



Australian
Competition &
Consumer
Commission

Draft Determination

Application for authorisation

lodged by

The Real Estate Institute of Western Australia (Inc)
(REIWA)

in respect of

its Membership Framework

Date: 31 May 2017

Authorisation number: A91586

Commissioners:
Sims
Rickard
Schaper
Court
Featherston

Summary

The ACCC proposes to grant conditional authorisation to the Real Estate Institute of Western Australia (Inc) (REIWA) and its current and future members for arrangements contained in the REIWA Membership Framework, namely its Articles of Association, including its proposed compulsory professional development (CPD) scheme, Members' Codes of Practice, Auction Code of Conduct, website (reiwa.com) terms and conditions, agreements between REIWA and its members that give rise to REIWA's Standard Exclusive Agency Forms and REIWA's proposed voluntary accreditation scheme.

The ACCC proposes to authorise the arrangements for ten years.

Next steps

The ACCC will seek submissions in relation to this draft determination before making its final decision.

The application for authorisation

1. On 22 May 2017, the Real Estate Institute of Western Australia (Inc) (**REIWA**) lodged application for authorisation A91586 with the Australian Competition and Consumer Commission (**ACCC**) on behalf of itself and its current and future members.
2. REIWA is seeking authorisation of conduct previously authorised by the ACCC, being its Articles of Association, Members' Code of Practice, Auction Code of Conduct and agreements between REIWA and its members that give rise to the REIWA Standard Exclusive Agency Forms.¹
3. REIWA is also seeking authorisation of conduct not previously authorised by the ACCC, being its website (reiwa.com) terms and conditions, and a proposed voluntary specialist accreditation process.
4. REIWA seeks authorisation for a period of ten years.
5. Authorisation is a transparent process where the ACCC may grant protection from legal action for conduct that might otherwise breach the *Competition and Consumer Act 2010* (**the Act**). The ACCC may 'authorise' businesses to engage in anti-competitive conduct where it is satisfied that the public benefit from the conduct outweighs any public detriment. 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. Before making its final decision on an application for authorisation the ACCC must first issue a draft determination.²

¹ See A70011 (21 December 2001), A91026 (18 April 2007) and A91280 (19 April 2012).

² Detailed information about the authorisation process is contained in the ACCC's *Authorisation Guidelines* available on the ACCC's website - <https://www.accc.gov.au/publications/authorisation-guidelines-2013>.

Background

2012 authorisation (A91280)

6. On 19 April 2012, the ACCC granted conditional authorisation A91280 in relation to arrangements encapsulated by REIWA's Membership Framework, namely its Articles of Association, Members' Codes of Practice, Multiple Listing Service By-Laws³, Auction Code of Conduct, and the agreement to make available its Standard Forms (including its Standard Exclusive Agency Forms).
7. Authorisation A91280 was also granted in relation to REIWA's proposed compulsory professional development (**CPD**) scheme. The scheme arose out of concerns on the part of REIWA that, as a result of a decision by the Council of Australian Governments (**COAG**) to introduce a National Occupational Licensing System (**NOLS**), compulsory education requirements would be removed. The reforms envisaged by COAG as part of the proposed NOLS model have not been implemented. REIWA states that while the prospects of the removal of government requirements for mandatory training have decreased since the 2012 Authorisation, it seeks to maintain this aspect of its Articles in case that situation changes during the course of the authorisation now applied for by REIWA.⁴
8. Authorisation A91280 was granted subject to a number of conditions relating to access to standard forms, for a period of five years (until 11 May 2017).

