



Australian
Competition &
Consumer
Commission

Determination

Application for Minor Variation of Authorisation A91026

Lodged by

The Real Estate Institute of Western Australia

in respect of

The Real Estate Institute of Western Australia Auction Code of Conduct

Date: 5 September 2007

Authorisation no. A91026

Commissioners:

Samuel
Sylvan
King
Martin
Smith
Willett

Public Register no. C2007/1548

The ACCC varies authorisation A91026 lodged by The Real Estate Institute of Western Australia to reflect that:

Clause 5.4 of the Real Estate Institute of Western Australia Auction Code of Conduct will not apply to any auction where a Court has ordered that the auction will take place without reserve. Namely clause 5.4 will now read:

if a property is to be sold at auction without reserve, no bid shall be made by or on behalf of the Seller and no Real Estate Agent or Auctioneer may in any way encourage or be a party to such a bid at the auction provided that this clause shall not apply to any auction where a Court has ordered to the effect that the particular auction shall take place without reserve.

1 Introduction

- 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 Act). A key objective of the Act 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 Act, however, allows the ACCC to grant immunity from legal action in certain circumstances for conduct that might otherwise raise concerns under the competition provisions of the Act. One way in which parties may obtain immunity is to apply to the ACCC for what is known as an ‘authorisation’. Broadly, the ACCC may ‘authorise’ businesses to engage in such conduct where it is satisfied that the public benefit from the conduct outweighs any public detriment.
- 1.3 A party to whom authorisation has been granted may also apply to the ACCC for a minor variation.

2 The Application

- 2.1 On 31 July 2007 The Real Estate Institute of Western Australia (REIWA) lodged an application under section 91A of the Act for minor variation to authorisation A91026 which was granted by the ACCC on 18 April 2007.
- 2.2 Authorisation A91026 relates, in part, to the REIWA Auction Code of Conduct (the Auction Code).
- 2.3 REIWA has lodged this application for minor variation regarding a proposed amendment to the Auction Code to provide for situations where a Court has ordered that an auction take place without a reserve.

- 2.4 REIWA proposes an amendment to clause 5.4 of the Auction Code, so that it now state (the proposed amendment is underlined):

5.4 if a property is to be sold at auction without reserve, no bid shall be made by or on behalf of the Seller and no Real Estate Agent or Auctioneer may in any way encourage or be a party to such a bid at the auction provided that this clause shall not apply to any auction where a Court has ordered to the effect that the particular auction shall take place without reserve.

3 Background to the application

- 3.1 REIWA is an industry body that represents the interests of real estate practitioners in Western Australia. REIWA's stated objectives are to:

- Create the best possible business environment for real estate practitioners; and
- Promote professionalism, ethical behaviour and integrity within the industry.¹

- 3.2 REIWA provides a number of services to real estate agents, such as liaising with government, providing training and legal advice and developing business processes. Importantly, REIWA is also responsible for developing practicing standards for Western Australian agents.

- 3.3 The original authorisation relating to the Auction Code was granted by the ACCC on 18 April 2007. Authorisation was granted for the arrangements contained in REIWA's Articles of Association, Members Code of Practice, Auction Code of Conduct, Multiple Listing Service By-Laws and the arrangement to make available for use the Standard Exclusive Agency Agreements.

- 3.4 Real estate agents that are members of REIWA are required to adhere to the Auction Code. The objectives of the code² are to:

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

- 3.5 Clause 5.4 of the Auction Code as originally considered reads:

¹ From REIWA website – <http://reiwa.com/hom/hom-aboutus-whatreiwadoes.cfm>. Accessed 28 August 2007.

² REIWA Policy Advocacy Information Pack p.7 – Available online at <http://reiwa.com/documents/policypages-jan07.pdf>. Accessed 28 August 2007.

5.4 if a property is to be sold at auction without reserve, no bid shall be made by or on behalf of the Seller and no Real Estate Agent or Auctioneer may in any way encourage or be a party to such a bid at the auction.

Paragraph 10.24 of the ACCC's determination on application A91026 concludes:

“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.”

- 3.6 REIWA now considers that clause 5.4 should be amended in order to address a specific situation that may arise. REIWA advises that occasionally, in proceedings before the Courts, parties are given leave to bid at Court ordered auctions. Those auctions are ordered on the basis that the parties to the Court proceedings hold a property as either joint tenants or tenants in common, the parties are in dispute as to the disposition of the property and the Court is prepared to enable the property to be purchased by one of the parties, occasionally without any reserve being set.
- 3.7 REIWA provided the example of a Family Court proceeding, where the Court might occasionally order that a property owned by a husband and wife as joint tenants be sold at auction without reserve and the husband and wife have liberty to bid at the auction.
- 3.8 Due to the inadvertent operation of the authorised clause 5.4, a real estate agent who is a member of REIWA would be unable to act with respect to such an auction. REIWA submits that this would be a detriment to the public.

4 Statutory provisions

- 4.1 Section 87ZD of the Act defines a minor variation as a single variation that does not involve a material change in the effect of the authorisation.
- 4.2 Section 91A of the Act provides that the ACCC must, if it is satisfied that the proposed variation is a minor variation, invite submissions from interested parties. After consideration of the application and any submissions received, the ACCC may make a determination varying the authorisation or dismissing the application.
- 4.3 Section 91A(4) of the Act provides that the ACCC may grant a minor variation to an authorisation granted under section 88(1), where it is satisfied that the variation would not result, or would be likely not to result, in a reduction in the extent to which the benefit to the public of the authorisation outweighs any detriment to the public caused by the authorisation.

