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BY EMAIL: adjudication@accc.gov.au

Dr Richard Chadwick
General Manager
Adjudication Branch
Australian Competition & Consumer Commission

Dear Dr Chadwick

Application for Authorisation [A91280] by the Real Estate Institute of Western Australia (Inc) (REIWA)
Response to Submissions received from Ms Jackie Crank of West Coast Property Training and Mr Bob Rossi

1. I refer to the emails that have been received by MDS Legal from Ms Hannah Ransom dated 18 January and 25 January 2012. Those emails have attached submissions that have been received by the ACCC in relation to REIWA's authorisation application from Ms Jackie Crank of West Coast Property Training, Mr Bob Rossi and Ms Amanda Lynch of the Real Estate Institute of Australia.

2. REIWA does not propose making any submission in response to the submission that has been received from Ms Lynch of the Real Estate Institute of Australia.

3. However, as has been discussed with Ms Ransom and Ms Hartcher-O'Brien in a telephone conversation I had with them on 31 January 2012, REIWA does wish to respond to the submissions that have been made by Ms Crank and Mr Rossi.

Submission by Mr Rossi

General comments

4. By way of introduction, it should be noted that Mr Rossi is no longer the Registrar of the Real Estate and Business Agents Supervisory Board of Western Australia and that entity ceased to exist on 30 June 2011. As far as REIWA and I are aware, Mr Rossi is not engaged by the Department of Commerce (which has effectively taken over the role of the Real Estate and Business Agent Supervisory

Board) and Mr Rossi does not purport to speak on behalf of that department. He therefore speaks as a private citizen.

5. Significantly, the Department of Commerce, which was one of the parties which was invited by the ACCC in its letter of 11 November 2011 to make a submission with respect to this matter, has not made any submission and there is nothing to indicate that the Department supports the comments made by Mr Rossi or is indeed aware of them.

6. It is also noteworthy that the Real Estate and Business Agent Supervisory Board was invited to make submissions by way of a letter dated 4 January 2007 from the ACCC in relation to REIWA's application for authorisation A91026, previously made by REIWA on 22 December 2006 (the revocation and substitution of which is the subject of the current application that has been made by REIWA). Mr Rossi was the Registrar of the Board at that time but the Board chose not to make any submission and did not raise any of the issues that have been raised by Mr Rossi in his conversation with Ms Hartcher-O'Brien and Ms Ransom on 12 January 2012, including the issues raised by Mr Rossi regarding REIWA's standard forms.

7. The Real Estate and Business Agents Supervisory Board did make written submissions with respect to REIWA's application for authorisation A70011, which was subsequently granted on 21 December 2001. Those written submissions were dated 27 September 2000 and 27 November 2001 and were made at a time when Mr Rossi was the Registrar of the Board. Mr Rossi also attended a pre-decision conference held on 31 August 2001. The issue of the liquidated damages clause contained in REIWA's Exclusive Authority to Act as Managing Agent of Residential Premises form (**Management Authority**) was the subject of considerable debate and analysis at that time and was the subject of specific findings by the ACCC that have given rise to the form of clause currently used in the form published by REIWA (see pages (vii) and 55 – 56 and 59 of the determination made by the ACCC in authorisation application A70011 dated 21 December 2001). There is no evidence that there has been any relevant change of circumstance that would justify the ACCC's determination with respect to this issue made on 21 December 2001 being varied.

8. Further, it should be noted that the approach made by the ACCC with respect to the application by REIWA for authorisation of its exclusive authority forms differed in 2001 when compared with the approach taken by the ACCC in the authorisation determination made by the ACCC made on 18 April 2007 (application number A91026). Whilst the ACCC analysed the issue of public benefit with respect to the 2001 authorisation so as to express views and make stipulations in relation to individual clauses within REIWA's exclusive agency authority forms, it adopted a different methodology in the 2007 determination. As noted at pp 98-99 of the submissions made with respect to the current authorisation application by REIWA (dated 4 November 2011), in the 2007 determination the ACCC stated that, whilst REIWA had appeared to seek authorisation for the standard form contracts themselves, it was the agreement between REIWA members to make available for use the standard forms which is the relevant conduct that may raise concerns under the *Trade Practices Act*, 1974 (now *Competition and Consumer Act*, 2010 (**CCA**)) (see the ACCC's 2007 Determination at para 11.3, p 29).

9. Consistent with this approach, REIWA has expressly sought authorisation in the current application of the agreement between it and its members and amongst REIWA members to make available for use the common forms that it provides to its members and the public to appoint agents to sell or lease real estate and to

sell businesses on an exclusive basis (see paragraph 9.1, pp 98-99 of the submissions by REIWA dated 4 December 2011).

10. The approach taken by the ACCC in 2007 and the application now made by REIWA in relation to its exclusive authority forms is consistent with authority and, in particular, in *Re Australian Association of Pathology Practices* (2004) ATPR 41 – 985. The Australian Competition Tribunal noted at para 138 of that decision that it is not the role of the ACCC, in considering an authorisation application, to "*redesign*" the arrangements put to it for authorisation by the applicant.

11. Further, the appropriate test which REIWA is required to satisfy in order for its conduct to be authorised is contained in sections 90(6) and 90(7) of the CCA. This test requires a consideration of the anti-competitive effect and public benefit of the relevant conduct and essentially, involves an assessment as to whether the conduct results in a net benefit to the public. However, unlike the test outlined in section 90(8) of the CCA, which is concerned with per se prohibitions, the test in sections 90(6) and 90(7) limits the consideration of the conduct prohibited by assessing "*the detriment to the public constituted by any lessening of competition*" resulting from the relevant conduct.