2017 application for revocation and substitution (A91569)

9. On 10 January 2017 REIWA lodged an application under subsection 91C(1) of the Act with the ACCC for the revocation of the 2012 authorisation A91280 and the substitution of a new authorisation A91569 for the 2012 authorisation⁵.
10. On 13 April 2017 the ACCC issued a draft determination proposing to grant conditional authorisation to REIWA for arrangements contained in REIWA's Membership Framework, namely its Articles of Association, including its proposed CPD scheme, Members' Codes of Practice, Auction Code of Conduct, website (reiwa.com) terms and conditions, agreements between REIWA and its members that give rise to REIWA's Standard Exclusive Agency Forms and REIWA's proposed voluntary accreditation scheme.
11. The ACCC proposed to authorise the arrangements for ten years, subject to a number of conditions relating to access to standard forms.
12. No submissions were received prior to, or following, the draft determination.
13. Section 91 of the Act allows the ACCC to grant interim authorisation where the ACCC considers it appropriate to do so for the purposes of enabling the ACCC to give due consideration to the substantive application for authorisation. In the case of an application for re-authorisation the ACCC may suspend the operation of the authorisation sought to be revoked and grant an authorisation that is expressed to be an interim authorisation in substitution for the authorisation suspended.

³ REIWA does not seek further authorisation of its Multiple Listing Service By-Laws, as this service has been superseded by the use of online real estate portals. See REIWA submission, 10 January 2017 [1.11].

⁴ REIWA Submission, 10 January 2017 [5.54].

⁵ In substance that application A91569 was identical to the current application A91586, but for technical legal reasons explained at paragraph 14 it was necessary for REIWA to lodge the new application A91586 rather than relying on the application for revocation and substitution.

14. However, REIWA did not seek, and the ACCC did not grant, interim authorisation prior to the expiry of authorisation A91280 on 11 May 2017. With the expiration of authorisation A91280, there is no current authorisation on foot to revoke before granting a new authorisation in substitution under s91C of the Act. Therefore REIWA has lodged a new application for authorisation A91586, since the revocation and substitution process is no longer available to it.

New application for authorisation (A91586)

15. On 22 May 2017 REIWA lodged a new application for authorisation under subsections 88 (1) and 88(1A) of the Act, in relation to arrangements contained in its Membership Framework. The conduct for which authorisation is sought is identical to that sought in the application for revocation and substitution (A91569). The only difference is that REIWA is now seeking authorisation for a period of 10 years (rather than five).

The applicant

16. REIWA is a not-for-profit association of Western Australian real estate and business agents incorporated under the *Associations Incorporation Act 2015* (WA). It aims to ensure that its members enjoy a reputation as highly professional real estate and/or business agency practitioners operating in a sustainable business environment. The main areas of membership services provided by REIWA are commercial, information and data, advocacy, professional development and internet services.
17. REIWA currently has 1,142 corporate members (i.e. companies, partnerships and sole traders), which it estimates represents approximately 90% of active real estate agents in Western Australia and 50% of businesses solely practising as business agents.⁶

The proposed conduct

18. REIWA seeks authorisation for arrangements contained in the REIWA Membership Framework, namely its:
- Articles of Association, including its proposed CPD scheme
 - Members' Codes of Practice
 - Auction Code of Conduct
 - website (reiwa.com) terms and conditions
 - agreements between REIWA and its members that give rise to REIWA's Standard Exclusive Agency Forms and
 - proposed voluntary accreditation scheme
- (the **proposed conduct**).
19. The REIWA membership framework may be considered as comprising agreements between competitors (including REIWA and its members and between the members themselves) as to the terms on which:
- the association will provide services

⁶ See REIWA submission, 10 January 2017 [3.8-3.11].

- members will participate in the association, and
- members will provide agency services to consumers.

