

**Final  
Determination**

**Application for Authorisation  
by  
Real Estate Institute of Western Australia (Inc.)**

**In relation to its**

**Articles of Association  
Members' Codes of Practice  
Multiple Listing Service By-laws  
and  
Standard Exclusive Agency Agreements**

**Date: 21 December 2001**

**Application no:**  
A70011  
**File no:**  
C2000/1212

**Commissioners:**  
Fels  
Cousins  
Bhojani  
Shogren  
Jones  
Martin

## **Executive summary**

The Australian Competition and Consumer Commission (the Commission) grants authorisation to the Real Estate Institute of Western Australia (REIWA) for its:

- Articles of Association;
- Members' Codes of Practice;
- Multiple Listing Service By-laws; and
- Standard Exclusive Agency Agreements,

subject to several conditions outlined below.

Authorisation is granted for five years and will commence on the date that the Commission informs REIWA that it is satisfied that the specified conditions have been met.

On 16 June 1998, the Commission commenced legal proceedings against REIWA alleging breaches of section 45 of the Trade Practices Act. These proceedings resulted on 8 October 1999 in the Federal Court issuing orders by consent requiring, among other things, REIWA to enter into a trade practices corporate compliance program. The program included the option for REIWA to ensure its Articles, Codes, MLS by-laws and standard agreements did not raise trade practices concerns by applying for authorisation.

REIWA applied for authorisation on 17 July 2000. The Commission released a draft determination on 20 July 2001 proposing to deny authorisation. However, it indicated that it would be prepared to grant authorisation if REIWA addressed several concerns. A pre-decision conference was held on 31 August 2001 in Perth at REIWA's request.

Following the Draft Determination, REIWA proposed several amendments to its Articles, Codes and standard agreements. These amendments addressed most of the Commission's concerns. REIWA was largely able to address the remaining concerns by providing further information to the Commission.

### **Articles of Association (the Articles)**

#### *Membership and disciplinary processes*

Generally, the Commission is satisfied that REIWA's membership processes provide a public benefit by ensuring that REIWA members meet appropriate and objective minimum criteria. In particular, it considers that the requirement to obtain professional indemnity insurance constitutes a public benefit.

The Commission also considers that REIWA's disciplinary processes produce a public benefit by assisting to ensure compliance with other REIWA rules (to the extent that these rules produce a public benefit).

The Commission considers that REIWA membership provides real estate agents in Western Australia with valuable benefits which significantly improve their ability to compete in the

market for selling and leasing property and businesses in Western Australia. For example, REIWA membership enables agents to use REIWA's Multiple Listing Service.

Consequently, the Commission considers that public detriment could arise if REIWA's membership and disciplinary processes could be used to inappropriately deny or remove membership (or penalise members), as this would reduce the ability of excluded agents to compete effectively in the market and thereby affect the overall intensity of competition to the detriment of consumers.

However, the Commission is satisfied that REIWA's processes minimise any potential public detriment of this nature, as their membership criteria are objective and, subject to the conditions below, their application and disciplinary processes are open, transparent and provide procedural fairness.

To ensure an appropriate level of transparency, the Commission requires REIWA 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/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 a finding 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; and
- 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.

#### *Employees working for more than one agent*

The Commission is sceptical about whether prohibiting real estate agent employees from working for two agents provides a public benefit outweighing any associated public detriment. In particular, if employers would be unlikely to allow this practice to occur, the Commission questions why the prohibition is needed. Moreover, the prohibition is likely to reduce the scope for part-time employment. Having said this, the Commission recognises that the REBA Act expressly prohibits sales representatives from working for two agents. Consequently, it is prepared to authorise REIWA's provisions on this matter only so far as they mirror the REBA Act.

#### *Agents exercising proper control and supervision over employees*

The Commission is satisfied that the provisions in the Articles that aim to ensure that agents exercise proper control and supervision over their employees produce a public benefit by assisting to ensure the integrity of the REBA Act licensing system, to the extent that this licensing system produces a public benefit, subject to the conditions below.

The Articles allow the Council, if it believes that a member is not exercising adequate and proper control and supervision over an agency, to instruct an auditor to investigate the affairs

of the business to determine whether its belief is correct. The Commission requires the Article to be amended to ensure that:

- auditors are independent of REIWA; and
- REIWA reports auditors' findings to the Real Estate and Business Agents Supervisory Board where the external Designated Compliance Officer considers that auditors have identified significant concerns about the member's supervision and control of the agency.

#### *Dispute resolution*

The Commission considers that REIWA's system of arbitration panels produces a public benefit by assisting to resolve disputes in the real estate industry. However, to minimise any public detriment, it requires that REIWA amend its Articles to require:

- parties to disputes to be advised early of the existence of other dispute-resolution fora; and
- that arbitration panels that decline to hear or determine a dispute provide written reasons for the decision to all parties to the dispute.

#### *Appeals*

The Commission requires REIWA to replace its Appeals Board with one comprising:

- an independent chairperson who is a legal practitioner;
- a consumer representative; and
- a real estate agent;

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

Subject to this condition, the Commission is satisfied that the Appeals Board is sufficiently independent of REIWA and that the processes used by the Board are open, transparent and provide procedural fairness.

#### **Members' Codes of Practice (the Codes)**

The Codes address a range of matters relevant to the relationships between agents and vendors/lessors, other agents and purchasers/lessees.

The Commission is satisfied that the Codes include a range of other provisions that provide a public benefit. For example, they:

- prohibit agents from accepting agencies if they are aware that another agency is in force which may oblige the vendor/lessor to pay two fees in the event of a sale or lease taking place, unless the agent gives a prior written statement to the vendor/lessor that he or she may be so liable if a further agency agreement is signed;
- require listing agents to agree to act in conjunction with fellow agents unless satisfied that this would not be in the best interests of the vendor or lessor; and
- require listing and conjunctive agents who intend to claim a fee on the basis of introducing a prospective purchaser or lessee to the property or business to ensure that

reasonable contact is maintained with that prospective purchaser or lessee. The Codes also define reasonable contact;

- prohibit inducing breaches of contracts; and
- require agents to be identified in advertisements.

In particular, the Codes regulate the making of *conjunctive agreements*. A conjunctive agreement is one between a listing agent and another agent (the conjunctive agent) to share a fee arising from the introduction of a customer by the conjunctive agent to the listing agent. On making a conjunctive agreement, the conjunctive agent becomes a sub-agent of the listing agent. Broadly, the Codes provide a process for entering conjunctive agreements and regulate relations between listing agents, conjunctive agents, vendors/lessors and purchasers/lessees.

The Commission is not required under REIWA's application to determine whether conjunctive agreements *per se* provide a public benefit outweighing any associated public detriment. However, it notes that conjunctive 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 the Codes restricted the use or effectiveness of conjunctive agreements.

Subject to the following conditions, the Commission considers that the relevant provisions of the Codes provide a public benefit that outweighs any public detriment by facilitating the effective and efficient operation of the conjunctive agreements system. The conditions are that:

- the existing provision preventing conjunctive agents from approaching vendors be replaced with provisions:
  - 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
  - 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;
- the existing provision requiring negotiations by conjunctive agents with vendors to be conducted through listing agents be made subject to the just-mentioned new clause;
- the existing provision requiring agents to identify prospective purchasers to listing agents before entering into conjunctive agreements be amended to prevent listing agents who are informed of prospective purchasers from approaching those purchasers if a conjunctive agreement is not subsequently entered into, unless the listing agent has previously introduced the purchaser to the relevant property;
- the existing provision prohibiting listing agents from approaching prospective purchasers/lessees the subject of a conjunctive agreement be replaced with one prohibiting such contact 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.