12. Therefore, when considering detriment, only the conduct which may be anti-competitive should be considered: see *Australian Association of Pathology Practices Incorporated* (2004) ATPR 41-985 at [93] and *Application by Medicines Australia Inc* [2007] ACompT 4 at [115].

13. In the light of this construction of the test by the Tribunal, the clauses referred to in the Management Authority which are of *"concern"* to Mr Rossi are not, by their nature, anti-competitive provisions and as such, any detriment caused by these clauses (even if it did exist, which is denied) is irrelevant for the purposes of REIWA's application for authorisation.

14. It is significant when considering the issue of REIWA's proposed compulsory professional development scheme (defined in REIWA's submissions dated 4 November 2011 as CPE Scheme (**CPE Scheme**)), that the scheme is only proposed to be implemented if the current compulsory professional development scheme administered by the Department of Commerce is terminated. In paragraphs 4-6 of the telephone note of the conversation between Mr Rossi and the ACCC on 12 January 20112, Mr Rossi notes that it is "*unlikely*" that the proposed legislative changes that would introduce a national licensing scheme for real estate agents (and bring about the end of the current compulsory professional development scheme administered by the Department of Commerce) will occur.

15. When considering issues raised by Mr Rossi regarding the proposed REIWA CPE Scheme (such as the limitations upon REIWA to provide educational sessions in regional areas, referred to in paragraph 11 of the telephone note), it is necessary to bear in mind the "*future with-and-without test*" established by the Australian Competition Tribunal, as discussed in paragraph 2.2, p16 of REIWA's submissions dated 4 November 2011.

16. REIWA repeats its analysis of "*the counterfactual*" in relation to its proposed CPE Scheme in paragraphs 5.3-5.36, p42 of its 4 November 2011 submissions. REIWA is not endeavouring to advance its proposed CPE Scheme as being a preferable alternative to the existing regulatory scheme. Rather, when analysing Mr Rossi's comments (and the submissions made by Ms Crank), it needs to be borne in mind that REIWA believes that, if the Department of Commerce regulatory scheme is abandoned, if the REIWA CPE Scheme is not implemented,

there will be no organised or co-ordinated professional development scheme applicable to real estate agents (whether or not members of REIWA) whatsoever.

17. Therefore, for example, whilst REIWA is not able to fund the provision of compulsory professional education presented in a class room setting (as distinct from an online setting) in regional areas to the same extent that is funded currently by the Department of Commerce, it is able to provide such a service in major regional areas such as Bunbury, Geraldton, Albany, the Pilbara and the Kimberley and by way of on-line services. If the REIWA CPE Scheme is not permitted to go ahead, there is no alternative body that would appear capable of providing an equivalent service to that of REIWA (including in regional areas) and, therefore, there will probably be no service provided to the majority of those regional areas. West Coast Property Training has in the past provided mandatory courses in Bali (it appears, primarily, for marketing purposes) and the only regional areas it has provided services are Northam and Margaret River. REIWA considers it unlikely that the provision of services by West Coast Property Training to WA regional areas would continue if Department of Commerce funding was withdrawn and the attending at the training by agents became voluntary. If there is no REIWA CPE Scheme (in circumstances where the regulator does not fund its own scheme and make attendance compulsory), it seems there will be no compulsory scheme at all and it would seem to be unlikely that any service at all would be offered to regional areas.

Response to Specific Submissions made by Mr Rossi

18. For ease of reference, the balance of the submissions made by REIWA in response to the submissions made by Mr Rossi are made with reference to the paragraph numbering identified below contained within the ACCC file note dated 12 January 2012.

Compulsory Professional Development

19. Paragraph 7. Mr Rossi's claim that, prior to the introduction of the compulsory education requirement for licensing in Western Australia in 2007, REIWA was the only provider of training services to real estate agents in Western Australia, is incorrect. Real estate training services have been provided for many years by Western Australian State government-funded Technical and Further Education (TAFE) Colleges. Indeed, the ACCC proceedings against REIWA brought by the ACCC in 1998 ([1999] FCA 1387) were also brought against two TAFE Colleges and, in part, arose out of the fact that REIWA was in competition with those colleges. The trainers, Kaplan and West Coast Property Training, were also providing real estate training services to real estate agents in 2007 (West Coast Property Training was registered as a business name in 2004 and gained the status of a registered training organisation in May 2007).

20. As to Mr Rossi's claim that REIWA derives "*significant*" income from the provision of training services, the reference to "*significant*" is vague, and in any event, the point is irrelevant to an assessment of REIWA's application.

21. REIWA's 2010-2011 Annual Report records that REIWA Learning had income of $2,477,248.00 and associated expenses of $2,244,188.00. This represented approximately 12% of REIWA's total revenue.

22. Paragraph 8. REIWA did not compete for the tender referred to by Mr Rossi as having been won by West Coast Property Training for the development of training materials. On the face of it, matters raised in this paragraph are irrelevant to REIWA's application for authorisation. To the extent that it may be being

suggested that REIWA does not have the capacity to properly prepare or maintain training materials for the REIWA CPE Scheme, such a suggestion is rejected and there is no evidence to support such a claim. Indeed, REIWA has been preparing course materials for courses such as these for decades.

23. Paragraph 9. REIWA's CPE Scheme will only be compulsory for REIWA members, and whilst approximately 90% of active real estate agents in Western Australia are members of REIWA, as Ms Crank points out in her submission, there are many persons involved with the real estate industry (in particular, property managers and sales representatives), who are not required to be licensed real estate agents under the *Real Estate and Business Agents Act*, 1978.