20. A summary of the documents and agreements comprising REIWA's Membership Framework is set out in the following table.

Document / agreement	Description	Whether previously authorised
Articles of Association See Schedule A of REIWA's submission in support of its application for authorisation	Specifies matters such as its objectives, membership requirements, disciplinary, appeals and dispute resolution processes, administrative processes (such as how elections will be conducted and how the association will be managed).	Previously authorised. REIWA submits that the current Articles contain relatively minor amendments to the form previously authorised by the ACCC.
Website (reiwa.com) terms and conditions See Schedule B of REIWA's submission in support of its application for authorisation	Specifies the standard terms and conditions for users of REIWA's online services including the <i>Feature Property</i> , <i>Banner Advertising</i> , <i>Headline Property</i> , <i>eFlyer</i> , <i>Realform</i> , <i>Real Inspection</i> and <i>Pricefinder</i> services. For example, under the proposed terms and conditions, REIWA can suspend supplying services to a member who has failed to pay for earlier services.	Not previously authorised.
Members' Codes of Practice (MCPs) See Schedule C of REIWA's submission in support of its application for authorisation	Imposes regulation on the conduct of its members to assist in the efficient delivery of real estate services and to provide consumer protection.	Previously authorised. The terms of the MCPs are unchanged from the form previously authorised by the ACCC in 2012.
Auction Code of Conduct See Schedule D of REIWA's submission in support of its application for authorisation	Regulates the procedures of REIWA members in conducting auctions and provide consumer protection for both sellers and buyers in the auction process. For example, clause 6 provides that REIWA members must not encourage or engage in dummy bidding.	Previously authorised. The terms of the Auction Code are unchanged from the form previously authorised by the ACCC in 2012.
Standard Exclusive Agency Forms See Schedule E of REIWA's submission in support of its application for authorisation	Forms produced by REIWA containing standard clauses relating to the appointment by members of the public of real estate agents and business agents on an exclusive basis: <ul style="list-style-type: none"> • Authority to Auction • Authority to Auction – Rural • Residential Exclusive Agency Selling Agreement (long version) • Residential Exclusive Agency Selling Agreement (short version) 	Previously authorised, subject to conditions. The terms of the forms for which authorisation is sought do not vary significantly from the forms that were the subject of the ACCC's 2012 Authorisation. Previously, authorisation was sought, and granted, with respect to the forms themselves. In

Document / agreement	Description	Whether previously authorised
	<ul style="list-style-type: none"> • Residential Exclusive Agency Selling Agreement – Unsolicited Consumer Contracts • Exclusive Selling Agency Agreement for Rural Property • Exclusive Selling Agency Agreement for Commercial and Industrial Property • Exclusive Appointment Agent to Sell a Business (including Land) • Exclusive Authority to Act as Managing Agent for Residential Premises for a Short Term/Holiday Accommodation • Exclusive Authority to Act as Managing Agent of Residential Premises • Exclusive Appointment to Act as Agent Manager of a Strata Company • Exclusive Authority to Act as Managing Agent for Commercial / Industrial Property. 	<p>the present case, it is the agreement to produce certain Standard Exclusive Agency Forms, rather than the forms themselves, for which authorisation is sought.</p> <p>REIWA proposes to continue to make the forms available to members of the public as a condition of the grant of authorisation (which was a condition imposed in the ACCC's 2012 Determination⁷).</p>
<p>Proposed Voluntary Accreditation Process</p> <p>See section 10 of REIWA's submission in support of its application for authorisation.</p> <p>While REIWA has not yet finalised the details of its Proposed Voluntary Accreditation Process, it seeks authorisation of the conduct giving rise to that scheme. REIWA submits that it would ultimately prepare a set of clearly worded and transparently written rules, criteria and procedures for administration of the system.</p>	<p>REIWA proposes to introduce an accreditation scheme for its members in relation to a number of areas of real estate and business broking practice including Auctioneer, Buyers' Agent, Property Manager, Strata Manager and Rural Representative.</p> <p>REIWA proposes that the following mandatory criteria would apply to all applicants for accreditation:</p> <ul style="list-style-type: none"> • be an Associate Member or Ordinary Member of REIWA • be a licensed real estate agent/business broker or registered sales representative under the <i>Real Estate and Business Agents Act 1978</i> (REBA Act) • have attained the mandatory continuing professional development requirements stipulated by the Department of Commerce for the past two consecutive years and be undertaking a maintenance of those requirements for the 	<p>Not previously authorised.</p>

⁷ A91280 (19 April 2012).

