



Australian  
Competition &  
Consumer  
Commission

# Determination

## Application for revocation of authorisation A91026 and substitution with authorisation A91280

**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 agreement regarding use of its Standard Exclusive Agency Forms**

**Date: 19 April 2012**

**Authorisation no.:** A91280  
**Public Register no.:** C2011/952

**Commissioners:** Schaper  
Court  
Dimasi  
Willett

## Summary

The ACCC revokes authorisation A91026 and grants conditional authorisation A91280 in substitution (reauthorisation). The conditional reauthorisation is 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 REIWA's Standard Exclusive Agency Forms. The ACCC grants conditional authorisation for five years.

On 7 November 2011, the Real Estate Institute of Western Australia (REIWA) lodged an application for revocation of authorisation A91026 and substitution of authorisation A91280 with the ACCC (reauthorisation). REIWA has applied for reauthorisation in relation to its membership framework, namely:

- Articles of Association (Articles);
- Members' Code of Practice (Members' Code);
- Multiple Listing Service By-Laws (MLS By-Laws);
- Auction Code of Conduct (Auction Code); and
- the agreement to make available its Standard Exclusive Agency Forms.

As part of its application for reauthorisation, REIWA has proposed a number of amendments to the documents in its membership framework compared to those which were considered in the ACCC's authorisation A91026.

REIWA submits that the public benefits that flow from the various documents in the membership framework include promoting high standards of real estate practice, and reducing the costs of transactions in the real estate industry.

REIWA also submits that each of its Articles, Members' Code, MLS By-Laws, Auction Code and the agreement regarding use of its Standard Exclusive Agency Forms carry with them a public benefit which would outweigh any anticompetitive effect of those arrangements.

In assessing REIWA's application for reauthorisation the ACCC has taken into account the proposal for a national occupational licensing scheme (NOLS), replacing state regulation of real estate and business agents. However, the ACCC has also taken into account the possibility that the Western Australian government will continue to regulate real estate and business agents, including requiring ongoing professional education.

The ACCC considers that REIWA's membership framework as amended (comprised of its Codes and Articles and its proposed ongoing training scheme, including ongoing compulsory professional education (CPE Scheme), which would be brought in only if NOLS proceeds) is likely to result in public benefits in the form of:

- encouraging members of REIWA to conduct real estate and business transactions with expertise and professionalism, resulting in benefits to consumers that engage REIWA members as agents and reputation benefits for members of REIWA;
- transaction cost savings from reducing the cost of drafting certain documents and reducing the cost of handling disputes; and
- administrative cost savings arising from REIWA's ability to efficiently manage its membership fees and debt.

The ACCC considers that REIWA's membership framework may also generate some anticompetitive detriments, namely:

- the effect of REIWA's membership framework upon competition amongst real estate agents, particularly any potential for exclusionary effects or facilitation of anticompetitive coordination amongst competitors; and
- the effect of the prevalence of REIWA's Standard Forms, which may limit competition in relation to terms and conditions encapsulated in the standard forms.

However, the ACCC is of the view that potential exclusionary effects and/or coordination that may arise from the membership framework are likely to be limited.

In relation to potential detriment arising from the potential exclusionary effect of REIWA's Standard Forms, the ACCC considers that this is likely to be mitigated by making REIWA's Standard Exclusive Agency Forms available to non-members and all of its Standard Forms available to training providers. The ACCC also considers that making these forms available to these persons is unlikely to have an undesirable chilling effect upon competition in relation to terms and conditions.

To ensure that the public benefit generated by the application outweighs the anticompetitive detriment, the ACCC grants reauthorisation subject to a number of conditions relating to access to forms. These conditions take into account submissions made by REIWA following the draft determination.

In relation to the issue of ongoing compulsory training, the ACCC considers that the potential public detriment likely to arise from the adoption of REIWA's CPE Scheme is less than the public detriment likely to arise from the alternative. That is, if governments cease to require agents to undertake any continuing education, REIWA's proposed CPE Scheme is likely to lead to better outcomes for the public than the alternative of no requirement for ongoing compulsory training for real estate agents, regardless of whether they are REIWA members.

On balance, the ACCC considers that the public benefits arising from the membership framework and proposed CPE Scheme will outweigh any potential anticompetitive detriment, subject to the conditions of the grant of authorisation.

The ACCC grants reauthorisation for a period of five years until 11 May 2017.

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## List of abbreviations

ACCC	Australian Competition and Consumer Commission
the Act	Prior to 1 January 2011, the <i>Trade Practices Act 1974</i> , and as of 1 January 2011, the <i>Competition and Consumer Act 2010</i> .
Articles	REIWA's Articles of Association
Auction Code	REIWA's Auction Code
CCA	<i>Competition and Consumer Act 2010</i> .
COAG	Council of Australian Governments
CPE Scheme	REIWA's Compulsory Professional Education Scheme consisting of seven hours of compulsory professional education training per year, of which 3.5 hours is proposed to be a course developed and provided by REIWA and 3.5 hours that can be provided by other training providers.
Department of Commerce	The Western Australian Department of Commerce
Members' Code	REIWA Members' Codes of Practice
MLS	REIWA's Multiple Listing Service
NOLS	National Occupational Licensing System
POIAC	Property Occupations Interim Advisory Committee
REBA Board	Real Estate and Business Agents Supervisory Board
REBA Act	<i>Real Estate and Business Agents Act (WA) 1978</i>
REIA	Real Estate Institute of Australia
REIWA	Real Estate Institute of Western Australia
REIWA membership framework	Articles, Members' Code, Auction Code, MLS By-Laws and the agreement to make available for use, the Standard Exclusive Agency Forms as amended
Standard Exclusive Agency Forms	The fourteen Standard Forms contained in Attachment B.
Standard Forms	Any form produced or otherwise supplied by REIWA for use in agent transactions. These include the Standard Exclusive Agency Forms as well as a much wider range of other forms.
TPA	<i>Trade Practices Act 1974</i>
WCPT	West Coast Property Training

# 1 The application for authorisation

- 1.1 On 7 November 2011, the Real Estate Institute of Western Australia (REIWA) lodged an application under section 91C(1) of the *Competition and Consumer Act 2010* (the Act) for the revocation of authorisation A91026 and the substitution of authorisation A91280 for the one revoked (referred to as reauthorisation).
- 1.2 Authorisation is a transparent process where the ACCC may grant immunity from legal action for conduct that might otherwise breach the Act. The ACCC may ‘authorise’ businesses to engage in anticompetitive conduct where it is satisfied that the public benefit from the conduct outweighs any public detriment.
- 1.3 The ACCC conducts a public consultation process when it receives an application for authorisation, inviting interested parties to lodge submissions outlining whether they support the application or not. Further information about the authorisation process is contained in Attachment A.
- 1.4 The holder of an authorisation may apply to the ACCC to revoke an existing authorisation and grant another authorisation in substitution for the one revoked (reauthorisation). In order for the ACCC to reauthorise conduct, the ACCC must consider the application for reauthorisation in the same manner as it would consider an application for initial authorisation under section 88 of the Act.
- 1.5 Relevantly, the initial authorisation, that is A91026, was made under section 88(1) of the Act 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 Act.
- 1.6 Pursuant to section 177(2) of the Act, which came into force on 24 July 2009, authorisation A91026 is also deemed to have been granted on the basis that it was applied for under section 88(1A) of the Act to make and give effect to a contract or arrangement, or arrive at an understanding a provision of which would be, or might be, a cartel provision (other than a provision which would also be, or might also be, an exclusionary provision within the meaning of section 45 of that Act).
- 1.7 The substitute authorisation A91280 is for substantially the same conduct and is also made under section 88(1) and section 88(1A). The main change of substance proposed under this application for reauthorisation relates to the arrangements for delivering ongoing compulsory professional education training to REIWA members in the event that there is no longer any such obligation imposed by national or state regulators.
- 1.8 A **chronology** of the significant dates in the ACCC’s consideration of the application for reauthorisation A91280 is contained in Attachment C.

## The applicant – The Real Estate Institute of Western Australia

- 1.9 REIWA is an association of Western Australian real estate and business agents incorporated under the *Associations Incorporation Act 1987* (WA). REIWA was initially incorporated in 1918.
- 1.10 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.

- 1.11 The main services provided by REIWA to its members include:
- commercial services, such as standard forms, access to legal advice, insurance services, fuel and vehicle discounts and other trading benefits with third parties;
  - information and data services, such as information alerts, statistics, market research and economic commentary;
  - advocacy services as a representative for real estate agents in Western Australia in dealing with governments and regulators;
  - professional development services, including the provision of training, the formulation of rules of ethical standards and the provision of arbitration services; and
  - internet services, such as a real estate marketing portal, related data and associated services.
- 1.12 REIWA submits it currently has 1,076 corporate members, which it says represents approximately 80-90% of active real estate agents in Western Australia and 50% of businesses solely practising as business agents.

### **Previous authorisations and the current application**

- 1.13 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.<sup>1</sup>
- 1.14 On 21 December 2001, the ACCC granted, with conditions, REIWA's application for authorisation (A70011) for five years (the 2001 authorisation). REIWA subsequently applied for, and was granted, authorisation A91026 by the ACCC on 18 April 2007 (the 2007 authorisation). The 2007 authorisation contained similar arrangements to the 2001 authorisation.

### **The proposed conduct**

- 1.15 The reauthorisation sought by REIWA is in respect of its Articles of Association, Members' Code of Practice, Auction Code of Conduct, Multiple Listing Service By-Laws and the agreement to make available for use its Standard Exclusive Agency Forms (together, the **REIWA membership framework**).
- 1.16 The REIWA membership framework may be considered as comprising agreements between competitors in the form of agreements between the association and its members and between the members themselves as to the terms on which:
- the association will provide services;
  - members will participate in the association; and
  - members will provide agency services to consumers.

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<sup>1</sup> On 8 October 1999, the Federal Court issued orders by consent which provided an opportunity for REIWA to lodge an application for authorisation of its conduct following the institution of legal proceedings by the ACCC for alleged breaches of section 45(2) of the then *Trade Practices Act 1974*.

1.17 REIWA seeks reauthorisation for five years.

### **Articles of Association**

1.18 In general, 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.

1.19 However, Articles may also be considered as agreements between an association and its members and between the members themselves as to the terms on which the association will provide services.

1.20 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.

1.21 Since the ACCC's 2007 Determination and 2009 Minor Variation Determination, REIWA states it has made two sets of amendments, in September 2010 and September 2011. The current application for reauthorisation is for the revised Articles, which have not yet been fully implemented and are subject to authorisation being granted.

### *Membership criteria and obligations*

1.22 REIWA's Articles contain provisions imposing obligations on and criteria for REIWA members in relation to their membership, including:

- Articles 7 and 8 contain objective membership criteria regarding licensing, minimum insurance levels, soundness of mind, absence of criminal convictions and absence of connection with entities indebted to REIWA or REIWA members;
- Article 9 requires membership applications to be determined by the Chief Executive Officer. A notice giving written reasons for any rejection must be provided within 14 days. Applicants can appeal the rejection decision pursuant to Article 43;
- Article 12 states that members of REIWA agree to be bound by the Articles, the Members' Code and all other rules and regulations, both at the time that they apply for membership and pursuant to any changes made to the Articles; and
- Articles 14 to 17 allow REIWA to levy membership subscriptions (currently less than \$1000 for corporate membership with a fee per registered sales agent or property agent, and around \$100 for non-corporate membership, with a discount of around 20% for rural/regional members).<sup>2</sup>

1.23 REIWA proposes amendments to Articles 7.4.3, 14 and 15 to reflect that REIWA's membership payments system now works on a monthly rather than annual cycle. The

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<sup>2</sup> REIWA, Submission in support of applications, 7 November 2011 (REIWA Submission), [5.61].

changes also provide the Chief Executive Officer with discretion to terminate a person's membership if these monthly subscriptions remain unpaid for 60 days, where previously such a termination was automatic.