The Codes require that advertising give greater prominence to agents' details than to the details of agents' employees. 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. The Commission also notes that the REBA Act only requires advertisements to contain such details as are sufficient to identify agents. The Commission further considers that the issue of dummy licensing (where unlicensed persons effectively control an agency) 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.

Finally, the Codes prohibit agents from erecting standard managing agency signs outside a strata titled building or common property unless the agent manages all of the managed properties and/or businesses in that complex. In response to concerns raised in the Draft Determination that the provision may prevent an agent informing the market of the extent of its management role, REIWA agreed to remove the provision.

#### **Multi Listing Service (MLS)**

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

The Commission is satisfied that the MLS provides a public benefit by improving the method of selling properties through exclusive agency and conjunctive agreements, thereby improving competition in the market for selling and leasing properties.

Access to the MLS is a significant benefit of REIWA membership. Consequently, the Commission considers that 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.

Generally, the Commission is satisfied that the MLS by-laws – which, for example, contain equivalent provisions to those in the Codes requiring agents to maintain reasonable contact with vendors/lessors – do not raise competition concerns.

#### **Standard exclusive agency agreements**

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

Generally, the Commission notes that the scope of REIWA's application for authorisation does not extend to determining whether exclusive agency agreements *per se* 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.

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 fact that they are, and are likely to continue to be used extensively in practice. As such, any public benefit or detriment flowing from them is likely to be significant.

Ultimately, the Commission considers that the exclusive agency agreements provide a net public benefit subject to the conditions below.

#### *Standard exclusive selling agency agreements*

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

- remove all references to 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 requirements; and
- give vendors the right to elect whether or not to pay marketing costs, irrespective of whether the property is sold or not.

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*

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

- allow owners to elect whether or not a 'holding over' provision will apply (these provisions provide that, after the expiry of the initial fixed term of the agreement, the agreement continues but is able to be terminated with a specified period of notice);
- require agents 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.
- 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.

REIWA is also 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.



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## 1. INTRODUCTION

1.1 On 17 July 2000, the Real Estate Institute of Western Australia (Inc.) (REIWA) lodged an application for authorisation with the Commission in relation to its:

- Articles of Association;
- Members' Codes of Practice;
- Multiple Listing Service By-laws; and
- Standard Exclusive Agency Agreements.

1.2 The application was made under sub-section 88(1) of the Trade Practices Act 1974 (the Act) to give effect to a contract, arrangement or understanding, a provision of which would have the purpose, or would have or might have the effect, of substantially lessening competition within the meaning of section 45 of the Act.<sup>1</sup> The application was expressed to cover REIWA and its members present and future.

1.3 The Commission released a Draft Determination on 20 July 2001 proposing to deny authorisation. However, it indicated that it would be prepared to grant authorisation if REIWA addressed several specified concerns.

1.4 A pre-decision conference was held on 31 August 2001 in Perth at REIWA's request.

### *Structure of this determination*

1.5 This determination first outlines relevant background information, the statutory test applied by the Commission in authorisations and general submissions made by REIWA and interested parties. It then separately evaluates each of the four parts of REIWA's application.

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<sup>1</sup> REIWA originally sought authorisation to give effect to a contract, arrangement or understanding which might be an exclusionary provision within the meaning of section 45 of the Act. On 13 November 2000, REIWA advised that the original application had been completed using the wrong form. Accordingly, it amended its application to be as set out in paragraph 1.2.

## 2. BACKGROUND

### *The applicant*

2.1 REIWA is an association of Western Australian real estate agents. It submitted that it provides professional development, marketing and commercial services to real estate agents, business agents and consumers which are designed to assist in the effective delivery of real estate and business agency services to consumers at the highest level of professional and ethical standards possible. REIWA members make up approximately 85% of the real estate industry in Western Australia. Its members represent approximately 85% of real estate and business agent transactions in Western Australia.<sup>2</sup>

### *Legal action by the Commission*

2.2 On 16 June 1998, the Commission commenced legal proceedings against REIWA alleging it had breached section 45(2) of the Act. On 8 October 1999, the Federal Court of Australia issued orders by consent, among other things:

- declaring that certain REIWA rules contravened section 45 of the Trade Practices Act and ordering that they be removed; and
- that REIWA enter into a trade practices corporate compliance program in a specified form. Under the compliance program, REIWA was required to:
  - within 2 months, appoint an external Designated Compliance Officer (DCO) with an expert knowledge of trade practices law;
  - within 6 months, present to the DCO, among other things, all current articles of association, standard clauses, rules of practice and operating directives for consideration and advice by the DCO specifically having regard to Part IV of the Act. Alternatively, REIWA was required to apply for authorisation of those documents. The ACCC agreed with REIWA, in accordance with the Court's orders, for the time for compliance with this requirement to be extended to 17 July 2000; and
  - have the DCO review all REIWA arbitration and disciplinary tribunal awards prior to issue to ensure they comply with Part IV of the Act. The DCO is required to keep a documentary record of these reviews and these records may be reviewed by the Commission within three years of their creation.

2.3 The compliance programme was implemented by REIWA in January 2000.

### *REIWA review of Articles, Members Codes of Practice etc.*

2.4 Both prior and following the Federal Court decision, REIWA conducted a review of the documents for which it has now sought authorisation. REIWA submitted that this review resulted in significant amendments to the documents to ensure they complied with the Act.<sup>3</sup>

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<sup>2</sup> REIWA's submission of 17 July 2000, paragraph 1.1 and Chapter 2.

<sup>3</sup> REIWA Submission, 17 July 2000, Chapter 4.

## *Regulation of real estate and business agents in Western Australia*

2.5 The *Real Estate and Business Agents Act 1978* (the REBA Act) regulates real estate and business agents in Western Australia. In particular, it establishes the Real Estate and Business Agents Supervisory Board (the Board) whose primary responsibilities include to:

- administer the licensing system for real estate and business agents and the registration system for sales representatives;
- conduct and promote education and provide advisory services;
- act as a disciplinary tribunal and conduct inquiries into allegations about real estate and business agents and sales representatives;
- administer the Fidelity Guarantee Fund, which can compensate people for financial loss due to criminal or fraudulent behaviour by an agent or sales representative;
- administer the Homebuyers Assistance Fund, which provides first homebuyers with financial assistance;
- recommend amendments to the regulations to the REBA Act; and
- advise the Minister for Fair Trading on the administration of the Act.<sup>4</sup>

2.6 The Act also prohibits persons practising as real estate or business agents unless they are licensed and hold a current triennial certificate. Broadly, the Board may grant a licence to persons over 18 who it is satisfied are of good character, possess specified qualifications, experience and financial resources, and understand the obligations of the Act. The Commission understands that licences are perpetual and that licensed persons are entitled to a triennial certificate.

2.7 In addition, the Act provides that real estate firms must be licensed. Firms are required to comply with financial, character and supervision requirements. For instance, a nominated licensed agent within each firm must be responsible for monitoring the work of the firm. Where branches have been established, a licensed agent must supervise the branch's work.

