment would complement and strengthen the existing requirement for listing agents to enter into conjunctive agreements unless they consider that this would not be in the interests of the vendor;
- Clause 4.2 (b) is replaced with a provision prohibiting a listing agent from approaching the prospective purchaser/lessee the subject of a conjunctive agreement unless:
 - the conjunctive agent is informed of the matters to be raised with the purchaser/lessee beforehand; or
 - otherwise agreed by the listing and conjunctive agent; or
 - the purchaser/lessee approaches the listing agent.

6.25 This last provision allows contact between a listing agent and purchaser – which may, in some circumstances, be to the benefit of the vendor/lessor and purchaser – without undermining the position of the conjunctive agent or creating doubt about who introduced the purchaser to the property.

Reasonable contact with purchaser/lessees⁹⁵

⁹⁵ Clause 5.

6.26 A listing or conjunctual agent who intends to claim a fee on the basis of introducing a prospective purchaser or lessee to the property or business must ensure that reasonable contact is maintained with that prospective purchaser or lessee. The Codes state that 'reasonable contact' includes, but is not limited to, when reasonably practical:

- for the sale or lease of a property, communicating with the prospective purchaser or lessee at least once in the 14 days before the contract is entered into;
- for the sale or lease of business, communicating with the purchaser or lessee at least once in the 28 days before the contract is entered into; and
- carrying out at least one inspection of the property or business concerned with the prospective purchaser or lessee.

6.27 Unless agreed otherwise, in addition to maintaining reasonable contact, conjunctual agents must perform the following tasks to claim a fee:

- introduce the purchaser or lessor to the property or business; and
- provide the listing agent with the name of the purchaser or lessor.

*REIWA submission*⁹⁶

6.28 Generally, REIWA submitted that the provision ensures that agents provide a minimum level of services to purchasers. It further submitted that the rule as it relates specifically to conjunctual agreements helps ensure the orderly working of the conjunctual agreement system.

*Board submission*⁹⁷

6.29 The Board supports the provisions because they encourage good service and communication with clients.

Conclusion

6.30 The Commission notes that generally agents are entitled to a commission where their introduction of the purchaser to the property is the effective cause of the sale. It accepts that the provisions above assist in establishing whether an introduction was the effective cause of the sale. Accordingly, they provide a public benefit by reducing the potential for disputes between agents and vendors/lessors, and between listing and conjunctual agents, on this issue.

Conflicts of interest⁹⁸

6.31 The Codes require agents to comply with the REBA Act and the *Code of Conduct for Agents and Sales Representatives* made under that legislation, in relation to conflicts of interest.

⁹⁶ REIWA submission, 17 July 2000, paragraph 4.3.4.

⁹⁷ Board submission, 27 September 2000, page 9.

⁹⁸ Clause 7.

Conclusion

6.32 To the extent that the conflict of interest provisions of the Act provide a public benefit, the Commission is satisfied that the Code's provision also provides a public benefit.

Advertising⁹⁹

6.33 Advertising must clearly show the agent's full trading name and telephone number. All advertising or marketing materials must display the agent's business name, address or telephone number and any other corporate identification with greater prominence than the names and telephone numbers of sales representatives and other employees of the agent.

*REIWA submission*¹⁰⁰

6.34 REIWA submitted that this provision provided a public benefit because it assisted in preventing dummy licensing (see paragraph 5.46). In particular, allowing advertisements to give greater prominence to unlicensed agency employees would assist unlicensed persons who wished to operate a real estate agency through a licensed figurehead. Consequently, it considered that the provision provides a public benefit by protecting consumers.

6.35 REIWA added that it wishes to prohibit dummy licensing to ensure that its reputation is not diminished by members who breach the REBA Act and to reinforce its role as a self-regulator. Indeed, it claimed it would be in an impossible situation if it could not prohibit breaches of the REBA Act.

6.36 REIWA also considered that the provision produced a public benefit by enabling consumers to ascertain who was behind an advertisement or other promotion so as to enable them to make complaints about that person if they wished.

Conclusion

6.37 Generally, the Commission considers that advertising restrictions, other than a requirement that advertisements not be misleading or deceptive, are likely to produce a public detriment. As long as it is honest and accurate, advertising contributes to consumers' ability to make a genuine and informed choice about goods or services. The Commission also notes that the REBA Act only requires advertisements to contain such details as are sufficient to identify agents and does not impose any requirements relating to the prominence to be given to these details.¹⁰¹ The Commission further considers that the issue of dummy licensing is adequately addressed by other REIWA provisions. Consequently, it considers that the requirement that advertisements display the agent's details with greater prominence than the agent's employees produces public detriment outweighing any public benefit.

⁹⁹ Clause 8.

¹⁰⁰ REIWA submission, 17 July 2000, paragraphs 12.2-12.5.

¹⁰¹ REBA Act, section 62(2).

Signs¹⁰²

6.38 An agent must not erect a standard managing agency sign on a strata titled building or common property unless the agent manages all of the managed properties and/or businesses in that complex.

REIWA submission

6.39 REIWA submitted that this provision provided a public benefit by ensuring consumers were not misled about the extent of an agent's authority in relation to the management of strata-titled properties.¹⁰³

6.40 In its Draft Determination, the Commission considered that the provision gives rise to a public detriment because it may prevent an agent informing the market of the extent of its management role in relation to a strata-titled building where the agent does not manage all properties in that building. In response, REIWA proposed to remove the provision.¹⁰⁴

Conclusion

6.41 Given the proposed removal of the provision, no concerns arise.

Conduct of agents¹⁰⁵

6.42 The Codes require members to:

- act in the best interests, and in accordance with instructions, of the principal except where it would be unreasonable or improper to do so;
- act fairly and honestly;
- not knowingly engage in misleading or deceptive conduct;
- not engage in harsh or unconscionable conduct; and
- exercise due skill, care and diligence.

REIWA submission

6.43 REIWA submitted that these provisions provide a public benefit by protecting consumers.¹⁰⁶

Board submission

6.44 The Board noted that the provisions appeared to accurately reflect the requirements of the statutory Code of Conduct.¹⁰⁷

¹⁰² Clause 9.