#### *Disciplinary procedures*

1.24 REIWA's Articles also provide for disciplinary procedures following non-compliance with REIWA's membership framework or a failure to pay membership subscriptions. The relevant articles include:

- Articles 21 and 22 contain provisions whereby membership of REIWA may be terminated by the CEO as a consequence of failure by a member to comply with Articles 7, 8 or 12;
- Articles 23 to 29 provide for the operation of a three person Professional Standards Tribunal (PST) to hear complaints regarding REIWA members or to hear appeals against decisions by the CEO to terminate REIWA membership;
- Article 25 permits a PST hearing to terminate membership, impose monetary penalties and reprimands, order restitution of money and require individuals to undertake training; and
- Article 28 obliges a PST hearing to afford members natural justice and procedural fairness including timeframes for the provision of: written notice of the matter to be heard, copies of documentary evidence to be considered, an opportunity to be heard and call evidence, and delivery of written reasons for the decision.

1.25 REIWA proposes to amend Article 28 to add a timeframe for the communication of outcomes of PST hearings to REIWA members through *REIWA News* or an equivalent publication.

#### *Arbitration procedures*

1.26 REIWA's Articles contain a number of provisions that establish its arbitration panel processes:

- Articles 34 to 41 provide for the creation, maintenance and operation of arbitration panels to hear and resolve disputes between REIWA members or submitted by members of the public against REIWA members;
- Article 34 excludes from arbitration panel consideration matters to be determined by the appeals board or disciplinary or membership matters to be considered by the Chief Executive Officer or a PST hearing; and
- Article 35 requires arbitration disputes to be determined in accordance with the terms of the *Commercial Arbitration Act 1985 (WA)*.

#### *Appeal procedures*

1.27 REIWA's Articles contain a number of provisions which establish its appeal board processes:

- Articles 43 to 50 provide for the creation, maintenance and operation of an appeals board to hear appeals against decisions that may be made by the Chief Executive Officer or a PST hearing;

- the following decisions may be appealed: rejection of a membership application by the Chief Executive Officer (Article 9.4); membership payment decisions by the Council (Article 17); suspension of membership services by REIWA (Article 18); a decision by a PST whether to reveal the identity of a person the subject of a hearing (Article 28.4); and a decision by a PST to penalise a member (Article 32); and
  - Article 44 requires appeals to be heard by a three member panel which includes an independent legal practitioner, a consumer representative and a licensed real estate or business agent.
- 1.28 Article 51 requires an appeals board hearing to afford the parties natural justice and procedural fairness including timeframes for the provision of: written notice of the matter to be heard, copies of documentary evidence to be considered, an opportunity to be heard and call evidence, and delivery of written reasons for the decision.

*Proposed changes to REIWA membership requirements in the event that national licensing is adopted*

- 1.29 REIWA submits that changes to its members' obligations in relation to training are necessary in order to allow it to be in a position to respond to proposed changes to the regulation of real estate and business agents under the Council of Australian Governments' (COAG) Intergovernmental Agreement. Through this agreement COAG proposes to establish a national occupational licensing system (NOLS) for specified occupations, including real estate and business agents.<sup>3</sup>
- 1.30 REIWA has amended Articles 2 and 8.4 to make it a condition of membership that REIWA members undertake compulsory professional education (CPE). REIWA proposes to prescribe the requirements for CPE for its members under a CPE Scheme. The ACCC notes that the Articles for which REIWA is seeking reauthorisation do not define what form the CPE Scheme will take. Instead, Article 2 includes a definition of CPE and under Article 8.4 REIWA members will need to comply with CPE obligations imposed by REIWA's Council<sup>4</sup> from time to time in order to be eligible to become or remain a member of REIWA.<sup>5</sup>
- 1.31 If NOLS requirements for real estate and business agents come into force and there are no ongoing professional training requirements imposed by state or national law, REIWA proposes to require all its members to undertake CPE pursuant to its CPE Scheme. REIWA proposes that its CPE Scheme will consist of seven hours of CPE per year, of which 3.5 hours is proposed to be a course developed and provided by REIWA. REIWA proposes publishing guidelines concerning how the requirements of the CPE Scheme may be met with regard to the remaining 3.5 hours, rather than providing a list of eligible courses or providers.

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<sup>3</sup> A more detailed description of NOLS is included at paragraphs 2.9 to 2.14.

<sup>4</sup> Defined in the Articles to mean the committee referred to in REIWA's Articles and established under Article 52 which is made up of the Persons who have the power to manage the affairs of REIWA as provided for in section 20 of the *Associations Incorporation Act (1987)*.

<sup>5</sup> Article 2 defines CPE as a program for continuing professional education, prescribed by REIWA's council from time to time, required to be undertaken by members who are licensed real estate and business agents.

- 1.32 Since the Articles for which REIWA is seeking reauthorisation do not define what form the CPE Scheme will take, the ACCC's assessment and authorisation decision is based upon REIWA's description above of the form of its proposed CPE Scheme and the circumstances in which it will be prescribed.
- 1.33 REIWA submits the requirement that REIWA itself run the mandatory component of the training will allow REIWA to ensure that the most pressing and important issues concerning the real estate industry are addressed and that the individuals providing the relevant information have the requisite knowledge and skill to do so. REIWA submits it is in a unique position to do this because of its dealings with the regulator and its role in providing information to its members and the public.<sup>6</sup>
- 1.34 REIWA contends that it does not have the financial resources or manpower to properly supervise other training organisations to deliver this aspect of training as part of the CPE Scheme. It considers that in the absence of training being mandated by a government regulator, there would be considerable public benefits to be derived from having REIWA's CPE Scheme in place. Further, REIWA considers that having minimum standards for the delivery of course content and course delivery is integral to the effectiveness of a CPE Scheme. Whilst REIWA is able to monitor and ensure the quality of its own course content and delivery, it submits that it is not able to do so with respect to other providers.<sup>7</sup>

### **Members' Code of Practice**

- 1.35 An industry association code of conduct or practice generally sets out specific standards of conduct for the association in relation to the manner in which it deals with members as well as how its members deal with their customers. However, as association codes often involve agreements between competitors, they have the potential to raise competition concerns. Parties wishing to set up or participate in such codes may seek to have them authorised on public benefit grounds.
- 1.36 Industry association codes have the capacity to generate public benefits where, for example, they encourage improvements in professional standards or promote improved consumer protection.
- 1.37 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 high standards in the practice of real estate and business agency services, and assists in enforcing those higher standards.
- 1.38 In particular, REIWA's Members' Code contains provisions which require REIWA members to:

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<sup>6</sup> REIWA, Submission in response to ACCC request for information, 23 December 2011, p.3 (REIWA Response to Information Request).

<sup>7</sup> REIWA Response to Information Request, p. 4

- obtain written authority to act from a principal prior to offering the principal's property or business for sale or lease;
- conduct title searches upon obtaining written authority of agency;
- not solicit or accept an agency appointment if the agent is aware that an exclusive agency agreement is in place (which would expose a principal to the risk of having to pay two fees or a claim for damages);
- make inquiries which will reveal the existence of any exclusive agency agreement;
- clearly explain a principal's rights and obligations in respect of any agency agreement and provide a copy of the agreement to the principal;
- follow REIWA's procedures in relation to conjunctional arrangements whereby one agent acts as a sub-agent to identify buyers for another agent; and
- conduct themselves fairly, honestly and without harsh or unconscionable conduct in dealings with other members and not knowingly engage in misleading or deceptive conduct.

1.39 The ACCC notes that the Members' Code is unchanged from the form previously authorised by the ACCC in 2007, except for changes which were the subject of the ACCC's grant of a minor variation in 2009.

### **Multiple Listing Service By-Laws**

1.40 REIWA submits that its Multiple Listing Service (MLS), which is created and regulated by its MLS By-Laws, is a system of marketing properties whereby details of properties for sale are provided to all eligible agents (MLS agents). Listing agents are able to make a unilateral offer to all other agents entitled to use the MLS that the listing agent is prepared to enter into a conjunctional agreement<sup>8</sup> with respect to that particular property. The details or properties that are listed with the MLS are then included in an online database known as "Total Property Market" (available to REIWA members only).

1.41 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.

1.42 REIWA states that the terms of the MLS By-Laws have not been substantially altered since its previous authorisation, and that the changes which have been made reflect changes in REIWA's practice. Specifically, references to *Homebuyer* magazine have been deleted as REIWA no longer produces the magazine, and references to "security lock box" have likewise been deleted as this system is no longer in use.

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<sup>8</sup> A conjunctional agreement is one between a listing agent (that is an agent authorised by the principal to sell the property) and another agent (the conjunctional agent) to share a fee arising from the introduction 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 – see ACCC, Determination of application for authorisation A70011 lodged by REIWA (2001), p.27-28 at [6.7].

## **Auction Code of Conduct**

- 1.43 REIWA's Auction Code of Conduct (Auction Code) was previously authorised by the ACCC in 2007 pursuant to authorisation A91026, and was the subject of two minor variations granted by the ACCC in 2007 and 2009. REIWA states that the Auction Code remains otherwise unchanged since the 2007 authorisation. REIWA submits 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.
- 1.44 The Auction Code's stated purpose is to regulate and standardise the procedures of REIWA members in conducting auctions and provide consumer protection for both sellers and buyers in the auction process.<sup>9</sup> It makes provision for how REIWA members conduct themselves in relation to an auction. The obligations imposed on REIWA members to act honestly and fairly and not apply undue pressure are in addition to obligations imposed on its members under its Members' Code.<sup>10</sup>
- 1.45 The Auction Code also provides detailed obligations regarding REIWA members' conduct before and during an auction.<sup>11</sup>
- 1.46 The Auction Code makes it a breach of the Code for a REIWA member to encourage or engage in dummy bidding.<sup>12</sup>
- 1.47 As discussed above in relation to the Members' Code, 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 conduct.

## **Standard Exclusive Agency Forms**

- 1.48 REIWA produces over 150 standard form contracts for use by its members in relation to various property transactions (Standard Forms).<sup>13</sup> Fourteen of the Standard Forms include clauses appointing agents to sell or manage property on an exclusive basis (Standard Exclusive Agency Forms). These include standard form contracts that may be used by agents and their clients to, for example, enter into agreements to sell or lease a property.
- 1.49 REIWA has sought authorisation of the agreement between it and its members, and the agreement between its members inter se, to produce and make available a number of Standard Exclusive Agency Forms to non-members. In addition, as noted below under Public Benefits, REIWA has also proposed to continue to make available all of its Standard Forms to training providers upon request. The Standard Exclusive Agency

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<sup>9</sup> REIWA Auction Code of Conduct, clause 1.

<sup>10</sup> REIWA Auction Code of Conduct, clause 3.

<sup>11</sup> REIWA Auction Code of Conduct, clauses 4 and 5.

<sup>12</sup> REIWA Auction Code of Conduct, clause 6.

<sup>13</sup> REIWA, Submission in Response to Interested Party Submissions, 8 February 2012, [6.5]-[6.6].

Forms in relation to which REIWA has sought authorisation are attached at Attachment B of this determination.

- 1.50 REIWA has agreed to continue to make the Standard Exclusive Agency Forms available to members of the public. The versions made available to the public are to mirror the form of agreements produced for use by REIWA members.<sup>14</sup>
- 1.51 REIWA is seeking to extend the authorisation to cover several additional Standard Exclusive Agency Forms, namely:
- *Residential Exclusive Agency Selling Agreement (short version)*;
  - *Residential Exclusive Agency Selling agreement – Unsolicited Consumer Contract*; and
  - *Exclusive Authority to Lease, Sub-lease or Assign Commercial/Industrial Premises* forms.
- 1.52 REIWA has made changes to the *Residential Exclusive Agency Selling Agreement (long version)* and the *Exclusive Authority to Act as Managing Agent of Residential Premises*.

## **Other parties**

- 1.53 Under section 88(6) of the Act, any authorisation granted by the ACCC is automatically extended to cover any person named in the authorisation as being a party or proposed party to the conduct.
- 1.54 REIWA has also sought authorisation to extend the arrangements to future members of REIWA.