24. However, the nature of REIWA's membership structure (i.e. licensed real estate agents and real estate businesses) will mean that REIWA's CPE Scheme will effectively cover those members of the real estate industry who are the principals of real estate businesses and who are primarily responsible for supervising sales representatives and property managers who are employed by real estate businesses. Requiring continuing education for these principals is expected to provide significant flow-on education benefits for the entire real estate industry and therefore provide public benefit.

25. Paragraph 10. In this paragraph Mr Rossi expresses a number of opinions as to the likelihood of REIWA becoming the only training provider for real estate agents in Western Australia. No factual foundations are provided for the giving of any of these opinions. There is no evidence that if the REIWA CPE Scheme was introduced any of the current providers of services would cease offering training.

26. It is reiterated that the TAFE Colleges have provided training services in competition with REIWA well before any mandatory CPE Scheme was introduced and there has been no claim made by Ms Crank in her submission that West Coast Property Training would cease offering services (indeed, to the contrary, Ms Crank appears to have made much of the fact that REIWA's membership only covers a small proportion of the total real estate industry).

27. It should be noted that West Coast Property Training has recently not been reappointed as a preparer of course materials or a deliverer of the mandatory compulsory professional development sales courses funded by the Department of Commerce. West Coast Property Training did, however, successfully tender for the development of the training course for property managers arising out of recent changes to residential tenancy laws in WA (REIWA did not tender for the provision of training in relation to this tenancy legislation).

28. Paragraph 11. Mr Rossi's submissions about the inability of the REIWA CPE Scheme to provide as comprehensive a level of training in regional areas as the existing scheme funded by the regulator is an argument in favour of maintaining the current regulator's scheme. However, it is reiterated that the REIWA proposal would only apply if the regulator's scheme was abandoned.

29. Paragraph 12. Mr Rossi's response to the ACCC's enquiry whether REIWA is in a "*special position*" to deliver mandatory training to real estate agents is not answered by his response. The issue raised by Mr Rossi as to a "*public perception*" that REIWA is in fact the regulator is irrelevant to REIWA's authorisation application and, in any event, is rejected by REIWA.

30. Mr Rossi does not give evidence to support his claim that there is a general perception among the public in Western Australia that REIWA is the regulator

and no evidence exists to support such a claim. Whilst there may be individuals who have this misconception this is not as a consequence of any conduct on the part of REIWA and REIWA rejects any insinuation whatsoever that it may have engaged in misleading or deceptive conduct.

31. Presumably, Mr Rossi is specifically referring to the public's perception with respect to the conduct of disciplinary matters. As the ACCC is aware, since 2002 (as part of the provisions the subject of REIWA's ACCC's authorisation) REIWA has provided formal notice to all persons making any enquiries regarding any disciplinary matters of the existence of relevant alternative bodies to deal with complaints, including the Real Estate and Business Agents Supervisory Board and the Department of Commerce.

32. Further, REIWA is required to report to the Department of Commerce, within 21 days of a finding being made, full details of all adverse disciplinary findings where REIWA's legal advisor considers the subject matter of that adverse finding *could* amount to a breach of the *Real Estate and Business Agents Act*, 1978 or the associated Code of Conduct (see pp52-53 of REIWA's 4 November 2011 submissions).

33. Further, following the ACCC's 2009 Minor Variation Determination, REIWA has effectively abandoned its role in dealing with complaints made by members of the public (except in relation to breaches of REIWA's Auction Code of Conduct) but REIWA continues to give notice to all members of the public who make enquiries regarding these issues of the existence of bodies such as the Department of Commerce to deal with consumer complaints. Further, Article 26 of REIWA's Articles provides that if a REIWA Professional Standards Tribunal declines to hear or determine a matter pursuant to the discretion provided to Tribunals to not deal with matters in certain circumstances, REIWA's CEO must then refer the matter to the Department of Commerce if, in the opinion of the Tribunal or the CEO, the matter might amount to a breach of the provisions of the *Real Estate and Business Agents Act* or the associated Code of Conduct.

Standard forms

34. Paragraph 14. Mr Rossi claims that, as far as he is aware, REIWA's forms have not been made available to non-REIWA real estate agents and this is despite express conditions stipulated in previous authorisations provided by the ACCC to REIWA. Mr Rossi provides no evidence for this claim.

35. REIWA rejects the assertion made by Mr Rossi that it has breached the terms of previous authorisations. Mr Rossi appears to be mistaken as to the extent of the obligation upon REIWA to provide copies of forms to non-REIWA agents. The condition only applies to standard exclusive agency forms that are the subject of the previous authorisation applications. There has never been any obligation upon REIWA to provide all of its forms to non-REIWA members.

36. Nevertheless, in addition to the exclusive agency agreements that are the subject of REIWA's ACCC authorisation, REIWA voluntarily makes the standard contract by offer and acceptance for the sale of land that is produces available to non-members.

37. REIWA produces a very large number of forms in addition to the exclusive agency agreements that have been the subject of its applications to the ACCC for authorisation. There has never been any suggestion that the non-exclusive agency forms are required to be provided to non-REIWA agents and REIWA would oppose such a requirement. REIWA expends significant sums of money in

relation to the preparation and maintenance of these forms and, of course, it owns the intellectual property associated with these forms. Whilst many non-member real estate agents would be disappointed that they cannot have full access to REIWA's comprehensive suite of forms, the service is one that is provided to, and funded by, members.

