



Australian  
Competition &  
Consumer  
Commission

# Determination

## Application for authorisation

**lodged by**

**The Real Estate Institute of Western Australia**

**in respect of**

**its Articles of Association, Members Code of Practice, Auction Code of Conduct, Multiple Listing Service By-Laws and Standard Exclusive Agency Agreements.**

**Date: 18 April 2007**

**Authorisation no.: A91026**

**Public Register no.: C2007/85**

**Commissioners:** Samuel  
King  
Martin  
McNeill  
Smith  
Willett

# Summary

The ACCC grants authorisation in respect of the arrangements contained in REIWA's Articles of Association, Members Code of Practice, Auction Code of Conduct, Multiple Listing Service By-Laws and the agreement to make available for use, the Standard Exclusive Agency Agreements. Authorisation is granted for five years.

## **The authorisation process**

The Australian Competition and Consumer Commission (ACCC) can grant immunity from the application of the competition provisions of the *Trade Practices Act 1974* (the TPA) if it is satisfied that the benefit to the public from the conduct outweighs any public detriment. The ACCC conducts a public consultation process to assist it to determine whether a proposed arrangement results in a net public benefit.

## **REIWA's application for authorisation**

On 22 December 2006, the Real Estate Institute of Western Australia (REIWA) lodged application for authorisation A91026 with the ACCC. REIWA has applied for authorisation in relation to its:

Articles of Association (Articles)

Members Code of Practice (Members Code)

Multiple Listing Service (MLS)

Auction Code of Conduct (Auction Code) and

Standard Exclusive Agency Agreements (Standard form contracts)

### *REIWA's submission in support of its application*

Overall, REIWA submits that the public benefit that flows from the arrangements includes facilitating the continuation of an association that aims to foster professionalism, efficiency and consumer protection in the practice of real estate and business agency.

REIWA's also submits that each of its Articles, Members Code, MLS, Auction Code and Standard Exclusive Agency Agreements carry with them a public benefit which would outweigh any anti-competitive effect of those arrangements.

## **ACCC assessment**

### *Anticompetitive detriments*

The ACCC considers that REIWA's proposed arrangements may generate some anticompetitive detriments. In particular, the ACCC considers that those provisions of REIWA's Members Code which require agents to disclose details of their clients to other agents or restrict agents from approaching possible buyers may potentially limit competition.

The ACCC also considers that the agreement by REIWA members to make standard form contracts available for use may potentially generate some anticompetitive detriments by lessening the incentive for real estate and business agents in Western Australia to be innovative in the services, terms and conditions they offer to potential clients.

The ACCC is however of the view that any potential anticompetitive effects which may arise from the conduct are likely to be reduced as membership of REIWA is not compulsory to provide real estate services in Western Australia and that use of the standard form contracts is also not compulsory.

### *Public benefits*

In addition, the ACCC is of the view that REIWA's arrangements are likely to generate a public benefit as:

- its Articles provide objective and fair admissions and appeal processes
- its Members Code requires increased disclosure by agents to consumers which is likely to provide greater contractual certainty resulting in fewer disputes
- its Multiple Listing Service improves the method of selling properties and increases competition
- its Auction Code provides a level of protection for consumers that is significantly higher than that provided by legislation and
- its standard form contracts generate some transaction cost savings.

Further, the ACCC considers that as any breaches of REIWA's rules and codes would be dealt with in accordance with the disciplinary procedures contained in REIWA's Articles, the public benefits identified are more likely to arise.

Overall therefore, the ACCC considers that the public benefits arising from the arrangements are likely to outweigh any public detriments that may arise.

### **Determination**

Authorisation is granted in respect of the arrangements contained in REIWA's Articles of Association, Members Code of Practice, Auction Code of Conduct, Multiple Listing Service By-Laws and the agreement to make available for use, the Standard Exclusive Agency Agreements.

Authorisation is granted to REIWA for a period of five years.

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# 1. Introduction

## Authorisation

- 1.1 The Australian Competition and Consumer Commission (the ACCC) is the independent Australian Government agency responsible for administering the *Trade Practices Act 1974* (the TPA). A key objective of the TPA is to prevent anti-competitive conduct, thereby encouraging competition and efficiency in business, resulting in a greater choice for consumers in price, quality and service.
- 1.2 The TPA, however, allows the ACCC to grant immunity from legal action for anti-competitive conduct in certain circumstances. One way in which parties may obtain immunity is to apply to the ACCC for what is known as an ‘authorisation’.
- 1.3 The ACCC may ‘authorise’ businesses to engage in anti-competitive conduct where it is satisfied that the public benefit from the conduct outweighs any public detriment.
- 1.4 The ACCC conducts a public consultation process when it receives an application for authorisation. The ACCC invites interested parties to lodge submissions outlining whether they support the application or not, and their reasons for this.
- 1.5 After considering submissions, the ACCC issues a draft determination proposing to either grant or deny the application. At that time, the applicant or any interested party may request that the ACCC hold a conference or lodge written submissions commenting on the draft determination.
- 1.6 The ACCC then reconsiders the application taking into account any further submissions received and issues a final determination. Should the public benefit outweigh the public detriment, the ACCC may grant authorisation. If not, authorisation may be denied.

## The application for authorisation

- 1.7 On 22 December 2006, the Real Estate Institute of Western Australia (REIWA) lodged application for authorisation A91026 with the ACCC.
- 1.8 REIWA applied for authorisation in relation to its Articles of Association, Members Code of Practice, Auction Code of Conduct, Multiple Listing Service By-Laws and Standard Exclusive Agency Agreements. REIWA seeks authorisation for a period of five years.

## Draft determination

- 1.9 On 21 March 2007 the ACCC issued a draft determination proposing to grant authorisation for a period of five years.

## 2. Background

### The Real Estate Institute of Western Australia

- 2.1 REIWA is an association of Western Australian real estate<sup>1</sup> and business agents<sup>2</sup> incorporated under the *Associations Incorporation Act 1987*. REIWA was initially incorporated in 1918.
- 2.2 REIWA states that its object and purpose is to, amongst other things, ensure that its members enjoy a reputation as highly professional real estate and/or business agency practitioners operating in a sustainable business environment.
- 2.3 REIWA provides a number of services to real estate agents, business agents and the general public designed to provide an effective method of assisting in the delivery of real estate and business agency services to consumers in Western Australia. The main services provided by REIWA include:
- **Professional development services** such as training, the formulation of rules and ethical standards and the provision of arbitration services.
  - **Marketing services** such as a comprehensive internet real estate service; the HomeBuyer and the Multiple Listing Service.
  - **Commercial services** such as the provision of printing services, internet hosting services and insurance services.
- 2.4 REIWA submits that it currently has 1,404 ordinary members and 864 corporate members which REIWA claims represents approximately 85% of real estate agents in Western Australia. REIWA estimates that some 95% of sales of residential real estate properties in Western Australia are conducted by its members.<sup>3</sup>

### Background to the application

#### *The ACCC's 1998 investigation of REIWA*

- 2.5 On 16 June 1998, the ACCC commenced legal proceedings in the Federal Court of Australia against REIWA alleging that certain of its Rules of Practice were anti-competitive and in breach of section 45(2) of the TPA. On 8 October 1999, the Federal Court issued orders by consent which, amongst other things, provided an opportunity for REIWA to lodge an application for authorisation.
- 2.6 On 17 July 2000, REIWA lodged an application for authorisation with the ACCC. Authorisation was sought for REIWA's Articles of Association, Members Code of Practice, Multiple Listing Service by-laws and Standard Form Exclusive Agency Agreements.

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<sup>1</sup> A real estate agent is a person whose business is to act as a paid agent in respect of real estate (land and/or buildings) transactions.

<sup>2</sup> A business agent is a person whose business is to act a paid agent in respect of business (commercial undertaking or enterprise) transactions.

<sup>3</sup> Page 18 of REIWA's submission in support of its application.

### *The ACCC's assessment of REIWA's 2000 application*

- 2.7 On 20 July 2001, the ACCC released a draft determination proposing to deny REIWA's application for authorisation. In making its assessment, the ACCC noted that while it considered that the benefits of the proposed arrangements were likely to be outweighed by their detriments, this balance could be shifted if a number of amendments were made to various aspects of REIWA's application.
- 2.8 Following release of the ACCC's draft determination, REIWA proposed making several amendments to its proposed arrangements. As these amendments addressed most of the ACCC's concerns, on 21 December 2001, the ACCC issued a final determination in which it granted REIWA's application for authorisation (A70011). The ACCC did however impose a number of conditions in the determination which effectively deferred the commencement of the authorisation until 20 August 2002.
- 2.9 Authorisation A70011 was granted for a period of five years and is due to expire on 19 August 2007.