## **Draft determination**

- 1.55 Section 90A(1) requires that before determining an application for authorisation the ACCC shall prepare a draft determination.
- 1.56 On 16 March 2012, the ACCC issued a draft determination proposing to grant conditional reauthorisation of the arrangements in the membership framework for five years.
- 1.57 A conference was not requested in relation to the draft determination.

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<sup>14</sup> REIWA Submission [9.2]

## 2 Background to the application

### Real estate industry of Western Australia

- 2.1 In Western Australia, individuals, partnerships or companies wanting to operate as real estate or business agents are required, under the *Real Estate and Business Agents Act 1978* (REBA Act), to be licensed. Until 30 June 2011 the Real Estate and Business Agents Supervisory Board (REBA) administered the Western Australian real estate licensing and regulatory systems. From 1 July 2011 the Western Australian real estate licensing and regulatory system became vested in the Commissioner for Consumer Protection and administered by the Consumer Protection division of the Western Australian Department of Commerce.
- 2.2 The Department of Commerce administers the REBA Act, the *Code of Conduct for Agents and Sales Representatives*, and the *Real Estate and Business Agents (General) Regulations 1979*.
- 2.3 An individual who wishes to work in Western Australia as a real estate and/or business sales representative (rather than as an agent) is also legally required to be registered with and licensed by the Department of Commerce.

### Training requirements for Western Australian real estate and business agents

#### Current training arrangements

- 2.4 Under the current Western Australian state licensing system for real estate agents, individuals are required to achieve a Diploma in order to obtain their relevant licence. This is a Level 5 qualification under the Australian Qualifications Framework.<sup>15</sup>
- 2.5 Until 2007, there was no requirement for real estate and business agents in Western Australia to undergo ongoing professional education. All training undertaken by agents after they had been granted a licence was voluntary.
- 2.6 In 2007, the REBA Board (then the regulatory body for the real estate and business agent industries) introduced the compulsory professional development scheme, which required all practicing real estate agents to undertake annual Compulsory Professional Development (CPD) as a condition of continued licensing.
- 2.7 Under professional development requirements, individuals must undertake 10 hours of CPD each year, with three of these hours comprising a mandatory course.<sup>16</sup> The Consumer Protection Division of the Department of Commerce determines the topics

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<sup>15</sup> REIWA Submission [5.7]

<sup>16</sup> See Department of Commerce's website regarding information on CDP:  
[http://www.commerce.wa.gov.au/consumerprotection/content/Licences/Real\\_Estate\\_Industry/CPD/CPD.html](http://www.commerce.wa.gov.au/consumerprotection/content/Licences/Real_Estate_Industry/CPD/CPD.html)

for the mandatory courses.<sup>17</sup> A tender process is run by the Department of Commerce and the successful tenderers conduct the training. Until February 2012, the providers of the mandatory courses were REIWA, West Coast Property Training, and Kaplan Professional.<sup>18</sup>

- 2.8 In February 2012 the Department of Commerce selected three providers to deliver training during 2012 following its 2011 tender process. The approved providers of the mandatory training are REIWA, which is approved to both develop and deliver training, TAFE and LivePM. Both the TAFE and LivePM are approved to deliver the training content developed by REIWA. The mandatory component of the CPD training, which is a 3 hour course, is currently fully funded by the Department of Commerce. The remaining 7 hours can be taken as elective courses. The Department of Commerce approves a list of educational activities that agents may elect to complete to accumulate the non-mandatory component points of their CPD program. CPD elective activities may take the form of training courses, seminars, workshops and distance education courses. Elective courses are currently offered by more than 80 different training providers.

### **The national occupational licensing system and potential impact on training for agents in Western Australia**

- 2.9 On 30 April 2009 the COAG signed an Intergovernmental Agreement to establish a national occupational licensing system (NOLS) for specified occupations, including real estate and business agents. The published position of the National Occupation Licensing Authority indicates that national harmonisation of real estate licensing under NOLS is anticipated to commence on July 1 2012.<sup>19</sup> However, the ACCC notes that commencement of NOLS will require agreement of all participating states and territories with each government adopting enabling legislation.<sup>20</sup>
- 2.10 The purpose of the national licensing reforms is to remove overlapping and inconsistent regulation between jurisdictions for the licensing of occupational areas. By so doing, it aims to improve business efficiency and the competitiveness of the national economy, reduce red tape, improve labour mobility and enhance productivity.<sup>21</sup>
- 2.11 National regulations for the eligibility criteria for a real estate license under NOLS have not yet been finalised. Interim Advisory Committees were established for occupational areas – including property related occupations. These Committees provide advice to the COAG National Licensing Steering Committee on national licensing policy issues to

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<sup>17</sup> Information regarding the mandatory component of CDP can be found at:  
[http://www.commerce.wa.gov.au/consumerprotection/content/Licences/Real\\_Estate\\_Industry/CPD/Mandatory.html](http://www.commerce.wa.gov.au/consumerprotection/content/Licences/Real_Estate_Industry/CPD/Mandatory.html)

<sup>18</sup> See: [http://www.commerce.wa.gov.au/consumerprotection/content/Licences/Real\\_Estate\\_Industry/CPD/Mandatory.html](http://www.commerce.wa.gov.au/consumerprotection/content/Licences/Real_Estate_Industry/CPD/Mandatory.html)

<sup>19</sup> <http://nola.gov.au/transitioning-to-a-national-licence>

<sup>20</sup> <http://nola.gov.au/transitioning-to-a-national-licence>. At this stage, Victoria, New South Wales, Queensland, South Australia, Tasmania and Northern Territory have all passed enabling legislation and the relevant legislation is currently before the Western Australian Parliament. The ACT is still in discussions about its participation in the national licensing scheme.

<sup>21</sup> *Explanatory Memorandum: Occupational Licensing National Law (WA) Bill 2010*.

assist with the development of licence categories, scopes of work and licence types, and eligibility requirements, both skill-based and non-skill based.<sup>22</sup>

- 2.12 Draft regulations for property occupations are to be developed which will then be subject to public consultation and would subsequently need to be agreed by jurisdictions through the Ministerial Council for Federal Financial Relations before being implemented. At this stage, it is yet to be determined whether these regulations will contain ongoing compulsory professional development.
- 2.13 In the latest Communiqué<sup>23</sup> from the Property Occupations Interim Advisory Committee (POIAC) to the National Licensing Steering Committee, POIAC proposed setting licence or eligibility qualifications at a lower level than currently mandated by Western Australian regulation. At the time of publishing the latest Communiqué, POIAC did not propose ongoing compulsory professional development for property occupations.
- 2.14 As the scope of NOLS is yet to be finalised and the details to be determined, it is uncertain whether or not ongoing compulsory professional development is likely to be included in the national licensing regulations for property occupations.

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<sup>22</sup> <http://nola.gov.au/transitioning-to-a-national-licence>

<sup>23</sup> <http://nola.gov.au/files/2010/09/Property-Occupations-Interim-Advisory-Committee-communication-4-December-2010.pdf>

### **3 Submissions received by the ACCC**

- 3.1 The ACCC tests the claims made by the applicant in support of an application for authorisation through an open and transparent public consultation process. To this end the ACCC aims to consult extensively with interested parties that may be affected by the proposed conduct to provide them with the opportunity to comment on the application.

#### **Prior to the draft determination**

##### **Applicant's supporting submission**

- 3.2 Broadly, REIWA submits that public benefit will flow from the arrangements, including:
- fostering professionalism, efficiencies and consumer protection in the practice of real estate and business agency;
  - facilitating the orderly and fair resolution of disputes between members;
  - providing a private and cost effective mechanism for the enforcement of standards of real estate practice through REIWA's arbitration process;
  - promoting high standards of real estate practice including by providing commercially significant incentives for REIWA members to comply with the Articles, Members' Code, MLS By-Laws and Auction Code; and
  - facilitating an efficient and cost effective method of selling and leasing real estate and businesses.
- 3.3 REIWA submits the resulting public benefits will outweigh any anticompetitive effect of the arrangements.

##### **Interested party submissions**

- 3.4 The ACCC sought submissions from a range of interested parties, including the relevant regulatory bodies, consumer organisations, industry associations, and competitors of REIWA in the provision of training services to real estate agents. A summary of the public submissions received from interested parties follows
- 3.5 The Real Estate Institute of Australia (REIA) submits the CPE Scheme proposed by REIWA would result in public benefit by ensuring that REIWA members are familiar with and understand current consumer protection issues.
- 3.6 West Coast Property Training (WCPT) – a competitor to REIWA in the provision of training services to real estate agents – raised concerns about the impact on competition of the proposed amended training arrangements if NOLS is adopted and REIWA's CPE Scheme is implemented. WCPT also raised concerns about the continued use of standard forms by REIWA.
- 3.7 Mr Rossi, the former Registrar of the REBA Board, raised issues in relation to REIWA's use of standard forms and about its proposed CPE Scheme.
- 3.8 REIWA made submissions in response to the concerns raised by interested parties. In particular, REIWA noted that:
- it is only seeking authorisation in relation to the 14 of its 152 standard forms that provide for exclusive agreements between its members and their customers. REIWA therefore submits that the ACCC's consideration of the benefits and detriments of its

use of standard forms should be confined to those forms for which authorisation is sought;

- it is not seeking authorisation of the 14 forms *per se* but rather authorisation of the agreement between it and its members and amongst REIWA members to make the common forms generally available for use; and
- its proposed training requirements will only be adopted if NOLS does not include mandatory training requirements and its adoption results in the current Department of Commerce's mandatory training requirements being displaced but not replaced by any form of ongoing professional education obligations for its members.

### **Following the draft determination**

- 3.9 Following the draft determination, the ACCC received one submission, from REIWA. In its submission, REIWA stated that it was generally satisfied with the draft determination including the proposed conditions, but proposed amendments and clarifications to the conditions (see paragraph 4.101).
- 3.10 The views of REIWA and interested parties are outlined in the ACCC's evaluation of the proposed arrangements in Chapter 4 of this determination. Copies of public submissions may be obtained from the ACCC's website ([www.accc.gov.au/AuthorisationsRegister](http://www.accc.gov.au/AuthorisationsRegister)) and by following the links to this matter.

## 4 ACCC evaluation

- 4.1 Broadly, under section 91C(7) the ACCC must not make a determination revoking an authorisation and substituting another authorisation unless the ACCC is satisfied that the relevant statutory tests are met.
- 4.2 The ACCC's evaluation of the proposed conduct is in accordance with the tests found in:
- sections 90(6) and 90(7) of the Act which 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 in the case of section 90(6) would result, or be likely to result, or in the case of section 90(7) has resulted or is likely to result, in a benefit to the public and
    - that benefit, in the case of section 90(6) 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 was given effect to, or in the case of section 90(7) has resulted or is likely to result from giving effect to the provision.
  - sections 90(5A) and 90(5B) of the Act which state that the ACCC shall not authorise a provision of a proposed contract, arrangement or understanding that is or may be a cartel provision, unless it is satisfied in all the circumstances that:
    - the provision, in the case of section 90(5A) would result, or be likely to result, or in the case of section 90(5B) has resulted or is likely to result, in a benefit to the public and
    - that benefit, in the case of section 90(5A) would outweigh the detriment to the public constituted by any lessening of competition that would result, or be likely to result, if the proposed contract or arrangement were made or given effect to, or in the case of section 90(5B) outweighs or would outweigh the detriment to the public constituted by any lessening of competition that has resulted or is likely to result from giving effect to the provision.
- 4.3 For more information about the tests for authorisation and relevant provisions of the Act, please see [Attachment D](#).