38. Mr Rossi is wrong in his claim that REIWA's forms are the only ones produced in Western Australia. Organisations, such as real estate franchise groups, make forms available to their members. Further, ADL Software, a Queensland based company, provides standard forms to real estate agents in Western Australia. Forms, such as a standard residential lease, are also published by the Department of Commerce.

39. Paragraph 15. Mr Rossi claims that he is aware of a real estate training organization that was granted access to REIWA forms but at a cost much greater than charged of REIWA members. REIWA denies this contention and supplies its forms to other trainers at no cost.

40. Paragraph 16. Mr Rossi has made a general claim that REIWA's forms have been of concern to him in the past and REIWA's role as a body which represents the interests of real estate agents could potentially put it in conflict with consumers. REIWA is conscious of its obligations in relation to documents that could potentially be regarded as standard form contracts under the *Australian Consumer Law* and rejects any assertion that its documents are unfair to consumers. However, it is reiterated that the only documents for which REIWA is seeking authorisation (and sought authorisation in the past) are REIWA's exclusive agency agreements. To the extent that Mr Rossi may be referring to documents that are not exclusive agency agreements, his comments are irrelevant.

41. Paragraph 17. Mr Rossi makes specific reference to REIWA's contract by offer and acceptance for the sale of land. This is not a document that is the subject of REIWA's authorisation application and Mr Rossi's comments about the form are therefore irrelevant.

42. Mr Rossi does not give any particulars as to his objections to the finance clause contained in the form and REIWA denies that there is anything unfair or against the interests of consumers contained in the form. The offer and acceptance document is prepared for the use of buyers and sellers and real estate agents are not parties to the contracts.

43. Buyers and sellers are able to re-negotiate the terms of the finance clause should they wish.

44. Paragraph 18. Mr Rossi has described discussions between the Real Estate and Business Agents Supervisory Board and REIWA regarding the terms of the finance clause contained within REIWA's offer and acceptance document. Mr Rossi's is referring to discussions that took place over 10 years ago and are of no relevance to REIWA's application for authorisation.

45. Paragraph 19. Mr Rossi's apparent concerns as to the Department of Commerce having taken over the role of the Real Estate and Business Agents Supervisory Board are irrelevant to REIWA's application. This was a decision solely made by the Western Australian State government.

46. Paragraph 20. Mr Rossi has expressed a concern regarding the liquidated damages provision in REIWA's Management Authority. This was an issue that

was discussed and debated at length at the time of REIWA's application for authorisation A70011 and was the subject of the ACCC's determination dated 21 December 2001 (see p55 of that determination). The issue was the subject of the ACCC's draft determination, submissions made by the Real Estate and Business Agents Supervisory Board and debate at the pre-decision conference.

47. The ACCC concluded that it would generally not be feasible to require the amount of liquidated damages to be negotiated by agents and lessors, given the technical nature of the matter. However, the ACCC was not necessarily satisfied that at 50% figure was justified in all cases. Consequently, to obtain authorisation, it required REIWA to add a note to the liquidated damages provision in the relevant standard agreements to the effect that REIWA considers that a 50% rate provides an accurate calculation of the actual damages that would usually be suffered if an agreement is terminated in a manner that attracts liquidated damages. However, if a lessor considers that circumstances exist which could justify a different rate, they may seek the agent's agreement for that rate. Such a notice has been included in REIWA's form since this time.

48. There is no evidence that circumstances have relevantly changed since 2001. It is also reiterated that the approach taken by the ACCC to REIWA's 2007 authorisation application and the approach now taken by REIWA in relation to this current application is that authorisation is sought for the agreement between REIWA members to make available for use the standard forms, rather than the forms themselves.

49. Further, Mr Rossi's reference to the clause giving a managing agent the ability to deduct liquidated damages funds from monies held in trust for an owner being contained in a different part of the document and, therefore, presumably, being unfair is rejected. The clause concerned (4.6.6) makes specific reference to clause 3 (the liquidated damages clause).

50. Paragraph 21. Mr Rossi is critical of the provision in the Management Authority that an agent may transfer, sell or assign the agent's rights under the agreement to a third party without the prior consent of the owner. Mr Rossi claims that this clause is unenforceable "*under the law*" but consumers would not realise this.

51. The impact of section 60 of the *Real Estate and Business Agents Act*, 1978 upon the ability of a real estate agent to assign a management authority has been the subject of considerable analysis and debate in 2000 and 2010/2011 between REIWA, Mr Rossi and the Board's senior legal practitioner. As a consequence of those discussions, REIWA is reviewing the terms of the current clause 4.6.1 (it should be noted that the permission given to agents in the clause to assign the agreement is qualified by reference to "*if allowed by law*" and the wording of a related "*Deed of Assignment to Manage Residential Property*" was agreed between the Board and REIWA).

52. It should be noted that section 60 of the *Real Estate and Business Agents Act*, that prescribes the requirements of a valid real estate agent's authority, imposes penalties if the provisions are breached and REIWA is not aware of evidence that there is any widespread failure of its members to comply with these requirements.

53. Paragraph 22. Mr Rossi has made incorrect comments regarding REIWA's sources of income and its motivation for providing standard form documentation and training. In particular, he seems to ascribe a motivation borne from the demise of the Multiple Listing Service. REIWA has provided forms to its members and training services for many decades and, in any event, REIWA's

Multiple Listing Service was only ever one of a number of services provided by REIWA. As has been discussed in detail in section 6 of REIWA's 4 November 2011 submissions, much of the role of the Multiple Listing Service has been replaced by consumers' increased use of the internet generally and internet marketing through the REIWA property portal, www.reiwa.com.