¹⁰³ REIWA submission, 17 July 2000, paragraph 14.4.

¹⁰⁴ REIWA submission, 30 August 2001, page 15.

¹⁰⁵ Clause 10.

¹⁰⁶ REIWA submission, 17 July 2000, paragraph 4.3.8.

Conclusion

6.45 The Commission accepts REIWA's submission on this matter.

¹⁰⁷ Board submission, 27 September 2000, page 9.

7. THE MULTI-LISTING SERVICE

7.1 The MLS is a system of marketing properties (not businesses¹⁰⁸) whereby details of properties for sale are provided to all eligible agents (MLS agents). Details of properties listed with MLS¹⁰⁹ are included in the *Homebuyer* (a REIWA property sales publication) and published on the REIWA internet site.¹¹⁰

ARTICLES OF ASSOCIATION

7.2 The Articles establish the MLS.¹¹¹ They also empower the Council to make such by-laws as it considers necessary for the operation of the MLS. These are considered separately below.

7.3 The Articles also provide that Ordinary and Corporate Members of REIWA are entitled to use the MLS provided they have paid the relevant fees. There are no other eligibility criteria.

*REIWA submission*¹¹²

7.4 REIWA submitted that the MLS is a popular method of selling property in Western Australia – indeed, 32.7 per cent of property sales in the Perth metropolitan area between 1 July 1999 and 29 February 2000 were made using MLS. However, this proportion varies within Perth. More sales are made using MLS in the middle to lower price ranges and in locations where there are a large number of home unit sales.

7.5 REIWA further submitted that:

- 61 per cent of REIWA members are MLS agents;
- the average time a property took to sell through MLS in the six months to December 1999 was 44 days;
- during the period from 1 July 1999 to 29 February 2000, 31 per cent of properties sold through MLS were sold using conjunctural agreements; and
- MLS operates in a number of country areas, including Mandurah, Geraldton, Bunbury and Albany.

7.6 REIWA stated that it provided significant financial support and subsidisation of the MLS. It estimated this support to be worth \$462,000 per annum. REIWA's net income from the MLS has varied in past years between \$70,000 and \$200,000. In 1999-2000, the MLS ran at a \$20,000 loss. In addition, REIWA estimated that if the MLS were operated by an organisation solely responsible for this activity, running costs would rise to \$600,000 per

¹⁰⁸ Clause 9, MLS By-Laws.

¹⁰⁹ This is not mandatory for properties in specified country areas; clause 11.

¹¹⁰ www.reiwa.com.au

¹¹¹ Article 43.

¹¹² REIWA submission, 17 July 2000, Chapter 7; see also paragraph 4.2.8.

annum. It therefore submitted that the financial viability of the MLS depended on it being run by REIWA.

7.7 REIWA also submitted that:

- its involvement allows users to benefit from its internet site, its system of security boxes for enabling agents to gain access to properties and the substantial institutional 'back-up' it provides (e.g. legal services, professional rules and regulations, standard documents and forms, education and training); and
- its *Homebuyer* magazine is the lynchpin of the MLS.

7.8 Given all the above, REIWA submitted that, while the MLS is limited to REIWA members, REIWA resources effectively allow the system to exist. Moreover, any anti-competitive effect from limiting MLS to REIWA members is reduced because 85 per cent of Western Australian real estate agents are members of REIWA and there is no substantial barrier to other agents joining REIWA. In addition, REIWA submitted that non-REIWA members could still enter into conjunctional agreements with respect to MLS properties.

7.9 REIWA submitted that MLS is, in principle, an extension and rationalisation of the conjunctional selling system. As such, it extends the general public benefits obtained through the conjunctional agreements system by providing a centralised, cohesive and well-resourced method of marketing properties. Both buyers and sellers are therefore exposed to very large numbers of agents, which enhances market efficiency and increased competition.

7.10 REIWA submitted that MLS fees (as at 17 July 2000) were \$105 per month for each office using the service, \$10 per month for each registered sales representative in an office using the service and \$6 for each listing lodged with the service. REIWA submitted that these fees cover administrative expenses only and are not set by reference to any goodwill or value obtained by agents from using MLS. Consequently, it considered that there was no fee barrier to agents' using MLS.

Interested party submissions

7.11 The Board considered that the MLS:

- assists small business by providing contracts and guidelines for agents to cooperate in sharing information and by putting more vendors and purchasers in contact with one another;
- provides an additional option for owners selling their property;
- dominates the middle-to-lower income range of property; and
- provides substantial income for REIWA (\$1 219 000 or 11% of total revenue).

7.12 However, the Board also noted that access to the multiple listing sales market is reduced as non-REIWA members are precluded from the MLS.¹¹³

¹¹³ Board submission, 27 September 2000, page 10.

Commission conclusion

7.13 The Commission is satisfied that systems like REIWA's MLS improve the method of selling properties through exclusive agency and conjunctional agreements, thereby improving competition in the market for selling and leasing properties.

7.14 Access to the MLS is a significant benefit of REIWA membership. Consequently, any significant and inappropriate barrier to accessing the MLS could produce public detriment. However, as indicated above, the Commission is satisfied that REIWA's membership processes produce minimal public detriment. Further, the only pre-condition to using the MLS other than possessing REIWA membership is to pay a fee based on the administrative costs of the scheme. Consequently, the Commission is satisfied that the eligibility requirements for accessing the MLS produce minimal public detriment.

7.15 Overall, the Commission is satisfied that establishing a multiple listing service like REIWA's potentially produces a net public benefit. However, the actual public benefit and detriment from REIWA's MLS also depend on the terms of the MLS by-laws, which are considered below.

MLS BY-LAWS

7.16 Those aspects of the MLS by-laws potentially raising significant public benefit and detriment issues are discussed below.