### The relevant area of competition

- 4.4 The first step in assessing the effect of the conduct for which reauthorisation is sought is to consider the relevant area of competition affected by that conduct.
- 4.5 In its 2007 determination, the ACCC considered that, for the purpose of assessing the application, the primary area of competition affected by the proposed conduct was likely to be the provision of services by real estate and business agents in Western Australia. The ACCC noted that the provision of such services was likely to be highly localised and characterised by a large number of small, local real estate agencies, but that there was

likely to be considerable overlap across the boundaries between geographic areas, especially in metropolitan regions.<sup>24</sup>

- 4.6 At that time, the ACCC further considered that another area of competition likely to be affected by the proposed conduct was for the provision of services to real estate and business agents. The ACCC considered that this is the area of competition in which REIWA and others compete to provide services to real estate and business agents.
- 4.7 REIWA advises that it agrees with the ACCC's findings in the 2007 determination with respect to definition of the area of competition, and that these findings should continue to apply to the present application.
- 4.8 The ACCC considers that, since 2007, it is likely that the increased use of the internet to advertise and deal in property has enlarged the geographical area within which many real estate and business agents compete to provide services. However, the ACCC considers that it is unnecessary for the purposes of this application to precisely define the boundaries of geographic competition in this regard.
- 4.9 The ACCC also notes that there may be additional related but separate competition to provide training to real estate agents (including compulsory training and non-compulsory training) and to provide standard form contracts for use in contracting between real estate and business agents and consumers.

### **The likely future with and without the authorisation**

- 4.10 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>25</sup> Under this test, the ACCC compares the likely public benefit and anticompetitive detriment generated by arrangements in the future if the authorisation is granted with those generated if the authorisation is not granted.

### **The likely future of REIWA's general operations absent authorisation**

- 4.11 In its submission in support of its current application for reauthorisation, REIWA contends that the likely alternative future is that, absent authorisation, REIWA would continue to represent Western Australian real estate and business agents and to provide them with certain services in a more limited capacity.
- 4.12 The ACCC notes the potential commencement of NOLS. However, the ACCC does not consider it will affect REIWA's general operation in the alternative future absent authorisation. On this basis, the ACCC considers that, absent authorisation, the likely alternative future is a situation in which REIWA continues to represent Western Australian real estate and business agents, and to provide them with certain services, albeit in a more limited capacity. This is consistent with the counterfactual identified by the ACCC in its 2007 determination.<sup>26</sup> REIWA's activities are likely to extend only to such things as providing general information to its members and the public. In particular,

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<sup>24</sup> ACCC, Determination for application A91026 lodged by REIWA (2007), p.8 at [6.7]

<sup>25</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>26</sup> ACCC, Determination for application A91026 lodged by REIWA (2007), p.9 at [6.15]-[6.16]

the ACCC notes that it is unlikely REIWA would continue to produce the Standard Exclusive Agency Forms for use by real estate agents and consumers.

- 4.13 The ACCC notes 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 Act and the *Corporations Act 2001* would continue to regulate the activities and behaviour of real estate and business agents in Western Australia.

#### **The likely future of agent training absent authorisation**

- 4.14 The ACCC notes that it is not publicly known at this stage whether NOLS will include ongoing professional development training requirements. Further, it is unclear whether the current Western Australian state government obligations will continue if NOLS does not include such requirements.
- 4.15 REIWA submits that following adoption of NOLS, there may be no ongoing professional training requirements imposed by state or national law (referred to as no government training obligations). REIWA submits that it will not adopt its CPE Scheme unless there are no government training obligations. REIWA also submits that, if there are no government training obligations and absent the authorisation of its CPE Scheme, the likely alternative future is that there will be no compulsory ongoing professional development training for real estate and business agents in Western Australia. In particular, REIWA submits that there will be no requirement for agents to undertake high quality training in key concepts such as developments in sound real estate and business agency practice and law, including amendments to statutory obligations (fundamentals training).<sup>27</sup>
- 4.16 The ACCC considers that the only future scenario under which the REIWA CPE Scheme will be adopted is one in which there are no government training obligations. The ACCC has considered such a scenario in order to assess the benefits and the detriments of the conduct.
- 4.17 In the situation where there are no government training obligations for agents, and absent authorisation, the ACCC considers that the demand for and take-up of ongoing training courses will be based on the business value agents place on these courses.
- 4.18 The ACCC considers that most individual consumers lack significant experience in the conduct of real estate and business property transactions. As a result, most consumers are generally unable to easily distinguish well trained agents from others.<sup>28</sup> In particular, consumers are generally unable to easily and reliably make this distinction prior to appointing the agent and engaging in (often high value) property transactions. As a result of this difficulty, agents may not capture the full benefit of investing in training, such as by winning more business from vendors, since those vendors may have difficulty in easily identifying these agents as being well trained. Accordingly, agents may place a lower business value on training courses, leading to lower demand for courses than would be expected in a market where consumers were fully aware of the level of training of all agents.

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<sup>27</sup> REIWA notes, for example, the desirability of training on the sometimes complex best practices required to prevent further occurrences of fraudulent real estate transfers stemming from overseas identity theft. REIWA, Submission in response to interested party submissions, 7 November 2012 at [5.26]

<sup>28</sup> Information asymmetry.

- 4.19 REIWA submits ongoing quality fundamentals training generates a number of public benefits which are not reflected in the business value placed on the courses by agents. In particular, individual consumers are likely to benefit if agents have an understanding of the latest developments in real estate practices and law, and the industry benefits as a whole if its agents have a reputation for being well trained. This issue is discussed in more detail under Public Benefits below.
- 4.20 The likely drop in demand for training from current levels, absent any government or REIWA imposed training obligations, is difficult to estimate. The ACCC considers that the level of voluntary take-up of quality fundamentals training in particular is likely to be substantially lower than both current levels and the efficient level,<sup>29</sup> particularly if agents have no mechanism to signal that they have up-to-date knowledge.
- 4.21 The ACCC considers that absent authorisation there is likely to be some demand for REIWA and other training providers to continue to provide some professional development training, a portion of which is likely to include fundamentals training. However, it is unclear whether any training provider could justify the cost of developing and running a quality fundamentals training course.
- 4.22 The ACCC notes that demand in some regional areas may mean that no provider can justify the cost of providing regular training. As a result, agents in these areas would need to travel further to access the likely remaining ad hoc professional development, increasing the effective cost of attendance.<sup>30</sup>

#### **The likely future of agent training with authorisation**

- 4.23 The ACCC considers that compared with the alternate scenario, REIWA's CPE Scheme will effectively ensure that 80-90%<sup>31</sup> of Western Australian real estate agents (REIWA members) will undergo some ongoing professional development. In particular, the CPE Scheme as described by REIWA will require REIWA's members to attend:
- 3.5 hours per year of training on fundamental concepts, provided by REIWA at an estimated cost of \$150 per person (referred to as mandatory fundamentals training); and
  - 3.5 hours per year of other professional development training, provided by REIWA or a training provider recognised but not quality checked by REIWA (referred to as elective CPE).
- 4.24 The obligations above will be imposed by REIWA's Council under the proposed amendment to Article 8.4 of REIWA's Articles should no government training obligations exist. This amendment will give REIWA's Council the power to impose CPE obligations from time to time upon REIWA members. Since the Articles for which REIWA is seeking reauthorisation do not define what form the CPE Scheme will take, the ACCC proposes to restrict its grant of authorisation to the form of CPE Scheme described by REIWA and outlined above. This restriction is contained in paragraph 5.9.

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<sup>29</sup> In economic terms, an efficient level of training participation is one in which the benefit to society from the last training unit (or 'marginal unit) is equal to the cost of delivering that unit of training; in other words, the marginal benefit is equal to the marginal cost.

<sup>30</sup> File note of conversation between the ACCC and Mr Rossi, 12 January 2012 at [10] (Rossi Submission), [11]

<sup>31</sup> REIWA Submission [3.7]

## Public benefit

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

...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>32</sup>

4.26 REIWA submits the proposed arrangements will deliver public benefits, including:

- fostering professionalism, efficiencies and consumer protection and capturing reputation benefits;
- facilitating the orderly and fair resolution of disputes between members;
- providing a private and cost effective mechanism for the enforcement of standards of real estate practice through REIWA's arbitration process;
- promoting high standards of real estate practice;
- providing commercially significant incentives for REIWA members to comply with the Articles, Members' Code, MLS By-Laws and Auction Code; and
- facilitating an efficient and cost effective method of selling and leasing real estate and businesses.

4.27 The ACCC considers the claimed benefits can be summarised and grouped as follows:

- encouraging members of REIWA to conduct real estate and business transactions with expertise and professionalism;
- transaction cost savings; and
- administrative efficiencies.

4.28 A brief discussion of each of the claimed public benefits follows. The ACCC has structured its consideration of the likely public benefits of these arrangements according to its grouping of the source of those benefits. The assessment of the conduct will only focus on those aspects of REIWA's membership framework that, in the ACCC's view, may potentially provide public benefits. A similar approach is adopted for the assessment of potential public detriments raised by the arrangements.

### **Encouraging members of REIWA to conduct real estate and business transactions with expertise and professionalism**

4.29 The ACCC recognises that arrangements which establish and enforce minimum standards of conduct and quality have the potential to result in a public benefit by providing firms with a method by which to benchmark and signal their performance relative to best practice. This enables consumers to make better-informed purchase

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<sup>32</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.

decisions and spend less time searching for a quality service, and thus promotes efficiency and welfare.

- 4.30 Consumers also benefit from arrangements which provide incentives for firms to provide a professional, skilled and ethical service. The members of an industry with such arrangements in place may also benefit as a whole from a reputation for providing a professional, skilled and ethical service.

*REIWA's membership framework (as amended)*

- 4.31 REIWA submits that significant public benefit is derived from the fact that consumers can be assured that real estate and business agents with whom they deal, if they are members of REIWA, comply with criteria that are designed to ensure agents maintain a high level of expertise and skill.<sup>33</sup>
- 4.32 Further, REIWA submits that the membership framework for which it seeks authorisation provides public benefits in promoting high standards of real estate practice through the:
- membership criteria in its Articles, which assure consumers that REIWA members comply with criteria designed to ensure honesty and integrity,<sup>34</sup>
  - Auction Code and Members' Code which prescribe minimum levels of conduct for real estate agents/ auctioneers, including provisions which are intended to provide consumers with some level of protection against exploitation,<sup>35</sup>
  - requirements for continuing professional development contained within its Articles, which are designed to ensure agents maintain a high level of expertise and skill, particularly given the potential future absence of government training obligations.<sup>36</sup>
- 4.33 REIWA also submits that the disciplinary procedures and appeals process outlined in its Articles, and the ongoing requirement of membership that members provide an annual declaration certifying compliance with the Articles, assist in ensuring these minimum standards are adhered to through creation of commercially significant disincentives for non-compliance.<sup>37</sup>
- 4.34 REIWA further submits that it has a high reputation in the Western Australian community and membership confers benefits to members' own reputations. REIWA submits that as its membership covers a substantial proportion of the participants in the real estate and business agency industry, the self-regulatory schemes created by the proposed conduct are effective.<sup>38</sup>
- 4.35 The ACCC has previously recognised the benefits arising from REIWA's membership framework. In particular, it has recognised that the membership framework establishes, enforces and signals minimum standards of conduct and quality. This enables consumers to make better-informed decisions as to which agent to appoint and spend less time searching for a quality service, and thus promotes efficiency and welfare. Consumers

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<sup>33</sup> REIWA Submission [5.22]

<sup>34</sup> REIWA Submission [5.41]

<sup>35</sup> REIWA Submission [8.13]

<sup>36</sup> REIWA Submission [5.22]

<sup>37</sup> REIWA Submission [5.53], [5.81]

<sup>38</sup> REIWA Submission [1.33]

also benefit from the disciplinary incentives in the membership framework designed to align the interests of agents with those of the consumers they represent.<sup>39</sup> REIWA members as a whole also benefit from the reputational externalities of being seen by consumers as maintaining a high level of expertise and skill and acting in a professional and ethical manner.