Submission by Ms Crank

54. For ease of reference, I have **attached** to this letter an annotated version of the document that has been lodged with the ACCC by Ms Crank, with paragraph numbering that has been inserted by me. The paragraph numbers that I have referred to below with respect to Ms Crank's submissions reflect these hand-written numbers.

General Comments

55. By way of general comment, Ms Crank's attack on REIWA's application for authorisation on the basis that there has been no consideration given to real estate agents being "*consumers*" is ill-conceived. Ms Crank sets out in paragraph 5 that the REIWA submissions seem only to deal with whether or not the general public will experience benefit of detriment, this approach "*does not consider the agent as a consumer*".

56. As mentioned in paragraphs 10-12 of this letter, the appropriate test which REIWA is required to satisfy in order for its conduct to be authorised is contained in sections 90(6) and 90(7) of the CCA. This test requires an assessment of the anti-competitive effect and public benefit of the relevant conduct.

57. REIWA's focus on "*public*" benefit, rather than the benefit to the "*real estate industry*" is necessary as a consequence of the statutory test enunciated in *Qantas Airways Ltd* [2004] A Compt 9 at [151].

58. When considering the "*public benefit*", and therefore considering whether the 'public benefit test' has been satisfied, the ACCC must assess whether the arrangement or understanding provides "*anything of value to the community generally*". In *Re Howard Smith Industries Pty Ltd & Anor* (1977) 28 FLR 385 at 392, the Trade Practices Tribunal stated that when assessing the public benefit, the benefit must be assessed with reference to the Australian public. As an example, the Tribunal noted that a benefit to shareholders through higher dividends may be given less weight (although this can be seen as being of benefit to the public) because there is no benefit to the community generally.

59. Further, the object clause inserted as section 2 into the CCA states that, "*[t]he object of this Act is to enhance the welfare of Australians through the promotion of competition and fair trading and provision for consumer protection*". The focus of the CCA on "*consumer*" protection lends support to the interpretation that the "*public benefit*" refers to the wellbeing or welfare of society generally and not to one particular group of individuals.

60. Accordingly, Ms Crank's submission that REIWA has somehow erred in assessing the public benefit of its proposed arrangements by "*only*" considering the benefit to the "*general public*" is incorrect. REIWA has properly applied the statutory test by assessing the "*public benefit*" with reference to the Australian community generally.

61. Ms Crank also asserts (in paragraph 3) that it is difficult to identify the main thrust of REIWA's purpose. This is a mere assertion by Ms Crank and no factual basis

for the assertion is provided in her submission. Further, the submission does not appear to have any relevance to the assessment of REIWA's application for authorisation under the CCA. Nevertheless, REIWA rejects the general criticism of it by Ms Crank that it does not have a "*purpose*" and reiterates paragraph 1.1 and section 3 of its 4 November 2011 submissions[1].

62. In paragraph 4 of her submission, Ms Crank submits that REIWA has a "*virtual Monopoly*" in the areas of the provision of documentation, advertising through the HomeBuyer magazine, training, photography, printing "*and so on*". Notwithstanding that this claim by Ms Crank is a mere assertion without any supporting factual foundation, REIWA submits, in any event, that it has historically had competition in the supply of real estate-related services, including:

    (a) the State Government-funded TAFEs have provided licensing and registration courses for real estate and business agents for decades and will now in 2012 be offering training with respect to the State regulator's compulsory professional development scheme;

    (b) as at 31 December 2011, there were approximately 85 providers of the State regulator's compulsory professional development scheme who are registered with the Department of Commerce;

    (c) REIWA's now defunct *HomeBuyer* magazine always faced competition, during the time it was published, from other print media, including Western Australian newspapers and the publication *Real Estate WA*;

    (d) REIWA's photography service, which has now also been discontinued, had competition, when it was operational, from many private photographers, including Open2view;

    (e) REIWA's printing service, which has now also been discontinued, had competition, when it was operational, from many other printing services, especially Printforce;

    (f) REIWA competes with many other entities in the provision of real estate information services online, especially with respect to the listing of properties for sale including, but not limited to, *realestate.com.au*, *realestateview.com.au* and *domain.com.au*. In paragraph 3.9(v), p 22 of the its 4 November 2011 submissions, REIWA has provided extensive details as to its competition in regards to its provision of online real estate marketing services in Western Australia.

63. Ms Crank also alleges that REIWA operates as a monopoly in that, unlike in other states, it does not have competition with respect to the provision of its standard forms. As detailed in paragraph 38 of this letter, this allegation is factually incorrect.

64. In any event, whilst this appears to be a general criticism of the operations of REIWA, it is unclear as to the relevance of this point to the apparent thrust of Ms Crank's submission (i.e. that REIWA does not adequately make its standard forms available to West Coast Property Training and that West Coast Property Training opposes the REIWA CPE Scheme).

[1] At paragraph 3.2 of those submissions the terms of REIWA's *"objects",* as set out in Article 3A of REIWA's Articles, are repeated.

65. Ms Crank also appears to labour under a misapprehension that the ACCC's previous authorisation determinations have required REIWA to provide all of its forms to non-REIWA members. As discussed in paragraphs 35 and 37 of this letter, it has only ever been suggested that exclusive agency forms (not the balance of REIWA's 152 forms, which are not the subject of REIWA's authorisation application), be required to be provided to non-REIWA agents. Bearing in mind REIWA's intellectual property rights, REIWA would oppose any requirement that all its forms that are not the subject of the authorisation application be made available to non-members. Nevertheless, REIWA provides all its forms free of charge to training providers and for training purposes. Training providers normally contact REIWA to request specific forms.

