

(Restriction of publication of part claimed)

23 December 2011

Attention: Hannah Ransom

Please find below a submission against the likely public benefit/detriment and impact on competition of the proposed arrangements contained within the Real Estate Institute of WA's application for authorisation [A91280]. This submission is made in response to a request for comment from interested parties, made by the Australian Competition and Consumer Commission on 11 November 2011.

Introduction

The Real Estate Institute of Western Australia occupies an unusual and potentially unique position in the Australian real estate industry, in that in most states the Real Estate Institutes have some competition in the provision of forms to industry.

REIWA is ultimately a service provider to the industry, requiring fee payment for membership and provision of services. It has however also evolved to be recognised as a 'peak industry body' providing a range of different service offerings, advice, advocacy and so on. At times it can be difficult to identify the main thrust of its purpose; the institute attempts to be 'all things to all people' – members, industry, government and the general public, as well as operating as a commercial enterprise. In trying to meet all of its identified responsibilities, REIWA experiences some conflict of interest.

Historically in Western Australia, REIWA has had a virtual monopoly in the areas of provision of documentation, advertising through the homebuyer magazine, training, photography, printing, and so on. Fortunately for competition, there has been a dramatic shift in these areas, forcing REIWA to acknowledge other players in these industry marketplaces. These changes have been forced upon REIWA by rapidly evolving technologies, which have enabled a raft of competitors to emerge in different service areas. Thus the real estate agent has become recognisable as a consumer, provided with a raft of alternative services, able to choose at will.

The proposed arrangements contained within authorisation A91280, however, seem to give little consideration to the real estate agent as a consumer. They seem only to deal with whether or not the general public will experience benefit or detriment and although consideration is also given to the possible anti-competitive nature of some elements of the proposal, this approach again does not consider the agent as a consumer, with a choice within the marketplace.

Response

In order to respond to the proposed arrangements it is necessary to expand on the definition of some terminology used in the submission as follows:

2.3 and 2.4 - Public benefit and public detriment have been contextualised in the proposed arrangements to only include the general public receiving a service from the real estate

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industry – this must be extended to include the real estate industry receiving services from a provider, so the real estate industry becomes ‘the public’ capable of experiencing public benefit or public detriment via the services it receives as a consumer.

4.1 - Although REIWA submits that there are a number of markets for the provision of real estate services, it must also be further acknowledged that ‘the market’ for the real estate agent as a consumer is quite a different model to that identified. Real estate agents exist in the marketplace as consumers and as such must be free to choose when and with whom they choose to do business – and why. Geography does not limit this market.

4.3 and 4.4 provide an ideal picture of ‘the market’ in its true sense. The real estate agent is also a consumer.

The two major areas of concern for the writer of this submission lie in:

1. Standard documentation used in real estate industry in WA (forms and contracts)
2. Provision of training for the real estate industry in WA

Standard Documentation

There is undoubtedly a public benefit gained by the use of standard contractual documentation within the real estate industry. The sale and purchase (or ongoing management) of a property is in fact a complex exchange, often poorly understood by the parties to the contracts. Agents, sales representatives and property managers in Western Australia do not have any *formal legal training*, and yet are required to complete contractual documentation on behalf of clients without legal assistance. Standard documentation enables agents preparing these contracts to be trained in a basic understanding of such contracts without the need to be legally qualified – with an adequate amount of training, agents should be able to interpret and explain the content and intent of the contracts to the contracting parties.

An unfortunate by-product of standard documentation is that pointed out at 9.56, being the possibility of reducing innovation. Whilst it is acknowledged that this shift from innovation is not intended, the fact remains that small business proprietors will tend towards the easiest solutions to complex problems; standard documentation minimises the need for creativity and questioning. The more insidious issue though is that if the documents are not questioned by the user, do they actually meet the needs of the consumer (both the real estate agent and the public) and continue to evolve and improve? A standard range of documents marketed as being prepared by ‘*expert legal people*’ removes the need for a business proprietor to delve beyond the surface of the document, both in its use and its intent.

4.34 – REIWA submits that one of the reasons WA has such a low concentration of franchise agencies when compared to the rest of Australia is that REIWA provides services that would otherwise be provided by those franchise groups (in particular standard forms and documents).

4.34 (11) – Australian real estate is dominated by small business.

Small business finds it easier to use standard documents than to invent their own.

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The Institute then is provided with the ability to control and dictate the content and use of such documentation as the real estate agents' trust and faith is unwavering. As noted earlier, agents are not required or expected to undertake *formal legal training* as part of their licensing requirements. They do study some basic commercial and contract law. However, West Australian legislation *requires* them to construct contracts on behalf of clients. Many agents and sales representatives may lack depth in their understanding of the contracts they use, as well as the multi-faceted nature of the law that governs their real estate activities. Standard documentation could serve to compound this.