*REIWA's CPE Scheme (if no government training obligation)*

- 4.36 REIWA submits that, in the absence of any government training obligation its CPE Scheme will allow it to ensure that the most pressing and important issues concerning the real estate industry are addressed and that the individuals providing the relevant information have the requisite knowledge and skill to do so. In particular, REIWA notes that its members comprise 80-90% of active real estate agents and all REIWA agents, whether long-standing or newly-licensed, will be kept abreast of important issues affecting the real estate industry and, as such, will be better educated and skilled.<sup>40</sup>
- 4.37 As noted above, REIWA proposes that under its CPE Scheme, its members will be required to undertake 7 hours of CPE per year, of which 3.5 hours is proposed to be quality "fundamentals"<sup>41</sup> training developed and provided by REIWA. REIWA proposes publishing guidelines concerning how the requirements of the CPE Scheme may be met with regard to the remaining 3.5 hours, rather than providing a list of eligible courses or providers.
- 4.38 REIWA submits that it will develop its CPE Scheme so as to balance the need to provide effective professional training whilst not placing onerous time or cost pressures upon members attending the course. It has indicated that it is developing 4 courses designed to satisfy the purposes of the CPE Scheme and it envisages that the cost to a member will be approximately \$150.00 for a half-day course.<sup>42</sup>
- 4.39 REIWA states that significant public benefit is derived from the fact that consumers can be assured that real estate and business agents with whom they deal, if they are members of REIWA, comply with criteria that are designed to ensure agents maintain a high level of expertise and skill.<sup>43</sup> It has identified a risk to consumers if REIWA members are not up to date in their training on important regulatory changes and relevant issues affecting the real estate industry, given the complexity of the transactions involved.<sup>44</sup> In REIWA's submission a lack of current training may also result in increased disputes and litigation. As REIWA provides a number of dispute resolution services, the costs of any increase in disputes are likely to be partially borne by REIWA.

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<sup>39</sup> In cases where it is difficult for consumers to observe the actions and efforts of people acting on their behalf, if the interests of the person appointed to act for a consumer do not align with the interests of the consumer, it can be difficult for the consumer to ensure that the person appointed is acting in the consumer's best interests. This is termed 'agency bias'. Agency in this context is used in an economic sense, which is not specific to real estate or business agents but refers to any situation where a person has been appointed to act for another.

<sup>40</sup> REIWA Submission [5.23]

<sup>41</sup> As at paragraph 4.15 above, fundamentals training is considered to include training in key concepts such as developments in sound real estate and business agency practice and law, including amendments to statutory obligations.

<sup>42</sup> REIWA Submission [5.16] – REIWA submits that the \$150.00 is comparable to the fees charged by other professional training providers for these types of courses and is the current subsidised funding amount provided by the State government for attendees at mandatory courses under the current State Regulatory CPO Program.

<sup>43</sup> REIWA Submission [5.22]

<sup>44</sup> REIWA Submission [5.23] and [5.28]

- 4.40 REIA submits that REIWA's CPE Scheme will result in public benefit and enhanced consumer protection if introduced as a substitute for the current Western Australian State Government CPD program. In REIA's submission, the proposed CPE Scheme will ensure that REIWA members are familiar with and understand issues of consumer protection arising in the real estate industry, for example, recent cases of identity fraud in Western Australia.
- 4.41 Both WCPT and Mr Rossi submit that REIWA's proposed CPE Scheme is unlikely to result in substantial public benefit and is likely to result in anticompetitive detriment.<sup>45</sup> The potential anticompetitive detriment is discussed in detail below under Public Detriment.
- 4.42 The ACCC accepts that REIWA's CPE Scheme, which would require participation in training as a requirement of membership, will result in significantly higher participation in ongoing training than under a voluntary scheme. The ACCC also considers that there may be an incentive for REIWA to offer a good standard of training for its mandatory fundamentals component in order to allow it to maximise the reputation for skill and expertise of the agents that are its members and minimise dispute resolution costs. By comparison, the quality of training offered under a voluntary system may be less consistent than the mandatory fundamentals training offered by REIWA under its proposed CPE Scheme.
- 4.43 The infrequency with which consumers interact with agents means that there is likely to be a delay in consumers' recognition of the effects of any decrease in agents' professional knowledge under a system where training is voluntary. However, as lower standards are recognised over time, real estate and business agents as a whole may suffer from decreased reputation and customer confidence in their abilities.
- 4.44 In summary, the ACCC considers that REIWA's CPE Scheme is likely to result in greater public benefits by ensuring that agents have a better level of understanding of their professional obligations and best practice than would be the case in a situation in which training is voluntary and determined solely by agent demand.

### *Conclusion*

- 4.45 The ACCC recognises that REIWA's membership framework and CPE Scheme (if adopted) are likely to lead to and signal higher standards of practice in the real estate and business agent industry. To this extent, they are likely to provide public benefits by:
- improving the information that is readily available to consumers in relation to the quality of a particular real estate or business agent;
  - encouraging and assisting REIWA members to provide services to consumers in a professional and ethical manner; and
  - assisting REIWA members as a whole to benefit from a reputation for maintaining a high level of expertise and skill and acting in a professional and ethical manner.

### **Transaction cost savings**

- 4.46 REIWA considers that its membership framework results in transaction cost savings associated with:

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<sup>45</sup> WCPT, Interested Party Submission, 23 December 2011, p.6 (WCPT Submission); Rossi Submission [10]

- negotiating and drafting exclusive contracts of engagement, including obtaining professional or legal advice, and other administration fees; and
- the resolution of disputes arising: between consumers and REIWA members, between REIWA members and in the context of REIWA's operations.

4.47 If transaction costs are high this can reduce the incentive to enter into agreements that increase welfare or lead to inadequately documented agreements. Actions which reduce transaction costs can therefore improve economic efficiency.

*Reducing the cost of drafting exclusive agency documents*

4.48 REIWA submits that, given that some real estate processes are generally similar, transaction costs are likely to be reduced by the use of standard form contracts for common agreements. For example:

- between a real estate agent and a customer regarding the selling of a house;<sup>46</sup> or
- between a listing agent and another agent regarding sharing a fee arising from the introduction of a customer to the listing agent by the second agent (a conjunctive agent) (a conjunctive agreement).<sup>47</sup>

4.49 As noted above, REIWA makes its Standard Exclusive Agency Forms, which cover the majority of agent appointments, available to non-members at the same cost that the forms are provided to REIWA members. In addition, REIWA makes all of its Standard Forms available free of charge to training providers upon request.

4.50 WCPT submits that the public benefits submitted by REIWA do not arise since REIWA does not proactively make its forms freely available to competing training providers, or inform other training providers of changes to the forms, or the existence of new forms. Mr Rossi also raised issues about the availability and cost of REIWA forms.

4.51 REIWA noted in response:

- its reauthorisation application relates only to its agreement to make its Standard Exclusive Agency Forms available and that it has made these forms available in accordance with the 2001 authorisation condition since 2001;
- that the considerable intellectual property contained in its Standard Forms means that, contrary to the suggestion of Mr Rossi, it has never agreed to make all of its Standard Forms available to non-members (other than training providers) and that it would oppose any proposal for it to do so;
- there are approximately 85 providers of compulsory training registered with the Department of Commerce and given the number of Standard Forms it would be an unreasonable administrative burden for REIWA to have to proactively notify each provider of every change in any Standard Form; and
- REIWA will in future keep a register of the Standard Forms provided to training providers so it can update the training providers following major changes.

4.52 The ACCC has previously considered that public benefits are likely to arise from the ready availability of REIWA's Standard Exclusive Agency Forms as a result of reduced

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<sup>46</sup> REIWA Submission [9.31]

<sup>47</sup> For example, when another agent REIWA submission [7.34]

transaction cost savings, especially in the form of legal cost savings. Provided REIWA makes available its Standard Forms (including its Standard Exclusive Agency Forms) on the terms upon which it has previously agreed and proposed as part of its current submissions, this is likely to achieve the public benefits previously recognised. The issues raised by the availability of REIWA's Standard Forms are discussed further under public detriment at paragraphs 4.69 to 4.77.

### *Reducing dispute costs*

4.53 REIWA submits that there are a number of mechanisms within its membership framework which are designed to reduce the potential for, and cost of, disputes. In particular:

- conjunctional agreements are traditionally verbal and lead to a number of disputes between agents. Stipulating minimum levels of service by conjunctional agents and provisions of conjunctional agreements in the Members' Code provides greater certainty and REIWA reports a significant resulting drop in the number of arbitrations it has conducted between its members;<sup>48</sup>
- the Arbitration Panels established under Article 34 of the Articles provide an efficient and cost effective method for resolving disputes in the real estate industry, as an alternative to both members and consumers becoming involved with the civil court system;<sup>49</sup> and
- the CPE Scheme, if implemented, will reduce the potential for disputes to arise compared to the situation where there is no mandated ongoing training. The scheme will thus fill the role currently played by the Department of Commerce to ensure that REIWA members are well-informed of developments in sound real estate and business agency practice and the law, including amendments to statutory obligations.<sup>50</sup>

4.54 Overall, the ACCC considers that, to the extent that REIWA's arrangements limit the potential number and cost of disputes, this is likely to result in some public benefit.

### **Savings for REIWA in its costs of administration**

4.55 The ACCC recognises that operational efficiencies are a public benefit. The ACCC places greater weight on such benefits where operational efficiencies lead to a reduction in the cost of providing a good or service.

4.56 REIWA submits that elements of the Articles, as amended, will create cost savings through improving the efficiency with which REIWA can administer its operations. In particular, the Articles allow REIWA to collect membership subscriptions, and to cease supplying membership services to a member if the member owes a debt to REIWA in excess of REIWA's stipulated trading terms. REIWA submits this allows REIWA to control its income and level of debt to allow it to continue to deliver its services.<sup>51</sup>

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<sup>48</sup> REIWA Submission [7.36]

<sup>49</sup> REIWA Submission [5.93], Arbitration Panels under the proposed Articles can arbitrate disputes arising out of matters related to REIWA's Articles, Codes or Rules or which otherwise arise out of the provision of real estate or business agency services by one or more members of REIWA.

<sup>50</sup> REIWA Submission [5.24]

<sup>51</sup> REIWA Submission [5.68]

- 4.57 REIWA has made amendments to its Articles enhancing its ability to collect its membership fees in a timely manner (Articles 7.4.3, 14 and 15). These articles also now reflect that REIWA's system of billing subscriptions is no longer performed on an annual basis. Rather, while its subscriptions are set annually, the subscriptions are payable in 12 equal monthly instalments.
- 4.58 Under Article 18 REIWA is able to cease to supply membership services to a member if the member has a debt in excess of REIWA's trading terms. REIWA submits that its ability to control its level of debt enables it to continue to deliver its member services which would otherwise prevent it from efficiently managing its operations. It submits that any anticompetitive detriment to its members from its ability to cease delivery of services if a debt for earlier services remains unpaid is limited as it does not have the power to expel a member for an unpaid debt under Article 18.
- 4.59 The ACCC considers that to the extent that these administrative efficiencies support REIWA's ability to improve the conduct of real estate and business transactions by REIWA members, these administrative efficiencies are likely to support the achievement of the public benefits identified above.

## **ACCC conclusion on public benefits**

- 4.60 The ACCC considers that the REIWA's membership framework (comprised of its Codes and Articles) and its CPE Scheme (if adopted) are likely to result in public benefits in the form of:
- encouraging and assisting members of REIWA to conduct real estate and business transactions with expertise and professionalism, resulting in benefits to consumers that engage REIWA members as agents and reputation benefits for members of REIWA;
  - transaction cost savings from reducing the cost of drafting certain documents and reducing the cost of handling disputes; and
  - administrative cost savings arising from REIWA's ability to efficiently manage its membership fees and debt.

## **Public detriment**

- 4.61 Public detriment is also not defined in the Act 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>52</sup>

- 4.62 REIWA submits that, while there might be a possibility that some of its Articles, Members' Code, MLS By-Laws, Auction Code and Standard Exclusive Agency Forms might be considered to have an anticompetitive effect, any public detriment constituted

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<sup>52</sup> Re 7-Eleven Stores (1994) ATPR 41-357 at 42,683.

by any lessening of competition is outweighed by the public benefit derived from those documents and agreements.