66. Ms Crank complains in paragraph 17 of her submissions that REIWA does not "*proactively*" make its forms freely available to competing training providers and that competing training providers must make themselves aware of the existence of a form and of the existence of any changes to forms. REIWA accepts that it does not seek out training providers to determine whether they wish to use REIWA's forms and submits that there is no obligation upon REIWA to do so, nor should there be. Bearing in mind that there are approximately 85 providers of the state regulator's compulsory professional development scheme who are registered with the Department of Commerce and the number of forms produced by REIWA (REIWA currently produces 152 different forms) it would be an unreasonable administrative burden upon REIWA to notify all training providers whenever any amendment was made to a REIWA form.

67. REIWA's lack of preparedness to provide forms to training providers on this basis does not lessen the public benefit that is derived from the activities of REIWA that are the subject of this authorisation application and Ms Crank's submissions on this point are irrelevant to the tests applicable to its application.

68. Nevertheless, REIWA will continue to voluntarily provide requested forms to training providers free of charge. REIWA will maintain a record of the forms provided to those training providers so that it may update the relevant training providers with amended forms when substantial changes are made to those forms.

69. Ms Crank appears to consider that the REIWA proposal in relation to its CPE Scheme is an attempt by REIWA to "*replace*" the existing compulsory professional development scheme funded by the Department of Commerce with a "*watered down version imposed by REIWA which is presented to 1,000 rather than 12,000+ individuals*". It is again stressed that REIWA is not promoting its CPE Scheme as being one that should be preferred to the current compulsory scheme but, rather, will provide a public benefit (as detailed at pp39-42 of its 4 November 2011 submissions) that will otherwise not be available if the current regulator's compulsory scheme is terminated.

Response to specific submissions made by Ms Crank

70. The balance of the submissions made by REIWA in response to the submissions made by Ms Crank are made with reference to the paragraph numbering marked on the attached copy of Ms Crank's document.

71. Paragraph 4. REIWA reiterates its denial that it has operated as a "*virtual monopoly*". It also denies that there has been a "*dramatic shift*" in REIWA's areas of interests, such that REIWA has been forced to acknowledge competition and recognise real estate agents as consumers. This submission is mere rhetoric and has been made without the provision of any factual foundation.

72. Paragraph 8. REIWA is unclear of the point being made by Ms Crank and, to the extent that Ms Crank is implying that real estate agents in Western Australia are not free to choose when and with whom they do business, that claim is denied. The allegation is made as a mere assertion and no evidence is provided to support the assertion.

Standard Documentation

73. Paragraph 12. The issue of standard forms producing a reduction in innovation has been the subject of the ACCC's 2007 determination dated 18 April 2007 at paragraphs 11.3-11.6, p29 and also the subject of submissions made by REIWA in paragraph 9.56 of its 4 November 2011 submissions. The ACCC has rightly considered in the past that any such potential detriments were likely to be mitigated as the agreement to make forms available for use (and the provisions they contain) do not compel REIWA members to use the standard form contracts. In addition, whilst the forms themselves set out certain terms and conditions, it is made clear that all aspects of the standard form contracts are open for negotiation. This continues to be the case with REIWA's forms, and as has been set out in paragraph 38 above, REIWA has competition with respect to its forms. Further, it is REIWA's experience that many individual agents produce their own forms, particularly with respect to the exclusive agency agreement for the sale of residential land.

74. Paragraph 15. Again, the point being made by Ms Crank in this paragraph would appear to be irrelevant to REIWA's application for authorisation. Ms Crank's apparent submission that there should be some increase in minimum licensing requirements for real estate agents is outside the scope of the authorisation application and outside the control of REIWA.

75. Paragraph 17. REIWA reiterates the submission made by it above in paragraphs 65 and 66 of this letter that REIWA is happy to continue to provide all its forms free of charge to training providers but that it would be an unreasonable administrative burden upon REIWA to notify all training providers whenever any amendment is made to a REIWA form. Further, the most commonly used exclusive agency agreements (for example, the exclusive agency for the sale of residential property) are infrequently amended. The extent of the amendments made over the past 10 years has been identified by REIWA in the forms annexed to its submissions made in support of its two most recent applications for authorisation dated 4 November 2011 and 22 December 2006.

76. Paragraph 19. The reference by Ms Crank to the Multiple Listing Service is irrelevant. REIWA is not asserting that the Multiple Listing Service "*equals*" standard documents and is not asserting that the relevance and significance of standard documentation has decreased.

77. Paragraph 20. There is nothing sinister in paragraph 9.11 of REIWA's 4 November 2011 submissions or the fact that virtually all sales of property in the Perth Metropolitan area take place pursuant to an exclusive agency agreement.

78. Paragraph 21. There is no basis upon which training providers should be made members of REIWA and this assertion is irrelevant to REIWA's application for authorisation. The Institute is an association of real estate agents, not educators.

Provision of Training/ Compulsory Professional Development

79. Paragraph 27. Ms Crank appears to be submitting that it is significant that REIWA was not awarded a tender for the preparation of mandatory CPE training

modules. REIWA did not tender for a contract for the delivery of these services at that time. It should be noted that whilst REIWA has recently been re-appointed by the Department of Commerce to deliver training services as funded by the Department, West Coast Property Training has been unsuccessful in its bid to be reappointed (except for preparing training modules for property managers dealing with the recent changes to the residential tenancy laws in WA).