As part of their application, REIWA propose to make their forms available to non-members of the Institute. This decision would provide a benefit on two levels – to the real estate industry as a whole, allowing independent real estate operators to afford comparable levels of consumer protection to their clients; and to the wider general public, as the participants in these standardised transactions and recipients of higher levels of consumer protection.

The potential for public detriment however is substantial, if agents are untrained in the use of these forms. Currently a significant proportion of REIWA members do not participate in training activities through the Institute, citing a preference to participate in specialised and advanced training provided by dedicated training providers. Worryingly, REIWA do not proactively make their forms freely available to competing training providers. Instead, the competing training provider has to make themselves aware of the existence of a form and of the existence of any changes to forms. Experience has shown this awareness usually occurs when an attendee at a session points out that the training provider is using an out-dated copy of a form. The combination of these issues could lead to public detriment as follows:

1. As consumers, agents choose their training provider as a party other than REIWA;
2. Training providers other than REIWA do not have full and current access to REIWA standard documents and contracts.

6.8 of the proposed arrangements talks about the significance and use of the Multiple Listing Service (MLS) having declined over a period of time. This information could lead to the belief that MLS *equals* standard documents, therefore the relevance and significance of standard documents has decreased. This is not the case. As stated at 6.9, although only approx. 1000 listings on reiwa.com appeared using MLS or Exclusive plus, the total of 14,914 were all present on the website through the use of a standard 'exclusive authority'. The difference is significant; the exclusive authority simply gives the agency more control over the potential 'conjunctural deal' but the use of the standard form is critical – there is no other form for the agency to use! MLS has declined; the use of standard forms and documents remains constant.

9.11 - REIWA confirms their belief that virtually all sales of property in the Perth metropolitan area take place pursuant to exclusive agency agreements.

The proposed arrangements in relation to standard documentation present the following public detriment:

- REIWA do not proactively make these forms freely available to other training providers
- REIWA do not advise other training providers of the existence of any new documents;

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- REIWA do not provide any updated information or proactive advice of changes to other training providers;
- REIWA will not allow other training providers to be members of the institute (unless they are currently practicing as real estate agents, in which case they are not dedicated training providers).

To ensure maximum public benefit and minimal public detriment, as well as healthy competition, it is essential that all standard documentation be treated as such and made freely available (with updates) to all parties involved in the training and development of industry participants.

Not making these documents freely available could be construed as not being in the best interest of the industry as a whole, nor offering requisite standards of consumer protection.

Provision of Training / Compulsory Professional Development

In 2007 the West Australian government, via the Department of Commerce (and the then REBA Board), introduced Compulsory Professional Development for all practicing real estate agents. This was extended to include all sales representatives and property managers from 2009. This program has been very successful, with the vast majority of participants embracing the learning experience and acknowledging the value for themselves and the consumer (general public).

Unfortunately for consumer protection, there seems the possibility that the compulsory component of CPD is under threat due to the implementation of National Licensing for real estate personnel. This is indeed ironic and unfortunate in the context of consumer protection, however it is critical that this issue is not muddied by suggesting that in some way it be replaced by a watered down version imposed by REIWA which is presented to 1000 rather than 12,000+ individuals.

The CPD program has required each individual to attend a total of 10 hours training per annum. The ten hours have been made up of one (1) three hour mandatory session plus an additional seven hours of elective (the subject matter of which is the choice of the participant, based on those on offer by training providers).

The content of the three hour mandatory session has been determined by the Department of Commerce and attendance at these sessions has been fully funded by the Department. The contract for delivery of these three hour sessions was awarded by tender to three providers. In the first year this contract was not awarded to REIWA, in the following three years REIWA was one of the three appointed providers.

WCPT, a small West Australian family-owned business, employing six full time staff and several casual staff was awarded the original tender to develop and then present some of the mandatory session for 2008. The same small business was subsequently awarded the tender to develop all sessions for agents, representatives and property managers for 2009, 2010 and 2011. WCPT also won the Department of Commerce contract to develop and present all CPD (on an exclusive contract) to settlement agents in WA for the same time period.

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During this period WCPT developed the content of all mandatory sessions, which were then handed to the other providers (including REIWA) for presentation. REIWA had no input into the development of any of this content during 2008 - 2011, though their presenters did comment on the high standards of the developed content.

WCPT has presented the compulsory component of CPD to over 14,000 real estate agents, representatives, property managers and settlement agents on behalf of the Department of Commerce.

As at 2 November 2011, WCPT had trained 56 per cent of all individual licensees completing mandatory CPD for 2011, according to Department of Commerce figures.

Based on these stated facts, there are some serious anomalies in the proposal from REIWA as follows: *(Note: it may be necessary to read the numbered section of the Application for Authorisation in conjunction with this document)*

4.22 – REIWA agrees with the ACCC's findings of 2007 and submits that they continue to apply in 2011, yet contends that it does not necessarily compete with "smaller" suppliers. REIWA is aware that its greatest competition in the provision of training to real estate agents in WA comes from a *very small* supplier known as West Coast Property Training, a small family business employing six full time staff.