MLS listings and conjunctional agreements¹¹⁴

7.17 Two types of listing are accepted for MLS:

- **Multi-List Exclusive Agency Agreements.** Listing a property with MLS using this agreement amounts to a unilateral offer by the listing agent to all other MLS agents to enter into conjunctional agreements; and
- **Exclusive Plus Agency Agreements.** Listing a property with MLS using this agreement does not amount to a unilateral offer. However, listing agents may agree to enter into conjunctional agreements with MLS agents if they so wish.

7.18 For either type of agreement, MLS agents may enter into conjunctional agreements with non-MLS agents (including non-REIWA members).

7.19 Unless otherwise agreed, an MLS agent is deemed to have accepted a listing agent's unilateral offer made via a Multi-List Exclusive Agency Agreement and is entitled to a conjunctional fee where he or she:

- introduces the purchaser to the property;
- carries out at least one valid inspection of the property with the purchaser before the purchase contract is entered into; and

¹¹⁴ Clause 2.

- communicates with the purchaser at least once in the 14 day period before the contract is entered into.

7.20 Where a listing agent enters into a conjunctional agreement with an MLS agent or a member of REIWA who is not a MLS agent in respect of a property the subject of an Exclusive Plus Agency Agreement, unless otherwise agreed, the MLS agent shall be entitled to a conjunctional fee where he or she:

- introduces the purchaser to the property and provides the listing agent with the name of the purchaser;
- carries out at least one valid inspection with the purchaser before the purchase contract is entered into; and
- communicates with the purchaser at least once in the 14 day period before the contract is entered into.

REIWA submission

7.21 REIWA submitted that restricting the MLS to certain exclusive agency agreements was inherently necessary given that the whole purpose of the MLS was to establish a formalised manner in which conjunctional sales are used in association with exclusive listings. In addition, any anti-competitive effect from this restriction was lessened substantially by the fact that:

- there is substantial competition between agents to obtain exclusive listings;
- there is substantial competitive pressure on agents to sell properties during the period of the exclusive listing; and
- listing agents are effectively required to enter into conjunctional agreements.¹¹⁵

7.22 REIWA submitted that the provisions above stipulating what an MLS agent must do to obtain a conjunctional fee were similar to provisions in the Codes stipulating what a conjunctional agent must do to be entitled to a fee (see paragraphs 6.26-27). As such, similar public benefits flowed. In particular, the provisions minimised the chance of disputes occurring and ensured clients received a minimum level of service. REIWA also noted that the provisions did not seek to dictate the terms of conjunctional agreements to agents, as it was open to agents to agree to different terms than those set out in the MLS by-laws.¹¹⁶

Interested party submission

7.23 The Board submitted that the MLS reduces disputes between agents in conjunctional deals as the terms of the agreement are understood.¹¹⁷

Conclusion

¹¹⁵ REIWA submission, 17 July 2000, paragraphs 7.27 and 7.31.

¹¹⁶ Ibid, paragraphs 7.23 and 7.30.

¹¹⁷ Board submission, 27 September 2000, p10.

7.24 The Commission is satisfied that any public detriment flowing from the above provisions does not outweigh the public benefits produced by the MLS identified at paragraphs 7.13-15. Further, the MLS by-laws governing when an MLS agent is entitled to a fee provide an additional public benefit by reducing the potential for disputes.

Provision of information to vendors

7.25 Listing agents are required to:¹¹⁸

- provide vendors with complete and accurate information about MLS;
- ensure that the vendor has read and fully understands the listing agreement and the fact that it is an enforceable agreement, before the vendor signs it;
- explain to the vendor his or her fee liability if the property is sold;
- maintain contact with the vendor during the period of the listing agreement; and
- make it clear to vendors that other agents may share in the selling fee should a conjunctional agreement be entered into.

Conclusion

7.26 The Commission is satisfied that the provisions above provide a public benefit by requiring vendors to be provided with relevant information, particularly about their rights and responsibilities under MLS.

MLS listing agreements¹¹⁹

7.27 Listing agreements to be used with MLS are to be in the form published by REIWA. These forms are for the use of MLS agents only.

7.28 In addition, information provided by the vendor that is contained in a listing agreement or appears in the Properties for Sale, but not information that also appears in the *Homebuyer*, is confidential and MLS agents are not to show or provide that information to any person not authorised by the vendor to receive it.

REIWA submission

7.29 REIWA submitted that the requirement that listing agreements be in a prescribed form ensured certainty and consistency, thereby reducing transaction costs. In addition, it submitted that the confidentiality requirements produce a public benefit because they guarantee that information vendors provide agents (for example, relating to security systems for a house) are not disclosed to unauthorised persons.¹²⁰

Conclusion

¹¹⁸ Clauses 3 and 4.

¹¹⁹ Clause 8.

¹²⁰ REIWA submission, 17 July 2000, paragraphs 7.24-7.25.

7.30 Restricting MLS listing agreements to MLS agents appears to create no significant public detriment given the agreements would only be relevant to these agents. The Commission agrees that the confidentiality provisions provide a public benefit as submitted by REIWA.

Advertising in the *Homebuyer*¹²¹

7.31 Properties listed with MLS (other than in specified country areas) must be advertised in the *Homebuyer* at least once.

REIWA submission

7.32 REIWA submitted that the *Homebuyer* is the linchpin of the MLS and that, without this requirement, much of the marketing advantage provided by the MLS would be lost.¹²²

Conclusion

7.33 The Commission accepts REIWA's submission on this matter.

¹²¹ Clause 11.

¹²² REIWA submission, 17 July 2000, paragraph 7.26.

8. STANDARD EXCLUSIVE AGENCY AGREEMENTS

8.1 REIWA has sought authorisation for several exclusive selling agency agreements and exclusive managing agent agreements.