### **Background to the industry**

- 2.10 In Western Australia, individuals, partnerships or companies wanting to operate as real estate or business agents are required, by law, to be licensed. The Real Estate and Business Agents Supervisory Board (REBA) administers the Western Australian real estate licensing and regulatory systems.
- 2.11 REBA is a statutory authority which is established in accordance with the *Real Estate and Business Agents Act 1978* (the REBA Act) and administers the REBA Act, its Code of Conduct for Agents and Sales Representatives and the Real Estate and Business Agents (General) Regulations 1979.
- 2.12 Under the REBA Act, a licensee that is granted the right to carry on a business as a real estate and/or business agent must also have a current triennial certificate (three year) in order to operate legitimately in the industry. REBA issues successful applicants with a triennial certificate at the time a licence is granted. The triennial certificate is subject to renewal once every three years.
- 2.13 To obtain a licence, a number of requirements must be satisfied. These include that the person must be of good character and repute; must be a fit and proper person to hold a license and; must have sufficient material and financial resources to comply with the REBA Act.
- 2.14 An individual wanting to work in Western Australia as a real estate and/or business sales representative is also legally required to be registered with REBA.
- 2.15 In addition to its licensing responsibilities, REBA has a number of other functions under the REBA Act including:
- conducting investigations into allegations about real estate agents and sales representatives
  - providing conciliation services to consumers and agents in dispute and
  - administering the Fidelity Guarantee Fund, which reimburses people for financial loss due to the criminal or fraudulent behaviour of an agent or sales representative.

### **3. REIWA's application for authorisation**

3.1 On 22 December 2006, REIWA lodged authorisation application A91026 with the ACCC. REIWA is seeking authorisation in relation to its:

Articles of Association (Articles)

Members Code of Practice (Members Code)

Multiple Listing Service (MLS)

Auction Code of Conduct (Auction Code) and

Standard Exclusive Agency Agreements (Standard form contracts)

3.2 REIWA has sought authorisation for a period of five years and for authorisation to extend to itself and to its present and future members.

#### **REIWA's submission in support of its application**

3.3 The ACCC notes that REIWA has provided extensive submissions in relation to each of the five components of its application listed in paragraph 3.1. The following is REIWA's general submission in relation to the overall conduct. Submissions in relation to each specific element of the application are included in the ACCC's assessment sections of this determination.

3.4 Overall, REIWA submits that each of its Articles, Members Code, MLS, Auction Code and Standard Exclusive Agency Agreements provides a public benefit and that public benefit outweighs any anti-competitive effect of those arrangements such that authorisation is warranted.

3.5 Specifically, REIWA submits that the public benefit that flows from the arrangements include:

- facilitating the continuation of an association that aims to foster professionalism, efficiency and consumer protection in the practice of real estate and business agency
- promoting the orderly and fair resolution of disputes between members and disputes between members and the consumer public, and
- facilitating a private and cost effective mechanism for the enforcement of standards of real estate practice and thereby reducing the need for all consumer complaints to be dealt with by government agencies and the civil courts.

3.6 Further, REIWA submits that the proposed arrangements are vital for the efficient delivery of services by REIWA to its members and the public and for the efficient operation of real estate and business sale transactions in Western Australia.

3.7 Finally, REIWA submits that the arrangements give certainty to the practices in the real estate and business agency markets thereby enabling sellers, buyers, owners and lessees to deal with reasonable knowledge of those practices.

## **4. ACCC consultation and draft determination**

- 4.1 Prior to issuing its draft determination, the ACCC sought submissions from a variety of interested parties that may potentially have been affected by the proposed conduct. The ACCC also sought submissions in response to the draft determination.

### **Submissions received prior to the draft determination**

- 4.2 The ACCC received a submission from the Real Estate Institute of Australia (REIA) prior to issuing its draft determination. REIA stated that it supported REIWA's application and was satisfied that the cited benefits to the public arising from REIWA's proposed arrangements would outweigh any potential impact on competition.

### **Draft determination**

- 4.3 On 21 March 2007, the ACCC issued a draft determination in which it proposed granting REIWA's application for authorisation for a period of five years. Specifically the ACCC proposed granting authorisation in respect of the arrangements contained in REIWA's Articles of Association and related codes and rules.
- 4.4 A conference was not called by any party in response to the ACCC's draft determination.

### **Submissions received subsequent to the draft determination**

- 4.5 REIA provided a further submission in response to the ACCC's draft determination. REIA stated that it supported the ACCC's proposal to grant authorisation.
- 4.6 Copies of REIA's full submissions are available on the ACCC's website and public register.

## 5. The net public benefit test

- 5.1 The ACCC may only grant authorisation where the relevant test in section 90 of the TPA is satisfied.
- 5.2 REIWA lodged application for authorisation A91026 under section 88(1) of the TPA to make and give effect to a contract or arrangement, or arrive at an 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 TPA. The relevant tests for this application are found in sections 90(6) and 90(7) of the TPA.
- 5.3 In respect of the making of and giving effect to the arrangements, sections 90(6) and 90(7) of the TPA state that the ACCC shall not authorise a provision of a proposed contract, arrangement or understanding, other than an exclusionary provision, unless it is satisfied in all the 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
  - this 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 was made and the provision concerned was given effect to.

### Application of the tests

- 5.4 The Tribunal has stated that the test under section 90(6) is limited to a consideration of those detriments arising from a lessening of competition.<sup>4</sup>
- 5.5 However, the Tribunal has previously stated that regarding the test under section 90(6):
- [the] fact that the only public detriment to be taken into account is lessening of competition does not mean that other detriments are not to be weighed in the balance when a judgment is being made. Something relied upon as a benefit may have a beneficial, and also a detrimental, effect on society. Such detrimental effect as it has must be considered in order to determine the extent of its beneficial effect.<sup>5</sup>
- 5.6 Consequently, given the similarity of wording between section 90(6) and 90(7), when applying these tests the ACCC can take most, if not all, detriments likely to result from the relevant conduct into account either by looking at the detriment side of the equation or when assessing the extent of the benefits.

### Definition of public benefit and public detriment

- 5.7 Public benefit is not defined in the TPA. However, the Tribunal has stated that the term should be given its widest possible meaning. In particular, it includes:

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<sup>4</sup> *Australian Association of Pathology Practices Incorporated* [2004] ACompT 4; 7 April 2004. This view was supported in *VFF Chicken Meat Growers' Boycott Authorisation* [2006] ACompT9 at paragraph 67.

<sup>5</sup> *Re Association of Consulting Engineers, Australia* (1981) ATPR 40-2-2 at 42788. See also: *Media Council case* (1978) ATPR 40-058 at 17606; and *Application of Southern Cross Beverages Pty. Ltd., Cadbury Schweppes Pty Ltd and Amatil Ltd for review* (1981) ATPR 40-200 at 42,763, 42766.

...anything of value to the community generally, any contribution to the aims pursued by society including as one of its principle elements ... the achievement of the economic goals of efficiency and progress.<sup>6</sup>

5.8 Public detriment is also not defined in the TPA but the Tribunal has given the concept a wide ambit, including:

...any impairment to the community generally, any harm or damage to the aims pursued by the society including as one of its principal elements the achievement of the goal of economic efficiency.<sup>7</sup>

### **Future with-and-without test**

5.9 The ACCC applies the ‘future with-and-without test’ established by the Tribunal to identify and weigh the public benefit and public detriment generated by arrangements for which authorisation has been sought.<sup>8</sup>

5.10 Under this test, the ACCC compares the public benefit and anti-competitive detriment generated by arrangements in the future if the authorisation is granted with those generated if the authorisation is not granted. This requires the ACCC to predict how the relevant markets will react if authorisation is not granted. This prediction is referred to as the ‘counterfactual’.

### **Other matters**

5.11 The ACCC can grant authorisation for a limited period of time.<sup>9</sup>

5.12 Finally, applications to make or give effect to contracts, arrangements or understandings that might substantially lessen competition or constitute exclusionary provisions may be expressed to extend to:

- persons who become party to the contract, arrangement or understanding at some time in the future<sup>10</sup> and/or
- persons named in the authorisation as being a party or a proposed party to the contract, arrangement or understanding.<sup>11</sup>

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<sup>6</sup> Re 7-Eleven Stores (1994) ATPR 41-357 at 42,677. See also Queensland Co-operative Milling Association Ltd (1976) ATPR 40-012 at 17,242.

<sup>7</sup> Re 7-Eleven Stores (1994) ATPR 41-357 at 42,683.