## *National Competition Policy review of REBA Act*

2.8 The Commission notes that the public benefits associated with some licensing restrictions imposed by the REBA Act, including those affecting directors of agencies and branch managers, were questioned by the Prices Surveillance Authority in a report of an Inquiry Into Real Estate Agents Fees Relating to Residential Property Transactions in 1992. The Commission assumes that these matters will again be considered in the National Competition Policy review of the REBA Act which is currently underway.

2.9 Generally, if this review results in amendments to the REBA Act, and provisions in REIWA Articles, Codes etc thereby become inconsistent with the Act, the Commission will

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<sup>4</sup> Board submission, 27 September 2000, page 2.

consider whether a material change in circumstances has occurred such as to warrant revocation.

2.10 Alternatively, REIWA may opt to amend its rules so that they are consistent with the REBA Act as amended, in which case it would need to consider applying to the Commission for, depending on the scale of its amendments, a minor variation to this authorisation or to revoke this authorisation and substitute another.

### **3. STATUTORY TEST**

3.1 The Commission shall not grant an authorisation unless it is satisfied in all circumstances that:

- the provision of the proposed contract, arrangement or understanding would result, or be likely to result, in a benefit to the public; and
- that benefit would outweigh the detriment to the public constituted by any lessening of competition that would result, or be likely to result, if the proposed contract or arrangement were made and the provision concerned given effect to.<sup>5</sup>

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<sup>5</sup> *Trade Practices Act 1974, section 90(6).*

## 4. SUBMISSIONS

4.1 REIWA lodged submissions in support of its application on 17 July and 7 December 2000, and on 20 April, 29 August, 14 September and 7 December 2001.

4.2 Submissions were also received from:

- the Law Society of Western Australia on 12 October 2000;
- the Real Estate and Business Agents Supervisory Board (the Board) on 27 September 2000 and 27 November 2001;
- the Real Estate Employers' Federation of Western Australia on 29 August 2001;
- the Real Estate Institute of Northern Territory on 14 September 2000;
- Patrick Grogan ( real estate agent) on 22 and 28 August 2001; and
- George Wallis on 22 August 2001.

4.3 A pre-decision conference was held on 31 August 2001. The following organisations made verbal submissions at that conference in addition to most of those listed above:

- the Consumers' Association of Western Australia; and
- the Real Estate Institute of Victoria.

4.4 This chapter outlines any general comments by the organisations or people mentioned above. Comments about specific aspects of REIWA's Articles, Codes etc are outlined in the relevant chapters below.

### REIWA<sup>6</sup>

4.5 Generally, REIWA considered that its Articles, Codes, etc result in a public benefit that outweighs the anti-competitive effect of the provisions. General public benefits include:

- facilitating the continuation of REIWA as an association that aims to foster professionalism in the practice of real estate and business agency;
- promoting consumer protection;
- promoting the orderly and fair resolution of disputes between members and disputes between members and consumers;
- promoting higher standards of real estate practice;

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<sup>6</sup> REIWA submission, 17 July 2000, paragraphs 1.7-1.8.

- facilitating a private and cost effective mechanism for the enforcement of standards of real estate practice and thereby reducing the need for consumer complaints to be dealt with by government agencies and the civil court system;
- facilitating an efficient and cost effective method of selling and leasing real estate and businesses in Western Australia, particularly by giving certainty to the practices in the real estate and business agency markets and reducing transaction costs. It considered that settled market practices removed the need for market participants to seek advice on contractual terms or how the market operates. Overall, REIWA considered that its Articles, Codes etc were:
  - vital for the efficient delivery of services to its members and the public, as well as for the efficient operation of real estate and business sale transactions in Western Australia; and
  - that the conduct the subject of the application results in a better-informed market that operates more efficiently and is more competitive;
- that REIWA's self-regulatory scheme is effective because:
  - its membership encompasses a substantial proportion of the real estate and business agency industry;
  - barriers to entry to REIWA are low, as it has deleted all subjective membership criteria and has modest membership fees;
  - significant commercial incentives existed for compliance with REIWA's Articles, Code and MLS by-laws, including financial penalties of up to \$10 000, as well as suspension or expulsion. REIWA considered that it has a high reputation in the WA community and that, therefore, membership of REIWA provided significant benefits to members' reputations. Consequently, loss of membership resulted in a significant commercial detriment;
- the provision of industry-based forums for complaint arbitration and appeals;
- public input into REIWA's self regulatory scheme, including through:
  - the right of the public to use REIWA's arbitration system to resolve disputes with members and their entitlement to make complaints about the conduct of members to REIWA; and
  - consumer representation on its appeals board and independent input into REIWA's operations through its compliance program.

4.6 REIWA also submitted that:

- it was inevitable that standard form documents would be used in this industry and that it was far preferable for these documents to be developed as part of a self-regulating scheme; and



- the ratio of substantiated complaints against real estate agents to the Board and REIWA is less than 0.5% of residential real estate transactions.

### **Real Estate and Business Agents Supervisory Board**

4.7 The Board submitted that a number of services (e.g. professional development training) and membership requirements provided by REIWA produce a public benefit because they encourage improved services and protect the general public. It also considered REIWA assists its members by providing standard contracts, block professional indemnity insurance and information about industry and legislative changes that members would have difficulty accessing by themselves.<sup>7</sup>

### **Law Society of Western Australia (LSWA)**

4.8 The LSWA commented on exclusive listing agreements; conjunctional agreements; and soliciting by agents. Its comments are outlined in the relevant chapters below.

### **Real Estate Institute of Northern Territory (REINT)**

4.9 REINT supported REIWA's application. In particular, it submitted that:

- REIWA's Articles and Codes of Practice aim to promote professionalism in agency practice and consumer protection;
- REIWA's arbitration and disciplinary procedures were clear and stated all rights and obligations; and
- exclusive agency, multiple listing and conjunctional transactions have been included in the public interest and do not constitute an unreasonable barrier to competition. Rather, they promote professionalism in agency practice and consumer protection.

### **Mr George Wallis**

4.10 Mr Wallis expressed concern at, in his view, the lack of independence of the Real Estate and Business Agents Supervisory Board from REIWA. In particular, he considered that REIWA members should be excluded from the Board. This issue is beyond the scope of REIWA's application for authorisation.

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<sup>7</sup> Board submission, 27 September 2000, page 3.

## 5. ARTICLES OF ASSOCIATION

5.1 REIWA's Articles of Association (the Articles), among other things, specify its:

- objects (e.g. to facilitate the business transactions and protect and conserve the business interests of real estate and business agents; to foster good relations between Institute members, other real estate agents and the general public);
- administrative processes; for example, the composition, powers and manner of election of its governing Council and Executive Committee; meetings requirements and procedures and the operation and powers of REIWA's country branches;
- membership criteria and the rights, obligations and manner of election of members;
- disciplinary processes, including its processes for suspending or expelling members; and
- procedures for resolving disputes between members and between members and the public.

5.2 The Articles also establish REIWA's Multi Listing Service (MLS). These provisions are considered in the Chapter 7.

5.3 Those aspects of the Articles potentially raising significant public benefit and detriment issues are discussed below.