*General REIWA submission*¹²³

8.2 Generally, REIWA submitted that, among other things:

- it does not compel the use of exclusive agency appointments. In fact, it also produces standard open agency agreements for residential land, vacant land and rural property;
- under an open agency agreement, agents have little incentive to commit significant time and resources to marketing a property because such a commitment would be wasted if a purchaser, for whatever reason, ultimately placed an offer through another listing agent;
- in contrast, exclusive agency agreements provide agents with the best incentive possible to endeavour to sell property and businesses vigorously. This incentive was increased by the facts that:
 - exclusive agency agreements are for a finite period, after which the agent is in danger of losing the right to market a property or business; and
 - agents could, in practice, be required to share a fee with a conjunctional agent unless they sell the property themselves first.

REIWA considered that, ultimately, using exclusive agency agreements increases the prospects of a sale, thereby creating a public benefit;

- there is significant competition between agents to obtain exclusive agency agreements, which benefits consumers;
- disputes about which agent introduced a purchaser to a property are inherently more likely in open agency listings than exclusive listings;
- virtually all property sales in Perth take place pursuant to exclusive agency agreements. However, it appeared that open listings were used more in country towns;
- this system was effective, as evidenced by the fact that substantiated complaints made against real estate agents amount to less than 0.5 per cent of residential real estate transactions; and
- the supply by REIWA of standard forms obviates the need for agents and vendors/lessors to negotiate individual contracts for each listing. This reduces transaction costs, ensures that the market functions in accordance with well-established practices and reassures consumers that they have the protection of contracts prepared by a reputable body such as a REIWA.

¹²³ Ibid, paragraphs 5.2-33 (see also submission of 7 December 2000, paragraphs 5-6).

Interested party submissions

8.3 The Board submitted that exclusive agency agreements were the most common form of contract signed with agents in Western Australia. It acknowledged that exclusive agency agreements are an important option for consumers and noted that, since they are more likely to receive a commission, exclusive agents are more likely to be committed to marketing a property vigorously and providing a high level of service. The Board also considered that the widespread use of REIWA's standard contracts assists consumers.¹²⁴

Conclusion

8.4 The scope of REIWA's application for authorisation does not extend to determining whether exclusive agency agreements provide a public benefit that outweighs any public detriment flowing from them. The application only extends to whether REIWA's standard exclusive agency forms provide a net public benefit. If authorisation was not granted to these forms and REIWA withdrew them, vendors/lessors and agents could still enter exclusive agency agreements, but would need to determine the terms of those agreements themselves or use some other standard form.

8.5 Having said this, the Commission recognises that the public benefit and detriment flowing from REIWA's standard exclusive agency forms needs to be assessed in light of the facts that:

- given the process for selling individual eg. residential properties is generally similar, it is inevitable that standard agreements between agents and vendors/lessors will be used so as to reduce transaction costs;
- while vendors/lessors, strictly speaking, may choose whether or not to use REIWA's standard forms, given that there appear to be no competing standard forms available, the Commission considers it inevitable that REIWA's forms will be extensively used in practice (as they appear to be);
- individual agents appear likely to continue to prefer exclusive listings, which suggests that these agreements will continue to be the primary mechanism through which properties and businesses are marketed in Western Australia; and
- given these considerations, any public benefit or detriment flowing from REIWA's standard exclusive agency agreements will, in practice, be significant.

EXCLUSIVE SELLING AGENCY AGREEMENTS

8.6 REIWA has sought authorisation for the following exclusive selling agency arrangements:

- Authority to auction, including provision for exclusive agency;
- Residential exclusive selling agency agreement;

¹²⁴ Board submission, 27 September 2000, page 10.

- Multi-list services selling agency agreement – residential (which can be used to reach Exclusive Plus Agency Agreements and Multi-list Exclusive Agency Agreements);
- Exclusive selling agency agreement for rural property;
- Exclusive selling agency agreement for commercial and industrial property; and
- Exclusive appointment of agent to sell a business.

8.7 Aspects of the exclusive selling agency agreements potentially raising significant public benefit and detriment issues are discussed below.

Term of agreement

8.8 Each agreement, apart from the authority to auction agreement, provides for the listing agent to have the exclusive right to sell a property for a period agreed between the vendor and the agent.¹²⁵ The authority to auction agreement provides for the agent to have the exclusive right to sell a property following an unsuccessful auction for a period to be agreed by vendor and agent.¹²⁶

8.9 Each exclusive agency agreement, except for the authority to auction agreement, provides for the agent to continue as a non-exclusive agent at the expiry of the exclusive rights period. The non-exclusive rights period is to be for one year or until terminated by the vendor in writing, which ever is the earlier.¹²⁷

REIWA submission

8.10 The Draft Determination expressed concern that automatic re-appointment as a non-exclusive agent for one year could depress competition. In response, REIWA agreed to alter its exclusive agency agreements to allow a vendor to elect whether or not to re-appoint a listing agent at the end of an exclusive rights period on a non-exclusive basis and, if so, to choose the remuneration that will be paid to that agent in those circumstances. It also agreed to alter its Authority to Auction standard agreement to make it clear that a vendor has a right to elect whether or not the listing agent will have an exclusive period to sell the property following the auction should the auction not succeed.¹²⁸

Conclusion

8.11 The Commission considers that any reference to a subsequent non-exclusive rights period in a standard exclusive rights agreement suggests that such a subsequent period is standard practice. Consequently, even if the existence of a subsequent period is negotiable, this inference would assist agents in gaining vendors' agreement to such periods. The Commission notes that subsequent non-exclusive rights periods would appear to prevent the vendor appointing a new exclusive agent at the end of the original agent's exclusive rights

¹²⁵ See clause 2 of the relevant agreements (clause 1 for the Exclusive Appointment of an Agent to Sell a Business).

¹²⁶ Clause 8.

¹²⁷ See clause 2 of the relevant agreements (clause 1 for the Exclusive Appointment of an Agent to Sell a Business).

¹²⁸ REIWA submission, 29 August 2001, pages 15-17.

period, thereby restricting competition. Consequently, it considers that there should be no reference in exclusive selling agency contracts to subsequent non-exclusive rights periods. Any such period should be negotiated separately. The Commission notes that the removal of this provision will require consequential amendments to other standard agreement provisions.

8.12 The Commission is satisfied that REIWA's proposed amendment to the Authority to Auction form addresses its concerns on this matter.