- 4.63 The ACCC considers that the sources of potential public detriments arising from REIWA's membership framework can be summarised and grouped as follows:
- the effect of REIWA's membership framework upon competition amongst real estate agents, particularly any potential for exclusionary effects or facilitation of coordination amongst competitors; and
  - the effect of REIWA's standard forms upon competition in relation to terms and conditions encapsulated in the standard forms.
- 4.64 The ACCC considers that a further source of potential public detriment may be the foreclosure of REIWA's competitors in the provision of ongoing professional development training services, in the event that REIWA's CPE Scheme is adopted.

### **The effect of REIWA's membership framework on competition amongst agents**

- 4.65 Generally, the ACCC considers that anticompetitive detriment may arise from agreements between competitors of the type encapsulated in REIWA's membership framework, if membership:
- has an exclusionary effect and is considered necessary to compete, or significantly assists a business to compete, in the relevant industry; and/or
  - makes coordination (rather than competition) between firms beyond the terms of the authorised agreement more likely and also across the market more generally.
- 4.66 The ACCC has found in its consideration of previous REIWA authorisation applications that the potential anticompetitive detriments due to exclusionary effects are likely to be limited since:
- REIWA's membership framework provides for objective and fair admissions and appeal processes along with clear on-going requirements for its members; and
  - the cost of REIWA membership and accessing members services, such as REIWA's MLS, is not prohibitive.
- 4.67 In addition, the ACCC has found in its previous considerations of REIWA authorisation applications that potential anticompetitive detriments due to coordination are likely to be limited since:
- as discussed in relation to benefits, REIWA's membership framework encourages improvements in professional standards, promotes improved consumer protection and is likely to reduce disputes; and
  - REIWA's membership framework, including its Standard Exclusive Agency Forms, does not set prices or restrict price decisions.
- 4.68 The ACCC has not received any information to contradict its previous view of REIWA's current membership framework or REIWA's membership framework including REIWA's proposed amendments. Accordingly, the ACCC considers that limited anticompetitive detriment is likely to arise from REIWA's membership framework.

### **Effect of the standard forms**

- 4.69 The ACCC has previously considered that the existence of Standard Forms prepared by REIWA raises two opposing sources of potential public detriment:

- the public detriment that may arise from the exclusionary effect of denying access by non-REIWA member agents and other training providers to forms which are effectively the industry standard, particularly the Standard Exclusive Agency Forms; and
- the public detriment that may arise from the reduced incentive for a certain form of non-price competition, namely agents competing through the different terms and conditions in their contracts. This incentive may be reduced due to the widespread availability and use of the Standard Exclusive Agency Forms, instead of each agent designing and offering its own distinct terms and conditions.

*Exclusionary effects*

- 4.70 Mr Rossi submits that public detriment may arise to the extent that real estate and business agents who are not REIWA members are less able to compete with REIWA members due to limited access to REIWA's forms. WCPT submits that non-REIWA training providers have difficulties in competing with REIWA to provide training without ready access to REIWA's Standard Forms.
- 4.71 In response to Mr Rossi and WCPT's submissions, REIWA notes that it has applied for authorisation of the agreements between its members and between itself and its members to make its 14 Standard Exclusive Agency Forms generally available to members and non-members. REIWA submits that the 14 Standard Exclusive Agency Forms are used in the vast majority of agent appointments. It will continue, if authorisation is granted, to make its Standard Exclusive Agency Forms readily available to non-member agents and all of its Standard Forms available upon request to training providers as agreed.
- 4.72 In addition, REIWA submits that there are other Western Australian providers of forms similar to those produced by REIWA including real estate franchise groups and ADL Software. Some forms, such as a standard residential lease are also published by the Department of Commerce.
- 4.73 The ACCC considers that any public detriment arising from the exclusionary effects of REIWA's Standard Forms is likely to be limited provided REIWA continues to make its forms available on the terms it has agreed and proposed in its submissions supporting its current application for reauthorisation.
- 4.74 The ACCC notes that the conditions in paragraph 5.6 imposed upon the grant of reauthorisation take into account REIWA's submissions regarding the availability of its Standard Exclusive Agency Forms and other forms.

*Effects upon competition in relation to terms and conditions*

- 4.75 The ACCC considers that widespread use of a single set of standard form contracts within an industry may result in the terms and conditions encapsulated in the contracts becoming accepted as the industry standard. This may generate an anticompetitive outcome as the standard terms establish industry benchmarks, reducing the potential for negotiation of more appropriate terms and conditions by consumers and innovation by agents.
- 4.76 The ACCC considers that while agents may not intentionally reduce their flexibility, the fact that these matters are conveniently included in a standard form contract, coupled with their understanding that most other competitors are likely to be using the same forms, may diminish their incentive to be flexible and/or innovate in relation to terms and conditions. Thus, although REIWA's agreement to make its Standard Exclusive Agency Forms available resolves the issue of exclusionary effects upon agents in relation

to these forms, it may potentially reduce certain forms of non-price competition between agents.

- 4.77 However, the ACCC considers that any public detriment arising from a loss of this form of non-price competition is likely to be limited since:
- the Standard Exclusive Agency Forms do not establish the level of fees and charges;
  - the Standard Exclusive Agency Forms clearly explain that all aspects of the terms and conditions in the forms can be negotiated;
  - there are a large number of real estate and business agents in the real estate industry in Western Australia and these agents have an incentive to seek new ways to gain a competitive advantage; and
  - there is no compulsion for an agent to use the Standard Exclusive Agency Forms.

### **Foreclosure of competitors in the professional development training services market**

- 4.78 The ACCC considers that anticompetitive detriment may arise where conduct that is the subject of an authorisation application provides an applicant with an enhanced ability or incentive to foreclose rivals in relevant market(s), including through price and non-price constraints upon competitors.<sup>53</sup>
- 4.79 Both WCPT and Mr Rossi submit that, should the CPE Scheme be adopted, it is likely that REIWA will become the monopoly provider of ongoing training for real estate agents.
- 4.80 WCPT submits that the CPE Scheme would effectively impose a barrier to REIWA members who wish to seek fundamentals training from other providers to the extent it is provided by REIWA.<sup>54</sup>
- 4.81 Mr Rossi submits that, should REIWA's proposed CPE Scheme be implemented, REIWA is likely to become the only ongoing training provider for real estate agents in Western Australia. He observes that, if it is compulsory to attend half of the training requirements with REIWA directly, the remaining 3.5 hours of elective CPE would likely also be sourced from REIWA on the same day as this will be the most convenient method of delivery for real estate agents. Mr Rossi noted that many real estate agents currently get all their compulsory training – both mandatory and elective – from a single provider for convenience reasons.<sup>55</sup>
- 4.82 REIWA submits in response to Mr Rossi's submission that there is no factual basis for the submission that if REIWA's CPE Scheme was introduced any of the current providers of training services would cease offering ongoing training.<sup>56</sup>
- 4.83 REIWA also submits that any anticompetitive effect caused through REIWA's proposed CPE Scheme, particularly the obligation that a course developed by REIWA be utilised

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<sup>53</sup> In this instance, foreclosure refers to a variety of potentially anticompetitive strategies including that REIWA, in imposing a non-price restraint on competitor training providers, may prevent those providers from being able to provide ongoing professional training to real estate agents as efficiently as REIWA.

<sup>54</sup> WCPT Submission, p.5

<sup>55</sup> Rossi Submission, [10]

<sup>56</sup> REIWA Response Submission [25]

to attain half the requirements of CPE, is outweighed by the public benefit created by the CPE Scheme.<sup>57</sup>

- 4.84 In this regard, REIWA raises a number of factors that it submits contribute to its view that it is more efficient for REIWA to be the sole provider of the mandatory component of its CPE Scheme. REIWA submits that it will be in a unique position to provide, as part of the mandatory fundamentals training component of its CPE Scheme, quality fundamentals training on a cost-effective basis, due to:
- its frequent dealings with the real estate and business agents regulator, which is likely to continue post-NOLS and which allow it to identify emerging issues which should be addressed;
  - its existing role in providing information to its members and the public;
  - its ability to monitor and ensure the quality of its own course content and delivery at minimal cost; and
  - the not-for profit status of its training business unit.
- 4.85 In addition, without the efficiencies arising from being the sole provider of such training to its members, REIWA also submits that it would not be in a position to ensure the delivery of quality fundamentals training to agents.<sup>58</sup> In particular, REIWA contends that it does not have the financial resources or manpower to properly supervise the quality of training provided by other organisations that may participate in the CPE Scheme.
- 4.86 REIWA notes the high cost of replicating the current level of quality assurance and audit that the Department of Commerce is resourced to undertake in relation to the current ongoing professional development training program. Further, REIWA considers that guaranteed minimum standards for the delivery of course content and course delivery is integral to the effectiveness of achieving the public benefits discussed above arising from mandatory fundamentals training.
- 4.87 The National Real Estate Institute, REIA, submits that it would be impractical for REIWA not to be the sole provider of the mandatory fundamentals training component of the CPE Scheme given the likely complexity and cost associated with monitoring and auditing multiple external providers. REIA also notes that REIWA members will have a wide choice of other providers for the other half of their CPE.
- 4.88 The ACCC has received information from the Department of Commerce which provides some support for the view that administering ongoing professional development through a tender process and auditing training providers' content is likely to involve considerable cost.
- 4.89 The ACCC considers that the adoption of NOLS may lead to a situation whereby there is no government training obligation for ongoing training for real estate agents or business agents. In this case, absent authorisation of REIWA's CPE Scheme, the take-up of ongoing training courses is likely to be based on the business value agents place on these courses. The ACCC considers that the amount of ongoing training, particularly of

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<sup>57</sup> REIWA Submission [5.29]

<sup>58</sup> As at paragraph 4.15 above, fundamentals training is considered to include training in key concepts such as developments in sound real estate and business agency practice and law, including amendments to statutory obligations.

fundamentals training, undertaken by agents would likely decrease under such a scenario (see paragraphs 4.18-4.22).

- 4.90 The ACCC considers that if REIWA's CPE Scheme is implemented, agents' demand for fundamentals training would be likely to be largely satisfied by the mandatory fundamentals training delivered by REIWA. This would be particularly the case since REIWA's members make up 80-90% of real estate agents in Western Australia and would all be required to complete the mandatory fundamentals training delivered by REIWA.
- 4.91 Other training providers could continue to compete to supply training to non-REIWA members as well as supplying training to make up the other 3.5 hours of elective CPE required of all REIWA members. The ACCC also notes that a number of real estate and business agent licensing trainers<sup>59</sup> are likely to remain as additional potential competitors to provide ongoing training.
- 4.92 However, there is also the potential that REIWA may secure a sizeable portion of the elective CPE provided to REIWA members. Given the convenience of acquiring all compulsory training as a package from REIWA, the ACCC considers that agents may have a reduced incentive to seek out elective CPE from alternative providers.
- 4.93 The ACCC considers that the level of competition to provide ongoing training following adoption of the CPE Scheme is likely to be influenced by the quality of training provided by REIWA (both mandatory fundamentals training and the elective component of the CPE scheme) and the quality of training provided by others. The ACCC considers that REIWA has an interest in providing its training to a good quality level in order to satisfy its members' business needs, to generate reputational benefits for its members and to minimise the costs of its dispute resolution processes.
- 4.94 In addition, the ACCC considers that regardless of the market share of competitors, REIWA's ability to increase its training prices and/or reduce the quality of its training will be constrained by:
- its status as representative body of the training participants and the control its members as a whole exert over its overall actions;
  - the flexible nature of REIWA's compulsory elective training requirement; and
  - the number of experienced providers of real estate training (including both initial licensing training and ongoing professional development training).
- 4.95 In particular, the ACCC considers any potential public detriment likely to arise under the CPE Scheme will be less than the public detriment likely to arise from the alternative of no required training at all, which would likely lead to a substantially lower training rate. That is, in a scenario where there is no government mandated training requirement, the REIWA CPE Scheme is likely to result in a net public benefit. Notwithstanding this assessment, the ACCC notes that should significant concerns arise once the proposed CPE Scheme is operational, particularly in relation to the quality or price of the mandatory fundamentals training component provided by REIWA, this would be taken into account in any future reauthorisation or revocation decision.