<sup>8</sup> Australian Performing Rights Association (1999) ATPR 41-701 at 42,936. See also for example: Australian Association of Pathology Practices Incorporated (2004) ATPR 41-985 at 48,556; Re Media Council of Australia (No.2) (1987) ATPR 40-774 at 48,419.

<sup>9</sup> Section 91(1).

<sup>10</sup> Section 88(10).

<sup>11</sup> Section 88(6).

## 6. ACCC assessment – The markets and counterfactual

6.1 The ACCC's evaluation of REIWA's proposed arrangements is in accordance with the net public benefit test outlined in section 5 of this determination. As required by the test, it is necessary for the ACCC to assess the likely public benefits and detriments which may flow from the proposed arrangements.

### **The market**

6.2 The first step in assessing the effect of the conduct for which authorisation is sought is to consider the relevant market(s) affected by that conduct.

6.3 REIWA submits that the relevant area of competition is for the provision of real estate and business agency services in Western Australia. However, REIWA submits that the provision of those services is not state-wide but is instead broken up into a number of smaller, localised geographic regions.

6.4 Without specifically identifying the number and location of these regions, REIWA submits that there are likely to be a number of such regions in country areas (i.e. Broome, Esperance and Margaret River) and a number in the Perth metropolitan area.

6.5 REIWA submits that the provision of real estate and business agency services in most of the local regions is characterised by market features such as low barriers to entry and a large number of small local operators.

### ***ACCC assessment of the relevant markets***

#### *Provision of services by real estate and business agents*

6.6 For the purpose of assessing this application, the ACCC considers that the primary area of competition affected by the proposed conduct is likely to be, as submitted by REIWA, the provision of services by real estate and business agents in Western Australia.

6.7 The ACCC has previously accepted<sup>12</sup> that the provision of such services is likely to be highly localised and characterised by a large number of small, local real estate agencies. The ACCC also considered that as there were likely to be considerable practical restraints on the ability of individual real estate agencies to compete across a wide geographic area, the provision of their services was likely to be limited to a defined geographic area.

6.8 The ACCC has however noted in past determinations that while the provision of real estate services is likely to be local, there was likely to be considerable overlap across the boundaries between the geographic areas especially in metropolitan regions.

6.9 The ACCC considers that a similar assessment of the geographic dimension of the market to that previously accepted is likely to apply in the current application.

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<sup>12</sup> See Estates Agents Co-Operative Ltd determination (A90678) dated 26 April 2000

### *Provision of services to real estate and business agents*

- 6.10 The ACCC considers that another area of competition likely to be affected by the proposed conduct is for the provision of services to real estate and business agents. The ACCC considers that this is the area of competition in which REIWA competes to provide services to real estate and business agents.
- 6.11 As outlined in section 2 of this determination, REIWA states that it provides its members with services that include: professional development services (training); marketing services (internet real estate service, the Multiple Listing Service); and commercial services (printing services, internet hosting services and insurance services).
- 6.12 The ACCC considers that although it is unlikely that REIWA competes with any single individual supplier to provide all of these services, it is likely that REIWA competes with a wide range of smaller suppliers to provide each of the discrete services. For example, it is likely that REIWA competes against providers of internet advertising and sales services along with providers of printing services.

### **The counterfactual**

- 6.13 As noted in section 5 of this determination, in order to identify and measure the public benefit and public detriment generated by the proposed conduct, the ACCC applies the ‘future with-and-without test’.
- 6.14 Under this test, the ACCC compares the public benefit and anti-competitive detriment likely to be generated by arrangements in the future if the authorisation is granted with those generated if the authorisation is not granted. This requires the ACCC to predict how the relevant markets will react if authorisation is not granted. This prediction is referred to as ‘the counterfactual’.
- 6.15 In this instance, the ACCC considers that the relevant counterfactual (that is the situation without authorisation) would likely be a situation in which REIWA continued to represent Western Australian real estate and business agents and to provide them with certain services, albeit in a more limited capacity.
- 6.16 The ACCC considers that as REIWA would not have the certainty provided by authorisation, it is likely that its activities may only extend to such things as providing general information to its members and the public.
- 6.17 The ACCC notes, however, that regardless of whether or not the authorisation is granted, state legislation such as the REBA Act and the *Fair Trading Act 1987 (WA)*, and federal legislation such as the TPA and the *Corporations Act 2001*, will continue to regulate the activities and behaviour of real estate and business agents in Western Australia.

### **ACCC’s approach to assessing the proposed arrangements**

- 6.18 In order to grant authorisation to the conduct proposed in REIWA’s application for authorisation, the ACCC must be satisfied that the proposed arrangements would result in a benefit to the public that outweighs any detriment to the public that may arise from the proposed arrangements.

6.19 REIWA's application is divided into the following five parts:

Articles of Association

Members Code of Practice

Multiple Listing Service

Auction Code of Conduct

Standard Exclusive Agency Agreements

6.20 The ACCC's assessment of the potential public benefits and detriments of the proposed arrangements will look at each of the five parts separately. The assessment will however only focus on those aspects of the arrangements that, in the ACCC's view, may potentially either raise public detriment concerns or provide public benefits.

6.21 Complete copies of each of the five sections of REIWA's application can be found on the ACCC's website [www.accc.gov.au](http://www.accc.gov.au) by following the links to Authorisations and Public Registers.

## **7. REIWA's Articles of Association**

- 7.1 Generally speaking, Articles of Association (Articles) are the rules which define the internal organisation of certain registered entities. Articles may deal with internal matters such as membership requirements, disciplinary procedures, conduct of meetings and the appointment of directors.
- 7.2 However, Articles may also be considered as agreements between the association and its members and between members themselves as to the terms on which association's services will be provided.
- 7.3 Articles may raise competition concerns if, for example, they contain subjective admissions procedures or lack appropriate mechanisms for the review of decisions which unfairly discriminate against a particular party. Similarly, Articles may generate public benefits where they provide clear and objective administrative processes which support positive organisational objectives.

### **REIWA's Articles**

- 7.4 REIWA states that its Articles specify matters such as its objectives, its membership requirements and its disciplinary, appeals and dispute resolution processes. In addition, REIWA's Articles outline its administrative processes, such as how elections will be conducted and how the association will be managed.
- 7.5 REIWA states that it has recently revised its Articles, with the changes anticipated to come into effect prior to 1 June 2007. The current application for authorisation is for the revised Articles. The following are submissions by REIWA in relation to those areas of its revised Articles which it considers may raise public detriment concerns or provide public benefits. The ACCC's assessment of the Articles follows.

### ***Ability to gain membership of REIWA***

- 7.6 REIWA states that its membership focus is on persons and entities that are actively involved in the real estate industry, rather than persons who, whilst they may hold a real estate licence, are not actively using that licence or involved in real estate or business agency businesses.
- 7.7 Consequently, REIWA states that its categories of membership have been developed so that individuals can only be members if they are associated with corporate members (being sole trading businesses, partnerships or companies) and corporate members may only be members if the individuals associated with the business concerned are ordinary members. REIWA submits that this produces a system whereby its members are effectively all carrying on the business of real estate or business agents, or alternatively, are associated with active businesses.

### ***Membership criteria and application process***

- 7.8 REIWA states that it has revised its membership criteria (Article 8) in order to ensure that its members meet certain standards. REIWA states that whilst the REBA Act requires persons who become licensed real estate agents, be of "good character and repute and fit and proper" persons, REIWA's Articles are less subjective. For example, REIWA states

that the criteria now include such matters as the person: not currently having a suspended license; not being an undischarged bankrupt; not being of unsound mind<sup>13</sup>; not having been convicted of certain indictable offences and not being indebted to REIWA.

- 7.9 In addition REIWA states that its membership application process has been streamlined and simplified. In particular REIWA states that there is no longer a requirement that applications for membership be accompanied by a proposer or seconder and there is no requirement on REIWA to give notice of applications for membership to existing members prior to processing the application.
- 7.10 Decisions to refuse membership must be accompanied with written reasons from the Chief Executive Officer and unsuccessful applicants may appeal a decision denying their application. The appeals process is discussed at paragraph 7.26 of this determination.
- 7.11 REIWA claims that its membership processes provide a public benefit insofar as they promote the delivery of services to the real estate and business agency industries and deliver a minimum standard of membership criteria that provides consumer protection.
- 7.12 In addition, REIWA states that its membership processes are unlikely to raise competition concerns as they provide objective and transparent criteria which REIWA claims are relatively simple to achieve. REIWA claims that this assertion is supported by the fact that the vast majority of trading real estate businesses in Western Australia are members of REIWA.

#### ***Annual membership returns***

- 7.13 REIWA submits that a new provision has been included in its Articles which requires members to provide REIWA with an annual declaration certifying compliance with its Articles. REIWA submits that this requirement will provide a public benefit by ensuring that its members continue to comply with membership criteria.