### **Membership and disciplinary processes**

#### *Membership criteria*

5.4 There are nine categories of REIWA membership,<sup>8</sup> including:

- corporate membership,<sup>9</sup> which is available to:
  - sole proprietors, corporations and partnerships provided that the entity or person concerned is actively conducting a real estate business and is the holder of a current triennial certificate issued under the REBA Act and whose directors, partners and branch managers, or the sole proprietor, are ordinary or associate members (except, for example, if directors or partners are ordinarily resident outside Western Australia); and
  - corporations incorporated outside Western Australia which are licensed agents and whose directors do not reside in Western Australia but whose branch managers are ordinary or associate members;
- ordinary membership,<sup>10</sup> which is available to directors and partners of a corporate member or sole proprietors who are corporate members; and

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<sup>8</sup> Article 29.

<sup>9</sup> Article 30.2.2.

- associate membership,<sup>11</sup> which is available to employees of a corporate member who hold an real estate qualification approved by REIWA.

5.5 A person is ineligible for REIWA membership if that person:<sup>12</sup>

- has had their licence and/or triennial certificate cancelled or suspended under the REBA Act;
- is an undischarged bankrupt;
- has been convicted of an indictable offence;
- is a director of a corporation which is indebted to REIWA or, alternatively, is indebted to a REIWA member pursuant to an arbitration award made under REIWA's Articles, rules, etc unless the person pays that debt in full; or
- is an ex-director of a corporation which is indebted to REIWA or, alternatively, which is indebted to a REIWA member pursuant to an arbitration award made under REIWA's Articles, rules etc unless:
  - the corporation did not owe that debt at the date the person ceased to be a director; or
  - the person pays the total amount of the debt due at the date he or she ceased to be a director.

5.6 In addition, applicants for membership must:

- agree in writing to abide by REIWA's rules, articles, codes etc;<sup>13</sup> and
- for applicants for Ordinary, Corporate, Associate or Affiliate membership, provide REIWA with written proof that they are insured under a professional indemnity insurance contract which, among other things, is held by a Corporate Member, covers all activities undertaken in relation to a real estate agency business and which provides a limit of indemnity of at least \$1 million or such other sum as prescribed by the Council from time to time.<sup>14</sup>

#### *Applying for membership*<sup>15</sup>

5.7 Applications for membership must be supported by nominations from at least two ordinary members and accompanied by a (refundable) nomination fee. Applications are considered by a Membership Committee appointed by the REIWA Council. The Membership Committee must make a written recommendation to grant or reject an application to the REIWA Council (or Executive Committee if membership matters are

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<sup>10</sup> Article 30.2.1.

<sup>11</sup> Article 30.2.3.

<sup>12</sup> Article 30.1.2.

<sup>13</sup> Article 30.1.1.

<sup>14</sup> Article 30.1.3.

<sup>15</sup> Article 31.

delegated to it). A three-quarters majority of the Council present and voting at the relevant meeting is required to grant membership to a member.

5.8 If the Membership Committee recommends rejecting the application (or a REIWA member objects to the application or the Council considers rejecting the application), not less than 14 days before the relevant Council meeting, the applicant must be given:

- written notice of the recommended rejection;
- written grounds for the recommended rejection; and
- written notice stating the date, time and place of the Council meeting and informing the applicant that he or she may speak at the meeting and/or provide written submissions at or prior to the meeting.

5.9 The applicant must be given written notice of the Council decision within 14 days of its decision.

5.10 The appeals process is considered below.

#### *Disciplinary processes*<sup>16</sup>

5.11 Members may be expelled or suspended by the Council (or Executive Committee if delegated this matter) for breaching REIWA rules, articles, codes etc. If any person makes a complaint to REIWA that a member has breached REIWA rules, articles etc, the Council must refer the matter to a Professional Standards Tribunal. Professional Standards Tribunals are appointed by the REIWA Council.

5.12 After conducting a hearing, a Tribunal may:

- dismiss the matter;
- reprimand the member;
- impose penalties prescribed in REIWA rules, articles etc;
- impose monetary penalties of not more than \$10,000;
- order the restitution of any money held by the member to persons entitled to that money;  
or
- recommend expulsion or suspension to the Council.

5.13 Tribunal hearings must be conducted as follows:

- not less than 14 days before the hearing, the member must be given:
  - written notice of the matter and relevant particulars;

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<sup>16</sup> Article 41.

- copies of relevant documents (for example, written complaints about the member); and
- written notice stating the date, time and place of the hearing and informing the member that they may speak at the hearing and make written representations at or prior to the hearing; and
- the Tribunal must deliver its decision and reasons for the decision in writing. These must be provided to the member within 14 days of the decision.

5.14 If a Tribunal finds that a member should be expelled or suspended, the matter must be referred back to the Council for decision. Members are deemed to be suspended until the Council makes a decision.

5.15 Council hearings must be conducted in essentially the same manner as Professional Standards Tribunal hearings.

5.16 The appeals process is outlined separately below. Members who are expelled or suspended are deemed to be suspended while an appeal is held.

#### *REIWA submission*

5.17 REIWA submitted that its membership criteria were objective.<sup>17</sup> It also submitted that these criteria produce a public benefit by ensuring a high level of professional standards.<sup>18</sup>

5.18 In particular, REIWA submitted that it requires its members to have adequate professional indemnity insurance to protect consumers by providing them with an avenue for redress should an agent, for example, act negligently. It pointed out that if agents were not insured, consumers would not be able to claim damages from impecunious agents. REIWA further submitted that it had negotiated, through AON Insurance Brokers, an insurance policy that was advantageous to agents. However, agents were free to obtain insurance from any broker and it was aware of four other policies available in Western Australia. It submitted that the type of insurance policy required was not onerous and, as such, did not constitute an unreasonable barrier to joining REIWA. In particular, the insurance policy negotiated by REIWA cost (as at 17 July 2000) \$962 per annum for corporate members plus \$272 for each sales representative employed by the agency.<sup>19</sup>

5.19 REIWA submitted that its process for admitting members ensured an orderly and transparent method of electing members which provided procedural fairness.<sup>20</sup>

5.20 REIWA submitted that its disciplinary processes provide procedural fairness to REIWA members.<sup>21</sup>

<sup>17</sup> REIWA submission, 17 July 2000, paragraph 4.2.2.

<sup>18</sup> Ibid, paragraph 9.4 (see also submission of 7 December 2000 at paragraph 14).

<sup>19</sup> Ibid, paragraphs 8.2-8.5.

<sup>20</sup> Ibid, paragraph 4.2.3 (see also submission of 7 December 2000, paragraph 15).

<sup>21</sup> Ibid, paragraph 4.2.7.