5 Submissions

Supporting submission from REIWA

- 5.1 REIWA submits that the proposed amendment increases the benefit to the public generated by the original authorisation in that the unintended anomaly is prevented. The amendment is limited to specifically addressing the particular problem that arises when a Court orders that an auction take place without reserve as detailed above. Otherwise, the prohibition contained in clause 5.4 remains.
- 5.2 In support of this assertion, REIWA further submits that where a Court has ordered that an auction take place without reserve and where the parties are at liberty to bid (for example, as a consequence of a family law dispute) it is likely that the seller who is bidding is also a genuine buyer. There is therefore not the same risk that a non-seller bidder will be misled into thinking that a person he or she is bidding against is a buyer when that is not the case.

REIWA also notes that the seller will still be publicly identified as a seller as a consequence of other obligations contained in the Auction Code.

5.3 Submissions from interested parties

The ACCC invited comments from interested parties in relation to REIWA's application for minor variation. The ACCC received a submission from the Real Estate Institute of Australia. The Law Society of Western Australia advised that it had no comment to make. Full copies of the submissions received are available on the ACCC website.

5.4 *Real Estate Institute of Australia*

The Real Estate Institute of Australia supports of REIWA's proposed variation and submits that:

- REIWA is a valued and highly respected member of the Real Estate Institute of Australia.
- REIWA has estimated that around 85% of active real estate businesses in Western Australia are REIWA members and that these businesses are involved in around 95% of residential property transactions in that jurisdiction.
- REIWA has endeavoured to design and engage procedures that avoid anti-competitive conduct and maximise public benefit through appropriate consumer protection policies.
- The proposed minor variation would not result or be likely to result in a reduction in the extent to which the benefit to the public of Authorisation A91026 outweighs any detriment to the public flowing from the authorisation.

6 ACCC evaluation

- 6.1 In considering the original authorisation, the ACCC identified the following potential areas of anticompetitive detriment (Chapter 12):
- REIWA's Members Code requires agents to disclose client details to other agents or restrict agents from approaching possible buyers. This may limit competition.
 - The agreement to make standard form contracts available may potentially generate some anticompetitive detriments by lessening the incentive for real estate and business agents to be innovative.

These potential detriments were associated with parts of REIWA's arrangements separate from the Auction Code of Conduct. Furthermore, the ACCC considered that any anticompetitive effects were likely to be reduced due to the voluntary nature of REIWA membership, combined with the fact that the use of standard form contracts was not compulsory.

- 6.2 The ACCC also identified a number of public benefits. While most related to REIWA arrangements other than the Auction Code of Conduct, it was specified in paragraph 12.5 that the Auction Code provides a level consumer protection that is beyond that provided by legislation. Further, the ACCC considered that public benefits were more likely to arise due to REIWA's ability to take disciplinary action against members who breached a rule or code.

- 6.3 REIWA proposes the addition of the following wording to clause 5.4 of the Auction Code as approved in the ACCC's initial authorisation:

provided that this clause shall not apply to any auction where a Court has ordered to the effect that the particular auction shall take place without reserve.

- 6.4 The submission received from the Real Estate Institute of Australia expressed strong support for REIWA's proposed amendment. The Real Estate Institute of Australia expressed its satisfaction that the variation would not result, or be likely to result in a reduction in public benefit.
- 6.5 The ACCC considers that allowing REIWA to amend clause 5.4 of the Auction Code in the proposed fashion would not alter the operation of the clause for the overwhelming majority of auctions. Clause 5.4 is designed to protect consumers by preventing the artificial inflation of auction prices by non-genuine bidders. Where a Court has ordered that an auction is to be held without a reserve, the person ordered to sell the house is likely to be a genuine potential buyer. It would be detrimental to restrict that seller to using an agent who is not a member of REIWA should they choose to bid. Amending clause 5.4 is likely to increase the public benefits from the arrangements.
- 6.6 Other buyers at such an auction are still protected by clause 5.3 of the Auction Code, which continues to require that the seller's status be disclosed if they place a bid. The ACCC considers that allowing REIWA to amend clause 5.4 in the way proposed will not increase public detriment.

- 6.7 The ACCC considers that the proposed variation is minor and is satisfied that the variation would be unlikely to result in a reduction in the net benefit to the public generated by authorisation A91026.

7 Determination

- 7.1 On 31 July 2007 the Real Estate Institute of Western Australia lodged an application under section 91A of the Act for minor variation to authorisation A91026. Authorisation A91026 was granted by the ACCC on 18 April 2007.

- 7.2 REIWA applied for the minor variation to enable it to amend clause 5.4 of the REIWA Auction Code of Conduct to read:

if a property is to be sold at auction without reserve, no bid shall be made by or on behalf of the Seller and no Real Estate Agent or Auctioneer may in any way encourage or be a party to such a bid at the auction provided that this clause shall not apply to any auction where a Court has ordered to the effect that the particular auction shall take place without reserve.

- 7.3 The ACCC considers that the proposed variation is minor and is satisfied that the public benefit test in section 91A(4) of the Act is met – that is, the variation which is the subject of this application is unlikely to result in a reduction in the net benefit to the public that arose from the original authorisation.
- 7.4 Pursuant to section 91A(3) of the Act, the ACCC makes this determination varying authorisation A91026, enabling clause 5.4 of the Real Estate Institute of Western Australia Auction Code of Conduct to be amended as requested by REIWA.
- 7.5 This determination is made on 5 September 2007. If no application for a review of the determination is made to the Australian Competition Tribunal in accordance with section 101 of the Act, it will come into effect on 27 September 2007.