#### ***Insurance***

- 7.14 REIWA states that in order to become and retain membership of REIWA, members are required to 'declare'<sup>14</sup> that they have a certain level of insurance. REIWA states that the reason it requires its members to be adequately insured is to protect consumers from potential negligence, protection it considers provides a benefit to the public.

#### ***Membership fees***

- 7.15 REIWA submits that its annual membership fees are modest. For example, REIWA submits that its annual corporate membership fee is \$646 per annum with the annual membership fee for ordinary members being \$72 per member.<sup>15</sup> REIWA submits that the level of its fees do not create a barrier to obtaining membership to REIWA.

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<sup>13</sup> As defined by the relevant mental health legislation.

<sup>14</sup> Previously members were required to provide proof.

<sup>15</sup> A fee is also charged by the Real Estate Institute of Australia to each corporate member, being \$120 for each corporate member plus \$120 for each branch office.

### ***Suspension of REIWA trading services to members***

- 7.16 REIWA states that it has introduced a new provision (Article 18) which provides the capacity for it to suspend trading services (but not cancel or suspend membership) to members who are indebted to REIWA with respect to services provided to those members. A person aggrieved by a decision under Article 18 may appeal such a decision.
- 7.17 REIWA submits that suspending services is merely a natural product of the exercising of reasonable and usual commercial rights and any potential anti-competitive effect is avoided by limiting the ability of REIWA to act in this situation to cease supplying services, rather than expelling or suspending a right to membership.

### ***Cessation of membership and disciplining of members***

- 7.18 REIWA submits that its disciplinary provisions provide a public benefit insofar as they ensure that REIWA's membership criteria are complied with and the consumer protection afforded by those provisions is maintained.
- 7.19 REIWA states that its revised disciplinary procedures provide that, amongst other things:
- if the Chief Executive Officer of REIWA determines that a member does not comply with the criteria for membership<sup>16</sup>, the person shall upon receipt of written notice, cease to be a member of REIWA
  - that person may, within 14 days, request that the matter be referred to a Professional Standards Tribunal for determination
  - if the person is not satisfied with the decision of the Professional Standards Tribunal they may appeal the decision.<sup>17</sup>
- 7.20 REIWA states that the Professional Standards Tribunal is empowered to hear all disciplinary matters. The Professional Standards Tribunals panel is made up of three individuals selected by the CEO from a panel of individuals previously approved by REIWA's Council and is to be chaired by a legal practitioner.
- 7.21 REIWA states that the Professional Standards Tribunal has sole power to terminate or suspend memberships but may also:
- impose certain penalties including monetary penalties of not more than \$10,000
  - require members to undertake a course of further training or
  - dismiss the matter without penalty.
- 7.22 As mentioned, Professional Standards Tribunal decisions may be appealed in accordance with the process outlined in paragraph 7.26 of this determination.

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<sup>16</sup> Stipulated in Articles 7 and 8

<sup>17</sup> Pursuant to Articles 41-53

## ***Arbitration***

- 7.23 REIWA states that its arbitration process provides an efficient and cost-effective alternate dispute resolution process for both its members and the public. REIWA states that its members must submit disputes to REIWA for resolution if the disputes:
- are between member agents or
  - between member agents and members of the public who agree to abide by a REIWA arbitration determination.
- 7.24 REIWA states that its arbitration panels must resolve disputes in accordance with the *Commercial Arbitration Act 1985* except insofar as the terms of that Act are lawfully modified by REIWA's Articles, Codes or Rules and/or the terms of REIWA's Dispute Resolution Manual.
- 7.25 REIWA states that its Dispute Resolution Manual sets out the procedures and guidelines that should be followed in conducting a conciliation or arbitration conference. Additionally, REIWA states that it advises all parties and complainants of the existence of alternate legal options for resolving their disputes (i.e. outside of REIWA's arbitration process) including the REBA board the Courts.

## ***Appeals process***

- 7.26 REIWA's states that its appeals process is available to persons:
- whose application for membership is rejected (Article 9.4)
  - who is suspended from receiving services supplied by REIWA (Article 18) and/or
  - who receives an adverse decision, including being suspended or expelled from REIWA, from REIWA's Professional Standards Tribunal (Article 32).
- 7.27 REIWA's appeal provisions are set out in its revised Articles 43 to 51. The general structure of REIWA's appeals process is similar to its previous process whereby the Appeals Board is made up of:
- a chairperson, being a legal practitioner appointed by the Australian Institute of Arbitrators and Mediators, who is a member of that Institute but not a member of REIWA or a licensed real estate agent or sales representative
  - a consumer representative who is not a licensed real estate agent or sales representative and who is not a member of REIWA and
  - a person who is a real estate agent licensed under the *Real Estate and Business Agents Act 1978* and appointed by REIWA.
- 7.28 REIWA states 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.
- 7.29 REIWA submits that the existence of an independent Appeals Board ensures procedural fairness.

## **ACCC's assessment of REIWA's Articles**

### ***Admission procedures***

- 7.30 Generally, the ACCC considers that anti-competitive detriment may arise from arrangements of the type proposed by REIWA, if membership of such an industry association is considered necessary to compete, or significantly assists a business to compete, in the relevant industry.
- 7.31 However, the ACCC considers that the potential anti-competitive detriment of such arrangements are likely to be significantly reduced if the membership admission processes and procedures which are required to enter an association like REIWA are open and transparent and contain provision for review of adverse decisions by an independent appeals body.
- 7.32 In this instance, the ACCC considers that while membership of REIWA is not mandatory to compete as a real estate or business agent in Western Australia, industry information seems to suggest that membership does provide a benefit. The ACCC is of the view therefore that it is reasonable to assume that membership of REIWA would carry with it some competitive advantage.
- 7.33 The ACCC considers that this proposition is supported by the fact that, according to REIWA, approximately 85% of real estate agents and 50% of business agents in Western Australia are members of REIWA. Given this, the ACCC considers it incumbent on REIWA to ensure that its admission procedures and assessment criteria are open, transparent and reviewable.
- 7.34 In this respect, the ACCC considers it is reasonable to expect that prospective REIWA members agree to abide by REIWA's rules and have a valid real estate or business agents license. In addition, the ACCC considers that REIWA's other requirements such as a prospective member not being an undischarged bankrupt or not having been committed of certain indictable offences, are also reasonable and are likely to provide a degree of consumer protection.
- 7.35 In respect of a decision by REIWA to reject an application for membership, the ACCC notes that the applicant must be provided with written reasons by REIWA explaining why their application was rejected. The applicant then has the right to appeal the decision pursuant to the appeals provisions contained in the Articles. The ACCC considers that provided this appeals process is sufficiently independent and impartial (this is discussed below) these provisions of the Articles dealing with the rights of aggrieved prospective members are likely to provide a benefit.
- 7.36 Overall, the ACCC considers that REIWA's admission requirements are sufficiently objective and are unlikely to result in the subjective or arbitrary exclusion of an otherwise suitable applicant.

### ***On-going requirements of members***

- 7.37 The ACCC considers that REIWA's on-going requirement that its members maintain professional indemnity insurance of at least \$1 million is likely to provide a benefit to the public. The ACCC considers that this benefit is likely to increase as a result of REIWA's additional requirement that its members provide annual declarations stating their compliance with membership conditions.

## ***Arbitration***

7.38 The ACCC considers that insofar as REIWA's arbitration process provides a cost effective method for resolving disputes in the real estate industry, it is likely to provide a public benefit. The ACCC considers that any potential detriment which may arise from the arbitration provisions of REIWA's Articles is mitigated by:

- the requirement that the dispute resolution process be conducted in accordance with the *Commercial Arbitration Act 1985* (WA)
- the process being limited to disputes not exceeding \$50,000 and
- REIWA advising all parties and complainants that alternative dispute resolution options exist.

## ***Disciplinary and appeals provisions***

7.39 Generally, the ACCC considers that disciplinary and appeals provisions can, as with admission procedures, potentially increase the anti-competitive detriments of arrangements being considered if, for example:

- the procedures are unclear and/or ambiguous
- there is potential for subjective or arbitrary decisions and
- there is scope for procedural unfairness or bias.

7.40 Conversely, the ACCC considers that the inclusion of fair and transparent disciplinary and appeals processes may provide a public benefit to the extent that they facilitate compliance with a fair and transparent Code of conduct.

7.41 In this instance, the ACCC considers that REIWA's disciplinary procedures as outlined in Articles 23-33 and its appeals provision outlined in Articles 43-51 are suitably clear and certain and provide a public benefit insofar as they uphold REIWA's Rules and Code of Practice.