5.21 REIWA also noted that REIWA members who lost their membership because their licence or triennial certificate had been cancelled or suspended could regain REIWA membership if they subsequently regained their licence or certificate.<sup>22</sup>

5.22 In response to proposals in the Draft Determination to improve the transparency of REIWA's application and disciplinary processes, REIWA submitted that:<sup>23</sup>

- it would provide information to the Board and REIWA members on the number and nature of complaints received or disputes raised, the time taken to deal with complaints/disputes, the number found to be in breach of rules, Articles, Codes, regulations or by-laws or any resolutions or policies of the REIWA Council, the outcomes achieved by the complaints handling mechanism and well as the number and outcome of appeals;
- it would be unjust in specific instances to publicly report on the outcome of individual membership issues. For example, an unsuccessful applicant for membership who has been convicted of an indictable criminal offence would have the ignominy of having that fact publicised to members and the public in circumstances where the offence may have occurred many years ago, merely because the person has applied for membership of REIWA without being aware of the relevant prohibition on membership contained in the REIWA Articles. Further, reporting individual cases could leave REIWA liable to claims for substantial damages for defamation;
  - As an alternative to the Commission's proposal, REIWA submitted that determinations by REIWA to reject membership applications or expel members could be audited annually by its external Designated Compliant Officer (DCO) appointed pursuant to the orders made by His Honour Justice French in the Federal Court on 5 October 1999 and pursuant to the REIWA Part IV of the Trade Practices Act Compliance Programme implemented pursuant to those orders. The review could be conducted each year at the same time that the DCO conducts his or her annual review of REIWA's Compliance Programme. REIWA also stressed that the DCO is required to consider all disciplinary determinations prior to their dissemination in the light of Part IV of the *Trade Practices Act, 1974* to ensure that its disciplinary process cannot be used for anti-competitive purposes.
- it opposed reporting *all* disciplinary matters to the Board. It submitted that the large bulk of complaints referred to REIWA do not amount to breaches of the REBA Act. It also considered that the automatic referral of all investigations to the Board could discourage agents from making complaints and participating in the disciplinary process. REIWA added that it had reported several major allegations of improper conduct by real estate agents to the Board over the past decade, including in recent months, and urged that decisive action be taken.
  - As an alternative to the Commission's proposal, REIWA proposed that it report to the Board all adverse disciplinary findings where the subject matter of that adverse finding *could* amount to a breach of the REBA Act or REBA Code of Conduct.

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<sup>22</sup> Record of pre-decision conference, 31 August 2001, page 14.

<sup>23</sup> REIWA submission, 29 August 2001, pages 1-5; submission of 7 December 2001, pages 2-4

In addition, it proposed to publish the outcomes of disciplinary hearings in the *REIWA News* (its own publication to members) or such other equivalent publication. However, it proposed that Professional Standards Tribunals retain a discretion (subject to appeal) to rule that the identity of the member not be published if it considered this would be unwarranted in the circumstances. REIWA noted that the publication of the identity of a member may devastate that member's business and would therefore be unfair in, for example, trivial cases.

#### *Interested party submissions*

5.23 The Board considered the requirement to take out professional indemnity insurance was an important matter of public protection.<sup>24</sup>

5.24 It considered that REIWA's disciplinary processes followed the rules of natural justice.<sup>25</sup> However, it noted that these processes were conducted in private and considered this undesirable. In particular, the Board considered that REIWA had seldom referred complaints to the Board and was concerned that complaints of serious misconduct may be being dealt with by REIWA without reaching the Board. It submitted that this reduced the ability of the Board to carry out its proper function. The Board proposed that REIWA provide it with a summary of each complaint received in a timely fashion, along with an indication of what steps REIWA proposes to take and a statement of the outcome.<sup>26</sup>

#### *Conclusion*

5.25 The Commission is satisfied that REIWA's membership processes provide a public benefit because they ensure that REIWA members meet appropriate and objective minimum criteria to protect consumers. In particular, it considers that the requirement to obtain professional indemnity insurance constitutes a public benefit. Further, the requirement that Corporate Members be licensed under the REBA Act provides a public benefit to the extent that the licensing system under the Act provides a public benefit.

5.26 The Commission also considers that REIWA's disciplinary processes produce a public benefit in that they assist in ensuring compliance with other REIWA rules (e.g. the Members Codes of Practice) to the extent that these rules produce a public benefit.

5.27 The Commission considers that REIWA membership provides real estate agents in Western Australia with valuable benefits which significantly improve their ability to compete in the market for selling and leasing property and businesses in Western Australia. For example, REIWA membership enables agents to use REIWA's Multiple Listing Service.

5.28 The Commission also notes the results of a survey conducted by Patterson Market Research in June 1998. This survey found that 50 per cent of persons had checked to see that the agent being used was a REIWA member; 38 per cent did not make such a check because they assumed the agent was a REIWA member; and only 2 per cent considered that REIWA membership was not important.<sup>27</sup>

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<sup>24</sup> Board submission, 27 September 2000, page 5.

<sup>25</sup> *Ibid*, page 6.

<sup>26</sup> Board submission, 27 November 2001, page 1.

<sup>27</sup> REIWA submission, 17 July 2000, paragraph 2.8.

5.29 In addition, the Commission notes REIWA's submission that, as a consequence of the considerable benefits to reputation enjoyed by REIWA members, expulsion from REIWA carries with it a corresponding significant commercial detriment.<sup>28</sup>

5.30 Consequently, public detriment could arise if REIWA's membership and disciplinary processes could be used to inappropriately deny or remove membership (or penalise members), as this would reduce the ability of excluded agents to compete effectively in the market and thereby affect the overall intensity of competition to the detriment of consumers.

5.31 Generally, the Commission will be satisfied that any potential public detriment of this nature is minimised if the organisation's membership criteria are objective and its application and disciplinary processes are open, transparent and provide procedural fairness.

5.32 In this case, the Commission is satisfied that REIWA meets these criteria, subject to the following conditions relating to transparency:

- REIWA is required 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;
- REIWA is required to report to the Board, within 21 days of the finding 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;
- REIWA is required to 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.

5.33 Subject to the above conditions, the Commission is satisfied that the public benefit flowing from REIWA's membership and disciplinary processes outweighs any public detriment.

#### **Notification of changes in constitution of firm<sup>29</sup>**

5.34 Corporate members are required to advise REIWA of any change in their partners, directors or branch managers within one month of such a change. The membership of the corporate member lapses two calendar months from the date of any such change unless any new partner, director or branch manager becomes an ordinary or associate member within the two calendar months or within a time allowed by REIWA (this requirement does not apply to partners and directors ordinarily resident outside Western Australia).

5.35 Corporate members are also required to advise REIWA within fourteen days of the resignation or decease of a partner, director or branch manager. REIWA shall request such information as it deems necessary in order to consider the continuance of membership of the corporate member.

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<sup>28</sup> Ibid, paragraph 1.7(viii).

<sup>29</sup> Article 35.



*REIWA submission*

5.36 REIWA submitted that the principal category of membership was Corporate Membership. It further submitted that if the above provisions did not exist, then persons could use Corporate Membership to avoid the requirement that directors, partners and branch managers be Ordinary or Associate Members. For example, a person not eligible for REIWA membership (e.g because they had been convicted of an indictable offence, such as fraud) could arrange for an agency to become a Corporate Member and afterwards become a director. REIWA therefore submitted that the provisions above maintain the professionalism of its members and thereby produce a public benefit.<sup>30</sup>

*Conclusion*

5.37 The Commission is satisfied that the above provisions assist in ensuring the integrity of REIWA's Corporate Membership requirements. They therefore produce a public benefit to the extent that those requirements produce a public benefit.

**Engaging employees of other agents<sup>31</sup>**

5.38 REIWA members are prohibited from:

- employing any person who is employed by another agent without the permission of the other agent; and
- employing a sales representative<sup>32</sup> who is employed by another agent.