Fees

8.13 The exclusive selling agency agreements provide for an agent's selling fee to be agreed between the vendor and the agent.¹²⁹

8.14 Provision is made for the fee to be paid, among other things, in the following circumstances:¹³⁰

- if the property is sold or exchanged during the exclusive rights period. However, vendors can elect that if, during the exclusive rights period, they introduce the ultimate purchaser of the property, they do not have to pay a commission to the agent;¹³¹
- if the property is sold during the non-exclusive rights period where the buyer is introduced by the agent (except for authority to auction agreement);
- at any time a person introduced by the agent during the exclusive rights or non-exclusive rights periods contracts to buy the property, or gets another person or entity to buy the property or otherwise becomes a legal or beneficial owner of the property; and
- if, within 120 days (for agreements to sell a business the period is 180 days and for authority to auction the period is 90 days) of the end of the exclusive rights period the property is sold to a purchaser who was introduced to the property during the exclusive rights period or gets another person or entity to buy the property or otherwise becomes a legal or beneficial owner, whether the introduction was by the agent or not.

8.15 The exclusive selling agency agreements also provide that:

- the selling agent's fee is to be paid where a property is sold to the purchaser in the above circumstances but the sale is not completed owing to the fault of the vendor;¹³² and
- if at the end of an exclusive rights period, the vendor enters into a selling agency agreement with another agent, then the former agent is not entitled to a fee if the new agent is entitled to a fee and the last two conditions in paragraph 8.13 do not apply.¹³³

8.16 The Authority to Auction agreement provides that the fee for selling the property at auction is the same as the fee for selling the property after auction.¹³⁴

¹²⁹ Clause 3 of all agreements (clause 7 for the Authority to Auction Agreement).

¹³⁰ Clause 1 of the Exclusive Selling Agency Agreement Terms and Conditions.

¹³¹ See, for example, clause 3.2 of the Residential Selling Exclusive Agency Agreement.

¹³² Ibid.

¹³³ Ibid.

Draft Determination

8.17 The Draft Determination raised concerns that:

- fees could be payable when contracts are exchanged, rather than on settlement;
- given the reliance on the concept of an agent 'introducing' a purchaser to a property for assessing whether a fee is payable to the agent, it would be beneficial to define 'introduction' in the standard forms;
- vendors may be innocently unaware that a purchaser was introduced to the property during the exclusive rights period and, consequently, could be discouraged from selling their properties after the exclusive rights period has expired other than through an agent. It consequently proposed that that a fee should only be payable after the expiry of the exclusive rights period if the vendor acted unscrupulously in delaying accepting an offer purely for the purpose of avoiding paying a commission to the agent; and
- given that vendors may prefer that a property be sold at auction, they may wish to offer agents a higher fee for achieving this than they would for selling the property after auction. Accordingly, the Commission considered that it would be appropriate to allow different fee levels and for both fees to be negotiated.

REIWA submission

8.18 REIWA initially submitted that, without a provision requiring fees to be paid to agents after the expiry of the exclusive rights period in certain circumstances, unscrupulous vendors could delay accepting an offer until the exclusive rights period has expired purely for the purpose of avoiding paying a commission.¹³⁵

8.19 In response to the Draft Determination, REIWA agreed:¹³⁶

- that fees should be payable on settlement;
- to amend its Authority to Auction form to allow different fees to be paid to agents if the property is sold at or after an auction and to provide that these fees are negotiable;
- to include definitions of 'introduced' and 'introduction' in its exclusive agency agreements;
- to substitute the provision requiring fees to be paid to agents after the expiry of the exclusive rights period in certain circumstances with a provision entitling agents to a fee on a sale that took place outside of the exclusive rights period if:
 - the purchaser was introduced to the property during the exclusive rights period; and

¹³⁴ Clause 7, Authority to Auction Agreement.

¹³⁵ REIWA submission, 7 December 2000, page 10.

¹³⁶ REIWA submission, 29 August 2001, pages 16, 17, 19-23.

- the vendor elected in the agency agreement to be liable to pay a commission if a purchaser introduced during the exclusive rights period entered into a contract an agreed number of days after the expiration of the exclusive period.

8.20 REIWA further submitted that:

- the issue of vendors being innocently unaware that a purchaser was introduced to the property is not a practical problem. Nevertheless, if the concern remains, it could be addressed by requiring vendors selling a property personally after the expiration of an exclusive agency period to make contact with the agent who initially had the listing to enquire whether the potential purchaser had been introduced by the agent. The agent could then be required, both contractually and by operation of REIWA's rules of practice, to provide the information required to be sought by the vendor; and
- the Commission's proposal that a fee only be payable where the vendor acts unscrupulously would not be in the interests of consumers. In particular, given the risk that they could miss out on a fee, agents would be less inclined to refer new purchasers to properties in their portfolio where the exclusive rights period was well advanced. In addition, the provision would provide little protection to agents, as it would typically be very difficult to determine whether or not a vendor had acted unscrupulously. Moreover, the test would often lead to litigation between vendors and agents. REIWA submitted that this would not be in the interests of either the parties or the market as a whole.

Interested party submissions

8.21 Mr Patrick Grogan, a Western Australian real estate agent submitted that it would be unreasonable if agents were not to receive a fee simply because the sale was concluded just after the exclusive rights period had expired, given the work they would have put into marketing a property.¹³⁷

Conclusion

8.22 With one exception, the Commission is satisfied that the fee provisions above, amended as proposed by REIWA, would produce a public benefit outweighing any public detriment by providing agents with appropriate incentives to sell vendors' properties.

8.23 In particular, it is satisfied that it is appropriate to include some provision for agents to receive fees after an exclusive rights period expires where they introduced the purchaser during that period. Such a provision assists in ensuring that agents continue their efforts to sell a property as the end of an exclusive period draws near, which benefits vendors.