7.42 In particular, the ACCC considers that REIWA's appeals process provides a fair and independent final hearing for prospective or existing REIWA members, of any adverse decision made under the Articles. The ACCC is of the view that this results from the requirement that the three member appeals board consist of two independent members, one being a legal practitioner appointed by an independent party<sup>18</sup> and the other a consumer representative who is not a member REIWA.

## **ACCC's conclusion on the Articles**

7.43 Overall, the ACCC is of the view that REIWA's Articles provide objective and fair admissions and appeal processes along with clear on-going requirements for its members. The ACCC considers that as these provisions are likely to increase compliance with REIWA's objectives and its Code of Practice, REIWA's Articles are likely to generate a public benefit.

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<sup>18</sup> The president of the Australian Institute of Arbitrators and Mediators.

## **8. Members Code of Practice**

- 8.1 An industry code of conduct or practice generally sets out specific standards of conduct for an industry in relation to the manner in which it deals with its members as well as its customers. However, as industry codes often involve agreements between competitors, they do have the potential to raise competition concerns and therefore parties may seek to have them authorised.
- 8.2 Industry codes also have the capacity to generate public benefits where, for example, they encourage improvements in professional standards or promote improved consumer protection.

### **REIWA's Members Code of Practice**

- 8.3 In this instance, REIWA states that its Members Code of Practice (Members Code) is designed to impose regulation on the conduct of its members to assist in the efficient delivery of real estate services. In addition, REIWA submits that its Members Code promotes: consumer protection; professionalism and higher standards in the practice of real estate and business agency services and; assists in enforcing those higher standards.
- 8.4 The ACCC notes that while REIWA's code has not changed from the form previously authorised by the ACCC (A70011), REIWA's current application provides an opportunity for the ACCC to re-evaluate its Members Code in light of the changes to its Articles.
- 8.5 The ACCC's assessment of the Members Code considers each of its main clauses and assesses them in turn with an overall assessment provided at the end of the section.

### **Clause 1 – Obtaining an agency to sell**

- 8.6 Clause 1 of the Members Code requires that REIWA members obtain written authority from principals before offering a property for sale and, on receipt of such authority, conduct relevant title searches.
- 8.7 The ACCC considers that clause 1 may provide some public benefits insofar as it increases contractual certainty for the vendor and their agent. The ACCC considers that this certainty will arise from the requirement for there to be a written agreement between the parties along with the imposition of a discipline on the real estate agent to determine the status of the property (i.e. encumbrances) prior to agreeing to sell it.

### **Clause 2 – Interference with contracts or agreement**

- 8.8 REIWA submits that clause 2 of its Members Code deals with the issue of agents potentially inducing a breach of an existing agency agreement.<sup>19</sup> REIWA states that the clause is intended to protect consumers from such activity where they may potentially be liable to pay two or more commissions.

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<sup>19</sup> An agreement between a listing agent and a vendor whereby the listing agent is given the right to sell or lease a property.

- 8.9 While the ACCC accepts that the overall intention of clause 2 does appear to be to limit the possibility for consumers to pay multiple commissions, it is concerned that provision 2.2 of that clause has the potential to be misinterpreted. Provision 2.2 states:

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 the sale or lease of the property or business the subject of the proposed listing** that impose any current or potential liabilities to pay a fee or impose any other current or potential obligations upon a principal and if so, what the terms of that prior agency agreement are (Emphasis added) .

- 8.10 Although the ACCC has received no specific complaints regarding this provision, it would be concerned if for example this requirement reduced the preparedness of agents to accept offers to sell a property simply on the basis that they would not be an exclusive agent. Additionally, the ACCC would be concerned if this provision were used by agents to determine which other agents they were competing against and using that information to decide whether they would list a property or not.
- 8.11 The ACCC is therefore of the view that insofar as clause 2 is used to prevent vendor/lessees from unwittingly breaching contracts or having to pay multiple commissions, it is likely to provide some public benefit, however, any misuse of the requirements in clause 2 would result in a public detriment.

### **Clause 3 - Agency agreements**

- 8.12 REIWA states that clause 3 of its Members Code deals with issues relating to agency agreements and its members responsibilities to vendors/lessors. This includes requiring that agents inform vendors of their rights and responsibilities under an agency agreement and to not take action against those vendors in certain circumstances such as when a property is sold by a second agent who was not aware of the exclusive appointment. REIWA submits that these provisions provide protection for consumers along with a practical rule for resolving disputes between agents when exclusive agency appointments overlap.
- 8.13 The ACCC considers that the provisions contained in clause 3 of the Members Code are likely to provide a public benefit by ensuring that real estate and business agents properly inform consumers of their rights and responsibilities and by providing some protection for consumers if this does not occur.

### **Clause 4 - Conjunctional agreements**

- 8.14 A conjunctional agreement is one between a listing agent and another agent (the conjunctional agent) to share a fee arising from the introduction of a customer by the conjunctional agent to the listing agent. On making a conjunctional agreement, the conjunctional agent becomes a sub-agent of the listing agent.
- 8.15 REIWA submits that the use of conjunctional agreements in Western Australia adds effectiveness to competition in the real estate and business agent industry and enables property and businesses to be sold and leased with greater efficacy. REIWA states that this is primarily achieved as a result of the increased exposure of sellers and properties to a greater number of agents.
- 8.16 REIWA states that given the importance of the conjunctional agreements, there is substantial public benefit in ensuring that the system operates clearly and efficiently. To

this end, REIWA states that clause 4 of its Members Code provides guidelines for the effective operation of conjunctional agreements between members of REIWA.

- 8.17 Clause 4 begins with a preamble which explicitly states that listing agents have complete freedom to negotiate: fees with vendors or lessors and; the sharing of fees with other agents.
- 8.18 REIWA states that provision 4.1 requires agents entering into conjunctional agreements to ensure that all of the conditions of that agreement are clearly agreed. REIWA states that this assists in avoiding future disputes regarding the terms of the agreement.
- 8.19 Provision 4.2 provides that if an agent, who has a prospective buyer, requests that a listing agent conjoin, the original agent must identify the buyer to the listing agent. REIWA submits that this avoids any disputes about who had earlier contact with the prospective purchaser.
- 8.20 Provision 4.2 also provides that conjunctional agreements will remain in force with respect to the prospective buyer or lessee until the listing agent's authority to sell or lease the property or business expires. REIWA submits that this will avoid the potential for disputes caused by uncertainty about when a conjunctional agreement expires.
- 8.21 Further, provision 4.2 prohibits a listing agent who has been informed of a prospective buyer by a prospective conjunctional agent from approaching that buyer if a conjunctional agreement is not subsequently entered. REIWA submits that this provision encourages the use of conjunctional agreements.
- 8.22 Provision 4.4 seeks to ensure that conjunctional agents inform listing agents of contact they have with vendors and that they do not misuse any information they receive during the course of that contact. Provision 4.5 outlines timeframes in which offers from a conjoining agent to a listing agent must be presented and provision 4.6 describes how deposit monies should be handled. Provision 4.7 outlines how and when fees are to be dealt with.

*ACCC assessment of rules applying to conjunctional arrangements*

- 8.23 In assessing clause 4 of REIWA's Members Code, the ACCC notes that it is not required to assess the benefits and detriments of conjunctional agreements *per se* but is instead only required to assess the rules regulating those agreements. That is, the ACCC is not assessing whether the use of conjunctional agreements by real estate agents in Western Australia is either good or bad but only whether the rules set out by REIWA to govern conjunctional agreements restrict competition or benefit the public.
- 8.24 In relation to the preamble to clause 4, the ACCC would consider any attempt by an industry group or professional association to set or restrict price decisions as being highly anti-competitive. The ACCC considers therefore that a statement or provision contained within a code which makes it clear to users that no such restrictions apply, while not necessarily providing a public benefit, may serve to decrease any potential detriment arising from the arrangements.
- 8.25 The ACCC does however consider that provision 4.2 of REIWA's Members Code has the potential to restrict competition. In particular, the requirements that conjoining agents identify prospective buyers to the listing agent and that the listing agent then not approach that prospective buyer if a conjunctional agreement is not entered, could raise competition concerns.

- 8.26 The ACCC accepts however that agents who have been approached by prospective buyers are not obliged to introduce them to listing agents and would probably be less likely to do so if they thought they might be circumvented. Therefore the ACCC considers that to the extent that agents consider conjunctional agreements to be an effective mechanism for selling properties and in the best interest of their clients provision 4.2 may provide some benefits.
- 8.27 With respect to the remaining provisions of clause 4 the ACCC considers that, insofar as those provisions encourage the efficient use of conjunctional agreements which leads to fewer disputes, the provisions are likely to generate a public benefit.