Document / agreement	Description	Whether previously authorised
	<p>current year, and</p> <ul style="list-style-type: none"> have a minimum of five consecutive years' experience within the category of specialisation. <p>Specific criteria will apply for each category of proposed accreditation.</p> <p>Additional professional development that each person would need to complete in order to obtain accreditation could be completed through any training provider (i.e. not just the training services provided by REIWA), subject to the need for the courses to be provided by the training providers being courses approved by the Department of Commerce as elective units within the current Department of Commerce State Regulatory CPD Program.</p>	
Proposed REIWA CPD requirements	<p>If current compulsory professional education requirements for licensing are removed by the regulator, REIWA proposes to require its members to complete CPD annually as a condition of ongoing membership of REIWA under Article 8.4 of its Articles.</p> <p>The CPD scheme as described by REIWA will require REIWA's members to attend:</p> <ul style="list-style-type: none"> 3.5 hours per year of training on fundamental concepts, provided by REIWA (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 CPD'). 	Previously authorised.

Consultation

21. The ACCC tests the claims made by an applicant in support of its application for authorisation through an open and transparent public consultation process.
22. In January 2017, in relation to the application for revocation and substitution (which is substantively identical to the new application A91586), and in April 2017 in response to the draft determination for that January 2017 application, the ACCC invited submissions from a range of potentially interested parties including regulatory bodies, consumer organisations, industry associations, and

competitors of REIWA in the provision of training services to real estate agents. No submissions were received.

23. Notwithstanding these two recent rounds of consultation on the substantively identical earlier application, in accordance with the Act the ACCC is required to invite submissions in response to this draft determination. In addition, the applicant or any interested party may request that the ACCC hold a conference to discuss the draft determination, pursuant to section 90A of the Act.
24. Further information in relation to the application for authorisation, including any submissions received by the ACCC as the matter progresses, may be obtained from the ACCC's Public Register.⁸

Assessment

25. The ACCC's assessment of the proposed conduct is carried out in accordance with the relevant net public benefit tests⁹ contained in the Act. In broad terms, the ACCC may grant authorisation if it is satisfied that the likely benefit to the public from the proposed conduct would outweigh the likely detriment to the public, including from any lessening of competition.
26. In order to assess the effect of the proposed conduct and the likely public benefits and detriments, the ACCC identifies the relevant areas of competition and the likely future with and without the proposed conduct.
27. In its assessment of the application the ACCC has taken into account:
 - the application and submissions received from the applicant¹⁰
 - other relevant information available to the ACCC, including information from consideration of the previous authorisations granted to REIWA¹¹
 - the likely future without the proposed conduct that is the subject of the authorisation¹²
 - the relevant areas of competition likely to be affected by the proposed conduct
 - the ten year authorisation period requested.

Relevant areas of competition

28. Consistent with the ACCC's 2007 and 2012 Determinations¹³, the ACCC considers that the primary area of competition affected by the proposed conduct is likely to be the provision of services by real estate and business agents in Western Australia.
29. The provision of such services is likely to be highly localised and characterised by a large number of small, local real estate agencies, but there is likely to be considerable overlap across the boundaries between geographic areas, especially in metropolitan regions.

⁸ www.accc.gov.au/authorisationsregister

⁹ Subsections 90(5A), 90(5B), 90(6) and 90(7) of the Act.

¹⁰ Please see the ACCC's Public Register for more details.

¹¹ See A70011 (21 December 2001), A91026 (18 April 2007) and A91280 (19 April 2012).

¹² For more discussion see paragraphs 5.20-5.23 of the ACCC's Authorisation Guidelines.

¹³ A91026 (18 April 2007) and A91280 (19 April 2012).

30. Consistent with its 2012 Determination¹⁴, the ACCC considers that 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.
31. The ACCC also considers that additional areas of competition likely to be affected by the proposed conduct are for the provision of:
- standard form contracts for use in contracting between real estate agents or business agents and consumers
 - professional development training services to real estate and business agents.