8.24 The Commission is satisfied that REIWA's proposed substitute provision on this matter produces minimal public detriment. Conceivably, different agents may be willing to accept different periods of time after the expiry of an exclusive rights period during which they would be entitled to receive a commission. The matter is therefore potentially one on which agents might compete and REIWA's proposed provision allows this to occur.

¹³⁷ Submission, 22 August 2001, page 1.

8.25 Finally, given REIWA's statement that it would be rare for vendors to be innocently unaware that a purchaser had been introduced to the property during the exclusive rights period, the Commission does not consider a public benefit would flow from requiring purchasers to check with their former listing agent about whether a purchaser had been introduced or not.

Marketing costs

8.26 The exclusive selling agency agreements require:¹³⁸

- require vendors/lessors and agents to agree on maximum marketing charges and expenses; and
- unless otherwise agreed, vendors to pay for all agreed marketing costs incurred by the agent whether or not the property is sold.

REIWA submission

8.27 In response to concerns raised in the Draft Determination that the above provisions did not give sufficient prominence to the option of vendors electing not to pay marketing costs, REIWA agreed to amend its standard forms to give principals the right to elect whether or not to pay marketing costs.¹³⁹

8.28 In response to proposals in the Draft Determination that vendors should be informed of agents' advertising requirements under the Members' Codes of Practice and not be required to pay for agents' meeting these requirements, REIWA agreed to amend its forms to:

- inform vendors that agents must meet certain requirements regarding the identification of their businesses in advertisements; and
- provide vendors with an option to negotiate whether or not they will pay for agents' complying with these requirements.

8.29 REIWA also pointed out that, in practice, complying with the Code's requirements benefits vendors because, for example, highlighting that a reputable agency is handling the sale can attract purchasers and provide a contact point for prospective purchasers.¹⁴⁰

Interested party submissions

8.30 Mr Patrick Grogan (a real estate agent) expressed concern at any proposal to prevent advertising costs being passed on to vendors, particularly given that vendors would expect that agents would identify themselves in advertisements so that purchasers had a point of contact. He proposed that the cost of displaying company logos in advertising be borne by the agent and that the cost of three lines of classified advertising type be borne by the vendor.

¹³⁸ See, for example, clause 4 of the Residential Exclusive Selling Agency Agreement. See also Clause 2 of the Exclusive Selling Agency Agreement Terms and Conditions.

¹³⁹ REIWA submission, 29 August 2001, page 24.

¹⁴⁰ *Ibid*, page 25 and Record of pre-decision conference, page 12.

Without such a compromise, he considered that marketing costs would be passed onto consumers through higher agents' fees.¹⁴¹

Conclusion

8.31 The Commission is satisfied that REIWA's proposed amendments address its concerns on this issue. In particular, it agrees that agents' obligations under the Codes benefit vendors and that there should therefore be scope for vendors and agents to agree that vendors pay some or all of the cost of meeting these obligations.

EXCLUSIVE MANAGING AGENT AGREEMENTS

8.32 REIWA has sought authorisation for the following exclusive managing rights agreements:

- Exclusive authority to act as managing agent for residential premises for short term/holiday accommodation;
- Exclusive authority to act as managing agent of residential premises;
- Exclusive appointment to act as agent manager of a strata company; and
- Exclusive authority to act as managing agent for commercial/industrial property.

8.33 Aspects of these agreements potentially raising significant public benefit and detriment issues are discussed below.

Term of agreement

8.34 The exclusive managing rights agreements provide for appointment of the agent for a term agreed between the owner and the agent. The agreements also provide that for an automatic 'holding over period'; that is they provide that, at the expiry of the agreed term, the arrangements are to continue on twenty-eight days' (one month for strata company agreements) written notice of termination.¹⁴²

REIWA submission

8.35 In response to concerns in the Draft Determination that automatic 'holding over' periods may not be appropriate in all cases, REIWA submitted that:

- many agreements, such as leases, provide for 'holding over' periods at the expiration of the initial term of the agreement. Their purpose is to prevent the situation arising where some sort of legal relationship continues but there is lack of certainty as to exactly what the terms of that continuing relationship are. Such situations could lead to unnecessary disputes and litigation;

¹⁴¹ Submission, 22 August 2001, pages 1-2.

¹⁴² See, for example, clause 3 of the Exclusive Authority to Act as Managing Agent of Residential Premises.

- managing agency agreements typically last for lengthy periods of time. A requirement whereby new contracts had to be entered into at the end of each fixed term would appear to be inconvenient for both parties. Further, holding over provisions frequently operate to the benefit of owners when, for example, they are overseas and fail to remember to renew the management authority; and
- it would amend the standard exclusive managing agent agreement to allow owners to elect whether or not the holding over provision will apply.

Conclusion

8.36 REIWA's proposed amendment satisfies the Commission's concerns on this matter.

Fees

8.37 The exclusive managing agent agreements provide for an agent's selling fee to be agreed between the vendor and the agent.¹⁴³

Conclusion

8.38 The Commission considers that this provision provides a public benefit as it informs consumers of their rights.

Indemnities

8.39 The managing rights agreements authorise the agent to undertake specific activities; for example, in relation to residential premises, select tenants, receive rents, engage and pay for all labour required to maintain premises, re-let the premises at the end of each tenancy if the premises are vacant; advertise the availability of the premises; deduct from sums due to the owner, all fees, charges, etc.¹⁴⁴

8.40 The agreements provide that the owner indemnifies the agent in relation to all matters arising from the managing agent authority.¹⁴⁵

REIWA submission

8.41 In response to concerns expressed in the Draft Determination that automatic indemnities could produce public detriment, REIWA submitted:

- that the indemnity provision applied where the agent was sued due to a cause of action linked to the property itself (e.g. fire through faulty wiring, personal injury caused by faults in a property), which is able to be covered by public liability insurance. This is different to where agents are sued because of their negligence, which is able to be covered by professional indemnity insurance;

¹⁴³ See, for example, clause 7 of the short term/holiday accommodation managing agent agreement.

¹⁴⁴ Clause 8, Exclusive Authority to Act as Managing Agent of Residential Premises.