#### **Clause 5 - Reasonable contact with buyers/lessees**

- 8.28 Clause 5 requires that a listing or conjunctional agent who intends to claim a fee from a prospective buyer or lessee must ensure that they maintain reasonable contact with that person. This may include: regular communication (i.e. at least once in the 14 days before the contract is entered into) and carrying out at least one inspection of the property.
- 8.29 In addition, to maintaining reasonable contact, conjunctional agents must have performed the following tasks to claim a fee: introduced the buyer or lessee to the property or business; and provided the listing agent with the name of the buyer or lessor.
- 8.30 REIWA states that the provisions of clause 5 further ensure the orderly working of the conjunctional agreement system and ensures that agents provide a minimum level of services to buyers.
- 8.31 The ACCC notes that generally agents are entitled to a commission, under conjunctional arrangements, where their introduction of the purchaser to the property ultimately results in a sale. The ACCC therefore accepts that if the provisions outlined in clause 5 provide greater certainty for parties which leads to fewer disputes, they are likely to generate some public benefit.

#### **Clause 7 - Conflicts of interest**

- 8.32 Clause 7 requires agents to comply with the REBA Act and its associated Code of Conduct in relation to conflicts of interest.
- 8.33 While the ACCC considers that REIWA members would have to comply with these provisions irrespective of this clause in the Members Code, to the extent the Members Code increases awareness of conflict of interest issues, it may provide some benefit.

#### **Clause 8 - Advertising**

- 8.34 REIWA states that clause 8 requires that its members advertising must clearly show an agent's full trading name and telephone number. REIWA states that this requirement enables consumers to ascertain who has been behind an advertisement or other promotion.
- 8.35 Generally, the ACCC considers that any restrictions on advertising in the context of an industry code, other than general requirements that advertisements not be misleading or deceptive, are likely to produce a public detriment. However, in this instance, the ACCC notes that the provisions contained in clause 8 essentially replicate advertising

requirements contained in the REBA Act<sup>20</sup> and therefore are enforceable with or without the Members Code.

### **Clause 9 - Signs**

8.36 REIWA states that clause 9 relates to “for sale”, “for lease” and “auction” signs and requires that those signs may only be erected if authorised by a principal. The ACCC considers that these requirements are unlikely to raise trade practice concerns.

### **Clause 10 - Conduct of agents**

8.37 REIWA submits that clause 10 sets out standards that members of REIWA must comply with such as acting in the best interests principal’s, acting fairly and honestly, not knowingly engage in misleading or deceptive conduct.

8.38 The ACCC notes that the provisions contained in clause 10 are also contained in the REBA Act and fair trading legislation.

### **Conclusion**

8.39 The ACCC notes that, as with all codes, its assessment of REIWA’s Member’s Code is not to determine if the code is best practice for the industry but instead is only to determine if the code provides a net public benefit.

8.40 In that respect the ACCC has identified a number of aspects of REIWA’s Member’s Code which may raise competition concerns. In particular, those provisions which require agents to disclose details of their clients to other agents or restrict agents from approaching possible buyers do have the potential to limit competition.

8.41 However, the ACCC considers that any potential detriments arising from REIWA’s code are outweighed by the benefits of the code and in particular those aspects which provide increased protection for consumers. These benefits include requiring increased disclosure by agents to consumers, providing greater contractual certainty for parties resulting in fewer disputes and increasing awareness of statutory rights and responsibilities.

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<sup>20</sup> REBA Act, section 62(2).

## 9. REIWA's Multiple Listing Service

9.1 REIWA submits that its Multiple Listing Service (MLS), which is created and regulated by its MLS By-Laws,<sup>21</sup> is a system of marketing properties whereby details of properties for sale are provided to all eligible agents (MLS agents). The details of properties that are listed with the MLS are then:

- included in the *HomeBuyer* (a REIWA property sales publication)
- included in the Reiwa.com property guide (available to REIWA members only)
- published on the REIWA internet site and
- available to be displayed in non-listing agents' office windows.

9.2 Generally, arrangements such as REIWA's MLS may be considered agreements between the association and its members and between the members themselves as to the terms on which members will deal with each other in certain circumstances.

### The Multiple Listing Service

9.3 The MLS operates in the following way. On approaching a real estate agent to sell their property, a vendor would be provided with a number of options as to how their property may be marketed and sold.

9.4 Should the vendor agree to use the real estate agent to sell their property (that real estate agent becomes the listing agent), they may be offered three alternative contractual options (listing agreements) that the vendor and the listing agent may enter:

*Exclusive Agency Agreement:* Under this agreement the listing agent is appointed to sell the property on an exclusive basis. Properties that are subject to these agreements are not able to be listed with the MLS.<sup>22</sup>

*Multi-List Exclusive Agency Agreements:* This agreement amounts to the listing agent making a unilateral offer to any other agent (including non-REIWA members) that they will enter a conjunctive agreement in relation to the sale of the property. This agreement is usually only used for harder to sell properties.<sup>23</sup>

*Exclusive Plus Agency Agreement:* This agreement is not a unilateral offer by the listing agent but instead an offer by the listing agent to all agents (including non-REIWA members) that they may be prepared to enter a conjunctive agreement.<sup>24</sup>

9.5 The MLS By-Laws set out the minimum tasks required by an agent (who is not the listing agent) before they will be entitled to claim a fee.<sup>25</sup> These are similar to the requirements contained in clause 5 of the Members Code which include introducing the purchaser to the property and maintaining reasonable contact with them.

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<sup>21</sup> Schedule G of REIWA's application.

<sup>22</sup> MLS By-Law 2.1.

<sup>23</sup> MLS By-Law 2.2.

<sup>24</sup> MLS By-Law 2.3.

<sup>25</sup> MLS By-Law 2.4 & 2.5.

- 9.6 At the time of entering a listing agreement, a listing agent is required to give complete and accurate information to the vendor and to ensure they have read and understood the terms of the agreement, they understand their potential liability under the agreement (i.e. for the payment of fees) and that other agents may share in the fee.<sup>26</sup>
- 9.7 If the vendor and listing agent enter either a *Multi-List Exclusive Agency Agreement* or a *Exclusive Plus Agency Agreement*, the listing agent will send a copy of the agreement along with full particulars of the property to REIWA.<sup>27</sup> This includes the provision by the listing agents of advertisements for lodgement in the Homebuyer and any photographers' information that may be necessary.<sup>28</sup>
- 9.8 On receiving information on the correct forms<sup>29</sup> the MLS is required to accept listings of the sale of all real property (not businesses).<sup>30</sup>
- 9.9 REIWA contends that the MLS and its by-laws provide a public benefit by promoting a viable and alternate method of selling property through conjunctional agreements, thereby improving competition in the market for selling and leasing properties.
- 9.10 REIWA states that the only condition to using the MLS, other than possessing REIWA membership, is to pay a fee based on the administrative costs of the scheme. REIWA submits that 594 out of its 864 corporate members are registered to use the MLS with 7,781 persons associated with those corporate members (being principals, REIWA Chapter Members, sales representatives and clerical staff) also being registered.
- 9.11 REIWA states that terms of the MLS By-Laws have not altered since its previous authorisation.

### **ACCC's assessment of REIWA's Multiple Listing Service**

- 9.12 The ACCC, and the Trade Practice Commission<sup>31</sup> before it, have considered a number of similar multiple listing arrangements to those contained in REIWA's application.
- 9.13 The TPC, for example, considered multiple listing systems in New South Wales (1981)<sup>32</sup>, Queensland (1984)<sup>33</sup>, Victoria (1984)<sup>34</sup>, Tasmania (1987)<sup>35</sup> South Australia (1988)<sup>36</sup> and the Australian Capital Territory (1994).<sup>37</sup> In each of these instances, the TPC considered that the multiple listing services were likely to benefit the public by more efficiently bringing vendors and purchasers together and, in doing so, have the potential to reduce market imperfections.

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<sup>26</sup> MLS By-Law 3 & 4.

<sup>27</sup> MLS By-Law 6.

<sup>28</sup> MLS By-Law 7.

<sup>29</sup> MLS By-Law 8.

<sup>30</sup> MLS By-Law 9.

<sup>31</sup> The Trade Practice Commission became the Australian Competition and Consumer Commission in 1995.

<sup>32</sup> *Estate Agents Co-operative* authorisation A30063

<sup>33</sup> *Real Estates Institute of Queensland* authorisations A90396 and A90397.

<sup>34</sup> *Real Estate and Stock Institute of Victoria* authorisations A4432 and A4443.