Likely future without the proposed conduct

32. Consistent with the ACCC's 2007 and 2012 Determinations¹⁵, the ACCC considers that without the proposed conduct, REIWA would continue to represent Western Australian real estate and business agents and to provide them with certain services, albeit in a more limited capacity.
33. In these circumstances, it is likely that REIWA's activities may only extend to such things as providing general information to its members and the public. In particular, the ACCC considers that REIWA would be unlikely to offer a number of services which are facilitated by the Membership Framework including the Standard Exclusive Agency Forms for use by real estate agents and consumers, or REIWA's proposed voluntary accreditation scheme.
34. The circumstances in which the REIWA CPD scheme would be adopted were examined in detail in the ACCC's 2012 Determination.¹⁶ Consistent with the ACCC's 2012 Determination, the ACCC considers that the only future scenario where the REIWA CPD scheme would be adopted is one in which there were no government training obligations.

Public benefit

35. The Act does not define what constitutes a public benefit and the ACCC adopts a broad approach. This is consistent with the Tribunal which has stated that the term should be given its widest possible meaning, and includes:
- “...anything of value to the community generally, any contribution to the aims pursued by society including as one of its principal elements ... the achievement of the economic goals of efficiency and progress.”¹⁷
36. REIWA submits the public benefits that the ACCC has previously recognised as arising from REIWA's Membership Framework remain the case with respect to the present application.¹⁸

¹⁴ A91280 (19 April 2012).

¹⁵ A91026 (18 April 2007) and A91280 (19 April 2012).

¹⁶ A91280 (19 April 2012).

¹⁷ *Queensland Co-operative Milling Association Ltd* (1976) ATPR 40-012 at 17,242; cited with approval in *Re 7-Eleven Stores* (1994) ATPR 41-357 at 42,677.

¹⁸ REIWA Submission, 10 January 2017 [1.35].

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

37. The ACCC has previously accepted 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.
38. The ACCC has also previously noted that:
- consumers benefit from the disciplinary incentives in the Membership Framework designed to align the interests of agents with those of the consumers they represent, and
 - REIWA members as a whole receive reputational benefits from being seen by consumers as maintaining a high level of expertise and skill and acting in a professional and ethical manner.
39. The ACCC considers that REIWA's Membership Framework has resulted and is likely to continue to result in higher standards of practice in the real estate and business agent industry 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.
40. In 2012 the ACCC undertook considerable analysis of REIWA's proposed CPD scheme. The ACCC accepted that the scheme, which would require participation in training as a requirement of membership, would result in significantly higher participation in ongoing training than under a voluntary scheme. The ACCC has not received any information to indicate that it should depart from its previous view of REIWA's CPD scheme.
41. The ACCC considers that the aspects of the Membership Framework which have not previously been authorised, being its Proposed Voluntary Accreditation Process and its website terms and conditions, are also directed at achieving the outcomes set out at paragraph 39 and therefore, reinforce the public benefits that are likely to arise from maintaining professional standards and expertise amongst REIWA members.

Transaction cost savings

42. The ACCC has previously accepted that the ready availability of REIWA's Standard Exclusive Agency Forms is likely to result in public benefits in the form of reduced transaction cost savings from:
- reducing the cost of drafting certain documents, and
 - reducing the cost of handling disputes.
43. Provided REIWA makes its forms available on the terms upon which it has previously agreed and proposes as part of its current application, the ACCC considers that the proposed conduct is likely to continue to achieve public benefits from transaction cost savings.

Administrative efficiencies

44. The ACCC has previously accepted that the Membership Framework is likely to result in public benefits in the form of administrative cost savings arising from REIWA's ability to efficiently manage its membership fees and debt.
45. The ACCC considers that to the extent these administrative efficiencies support REIWA's ability to improve the conduct of real estate and business transactions by REIWA members; they are likely to continue to support the achievement of public benefits.

Public detriment

46. The Act does not define what constitutes a public detriment and the ACCC adopts a broad approach. This is consistent with the Tribunal which has defined it as:

“...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.”¹⁹
47. REIWA submits that, while there might be a possibility that some of its Articles, Members' Code, Auction Code, website terms and conditions, specialist voluntary accreditation process and Standard Exclusive Agency Forms might be considered to have an anti-competitive effect, any public detriment constituted by any lessening of competition is outweighed by the public benefit derived from those documents and agreements.
48. Consistent with its 2012 Determination²⁰, 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
 - the effect of REIWA's standard forms upon competition in relation to terms and conditions encapsulated in the standard forms
 - foreclosure of competitors in the provision of professional development training services.