¹⁴⁵ See, for example, clause 11 of the Exclusive Authority to Act as Managing Agent of Residential Premises. Under clause 7 of the management agreement for strata companies, the indemnity does not apply where the liability arises because of the agent's negligence or default under the agreement.

- given this, it is entirely fair that an owner in all cases indemnify an agent for such actions.

Conclusion

8.42 Given the indemnity applies to causes of action linked to the property of the owner, and that owners can sue managing agents if they have acted negligently, the Commission is satisfied that the indemnity provisions in the exclusive managing agency agreements do not result in a significant public detriment.

Termination of agreements

8.43 The management agreements for residential premises and for residential premises for short term/holiday accommodation may be terminated prior to the expiry of the period of agency:

- if the agent fails to substantially perform its obligations and such failure continues for twenty-eight days after a written notice of complaint on the matter is given by the owner to the agent; or
- if the owner or agent give at least 28 days' notice in writing to the other.¹⁴⁶

8.44 Strata companies may immediately terminate strata company managing agent agreements if:

- the agent breaches the *Strata Titles Act* or the REBA Act and fails to remedy the breach (if capable of remedy) within 14 days from being notified of the breach by the strata company;
- the agent breaches the agreement and fails to remedy the breach (if capable of remedy) within 7 days of being notified of the breach by the strata company; or
- the agent becomes insolvent or bankrupt.¹⁴⁷

8.45 Clients may immediately terminate a commercial/industrial property managing agent agreement if, among other things, the agent fails to perform any duty required under the agreement and this default is not remedied within thirty days of being notified of the failure by the client.¹⁴⁸

REIWA submission

8.46 The Draft Determination expressed concern that, in particular, managing agency agreements for residential and commercial property only allow termination where the agent fails to rectify a breach of the agreement within 28 days (30 days for commercial agreements). In response, REIWA submitted that lessors possess a right to earlier termination under the common law. However, it was also prepared to add clauses to the standard management agreement whereby:

¹⁴⁶ Clause 12(1) in each agreement.

¹⁴⁷ Clause 8.

¹⁴⁸ Clause 5.

- agents are required to act with due care and diligence; and
- owners are able to terminate a management agreement without giving notice should the agent breach the terms of the agreement in such a way that there has been a "fundamental breach" of the agreement or a repudiation of the agreement by the agent.¹⁴⁹

Conclusion

8.47 The Commission is satisfied that the additional termination provisions REIWA has proposed to add to the managing agency agreements appropriately address the Commission's concerns expressed in its Draft Determination.

Liquidated damages

8.48 The rate of liquidated damages payable under the exclusive managing agent agreements for residential property and residential premises for short term or holiday accommodation is 50 per cent. For example, under the exclusive managing agent agreement for residential property agreement, liquidated damages are set equal to 50 per cent of the management fee that would have payable, if the agreement had not been terminated, for the unexpired period of the agency.¹⁵⁰

REIWA submission

8.49 In response to concern expressed in the Draft Determination that the level of liquidated damages should be negotiable, REIWA submitted that liquidated damages clauses aim to provide an accurate calculation of the actual damages that will be suffered if a contract is breached. REIWA considered that it would be difficult to see how such a calculation could be the subject of negotiation, particularly as agents and consumers are unlikely to be aware of the intricacies of determining liquidated damages. Further, requiring the matter to be negotiated would result in substantial disputes and litigation as to whether or not the negotiated liquidated damages figure amounts to a legitimate calculation of the actual damages that would be suffered if a contract is breached.¹⁵¹

Interested party submissions

8.50 The Board was concerned that landlords are not aware of their liability to pay liquidated damages and has proposed an amendment to its Code of Conduct to require agents to have landlords initial the liquidated damages provision.¹⁵²

Conclusion

8.51 The Commission accepts that it would generally not be feasible to require the amount of liquidated damages to be negotiated, given the technical nature of this matter. However, it is not necessarily satisfied that a 50 per cent is justified in all cases. Consequently, to obtain authorisation, it requires REIWA to add a note to the liquidated damages provision in the relevant standard agreements to the effect that:

¹⁴⁹ REIWA submission, 29 August 2001, page 29.

¹⁵⁰ Exclusive authority to act as managing agent of residential property agreement, clause 12(2).

¹⁵¹ REIWA submission, 29 August 2001, page 29.

¹⁵² Board submission, 27 November 2001, page 3.

- REIWA considers that a 50 per cent rate provides an accurate calculation of the actual damages that will usually be suffered if a agreement is terminated in a manner that attracts liquidated damages;
- however, if a lessor considers that circumstances exist which could justify a different rate, they may seek the agent's agreement to that rate.

GENERAL MATTERS

Disputes

8.52 To ensure vendors are fully aware of their rights, REIWA is required, in respect of references in all its standard exclusive agency agreements to disputes between vendors and agents, to include reference to rights to access the legal system and any other available redress mechanisms not already mentioned.

Availability of standard exclusive agency agreements

8.53 On the information before it, the Commission is satisfied that the REIWA standard exclusive agency agreements effectively constitute the industry standard. Consequently, it considers that public detriment arises from limiting the availability of these agreements to REIWA members, as this detrimentally affects the ability of non-REIWA members to compete in the market for selling and leasing properties and businesses. Moreover, vendors and lessors dealing with non-REIWA members are denied the benefits of REIWA's standard agreements.

8.54 Therefore, to obtain authorisation, REIWA is required to produce standard exclusive agency agreements specifically identified to be for non-REIWA members. These agreements are required to mirror the terms of the standard agreements for REIWA members. Producing mirror agreements for non-REIWA agents ensures that the public is not misled about whether these agents are members of REIWA. REIWA is further required to make these agreements available for purchase by non-REIWA agents and members of the public for a price reflecting the cost of producing the agreements.