80. Paragraph 28. This paragraph is irrelevant to REIWA's application for authorisation.

81. Paragraph 29. This paragraph is irrelevant.

82. Paragraph 30. This paragraph is irrelevant.

83. Paragraph 31. The significance of the statistics provided by Ms Crank as to the percentage of real estate licensees trained by West Coast Property Training as at 2 November 2011 is unclear.

84. The statistics provided by the Department of Commerce for the year ending 31 December 2011 show that, of the mandatory components of the CPE courses, REIWA had a 47% share of the total number of licensees attending these courses and a 55% share of registered personnel (e.g. sales representatives and property managers attending courses). REIWA's percentage share of the elective components of the CPE courses was 55% of licensees and registered personnel. The 2011 Real Estate and Business Agents Supervisory Board Annual Report recorded on page 55 that there were 2,536 licensed agents in Western Australia.

85. Presumably Ms Crank is referring to West Coast Property Training having provided mandatory training to 56% of the total number of licensed agents in Western Australia, not 56% of REIWA members. As of 31 December 2011 the Department of Commerce records show that REIWA trained 1,010 licensed agents in 2011.

86. It would therefore seem that the majority of non-REIWA members who are licensed real estate agents have sought their compulsory professional development training from sources not associated with REIWA. It is reiterated that under REIWA's proposed CPE Scheme non-REIWA members would not be required to comply with REIWA's membership requirements, including compulsory professional development.

87. Paragraph 32. The claim by Ms Crank that there are "*serious anomalies*" in REIWA's submissions is categorically rejected and none of the assertions made in her submissions justify such a contention.

88. Paragraph 33. In paragraph 4.22 of REIWA's 4 November 2011 submissions, it is submitted that REIWA's competitors are not "*necessarily smaller*". The point being made in the submission was that, particularly with respect to the provision of internet services, many of REIWA's competitors are far larger corporations. Of course, none of this amounts to a claim by REIWA that all of its competitors are larger and the conclusion by Ms Crank that REIWA is making such a claim and that the falsity of that claim should be held against REIWA is unjustified.

89. Paragraph 34. This paragraph is somewhat difficult to understand but, to the extent that it is alleged that REIWA's proposed CPE Scheme amounts to "*an absolute barrier to entry*", this is a mere assertion without any factual foundation and is rejected. It is unclear as to whether the allegation is that the CPE Scheme

will impose an absolute barrier to entry to working as a real estate agent or to providing training services. There is nothing in REIWA's proposals that will prevent real estate agents from practising if they are not members of REIWA or prevent trainers from providing training services to real estate agents. This is particularly the case given that it appears to be open to be concluded that a large proportion of training services provided by groups such as West Coast Property Training are provided to non-REIWA members.

90. Paragraph 35. Again, the point sought to be made by Ms Crank in the context of REIWA's application for authorisation is unclear. If the assertion is that REIWA only has relevance to 1,000 persons out of an industry of 12,000, then it is difficult to see how REIWA's proposed CPE Scheme will have any significant impact upon competition and the provision of educational services. This is particularly the case given the requirement that REIWA be used to provide half of the points requirement and that the CPE Scheme only applies to continuing professional development of REIWA members, not training by real estate agents, sales representatives or property managers to obtain a license or registration.

91. Presumably, the 12,000 people referred to by Ms Crank include non-REIWA members and people such as support staff employed by real estate agencies.

92. To the extent that Ms Crank is denigrating the reliance that can be placed upon REIWA's survey of its members, the survey was a voluntary one, and in any event, REIWA did not seek to obtain the views of people unaffected by its CPE Scheme (i.e. non-REIWA members).

93. Paragraph 36. This paragraph appears to be irrelevant. REIWA's survey was not seeking to enquire as to who the providers should be of education schemes in Western Australia but, rather, whether REIWA members had a desire for a continuing compulsory education scheme if the current regulatory scheme is brought to an end. REIWA has not claimed otherwise.

94. Paragraph 37. It is reiterated that the point of the survey was to ascertain whether REIWA members wish to have a continuing professional education scheme. The point being made by Ms Crank in attacking the survey and its legitimacy is unclear. The logical extension of the point apparently being made by Ms Crank appears to be that the REIWA survey cannot be relied upon and, if that is the case, there is in fact no desire for continuing professional education within the REIWA membership and it should not be provided at all. That would be a curious submission for an active provider of training services to make and, in any event, is rejected by REIWA.

95. Paragraph 38. REIWA denies that it has somehow been evasive or secretive to its members. REIWA has never promoted its survey as being a survey as to who should provide training services. The reference to "*numerous*" REIWA members is again a mere assertion and no facts to support the allegation have been provided.

96. Paragraph 39. The point made by REIWA in paragraph 5.22 of its 4 November 2011 submissions is that the existence of REIWA and its membership requirements provides consumer protection due to many of the obligations of that membership, including provisions in REIWA's Articles and codes of practice. Other than being a criticism of REIWA's general credibility, the relevance of this paragraph is unclear.

97. Paragraph 40. Again, the point being made by Ms Crank in this paragraph is unclear as it appears to be an assertion that one of the problems with the REIWA

CPE Scheme is that it will only deal with a small number of people in the real estate industry. If Ms Crank is asserting that there should be some compulsion upon non-REIWA members to attend training, of course REIWA is unable to impose that requirement. If the point being made is that the vast majority of people working in the real estate industry will not be covered by the REIWA CPE Scheme, this would appear to mean that presumably many of those people will continue to use the services of West Coast Property Training. Indeed, whilst a mere assertion, the claim made by Ms Crank is that a large number of individuals choose not to use REIWA when they have a choice and the vast majority of people in the real estate industry are not members of REIWA.