<sup>35</sup> *Real Estate Institute of Tasmanian* authorisations A5023, A5024 and A21450.

<sup>36</sup> *Real Estate Institute of South Australia* authorisation A6005 and ors.

<sup>37</sup> *United Real Estate Agents Group* authorisation A90536.

### *Estate Agents Co-operative*

- 9.14 More recently, the ACCC considered an application from the Estate Agents Co-operative (EAC)<sup>38</sup> for a multiple listing service which included a partial compulsory listing rule. At the time of its application in 2000, EAC claimed to represent 16% of New South Wales real estate agents who were broken into 30 administration zones.
- 9.15 Under the partial compulsory listing rule, if the members of a particular administration zone adopted the rule, they would all be required to list all of their residential properties into the EAC's multiple listing service unless a vendor specified otherwise.
- 9.16 While the ACCC accepted that attaching a partial compulsory listing rule to a multi-listing service had the potential to result in some anti-competitive detriment, it was of the view that the overall pro-competitive benefits of EAC's multiple listing service were sufficient to outweigh any such detriment.

### *REIWA's 2001 authorisation*

- 9.17 In considered REIWA's original application in 2001, the ACCC also considered that systems like its multiple listing service served to improve the method of selling properties through exclusive agency and conjunctional agreements and thereby improved competition in the market for selling and leasing properties.

### *REIWA's current application*

- 9.18 In relation to the current application, the ACCC remains of the view that REIWA's MLS is likely to generate a public benefit.
- 9.19 The ACCC notes that, unlike EAC, REIWA represents a significant percentage of its state's real estate agents. The ACCC considers therefore that any potential anticompetitive detriment that may arise from its MLS is likely to be significantly greater than those considered by the ACCC in the EAC authorisation.
- 9.20 However, the ACCC notes that REIWA's MLS is entirely voluntary and does not contain any provisions that compel, or potentially compel, its members to list properties that they may otherwise not wish to list. In addition, the ACCC notes that the process provides for the negotiation of split fees, rather than having fixed rates. The ACCC considers that the absence of such provisions significantly mitigates any potential detriments.
- 9.21 The ACCC considers that there are a number of other features of REIWA's MLS that serve to mitigate any potential detriment including:
- the admission process to REIWA, and consequently to accessing the MLS, appears to be objective and fair
  - the MLS By-Laws are supported by the dispute resolution and appeals process contained in REIWA's Articles
  - the cost of using the MLS is not prohibitive and
  - any real estate agent, whether they are a member of REIWA or not, can enter into a conjunctional agreement with the listing agent.

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<sup>38</sup> *Estate Agents Co-operative* authorisation A90678.

- 9.22 In addition, the ACCC considers that REIWA's MLS is likely to provide a number of public benefits such as: improving the method of selling properties thereby improving competition in the market for selling and leasing properties and; providing clear guidelines as to when a MLS agent is entitled to a fee.
- 9.23 Overall therefore, the ACCC considers that any potential anticompetitive detriments that may arise from REIWA's MLS are likely to be outweighed by their public benefits.

## 10. REIWA's Auction Code of Conduct

10.1 Since the 2001 authorisation, REIWA has developed an Auction Code of Conduct (Auction Code). REIWA states that the purpose of the Auction Code is to provide guidance to its members on how they should conduct auctions. REIWA notes, however, that as the Auction Code has the potential to restrict the manner in which its members conduct themselves at auctions, it may require authorisation.

### Clauses 1 and 2

10.2 Clause 1 of the Auction Code outlines its objectives which are to:

- Regulate and standardise the procedures of REIWA members when conducting auctions.
- Provide consumer protection for both sellers and buyers in the auction process.

10.3 Clause 1 goes on to state that this will be achieved by, amongst other things, educating REIWA members and the public about the Auction Code and ensuring, through enforcement, that the Auction Code is complied with.

10.4 Clause 2 contains a number of definitions.

### Clause 3

10.5 Clause 3 outlines the manner in which REIWA members are expected to conduct themselves when acting in relation to auctions. This includes, acting with honesty and fairness, not acting unconscionably and not putting undue pressure on members of the public.

### Clause 4

10.6 Clause 4 sets out the requirements of REIWA members *before an auction* takes place. These include: not advertising the property for sale unless it is genuinely for sale; making details of the auction available; specifying if the seller intends to bid for the property; and, if so instructed, advising that offers for the property may be made prior to the auction.

### Clause 5

10.7 Clause 5 sets out the requirements of REIWA members *at an auction*. This includes:

- Making available the terms and conditions of the auction.
- The auctioneer, prior to the commencement of the bidding for the property, announcing if the property has a reserve price.
- The auctioneer, prior to the commencement of the bidding for the property, announcing if the seller has reserved the right to bid for the property.
- Where the seller (or some other person on their behalf) is bidding, the auctioneer is required to identify that person prior to the commencement of the bidding and the maximum number of bids they may make.
- The auctioneer must announce each time the seller bids.

10.8 Clause 5.4 of the Auction Code requires that if a property is to be sold at auction without reserve, no bid shall be made by or on behalf of the seller. Further, Clause 5.8 states that under no circumstances may a bid made on behalf of a seller by an auctioneer or a real estate agent be at or in excess of any seller's reserve price.

#### **Clauses 6-9**

10.9 Clause 6 prohibits dummy bidding. Dummy bidding is fictitious or false bidding at an auction by non-genuine bidders that have no intention of buying the property.

10.10 Clause 7 requires REIWA to promote the Auction Code to consumers and its members. This includes collecting data about the Auction Code and reviewing its terms.

10.11 Clause 8 reproduces clause 10 of the Members Code.

10.12 Clause 9 deals with breaches of the Auction Code and reproduces the relevant disciplinary sections of REIWA's Articles.

10.13 Overall, REIWA submits that its Auction Code generates a public benefit in that it clearly prescribes the minimum levels of conduct of real estate agents, real estate sales representatives and auctioneers involved in auctions. REIWA contends that this promotes consumer protection in that the terms of the Auction Code promote transparency, honesty and fairness in the conduct of auctions and assist with the efficient delivery of the auction process.

#### **ACCC assessment of REIWA's Auction Code**

10.14 As with REIWA's Members Code of Practice which was considered earlier in this determination, the ACCC is of the view that a self regulatory code that specifies standards of conduct for industry participants can potentially deliver consumer protection benefits and reduce regulatory burdens for business. However, detriments may arise if provisions of the code were to restrict or hinder competitive forces.

10.15 In this instance, the ACCC notes that while the REBA Act has no specific provisions relating to auctions, auctions in Western Australia are regulated by the *Auction Sales Act* 1973. The Auction Sales Act is designed to regulate a broad range of auctions from real estate to wool and livestock to motor vehicles. However, the Auction Sales Act contains only limited guidance in relation to the conduct of an auction and has no specific provisions relating to the conduct of a real estate related auction.

#### *Conduct of REIWA members*

10.16 The ACCC notes that many of the requirements contained in the Auction Code are required elsewhere in either REIWA's Members Code of Practice or in legislation. For example, the general conduct requirements set out in Clause 3 (acting with honesty and fairness, not acting unconscionably or using undue pressure) and Clause 8 (acting in the best interest of principles, not acting in a misleading or deceptive manner) are contained in the REIWA's Members code, the Western Australian fair trading legislation and/or the TPA.

10.17 However, the ACCC considers that as it is also a requirement of the Auction Code that REIWA member's make the Auction Code available to the public at auctions and generally promote the Code, it is likely to gain relatively high exposure amongst those

groups which are most affected by it. The ACCC considers therefore that to the extent the Auction Code raises awareness amongst industry participants and the public of their consumer protection rights and responsibilities, it is likely to generate a public benefit.

### *Sellers bidding*

10.18 In relation to sellers making bids, the ACCC notes that under the Auction Sales Act a seller may, provided they give sufficient notice, make a specified number of bids on their own property.<sup>39</sup> The ACCC acknowledges that while such a mandate may be beneficial in certain circumstances, it may also be open to abuse.

10.19 In particular, the ACCC notes that the Sales Auction Act has no provisions requiring:

- auctioneers to announce prior to the auction that the seller will be bidding
- announcing each time the seller bids
- prohibiting the seller from bidding where there is no reserve price or
- restricting the seller from bidding above the reserve price.

10.20 The ACCC considers that the absence of such requirements has the potential to both distort market forces, by allowing real estate prices to be artificially increased, and to deceive consumers.

10.21 The ACCC considers therefore that as the Auction Code does require an auctioneer to make certain disclosures about the seller prior to the auction, including identifying them, and also requires them to prevent the seller from bidding in certain circumstances (such as when there is no reserve price or when the reserve price has been reached) the Auction Code is likely to generate a public benefit.