*REIWA submission<sup>33</sup>*

5.39 REIWA submitted that:

- these provisions are consistent with the REBA Act which:
  - requires licensed agents to constantly control and supervise the work of unlicensed persons assisting the agency;<sup>34</sup> and
  - prohibits agents engaging sales representatives employed by other agents;<sup>35</sup>
- the provisions ensure that (unlicensed) sales representatives are properly supervised and that the supervision of other persons associated with real estate agents can be properly managed;

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<sup>30</sup> REIWA submission, 17 July 2000, paragraph 9.4.

<sup>31</sup> Articles 37.1.1.

<sup>32</sup> The REBA Act defines 'sales representative' as a person who negotiates real estate transactions on behalf of a licensed real estate agent, but who is not him or herself a licensed real estate agent. Sales representatives must, however be registered under the REBA Act.

<sup>33</sup> REIWA submission of 29 August 2001, page 12; submission of 17 July 2000, paragraph 10.3; Record of pre-decision conference, page 8.

<sup>34</sup> Section 132, REBA Act.

<sup>35</sup> Section 55, REBA Act.

- the prohibition is similar to provisions applying in other industries where there is a duty of fiduciary care – for example, the legal profession;
- people who work for real estate agents cannot serve two masters; for example, the client of one employer may be neglected because of the demands of the client of another employer; and
- the provisions do not prevent employees changing employment; rather it merely prevents persons being employed by two agents at the same time.

*Interested party submissions*

5.40 The Real Estate Employers' Federation of Western Australia (REEFWA) submitted that allowing sales representative to work for more than one employer would create difficulties including:

- where a sales representative lists a property for sale with one agency and introduces a purchaser to the property under the guise of another agency, and a claim for negligence is lodged against the sale representative, it would be difficult to determine which agency's professional indemnity insurance the claim should be made against. More generally, all the employers of a sales representative should, if prudent, take out indemnity insurance in relation to that representative, thereby increasing insurance costs;
- similarly, if the sales representative is injured, it may be difficult to determine which employers' workers' compensation policy should be used to make the relevant claim;
- conflicts of interest could arise where sales representatives are faced with the prospect of determining which employer should be served; for example, if a sales representative encountered a purchaser looking at two houses, one by marketed by each employer, he or she may favour the house marketed by the employer paying the higher commission rather than the one which better suits the purchaser;
- if an employer is to be in bona fide control of an employee, that employee must be answerable to one employer only. This need is exacerbated by the fact that professional and work ethic standards vary greatly between agencies.<sup>36</sup>

5.41 The Real Estate Institute of Victoria highlighted conflict of interest problems: for example, it wondered how a vendor would react if the same person arrived representing two agencies. Similarly, it highlighted the problem of where an agent received an offer on a Monday but was not working for the relevant agent until Friday. Generally, it considered that employers would not tolerate employees working for two employers.<sup>37</sup>

5.42 The Board considered that allowing sales representatives to work for two employers had no merit under the current licensing system and would result in weakening of the level of supervision of these agents and a weakening of the protection provided by the trust account requirements in the REBA Act.<sup>38</sup>

<sup>36</sup> REEFWA submission, 29 August 2001; Record of pre-decision conference, page 8.

<sup>37</sup> Record of pre-decision conference, page 6.

<sup>38</sup> Ibid, page 8; Board submission of 27 November 2001, page 2.

## *Conclusion*

5.43 The Commission remains sceptical about whether prohibiting real estate agent employees from working for two agents provides a public benefit outweighing any associated public detriment. In particular, if employers would be unlikely to allow this practice to occur, the Commission questions why the provisions are needed. Moreover, the provisions are likely to reduce the scope for part-time employment. Having said this, the Commission recognises that section 55 of the REBA Act expressly prohibits sales representatives from working for two agents. Consequently, it is prepared to authorise REIWA's provisions on this matter only so far as they are strictly consistent with the REBA Act, on the basis that such provisions would provide a net public benefit to the extent that the provisions in the REBA Act provide a net public benefit.

### **Licensed agents controlling agencies<sup>39</sup>**

5.44 REIWA members are required:

- if they control a licensed agency, to be licensed under the REBA Act; and
- if licensed under the REBA Act but not a firm or body corporate, to give substantial time and attention to the business and ensure that the agency's branch managers give substantial time and attention to their branches. Further, members who are branch managers must also give substantial time and attention to the business at the branch. An equivalent provision exists for licensed members which are firms or body corporates.

5.45 In addition, if the Council believes that a member is not exercising adequate and proper control and supervision over an agency, it may instruct an auditor to investigate the affairs of the business to determine whether its belief is correct.

### *REIWA submission<sup>40</sup>*

5.46 REIWA submitted that:

- the REBA Act requires persons in control of an agency to be licensed, and requires them to exercise control by giving substantial time and attention to the business, so as to avoid the practice of dummy licensing.<sup>41</sup> Under this practice, persons who have had their licences revoked or who have been unsuccessful in applying for a licence (e.g. because of a fraud conviction) find a licensed person to act as a figurehead while they actually control an agency's operations. The practice avoids the Board's licensing requirements, which seek to ensure that persons running agencies are properly qualified and not unscrupulous;
- that it would be placed in an impossible situation if it could not prohibit flagrant breaches of the REBA Act;

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<sup>39</sup> Article 37.2.

<sup>40</sup> REIWA submission, 17 July 2000, 10.1-2,6-8; submission of 29 August 2001, page 6; Record of pre-decision conference, pages 10-11.

<sup>41</sup> Sections 28 and 132, REBA Act.

- the power to establish audits is needed to enforce the above provisions, although the power is rarely used (it estimated that an auditor had been appointed twice in the last decade);
- that it appoints independent, external auditors;
- that it would be prepared to refer an adverse finding of an auditor to the Board.

#### *Interested party submissions*

5.47 With one exception, the Board supports the provisions above as they reiterate the requirements of the REBA Act and provide information that will assist agents to comply with their legislative obligations. In particular, it supports the power to audit agencies to ensure they are exercising adequate supervision and control. However, it considers that the Board should be informed of the circumstances of every appointment by REIWA of an auditor.<sup>42</sup>

#### *Conclusion*

5.48 The Commission is satisfied that the above provisions produce a public benefit by assisting to ensure the integrity of the REBA Act licensing system, to the extent that this licensing system produces a public benefit, subject to;

- auditors being independent of REIWA; and
- REIWA reporting auditors' findings to the Board where the external Designated Compliance Officer considers that auditors have identified significant concerns about the member's supervision and control of the agency.

#### **Dispute resolution**<sup>43</sup>

5.49 The Council is required to establish arbitration panels to resolve disputes between:

- members involving REIWA rules, articles, etc or which arise out of the provision of real estate or business agency services by members. Members are required to submit all disputes of this type to an arbitration panel; and
- members and the public involving REIWA rules, articles, etc or which arise out of the provision of real estate or business agency services by members provided that the member of the public concerned agrees in writing to submit the dispute to a panel and abide by the resolution.

5.50 Unless the Council has required a dispute to be resolved by an arbitration panel, a panel:

- may refuse to resolve a dispute if it concludes that the subject matter of the dispute is not within its capacity or that it would be otherwise inappropriate for it to do so; and

<sup>42</sup> Board submission, 27 September 2000, page 6; submission of 27 November 2001, page 1. The Commission notes that, in its original submission, the Board considered that it should be notified where an audit identifies problems.

<sup>43</sup> Article 44.

- may not resolve disputes involving sums of money in excess of \$20,000 (or a sum stipulated by the Council).