4.25 – The proposed CPE scheme imposes an absolute barrier to entry and ongoing work in the industry for any individual who chooses to be a member of REIWA so that they have access to the use of standard documentation, or for any other reason, if they prefer to choose a different provider for their training.

5.18 – If REIWA has approx. 1000 members this means that of the approx. 12,000 operational individuals in WA only 1000 were surveyed. Of this 1000 only 16% (160) responded and of these only 77% (123) were in favour of the proposal. 123 out of 1000 is hardly representative of the WA real estate community, let alone 123 out of 12,000 (which represents just one per cent of the industry).

It is also worth noting that according to REIWA figures, between only 80 and 90 per cent of active real estate agents in WA are members (over 80 per cent according to reiwa.com; approx. 90 per cent according to Application for Authorisation A91280). This means that somewhere between 111 – 250 individual real estate agents operating in WA are not members of REIWA and therefore were not included in the survey.

The relationship between the low response rate to the survey (160), the number of positive responses (123) and the number of licensed individuals not surveyed (up to 250) is significant and supports the fact that the survey results are not representative of the WA real estate community.

5.19 – WCPT were contacted by numerous REIWA members following this survey, all of whom noted that despite seeking clarification as to who would be the providers of training in such a proposed scheme, no clear answer was given. REIWA members, at

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this time had not been consulted on the issue of who would provide training in such a proposed scheme.

5.22 – appears as a statement with no supporting evidence. Being a member of an organisation does not gift an individual with compliance.

5.23 – there are approx. 12,000 operational individuals in the real estate industry in WA, yet the proposal covers only approx. 1000 of these (5.20). This does not constitute keeping an industry better educated and skilled. The fact remains that REIWA are aware they can only impose this requirement on their paying members, not on the employees of these members. Again it is worth noting the number of individuals who, when given a choice, do not choose REIWA as their training provider.

5.24 – user choice must be addressed. Imposing training on an individual does not ensure anything.

5.25 – REIWA is *not* in a 'unique position' because of its dealings with the regulator. As previously stated, all mandatory CPD thus far in WA (2008, 2009, 2010, 2011) has been developed exclusively for the regulator by WCPT as a small business specialising in real estate industry training. The *most pressing and important issues* can be easily identified simply by consulting with industry on an ongoing basis – WCPT know this because we do it every day! To equip training staff to provide relevant information and ensure they have the requisite skills and knowledge to do so requires substantially more than membership of an industry body. It is true as stated at 5.25 that **“REIWA is unable to monitor or control the material covered by other professional development providers”**. This raises the question, why would REIWA expect to be able to monitor or control the material covered by other professional development providers? Wouldn't this be the job of an industry regulator?

5.27 – Further emphasises the complex and unclear 'role' of the Institute; in this case, REIWA is conferred and consulted with because they are there. There is no alternative organisation and this is the way it has always been done in Western Australia. A critical point is that REIWA are an Institute and should represent the industry – not control it.

5.28 – NOLS (National Occupational Licensing System) provides the potential for a major issue for consumer protection in WA if it does not include an ongoing training component, but REIWA has been in existence (without compulsory professional development) since 1918. Why, suddenly under threat of NOLS, does the real estate industry in WA need REIWA's CPE scheme?

5.29 – REIWA's CPE scheme is anti-competitive and there is no evidence to suggest any public benefit. Consumer protection needs to be addressed as a very separate issue to the proposed arrangements.

5.30 – REIWA's proposed CPE scheme seems to ensure an anti-competitive environment that carefully and quietly returns real estate training to a monopoly in WA. It completely ignores the fact that 56 per cent (figures provided by DoC 2/11/11) of operating licensed real estate agents in WA chose to complete their mandatory CPD

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with WCPT in 2011. The remaining 44 per cent were divided between REIWA and one other training provider.

5.31 – REIWA is not in a 'unique position' to identify appropriate course content for professional development training. WCPT has been part of a consultative process in choosing appropriate course content for mandatory CPD with the regulator since 2008. REIWA are in a 'unique position' to provide standard documentation to industry in WA as no other organisation does so.

5.32 –The vast majority of active real estate **agents** in WA are members (approx. 1000), however the vast majority of these members do not choose REIWA for the provision of training. Nor do their staff which number up to approx. 12,000.

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We hope this submission gives rise to a serious reconsideration as to whether REIWA's application for authorisation A91280 is in the best interests of the industry, given the identified public detriment and significant impact on competition.

Given the criticality of this proposed arrangement, I thank you for the opportunity to provide comment. I remain available to comment further on any content as required.

Sincerely,

Jackie Crank
Chief Executive Officer
West Coast Property Training