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<sup>59</sup> This refers to providers of the initial training required by real estate and business agents in order to become licensed, as opposed to providers of ongoing training post-licensing.

## **ACCC conclusion on public detriments**

4.96 Other than the issues and conduct raised in relation to training obligations placed on REIWA members, the issues and conduct raised by interested parties are similar to those considered and dealt with in the ACCC's 2007 authorisation. The ACCC considers that the information it has received to date is not sufficient to change the views expressed in its 2007 determination. In particular:

- the ACCC has not received any information to contradict its previous view that the potential anticompetitive detriment arising from REIWA's membership framework due to exclusionary effects or coordination is likely to be limited;<sup>60</sup>
- any public detriment likely to arise from the exclusionary effect of REIWA's Standard Forms is mitigated by making the Standard Exclusive Agency Forms available to non-members and all Standard Forms to training providers without leading to an excessive chilling effect upon competition.<sup>61</sup>

4.97 In relation to the issue of compulsory training for real estate and business agents, the ACCC considers that any potential public detriment likely to arise from the adoption of REIWA's CPE Scheme is less than the public detriment likely to arise from the alternative. That is, if governments cease to require agents to undertake any continuing education, REIWA's proposed CPE Scheme is likely to lead to better outcomes for the public than the alternative of no requirement for compulsory ongoing training for real estate agents.

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

4.98 The ACCC considers that REIWA's membership framework (comprised of its Codes, Articles and MLS) and its CPE Scheme (if adopted) are likely to result in public benefits that outweigh any potential detriments. In particular, the ACCC considers that the public benefits arise from those aspects of the membership framework and CPE Scheme that provide for increased consumer information and compliance by REIWA members with minimum standards of conduct and quality, reduced agency bias and transaction and operational cost savings.

## **Conditions of authorisation**

4.99 The Act allows the ACCC to grant authorisation subject to conditions.<sup>62</sup> Generally, the ACCC may impose conditions to ensure that the net public benefit test is met or continues to be met over the period of authorisation.

4.100 In its draft determination, the ACCC proposed four conditions of authorisation (C1-C4) which related to the terms upon which training providers and other non-REIWA members would be able to access certain REIWA forms. In essence, these conditions were intended to provide for REIWA's Standard Exclusive Agency Forms to be made

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<sup>60</sup> ACCC, Determination for application A91026 lodged by REIWA (2007), [7.43], [8.39-8.41], [9.12-9.23], [10.24], [11.14-11.16].

<sup>61</sup> ACCC, Determination for application A91026 lodged by REIWA (2007), [7.43], [8.39-8.41], [9.12-9.23], [10.24], [11.14-11.16]

<sup>62</sup> Section 91(3).

available to anyone who sought access to them, and for training providers to be given free access not only to the Standard Exclusive Agency Forms, but to REIWA's full range of Standard Forms.

- 4.101 Following the ACCC's draft determination, REIWA made submissions in relation to the conditions proposed by the ACCC in its draft determination. The ACCC has taken into account these submissions in formulating the final version of the conditions, which appear at paragraphs 4.103 and 5.6. In particular, REIWA:
- proposed an amendment that would clarify that the relevant price to be charged to non-member agents for Standard Exclusive Agency Forms under condition C1 would be the same as the price charged to REIWA members;
  - proposed an amendment to the definition of "Training Provider" in relation to condition C2 to clarify that a Training Provider must be accredited with certain bodies and authorised to conduct certain training; and
  - sought to clarify the manner in which it proposes to implement conditions C3 and C4, including its intention to post on its website a notice listing a telephone number that parties wishing to obtain copies of forms should call.
- 4.102 The ACCC considers the conditions of authorisation will mitigate public detriments identified in its analysis and address concerns raised by interested parties during initial consultations in relation to access to standard forms. The ACCC notes that the conditions imposed upon the grant of reauthorisation take into account REIWA's submissions in relation to the conditions.
- 4.103 Therefore, the ACCC grants authorisation subject to the following conditions:
- C1 REIWA must make available any of its Standard Exclusive Agency Forms to any person who seeks access. This access must be provided within seven calendar days and at the same price that REIWA members are charged for the Standard Exclusive Agency Forms.
  - C2 REIWA must make available to any Training Provider, upon request, any form produced or otherwise supplied by REIWA for use by an Agency Business (the **Standard Forms**). This access must be provided within seven calendar days and free of charge.
  - C3 REIWA must publish on the homepage of its website a notice stating the means by which it will make available the:
    - a. Standard Exclusive Agency Forms in compliance with C1; and
    - b. Standard Forms available in compliance with C2.
  - C4 REIWA must record contact details of any Training Provider who seeks access from REIWA to any Standard Form. Following any material change to any of the Standard Forms, REIWA must undertake its best endeavours to provide the revised version of the relevant Standard Form to all Training Providers who sought access from REIWA to the previous version of the Standard Form in the preceding 12 months.

Where:

**Agent** means a person who is a Real Estate Agent or a Business Agent, or both a Real Estate Agent and a Business Agent.

**Agency Business** means the business of an Agent.

**Business Agent** means a person whose Agency Business either alone or as part of or in connection with any other business, is to act as Agent for consideration in money or money's worth, as commission, reward, or remuneration, in respect of a business transaction.

**Business Sales Representative** means a person who on behalf of an Agent negotiates a business transaction

**Real Estate Agent** means a person whose business either alone or as part of or in connection with any other Agency Business, is to act as Agent for consideration in money or money's worth, as commission, reward or remuneration, in respect of a real estate transaction.

**Real Estate Sales Representative** means a person who on behalf of an Agent or a developer negotiates a real estate transaction.

**Training Provider** means a person that:

- i. is not associated with an Agency Business;
- ii. provides training relating to Business Agents, Business Sales Representatives, Real Estate Agents or Real Estate Sales Representatives;
- iii. is registered as a registered training organisation with the Western Australian Training Accreditation Council (TAC) established under the Vocational Education and Training Act (WA) 1996, or with the Australian Government Australian Skills Quality Authority (ASQA) pursuant to the National Vocational Education and Training Regulator Act 2011 (Cth) or their successors; and
- iv. is authorised by TAC or ASQA (or their successors) to conduct Diploma of Property Services (Real Estate) courses in Western Australia or, alternatively, authorised to deliver specific units of competency within those courses.

## **Length of authorisation**

4.104 The Act allows the ACCC to grant authorisation for a limited period of time.<sup>63</sup> In this instance, REIWA seeks reauthorisation for five years. None of the interested parties made submissions on the length of authorisation sought.

4.105 The ACCC grants authorisation to the REIWA membership framework as defined for five years.

## **Future Parties**

4.106 The ACCC grants authorisation to extend to the future members of REIWA. The ACCC notes that it may at any time review the authorisation and potentially revoke it should the

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<sup>63</sup> Section 91(1).

addition of a future party alter the balance of likely public benefits and detriments sufficiently to constitute a material change of circumstances.<sup>8</sup>

### **Variations to the proposed conduct**

4.107 The ACCC notes that any amendments to the 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 Forms during the term of this reauthorisation would not be covered by the authorisation.

## 5 Determination

### The application

- 5.1 On 7 November 2011 REIWA lodged an application under section 91C(1) of the Act for the revocation of authorisation A91026 and the substitution of authorisation A91280 for the one revoked.
- 5.2 Application A91280 was made under section 91C(1) of the Act. Relevantly, the initial authorisation A91026 was made under subsection 88(1). Pursuant to section 177(2) of the Act, which came into force on 24 July 2009, authorisation A91026 is also deemed to have been granted on the basis that it was applied for under section 88(1A) of the Act.
- 5.3 In particular, REIWA seeks authorisation for the arrangements contained in its 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 Forms (together, the REIWA membership framework).
- 5.4 Section 90A(1) requires that before determining an application for authorisation the ACCC shall prepare a draft determination.

### The net public benefit test

- 5.5 For the reasons outlined in Chapter 4 of this determination, and subject to the conditions below, the ACCC considers that in all the circumstances the arrangements for which the reauthorisation is sought are likely to result in a net public benefit that would outweigh the detriment to the public constituted by any lessening of competition arising from the REIWA membership framework. The ACCC is therefore satisfied that the tests in sections 90(6) and 90(7) and 90(5A) and 90(5B) are met.
- 5.6 The ACCC therefore **revokes** authorisations A91026 **and grants** authorisation A91280 in substitution. The substitute authorisation is granted on condition that:
- C1 REIWA must make available any of its Standard Exclusive Agency Forms to any person who seeks access. This access must be provided within seven calendar days and at the same price that REIWA members are charged for the Standard Exclusive Agency Forms.
- C2 REIWA must make available to any Training Provider, upon request, any form produced or otherwise supplied by REIWA for use by an Agency Business (the **Standard Forms**). This access must be provided within seven calendar days and free of charge.
- C3 REIWA must publish on the homepage of its website a notice stating the means by which it will make available the:
- Standard Exclusive Agency Forms in compliance with C1; and
  - the Standard Forms available in compliance with C2.
- C4 REIWA must record contact details of any Training Provider who seeks access from REIWA to any Standard Form. Following any material change to any of the Standard Forms, REIWA must undertake its best endeavours to provide the revised version of the relevant Standard Form to all Training Providers who

sought access from REIWA to the previous version of the Standard Form in the preceding 12 months.

Where:

**Agent** means a person who is a Real Estate Agent or a Business Agent, or both a Real Estate Agent and a Business Agent.

**Agency Business** means the business of an Agent.

**Business Agent** means a person whose Agency Business either alone or as part of or in connection with any other business, is to act as Agent for consideration in money or money's worth, as commission, reward, or remuneration, in respect of a business transaction.

**Business Sales Representative** means a person who on behalf of an Agent negotiates a business transaction

**Real Estate Agent** means a person whose business either alone or as part of or in connection with any other Agency Business, is to act as Agent for consideration in money or money's worth, as commission, reward or remuneration, in respect of a real estate transaction.

**Real Estate Sales Representative** means a person who on behalf of an Agent or a developer negotiates a real estate transaction.

**Training Provider** means a person that:

- i. is not associated with an Agency Business;
- ii. provides training relating to Business Agents, Business Sales Representatives, Real Estate Agents or Real Estate Sales Representatives;
- iii. is registered as a registered training organisation with the Western Australian Training Accreditation Council (TAC), established under the Vocational Education and Training Act (WA) 1996 or the Australian Government Australian Skills Quality Authority (ASQA) pursuant to the National Vocational Education and Training Regulator Act 2011 (Cth) or their successors; and
- iv. is authorised by TAC or ASQA (or their successors) to conduct in Western Australia Diploma of Property Services (Real Estate) courses or, alternatively, authorised to deliver specific units of competency within those courses.