5.51 Arbitration panels must resolve disputes in accordance with the *Commercial Arbitration Act 1985* (WA) except in so far as the terms of this Act are lawfully modified by REIWA's articles, rules, etc, including its Dispute Resolution Manual.

5.52 REIWA's Dispute Resolution Manual requires, among other things:

- that arbitration panels be convened upon REIWA receiving a written request from a member or member of the public or upon the Council directing that a hearing be conducted;
- notice of the date of the hearing to be given to all parties no less than 14 days before the hearing; and
- unless advised otherwise by the Arbitration Panel, that all parties provide to the Arbitrator no less than 7 days before the hearing all documentary evidence they propose to rely on at the hearing. Wherever possible, REIWA shall provide copies of evidence provided by one party to all other parties.

5.53 REIWA has not sought authorisation of its Dispute Resolution Manual.

5.54 In addition, before a matter will be considered by an arbitration panel, parties to a dispute may be required to:

- attend a conciliation conference; and
- lodge with the Council monies identified to be in dispute, which are held in trust.

#### *REIWA submission*

5.55 REIWA submitted that its arbitration procedures provide a cost effective way of resolving disputes.<sup>44</sup> It also noted that over 90 per cent of arbitrations concern disputes between agents regarding the terms of conjunctual agreements.<sup>45</sup>

5.56 In response to concerns raised in the Draft Determination about whether parties to disputes would be aware of other dispute-resolution fora, REIWA submitted that it would amend its Articles and Dispute Resolution Manual to require that these parties be advised early of the existence of these other fora.<sup>46</sup>

5.57 The Draft Determination raised concerns about the lack of a requirement for parties to disputes to be informed of other parties' arguments and given an opportunity to rebut them. In response, REIWA submitted:<sup>47</sup>

<sup>44</sup> REIWA submission, 17 July 2000, paragraph 4.2.9.

<sup>45</sup> Ibid, paragraph 6.13.

<sup>46</sup> REIWA submission, 29 August 2001, pages 6-7.

<sup>47</sup> Ibid, pages 7-8.

- that its arbitrations are conducted in accordance with the *Commercial Arbitration Act* (CAA), which is consistent with the uniform Australia-wide legislation on arbitrations. The CAA provides that an arbitrator may conduct proceedings in such a manner as he or she thinks fit. However, this power is subject to the relevant common law principles of fairness and natural justice. REIWA considers that this system provides a fair and appropriate way for arguments to be presented. Further, requiring it to change the system would be highly unusual and unwarranted;
- generally, the arbitration process aims to give rise to just, economical and expeditious determination of a dispute. A requirement that, in *all* cases, written arguments be passed between the parties before a case is heard would not be consistent with this consideration;
- such a requirement might also present difficulties to unrepresented persons (who will often be consumers) who might not have the experience necessary to adequately write out their arguments;
- in addition, imposing such a requirement would raise questions about whether a party that failed to raise an argument prior to the conduct of a hearing could raise that argument at the hearing. Again, REIWA considered that this was likely to be prejudicial against inexperienced parties, particularly consumers.

5.58 The Draft Determination also raised concerns about the transparency of the arbitration process. In response, REIWA opposed reporting to the Board all individual cases of a non-membership nature considered by it. It highlighted that arbitrations are of a private character and are not usually open to the public.<sup>48</sup>

#### *Interested party submissions*

5.59 The Board submitted, among other things, that:

- the panels offer a very useful option for resolving disputes involving members that is not offered elsewhere;
- members of the public in dispute with an agent may opt to have the Board conciliate or investigate that dispute; and
- the Board has not received complaints regarding the operation of REIWA's arbitration panels in previous years.<sup>49</sup>

#### *Commission conclusion*

5.60 The Commission considers that REIWA's system of arbitration panels produces a public benefit by assisting to resolve disputes in the real estate industry.

5.61 The Commission considers that the system produces minimal public detriment, subject to REIWA amending its Articles to require:

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<sup>48</sup> Ibid, page 3.

<sup>49</sup> Board submission, 27 September 2000, page 6.

- that parties to disputes be advised early of the existence of other dispute-resolution fora; and
- arbitration panels that decline to hear or determine a dispute provide written reasons for the decision to all parties to the dispute.

5.62 The Commission accepts that minimal public detriment flows from the lack of a requirement that parties always be advised of each other's arguments before a hearing, particularly given that REIWA's dispute resolution manual generally requires parties to provide documentary evidence to the arbitrator before a hearing and requires, wherever possible, REIWA to provide copies of this evidence to other parties. The Commission also notes the general desirability of ensuring that arbitrations are not conducted in an overly legalistic manner.

### **Appeals<sup>50</sup>**

5.63 Appeals against, for example, Council or Professional Standards Tribunal decisions must be lodged with REIWA in writing within 14 days, along with the grounds for the appeal.

5.64 Appeals are heard by an Appeals Board appointed, with one exception, by the Council. The Appeals Board comprises: an office-bearing Council member; two ordinary members of Council; a member of REIWA who is a member of an Arbitration Panel; and a consumer representative appointed by the President of the Australian Institute of Arbitrators and Mediators and who is member of that Institute.

5.65 Appellants must pay REIWA an amount of money determined by the Council. The Appeals Board determines the extent to which this money is refunded.

5.66 Appeal hearings must be conducted as follows:

- not less than 14 days before the hearing, REIWA must give each party to the appeal:
  - written grounds of the appeal;
  - copies of documentary evidence considered by the original decision-maker; and
  - written notice stating the date, time and place of the hearing and informing the parties that they may speak at the hearing and make written representations at or prior to the hearing; and
- the Appeals Board must deliver its decision and reasons for the decision in writing. These must be provided to the parties to the appeal within 14 days.

5.67 Upon hearing an appeal, the Appeals Board is able to:

- uphold the earlier decision and dismiss the appeal;

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<sup>50</sup> Article 45.

- or grant the appeal and make such alternative decision as it deems fit. However, the Appeals Board may only make an alternative decision which the body that made the appealed decision was empowered to make.

*REIWA submission*

5.68 REIWA initially submitted that it had added a consumer representative to its Appeals Board and that the appeals process ensured procedural fairness for appellants.<sup>51</sup>

5.69 In response to concerns raised in the Draft Determination about the independence of the appeals board from REIWA, REIWA proposed to replace its existing Board with one constituted as follows:<sup>52</sup>

- 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, who is not a legal practitioner under the *Legal Practitioners Act 1893* 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.

5.70 REIWA submitted that it is appropriate to retain one representative on the Appeals Board who is a practising real estate agent because of the practical and unique knowledge that real estate agents have about many of the matters that are brought before the Appeals Board. In particular, agents appearing before the Appeals Board would be less likely to be able to take unfair advantage of the lack of practical knowledge of the industry by decision-makers who are not real estate agents.

5.71 REIWA also emphasised that its appeal mechanism was additional to, for example, appeal mechanisms available under the Commercial Arbitration Act for arbitrations or the right to complain to the Board in relation to disciplinary matters.

*Interested party submissions*

5.72 The Consumers' Association of Western Australia submitted that, as originally constituted, the Appeal Board was weighted in favour of REIWA.<sup>53</sup>

<sup>51</sup> REIWA submission, 17 July 2000, paragraph 4.2.10.

<sup>52</sup> REIWA submission, 29 August 2001, pages 8-10.