98. Paragraph 41. This paragraph attacks the fact that training will be imposed upon the individual. REIWA reiterates its submissions that the imposition of this training upon its members will provide public benefit. It is reiterated that it is appropriate to apply the "*future with-and-without*" tests and to analyse the alternatives that will apply if the REIWA CPE Scheme is not implemented. If there is no compulsion permitted with respect to REIWA's members, those members will not need to carry out the training and will join the rest of the 12,000 people identified by Ms Crank as being people who will only need to spend the time involved in the training if they choose to. If the current statutory scheme ceases, there will be no other mandatory scheme that will take its place.

99. Paragraph 42. REIWA affirms the submission made by it in section 5 of its 4 November 2011 submissions (at pp34-42) as to its unique position to provide a compulsory CPE Scheme and nothing contended by Ms Crank in her submission detracts from that submission.

100. The last two sentences of this paragraph underlines the extent to which Ms Crank's submission is ill-conceived. Ms Crank appears to accept that REIWA is unable to monitor the activities of other trainer providers (as claimed by REIWA) but then goes on to contend that this should be a job for the industry regulator. Of course, the whole basis of the REIWA scheme is that it is proposed to apply only if the industry regulator no longer has this role. REIWA is not proposing it will become the regulator. Indeed, REIWA is proposing the very opposite. REIWA is unable to regulate a CPE Scheme beyond its own operations and members.

101. It should be noted that for the existing CPE Scheme the Department of Commerce liaises with industry, including REIWA as the industry's peak body, towards the end of each year to determine what issues are relevant and should be included in the sessions for the following year.

102. REIWA also has two representatives on the Property Industry Advisory Committee, which was formed in 2011 to advise the Minister for Consumer Protection and the Commissioner for Consumer Protection on industry issues.

103. Paragraph 43. The criticism of the "role" of REIWA and the claim that there is a lack of clarity as to its role is a mere assertion, without the provision of any factual foundation, and is rejected.

104. The argument that REIWA is only conferred and consulted with because it is there is fatuous. The same argument could be made with respect to a number of professional associations, including the Western Australia Law Society and the Australian Medical Association. REIWA is held in high esteem by governments and regulators and this is evidenced by its role with the Property Industry Advisory Committee formed by the West Australian government.

105. There was no requirement upon, for example, the regulators to consult with REIWA in relation to the recent identity fraud issue referred to in paragraphs 5.26-5.28 at p40 of REIWA's submissions of 4 November 2011.

106. There are a number of consumer groups, franchise groups and other organisations (such as West Coast Property Training) who the government could have consulted with if it wished.

107. The claim that REIWA should represent the industry and not control it is merely rhetoric.

108. Paragraph 44. This paragraph is irrelevant. Presumably, West Coast Property Training accepts that education provides a benefit. REIWA merely wishes to ensure that its members receive such an education and the resulting public benefit is produced.

109. Paragraph 45. This paragraph is a mere assertion without a factual basis. The reality is that without the REIWA CPE Scheme there would be no alternate scheme.

110. Paragraph 46. The assumption upon which this paragraph is based, namely that in the past REIWA has had some form of monopoly with respect to training is, again, rejected. No factual foundation for this assertion is provided. It is reiterated that real estate training has always been conducted by the West Australian government through TAFE Colleges, where people can obtain a license or a registration qualification without reference to REIWA. It is not proposed, by the introduction of NOLS, or by any proposal made by REIWA or the regulator, that education requirements for the obtaining of licenses or registration under the *Real Estate and Business Agents Act* 1978 will be abandoned. It is assumed that West Coast Property Training, other private property trainers and the TAFE Colleges will continue to provide educational courses.

111. REIWA did not have a "*monopoly*" with respect to the provision of real estate training courses prior to the introduction of the current regulator's CPE Scheme and the proposed REIWA CPE Scheme will not bring about such a monopoly.

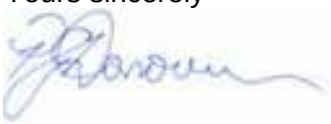
112. Paragraph 47. REIWA repeats its submissions contained in paragraph 5.25, pp39-40, of its 4 November 2011 submissions as to the uniqueness of its position to identify appropriate course content. That is not to say that West Coast Property Training, or any other training provider, is incompetent or is incapable of preparing course content.

113. Paragraph 48. The claim by Ms Crank that the "*vast majority*" of REIWA members do not choose REIWA for the provision of training is incorrect. In 2011 726 members of REIWA who are real estate agents and 2,155 registered sales representatives or property managers who are members of REIWA or associated with members of REIWA were enrolled to receive training services from REIWA. REIWA has 1076 Corporate Members (i.e. companies/partnerships/sole traders) that conduct real estate businesses and 1,500 Ordinary Members (i.e. individuals who are directors/partners/sole proprietors of those real estate businesses). Not all of those 1,500 Ordinary Members are licensed real estate agents (and required to attend mandatory CPE), but at least one of the directors etc of a Corporate Member would be expected to be a licensed agent. Therefore, REIWA estimates that between 1,076 and 1,500 REIWA Ordinary Members are licensed real estate agents required to attend mandatory training. Given that 726 of these

members acquire that training from REIWA, it is incorrect for Ms Crank to claim that West Coast Property Training trains the "*vast majority*" of REIWA members.

Should the ACCC have any questions or require any further information from REIWA regarding the matters dealt with in this letter, or any other matters arising out of REIWA's application, please do not hesitate to contact me or Gabriela McLean.

Yours sincerely



P G DONOVAN
Director
MDS LEGAL

Enc 1 - Annotated version of document lodged with ACCC by Ms Crank