### *Dummy bidding*

10.22 As mentioned, dummy bidding is fictitious or false bidding at an auction by non-genuine bidders that have no intention of buying the property. Dummy bidding is similar to sellers bidding in that it also increases the potential for real estate prices to be artificially increased beyond what the market would otherwise dictate.

10.23 Again, the ACCC is of the view REIWA's outright prohibition on dummy bidding is likely to generate a public benefit by ensuring transparency and avoiding false or misleading representations.

### **Conclusion**

10.24 Overall, the ACCC is of the view that REIWA's Auction Code is likely to provide a level of protection for consumers that is beyond that provided by legislation and is therefore likely to generate a public benefit.

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<sup>39</sup> Part 29 of the *Auction Sales Act 1973* (WA)

## 11. REIWA's Standard Exclusive Agency Agreements

- 11.1 REIWA has sought authorisation for a number of *Exclusive Selling Agency Agreement* forms and *Exclusive Managing Agent Agreement* forms (standard form contracts). These are standard form contracts that may be used by agents and their clients to, for example, enter into agreements to sell or lease a property.
- 11.2 The standard form contracts for which REIWA has sought authorisation are listed at Attachment A of this determination.
- 11.3 The ACCC notes that while REIWA appears to have sought authorisation for the standard form contracts themselves, it is the agreement between REIWA members to make available for use the standard forms which is the relevant conduct that may raise concerns under the TPA.
- 11.4 As a result, any authorisation granted would be for the agreement by REIWA members to make those standard forms documents available for use rather than for the actual documents themselves or the contracts signed between agents and clients.
- 11.5 It follows that, the ACCC is here required to assess whether the agreement by those competing real estate and business agents in Western Australia (as represented by REIWA) to make the standard form contracts available for use produces a net public benefit.
- 11.6 Naturally such an assessment will require consideration of the provisions and words contained in the standard form contracts but, as mentioned, those forms themselves would not be authorised.

### REIWA's submission

- 11.7 REIWA submits that its members agreeing to use its standard exclusive agreement forms generates a number of public benefits including:
- reducing transaction costs
  - encouraging greater compliance with legislation such as the *Privacy Act 1988* and
  - reassuring consumers that they have the protection of contracts prepared by a reputable body such as REIWA.

### ACCC assessment of REIWA's standard form contracts

- 11.8 The ACCC considers that the agreement by REIWA members to make the standard form contracts available for use does have the potential to generate anticompetitive detriments. In particular, the ACCC considers that the agreement to use standard form contracts may have the effect of reducing innovation by real estate and business agents in the services, terms and conditions they offer to potential clients.
- 11.9 For example, the ACCC considers that by agreeing to make standard form contracts available for use, agents may be less inclined to develop unique fee arrangements or to accept incentives outside of those contained on the standard forms. Such arrangements may include incentive based fees instead of fixed rates or percentages, or innovative marketing techniques.

- 11.10 The ACCC considers that while agents may not intentionally reduce their desire to innovate, the fact that these matters are conveniently included in a standard form contract and their understanding that most other competitors are likely to be using the same forms, may diminish their incentive to do so.
- 11.11 The ACCC considers however that any such potential detriments are likely to be mitigated as the agreement to make the forms available for use (and the provisions they contain) does not compel REIWA members to use the standard form contracts. In addition, while the forms themselves set out certain terms and conditions, it is made clear that all aspects of the standard form contract are open for negotiation.
- 11.12 The ACCC is also of the view that the real estate industry in Western Australia appears to be competitive and that real estate and business agents would continue to have an incentive to seek new ways to gain a competitive advantage.
- 11.13 In relation to public benefits, the ACCC considers that the agreement by REIWA members to use standard form contracts may generate some benefits. In particular, the ACCC considers that benefits may arise as a result of reduced transaction cost saving, especially in the form of legal costs savings.

### **Conclusion**

- 11.14 The ACCC is of the view that the agreement by REIWA members to make standard form contracts available for use may potentially generate some anticompetitive detriments by lessening the incentive for real estate and business agents in Western Australia to be innovative.
- 11.15 However, the ACCC considers that these detriments are likely to be mitigated as REIWA members are not obliged to use the forms and are likely to compete vigorously for customers. In addition, the ACCC considers that the forms will generate some benefits, particularly in the form of transaction cost savings.
- 11.16 Therefore the ACCC considers that the benefits of REIWA members agreeing to make standard form contracts available for use is likely to outweigh the detriments of that conduct.

## **12. Balance of public benefit and detriment**

12.1 The ACCC may only grant authorisation if it is satisfied that, in all the circumstances, the proposed arrangements are likely to result in a public benefit that will outweigh any public detriment.

### **Anticompetitive detriments**

12.2 The ACCC considers that REIWA's proposed arrangements may generate some anticompetitive detriments. In particular, the ACCC considers that those provisions of REIWA's Members Code which require agents to disclose details of their clients to other agents or restrict agents from approaching possible buyers may potentially limit competition.

12.3 The ACCC also considers that the agreement by REIWA members to make standard form contracts available for use may potentially generate some anticompetitive detriments by lessening the incentive for real estate and business agents in Western Australia to be innovative.

12.4 The ACCC is however of the view that any potential anticompetitive effects which may arise from the conduct are likely to be reduced as membership of REIWA is not compulsory to provide real estate services in Western Australia and that use of the standard form contracts is not compulsory.

### **Public benefits**

12.5 The ACCC is of the view that REIWA's arrangements are likely to generate a public benefit as:

- its Articles provide objective and fair admissions and appeal processes
- its Members Code requires increased disclosure by agents to consumers and provides greater contractual certainty for parties resulting in fewer disputes
- its Multiple Listing Service improves the method of selling properties and increases competition
- its Auction Code provides a level of protection for consumers that is beyond that provided by legislation and
- its standard form contracts generate some transaction cost savings.

12.6 Further, the ACCC considers that as any breaches of REIWA's rules and codes would be dealt with in accordance with the disciplinary procedures contained in REIWA's Articles, the public benefits identified are more likely to arise.

12.7 Overall therefore, the ACCC considers that the public benefits arising from the arrangements are likely to outweigh any public detriments that may arise.

### **Length of the authorisation**

12.8 The ACCC generally considers it appropriate to grant authorisation for a limited period of time, so as to allow an authorisation to be reviewed in the light of any changed circumstances. In this respect, the ACCC considers that REIWA's proposal of five years appears reasonable.

## 13. Determination

13.1 On 22 December 2006, the Real Estate Institute of Western Australia (REIWA) lodged an application for authorisation A91026 with the Australian Competition and Consumer Commission (the ACCC).

13.2 Application A91026 was made using Form B, Schedule 1, of the Trade Practices Regulations 1974. The application was made under subsection 88(1) of the *Trade Practice Act 1974* (TPA) to:

- to make and give effect to a contract or arrangement, or arrive at an 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 TPA.

13.3 In particular, REIWA seeks authorisation in relation to its Articles of Association, Members Code of Practice, Auction Code of Conduct, Multiple Listing Service By-Laws and Standard Exclusive Agency Agreements for a period of five years.

### **The net public benefit test**

13.4 For the reasons outlined in this determination, the ACCC considers that in all the circumstances the arrangements for which authorisation is sought are likely to result in a public benefit that would outweigh the detriment to the public constituted by any lessening of competition arising from the arrangements.

13.5 The ACCC therefore **grants** authorisation to application A91026.

### **Conduct for which authorisation is granted**

13.6 Authorisation is granted in respect of the arrangements contained in REIWA's Articles of Association, Members Code of Practice, Auction Code of Conduct, Multiple Listing Service By-Laws and the agreement to make available for use, the Standard Exclusive Agency Agreements.

13.7 Authorisation is granted for a period of five years.

### **Date authorisation comes into affect**

13.8 This determination is made on 18 April 2007. If no application for review of the determination is made to the Australian Competition Tribunal (the Tribunal), it will come into force on 10 May 2007.

***Exclusive Selling Agency Agreements***

Authority to Auction

Authority to Auction – Rural

Residential Exclusive Agency Selling Agreement

Multi-List Exclusive Plus Services Selling Agency Agreement Residential, (known as the Internet Listing Service Selling Agency Agreement – Residential)

Exclusive Selling Agency Agreement for Rural Property

Exclusive Selling Agency Agreement for Commercial and Industrial Property

Exclusive Appointment of Agent to Sell/Offer to Sell a Business

***Exclusive Managing Agent Agreements***

Exclusive Authority to Act as Managing Agent for Residential Premises for a 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

Exclusive Authority to Act as Managing Agent for Commercial/Industrial Property.