<sup>53</sup> Record of pre-decision conference, 31 August 2001, page 5.



### *Commission conclusion*

5.73 The Commission is satisfied that the Appeals Board, constituted as proposed by REIWA with one change, is sufficiently independent of REIWA and that the processes used by the Board are open, transparent and provide procedural fairness. The Commission considers that requiring that the consumer representative on the Appeals Board not be a legal practitioner under the Legal Practitioners Act is unnecessarily restrictive and therefore could produce public detriment. The Commission also considers that public detriment could arise if any member of the Appeals Board was also part of the original decision-making body, as this would reduce the independence of the Board.

### **Legal representation**<sup>54</sup>

5.74 Subject to any rule of law to the contrary, a person is entitled to legal representation at any hearing or appeal conducted pursuant to REIWA's articles, rules, etc only if the body conducting the hearing or appeal considers that such legal representation is necessary to enable the parties to the hearing to effectively present their cases and it is otherwise appropriate in the circumstances.

### *REIWA submission*

5.75 In response to concerns raised in the Draft Determination that the above restriction on legal representation may result in public detriment, REIWA submitted that:<sup>55</sup>

- where the issue of legal representation is a matter for the discretion of a body, the common law has clear rules as to how that discretion should be exercised, particularly with complex matters, where the livelihood of the parties might be at stake or where one party is disadvantaged by the process, such as being unable to adequately present their own case;
- granting parties a right to legal representation, particularly at arbitration hearings, may well produce unjust results, particularly with consumers;
- the Commercial Arbitration Act gives arbitrators a discretion to allow legal representation;
- granting a right to legal representation would work unfairly against parties who are unable to afford it;
- granting such a right would also operate against the spirit of having an informal and non-legalistic determination of disputes;
- using the REIWA arbitration process is optional. Members of the public may also apply to a Court where he or she might be guaranteed of the right to use a lawyer; and
- generally, to reduce the costs and complexity of hearings, it is becoming increasingly common in Australia for legislatures to ban or otherwise restrict the right of parties to use lawyers at hearings, including even Court hearings. This includes the Small Disputes

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<sup>54</sup> Article 46.

<sup>55</sup> REIWA submission, 29 August 2001, pages 10-11.

Division of the Western Australian Local Court and the Western Australian Small Claims Tribunal.

*Commission conclusion*

5.76 Given that the common law regulates how bodies conducting hearings exercise their discretion to allow legal representation or not, and the provisions of the Commercial Arbitration Act, the Commission is satisfied that the above provision does not give rise to a public detriment.

**Membership fees**

5.77 Membership fees are \$450 per year for Corporate Members and \$50 per year for Ordinary Members.

*REIWA submission*

5.78 REIWA submitted its fees were modest.<sup>56</sup>

*Commission conclusion*

5.79 The Commission concludes that REIWA's membership fees are not a significant barrier to obtaining REIWA membership. Consequently, they do not result in a significant public detriment.

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<sup>56</sup> REIWA submission, 17 July 2000, paragraph 1.7(vii).

## 6. MEMBERS' CODES OF PRACTICE

6.1 The Members' Codes of Practice (the Codes) address a range of matters relevant to the relationships between agents and vendors/lessors, other agents and purchasers/lessees. Those aspects of the Codes potentially raising public benefit and detriment issues are discussed below.

### Soliciting<sup>57</sup>

6.2 The Codes provide that:

- where an agent has entered into an agency agreement, members must not induce or attempt to induce a breach of, or interference with, that agency agreement;
  - *REIWA submission*: REIWA submitted that this provision reflects the common law;<sup>58</sup>
  - *Commission conclusion*: The Commission accepts that this provision produces a public benefit given that it reflects the common law;
- prior to entering into any agency agreement for the sale or lease of a property or business an agent must enquire of the prospective principal whether that principal has entered into any prior agency agreements in connection with subject sale or lease that impose any liabilities to pay a fee or impose any other obligations upon a principal and, if so, what the terms of that prior agency agreement are; and
- an agent must not solicit or accept any agency if the agent is aware that any other agency is in force which may oblige the vendor/lessor to pay two fees or expose the vendor/lessor to a claim of damages for breach of contract in the event of a sale or lease taking place, unless the agent gives a prior written statement to the vendor/lessor that the vendor/lessor may be so liable if a further agency agreement is signed;
  - *REIWA submission*: REIWA submitted that these two provisions enable the soliciting agent to issue a warning about the potential liability of the vendor/lessor to pay two commissions. It also notes that the latter provision is identical to one authorised by the Commission as part of Real Estate Institute of Australia's Code of Conduct on 23 November 1999;<sup>59</sup>
  - *Interested parties*: The Board submitted that these provisions partially reflect its statutory Code of Conduct which requires that a client is not charged two commissions. It considered that the provisions were useful because they set out how to avoid paying two commissions. Generally, it considered that the provisions demonstrated a useful role for industry regulation.<sup>60</sup>

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<sup>57</sup> Clause 2.

<sup>58</sup> REIWA submission, 17 July 2000, paragraph 4.3.1.

<sup>59</sup> Ibid; see also paragraphs 11.1-11.6.

<sup>60</sup> Board submission, 27 September 2000, page 7.

The Law Society of Western Australia considers that competition may be effective only if vendors can readily switch agents when an agency agreement expires. Consequently, it had no objection to the spirit of the third provision outlined above;<sup>61</sup>

- *Commission conclusion:* the Commission accepts that these provisions produce a public benefit by assisting to inform vendors/lessors of their potential obligations.

### **Agency agreements<sup>62</sup>**

6.3 The Codes require, among other things:

- agents to clearly explain to the vendors/lessors their rights and responsibilities in respect of any agency agreement and provide a copy of the agreement to the vendor/lessor at the time it is signed; and
- agents who hold an exclusive appointment not to take action against a vendor/lessor for recovery of a fee when a property and/or business has been sold or leased by a second agent who was not aware of the exclusive appointment and who has been paid a fee, unless the vendor or lessor was made fully aware of their responsibilities under the exclusive agency agreement at the time the agreement was signed.

#### *REIWA submission*

6.4 REIWA submitted that this rule protected consumers by requiring agents to fully explain to vendors/lessors their rights and responsibilities under agency agreements.<sup>63</sup>

#### *Board submission*

6.5 The Board submitted that the first provision above assists clients to understand their contracts with agents. It also supported the second provision above, which it submitted provides a practical rule for resolving disputes between agents when exclusive agency appointments overlap. Further, the provision assists in ensuring that clients are only charged one commission, as required under its statutory Code of Conduct.<sup>64</sup>

#### *Commission conclusion*

6.6 The Commission considers that the provisions outlined above provide a public benefit by ensuring that vendors/lessors make informed decisions about the consequences of the arrangements they enter into with real estate and business agents.

### **Conjunctional agreements<sup>65</sup>**

#### General

6.7 A conjunctional agreement is one between a listing agent<sup>66</sup> and another agent (the conjunctional agent) to share a fee arising from the introduction of a customer by the

<sup>61</sup> Law Society of Western Australia submission, 12 October 2000, page 2.

<sup>62</sup> Clause 3.

<sup>63</sup> REIWA submission, 17 July 2000, paragraph 4.3.2.

<sup>64</sup> Board submission, 27 September 2000, page 7.

<sup>65</sup> Clause 4.