9. DETERMINATION

9.1 The Commission grants application for authorisation A70011 to REIWA subject to the following conditions.

Articles of Association

9.2 REIWA is required to amend its Articles to require it to:

- make public (for example, in its annual report) information on: the number and nature of complaints received or disputes raised, the time taken to deal with complaints and disputes, the outcome of disciplinary proceedings and dispute resolution processes, as well as the number and outcome of appeals;
- report to the Real Estate and Business Agents Supervisory Board, within 21 days of findings being made, full details of all adverse disciplinary findings where the external Designated Compliance Officer considers the subject matter of that adverse finding could amount to a breach of the REBA Act or REBA Code of Conduct;
- publish the outcomes of disciplinary hearings in the *REIWA News* or an equivalent publication. The relevant Professional Standards Tribunals may retain a discretion (subject to appeal) to rule that the identity of the member not be published if it considers this would be substantially unfair in the circumstances;
- amend Article 37.1.1 so that its effect is no more than that of section 55 of the REBA Act;
- ensure that auditors appointed pursuant to Article 37.1.2 are independent of REIWA;
- report auditors' findings to the Real Estate and Business Agents Supervisory Board where the external Designated Compliance Officer considers that the auditor has identified significant concerns about the member's supervision and control of the agency;
- advise parties to disputes early of the existence of other dispute-resolution fora;
- ensure that arbitration panels that decline to hear or determine a dispute provide written reasons for the decision to all parties to the dispute;
- replace its existing Appeals Board with one constituted as follows:
 - the chairperson, being a legal practitioner appointed by the President of the Australian Institute of Arbitrators and Mediators, who is a member of that Institute but is not a member of REIWA and is not a licensed real estate agent or sales representative under the REBA Act;
 - a consumer representative who is not a licensed real estate agent or sales representative under the REBA Act, and who is not a member of REIWA;
 - a person who is a real estate agent licensed under the REBA Act and appointed by REIWA;

where none of these persons was a member of the original decision-making body.

Members' Codes of Practice

9.3 REIWA is required to amend the Codes to:

- remove clause 9.4 (relating to management signs outside strata-titled buildings);
- remove the second paragraph of clause 8;
- replace the fourth paragraph of clause 4.2(a) with provisions:
 - prohibiting conjunctional agents breaching their common law duty of fidelity to listing agents including, unless agreed to the contrary, a requirement that conjunctional agents not use for their own personal benefit, to the detriment of the listing agent, information acquired in the course of their employment as the conjunctional agent; and
 - entitling conjunctional agents to make direct contact with vendors, both during and after the period of the conjunctional agreement, but requiring that all offers to purchase the relevant property must be either put to the vendor through the listing agent or, alternatively, the listing agent must be informed by the conjunctional agent of the fact of such an offer being put to the vendor prior to the vendor's acceptance of that offer;
- make clause 4.4 (requiring negotiations by conjunctional agents with vendors to be conducted through listing agents) subject to the above-mentioned new clause;
- amend the first paragraph of Clause 4.2(a) to prevent a listing agent who has been informed of a prospective purchaser by a prospective conjunctional agent from approaching that purchaser if a conjunctional agreement is not subsequently entered into, unless the listing agent has previously introduced the purchaser to the relevant property;
- replace clause 4.2 (b) with a provision prohibiting a listing agent from approaching the prospective purchaser/lessee the subject of a conjunctional agreement unless:
 - the conjunctional agent is informed of the matters to be raised with the purchaser/lessee beforehand; or
 - otherwise agreed by the listing and conjunctional agent; or
 - the purchaser/lessee approaches the listing agent.

Standard Exclusive Selling Agency Agreements

9.4 REIWA is required to amend the relevant standard exclusive selling agency agreements to:

- remove all references to vendors re-appointing listing agents at the end of an exclusive rights period on a non-exclusive basis;

- provide that fees should be payable on settlement;
- include definitions of 'introduced' and 'introduction';
- substitute the provision requiring fees to be paid to agents after the expiry of the exclusive rights period in certain circumstances with a provision entitling agents to a fee on a sale that takes place after the expiry of the exclusive rights period if:
 - the purchaser was introduced to the property during the exclusive rights period; and
 - the vendor elected in the agency agreement to be liable to pay a commission if a purchaser introduced during the exclusive rights period entered into a contract an agreed number of days after the expiration of the exclusive period;
- inform vendors that agents must meet certain requirements regarding the identification of their businesses in advertisements and provide vendors with an option to negotiate whether or not they will pay for agents' complying with these obligations; and
- give vendors the right to elect whether or not to pay marketing costs, irrespective of whether the property is sold or not.

9.5 REIWA is also required to amend its Authority to Auction Agreement to:

- allow different fees to be paid to agents depending on whether the property is sold at or after an auction and to provide that these fees are negotiable; and
- make it clear that a vendor has a right to elect whether or not the listing agent will have an exclusive period to sell the property following the auction should the auction not succeed.

Standard exclusive managing agency agreements

9.6 REIWA is required to amend its standard exclusive managing agency agreements to:

- allow owners to elect whether or not the holding over provision will apply;
- require agents are required to act with due care and diligence and allow owners to terminate an agreement without giving notice should the agent breach the terms of the agreement in such a way that there has been a fundamental breach of the agreement or a repudiation of the agreement by the agent.
- to add a note to the liquidated damages provision in the relevant standard agreements to the effect that:
 - REIWA considers that a 50 per cent rate provides an accurate calculation of the actual damages that will usually be suffered if a agreement is terminated in a manner that attracts liquidated damages;
 - however, if a lessor considers that circumstances exist which could justify a different rate, they may seek the agent's agreement to that rate.

9.7 REIWA is required, in respect of *all* its standard exclusive agency agreements to:

- ensure that references to disputes between vendors and agents also refer to rights to access the legal system and any other available redress mechanisms not already mentioned; and
- produce standard exclusive agency agreements for non-REIWA members which mirror the standard agreements for REIWA members. Members of the public and non-REIWA agents are to be able to purchase these agreements for a price reflecting the cost of producing the agreements.

Term of authorisation

9.8 The Commission grants this authorisation for a period of five years. The authorisation will commence on the date when the Commission informs REIWA in writing that it is satisfied that the conditions above have been met.