## **Conduct for which the ACCC grants authorisation**

- 5.7 The ACCC therefore **revokes** authorisations A91026 **and grants** authorisation A91280 in substitution.
- 5.8 The ACCC grants authorisation under section 91C(4) of the Act to REIWA for the arrangements encapsulated by the REIWA membership framework.
- 5.9 The ACCC notes that the Articles for which REIWA is seeking authorisation do not define what form the CPE Scheme will take. The form of CPE Scheme considered by the ACCC is described only in REIWA's submissions. Accordingly, consistent with REIWA's submissions, in relation to Article 8.4 and the related definition of CPE Scheme in Article 2 of REIWA's Articles, the ACCC grants authorisation only to the extent that the content of the CPE Scheme implemented by REIWA is either:
- determined by the Western Australian Department of Commerce under the Department's CPD program; or

- if there is no government requirement for ongoing training for real estate and business agents in Western Australia, is constituted by the requirement for REIWA members to undertake seven hours of compulsory professional education (CPE) per year, of which 3.5 hours will be course content developed and provided by REIWA and the remaining 3.5 hours will be met by REIWA members attending training that complies with guidelines published by REIWA.
- 5.10 The ACCC grants authorisation for five years until 11 May 2017. Pursuant to clause 88(10) of the Act, the ACCC extends the authorisation to future members of REIWA.
- 5.11 Further, the substitute authorisation has been sought and granted in respect of particular documents (REIWA's Articles, Members' Code, Auction Code, MLS By-Laws and 14 Standard Exclusive Agency Forms) as they stand at the time of authorisation. Any changes to these documents during the term of the authorisation would not be covered by the authorisation.
- 5.12 This determination is made on 19 April 2012.
- 5.13 The attachments to this determination are part of the determination.

### **Conduct not authorised**

- 5.14 The authorisation does not extend to REIWA implementing its proposed CPE Scheme other than as detailed in paragraph 5.9 of this determination.

### **Date authorisation comes into effect**

- 5.15 This determination is made on 19 April 2012. If no application for review of the determination is made to the Australian Competition Tribunal, it will come into force on 11 May 2012.

## **Attachment A — the authorisation process**

The Australian Competition and Consumer Commission (the ACCC) is the independent Australian Government agency responsible for administering the *Competition and Consumer Act 2010* (the Act). A key objective of the Act is to prevent anticompetitive conduct, thereby encouraging competition and efficiency in business, resulting in a greater choice for consumers in price, quality and service.

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’.

The ACCC may ‘authorise’ businesses to engage in anticompetitive conduct where it is satisfied that the public benefit from the conduct outweighs any public detriment.

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.

After considering submissions, the ACCC issues a draft determination proposing to either grant the application or deny the application.

Once a draft determination is released, the applicant or any interested party may request that the ACCC hold a conference. A conference provides all parties with the opportunity to put oral submissions to the ACCC in response to the draft determination. The ACCC will also invite the applicant and interested parties to lodge written submissions commenting on the draft.

The ACCC then reconsiders the application taking into account the comments made at the conference (if one is requested) and 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. However, in some cases it may still be possible to grant authorisation where conditions can be imposed which sufficiently increase the benefit to the public or reduce the public detriment.

## **Attachment B – Standard Exclusive Agency Forms**

1. Authority to Auction
2. Authority to Auction -Rural
3. Residential Exclusive Agency Selling Agreement (long version)
4. Residential Exclusive Agency Selling Agreement (short version)
5. Residential Exclusive Agency Selling Agreement -Unsolicited Consumer Contracts
6. Multi-List Exclusive Plus Services Selling Agency Agreement Residential, known as the "*Internet Listing Service Selling Agency Agreement -Residential*" (including appointment options of exclusive agency, exclusive plus agency or multi-list exclusive agency)
7. Exclusive Selling Agency Agreement for Rural Property
8. Exclusive Selling Agency Agreement for Commercial and Industrial Property
9. Exclusive Appointment Agent to Sell a Business (including Land) (formerly called the Exclusive Appointment of Agent to Sell/Offer to Sell a Business)
10. Exclusive Authority to Lease, Sub-lease or Assign Commercial/Industrial Premises
11. Exclusive Authority to Act as Managing Agent for Residential Premises for a Short Term/Holiday Accommodation
12. Exclusive Authority to Act as Managing Agent of Residential Premises
13. Exclusive Appointment to Act as Agent Manager of a Strata Company
14. Exclusive Authority to Act as Managing Agent for Commercial/Industrial Property

## **Attachment C — chronology of ACCC assessment for application A91280**

The following table provides a chronology of significant dates in the consideration of the application by REIWA.

<b>DATE</b>	<b>ACTION</b>
7 November 2011	Application for revocation and substitution lodged with the ACCC.
11 November 2011	Public consultation begins.
5 December 2011	Closing date for submissions from interested parties in relation to the substantive application for authorisation.
8 February 2012	Submission received from REIWA in response to interested party submissions.
16 March 2012	Draft determination issued.
30 March 2012	Closing date for submissions from interested parties in relation to the draft determination.
19 April 2012	Determination issued.

# Attachment D — the tests for authorisation and other relevant provisions of the Act

## Competition and Consumer Act 2010

### Section 90—Determination of applications for authorisations

- (1) The Commission shall, in respect of an application for an authorization:
  - (a) make a determination in writing granting such authorization as it considers appropriate; or
  - (b) make a determination in writing dismissing the application.

- (2) The Commission shall take into account any submissions in relation to the application made to it by the applicant, by the Commonwealth, by a State or by any other person.

Note: Alternatively, the Commission may rely on consultations undertaken by the AEMC: see section 90B.

- (4) The Commission shall state in writing its reasons for a determination made by it.
- (5) Before making a determination in respect of an application for an authorization the Commission shall comply with the requirements of section 90A.

Note: Alternatively, the Commission may rely on consultations undertaken by the AEMC: see section 90B.

- (5A) The Commission must not make a determination granting an authorisation under subsection 88(1A) in respect of a provision of a proposed contract, arrangement or understanding that would be, or might be, a cartel provision, unless the Commission is satisfied in all the circumstances:
  - (a) that the provision would result, or be likely to result, in a benefit to the public; and
  - (b) that the benefit would outweigh the detriment to the public constituted by any lessening of competition that would result, or be likely to result, if:
    - (i) the proposed contract or arrangement were made, or the proposed understanding were arrived at; and
    - (ii) the provision were given effect to.

- (5B) The Commission must not make a determination granting an authorisation under subsection 88(1A) in respect of a provision of a contract, arrangement or understanding that is or may be a cartel provision, unless the Commission is satisfied in all the circumstances:
  - (a) that the provision has resulted, or is likely to result, in a benefit to the public; and
  - (b) that the benefit outweighs or would outweigh the detriment to the public constituted by any lessening of competition that has resulted, or is likely to result, from giving effect to the provision.

- (6) The Commission shall not make a determination granting an authorization under subsection 88(1), (5) or (8) in respect of a provision (not being a provision that is or may be an exclusionary provision) of a proposed contract, arrangement or understanding, in respect of a proposed covenant, or in respect of proposed conduct (other than conduct to which subsection 47(6) or (7)

applies), unless it is satisfied in all the circumstances that the provision of the proposed contract, arrangement or understanding, the proposed covenant, or the proposed conduct, as the case may be, would result, or be likely to result, in a benefit to the public and that that benefit would outweigh the detriment to the public constituted by any lessening of competition that would result, or be likely to result, if:

- (a) the proposed contract or arrangement were made, or the proposed understanding were arrived at, and the provision concerned were given effect to;
- (b) the proposed covenant were given, and were complied with; or
- (c) the proposed conduct were engaged in;

as the case may be.

(7) The Commission shall not make a determination granting an authorization under subsection 88(1) or (5) in respect of a provision (not being a provision that is or may be an exclusionary provision) of a contract, arrangement or understanding or, in respect of a covenant, unless it is satisfied in all the circumstances that the provision of the contract, arrangement or understanding, or the covenant, as the case may be, has resulted, or is likely to result, in a benefit to the public and that that benefit outweighs or would outweigh the detriment to the public constituted by any lessening of competition that has resulted, or is likely to result, from giving effect to the provision or complying with the covenant.

(8) The Commission shall not:

- (a) make a determination granting:
  - (i) an authorization under subsection 88(1) in respect of a provision of a proposed contract, arrangement or understanding that is or may be an exclusionary provision; or
  - (ii) an authorization under subsection 88(7) or (7A) in respect of proposed conduct; or
  - (iii) an authorization under subsection 88(8) in respect of proposed conduct to which subsection 47(6) or (7) applies; or
  - (iv) an authorisation under subsection 88(8A) for proposed conduct to which section 48 applies;

unless it is satisfied in all the circumstances that the proposed provision or the proposed conduct would result, or be likely to result, in such a benefit to the public that the proposed contract or arrangement should be allowed to be made, the proposed understanding should be allowed to be arrived at, or the proposed conduct should be allowed to take place, as the case may be; or

- (b) make a determination granting an authorization under subsection 88(1) in respect of a provision of a contract, arrangement or understanding that is or may be an exclusionary provision unless it is satisfied in all the circumstances that the provision has resulted, or is likely to result, in such a benefit to the public that the contract, arrangement or understanding should be allowed to be given effect to.

(9) The Commission shall not make a determination granting an authorization under subsection 88(9) in respect of a proposed acquisition of shares in the capital of a body corporate or of assets of a person or in respect of the acquisition of a controlling interest in a body corporate within the

meaning of section 50A unless it is satisfied in all the circumstances that the proposed acquisition would result, or be likely to result, in such a benefit to the public that the acquisition should be allowed to take place.

- (9A) In determining what amounts to a benefit to the public for the purposes of subsection (9):
- (a) the Commission must regard the following as benefits to the public (in addition to any other benefits to the public that may exist apart from this paragraph):
    - (i) a significant increase in the real value of exports;
    - (ii) a significant substitution of domestic products for imported goods; and
  - (b) without limiting the matters that may be taken into account, the Commission must take into account all other relevant matters that relate to the international competitiveness of any Australian industry.

## Variation in the language of the tests

There is some variation in the language in the Act, particularly between the tests in sections 90(6) and 90(8).

The Australian Competition Tribunal (the Tribunal) has found that the tests are not precisely the same. 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 but the test under section 90(8) is not so limited.<sup>64</sup>

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>65</sup>

Consequently, when applying either test, the ACCC can take most, if not all, public 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.

Given the similarity in wording between sections 90(6) and 90(7), the ACCC considers the approach described above in relation to section 90(6) is also applicable to section 90(7). Further, as the wording in sections 90(5A) and 90(5B) is similar, this approach will also be applied in the test for conduct that may be a cartel provision.

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<sup>64</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>65</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.

## Conditions

The Act allows the ACCC to grant authorisation subject to conditions.<sup>66</sup>

## Future and other parties

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>67</sup>
- persons named in the authorisation as being a party or a proposed party to the contract, arrangement or understanding.<sup>68</sup>

## Six- month time limit

A six-month time limit applies to the ACCC's consideration of new applications for authorisation<sup>69</sup>. It does not apply to applications for revocation, revocation and substitution, or minor variation. The six-month period can be extended by up to a further six months in certain circumstances.

## Minor variation

A person to whom an authorisation has been granted (or a person on their behalf) may apply to the ACCC for a minor variation to the authorisation.<sup>70</sup> The Act limits applications for minor variation to applications for:

... a single variation that does not involve a material change in the effect of the authorisation.<sup>71</sup>

When assessing applications for minor variation, the ACCC must be satisfied that:

- the proposed variation satisfies the definition of a 'minor variation' and
- if the proposed variation is minor, the ACCC must assess whether it results in any reduction to the net benefit of the arrangements.

## Revocation; revocation and substitution

A person to whom an authorisation has been granted may request that the ACCC revoke the authorisation.<sup>72</sup> The ACCC may also review an authorisation with a view to revoking it in certain circumstances.<sup>73</sup>

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<sup>66</sup> Section 91(3).

<sup>67</sup> Section 88(10)

<sup>68</sup> Section 88(6)

<sup>69</sup> Section 90(10A)

<sup>70</sup> Subsection 91A(1)

<sup>71</sup> Subsection 87ZD(1)

<sup>72</sup> Subsection 91B(1)

<sup>73</sup> Subsection 91B(3)

The holder of an authorisation may apply to the ACCC to revoke the authorisation and substitute a new authorisation in its place.<sup>74</sup> The ACCC may also review an authorisation with a view to revoking it and substituting a new authorisation in its place in certain circumstances.<sup>75</sup>

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<sup>74</sup> Subsection 91C(1)

<sup>75</sup> Subsection 91C(3)