Effect of REIWA's Membership Framework on competition amongst agents

49. Generally, the ACCC considers that anti-competitive 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.
50. The ACCC has found in its consideration of previous REIWA authorisation applications that the potential anti-competitive detriments due to exclusionary effects are likely to be limited since:

¹⁹ *Re 7-Eleven Stores* (1994) ATPR 41-357 at 42,683.

²⁰ A91280 (19 April 2012).

- 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 is not prohibitive.
51. The ACCC notes that the two aspects of the Membership Framework which have not been previously authorised also potentially involve exclusionary effects.
 52. Firstly, the website terms and conditions allow REIWA to suspend supplying services to a member who has failed to pay for earlier services. However, the ACCC considers that these terms and conditions appear to be consistent with reasonable terms and conditions for the delivery of services of this nature and do not appear to be a barrier to continuing membership of REIWA.
 53. Secondly, as noted by REIWA itself, the Proposed Voluntary Accreditation Process may be viewed as a form of barrier to entry to the market. However, the ACCC notes that the accreditation scheme is entirely voluntary and applicants will be entitled to obtain training from multiple education providers. Additionally, the ACCC considers that the accreditation scheme may be pro-competitive as it may encourage improvements to standards of conduct and quality of services provided to consumers.
 54. Accordingly, the ACCC considers that the additional features of the Membership Framework do not alter the conclusion that the potential anti-competitive detriments due to exclusionary effects are likely to be limited.
 55. The ACCC has found in its previous considerations of REIWA authorisation applications that potential anti-competitive 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 does not set prices or restrict price decisions.
 56. The ACCC has not received any information which indicates that it should depart from its previous conclusion that the potential anti-competitive detriment arising from REIWA's Membership Framework due to exclusionary effects or coordination is likely to be limited.

Effect of the standard forms

57. The ACCC has previously identified two potential sources of public detriment that might result from the existence of the standard forms prepared by REIWA.
58. The first potential public detriment arises from the exclusionary effect of denying access to forms which are effectively the industry standard.
59. The ACCC has examined this issue in detail in previous determinations and imposed conditions of authorisation which broadly speaking ensure that REIWA makes its standard forms available to any person who seeks access to them.
60. REIWA does not object to the imposition of these conditions on any grant of a new authorisation by the ACCC.
61. The ACCC considers it appropriate to continue to impose conditions of authorisation, in order to limit any exclusionary effect resulting from the existence of standard forms prepared by REIWA. The proposed conditions are the same as

those previously imposed, and are set out in paragraph 82 of this draft determination.

62. The second potential public detriment arises from the reduced incentive to innovate in contractual agreements as a result of the widespread availability and use of standard forms.
63. Again, the ACCC has examined this issue in detail in previous determinations and concluded that any public detriment arising from a loss of innovation is likely to be limited since:
- the standard forms do not establish the level of fees and charges
 - the standard 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 forms.
64. The ACCC has not received any information to indicate that it should depart from this conclusion in respect of the current application for authorisation. Further, it is noted that under the proposed conduct, it is the agreement to produce certain Standard Exclusive Agency Forms for which authorisation is sought, rather than the forms themselves.

Foreclosure of competitors in the provision of professional development training services

65. The ACCC considers that anti-competitive detriment may arise where conduct provides a competitor with an enhanced ability or incentive to foreclose rivals in relevant market(s), including through price and non-price constraints upon competitors.
66. In 2012, the ACCC examined the extent to which REIWA's proposed CPD scheme might result in this type of detriment by foreclosing other providers of professional development training services. The ACCC concluded that any potential public detriment likely to arise under the scheme would be likely to be less than the public detriment likely to arise from the alternative of no compulsory training at all, which would likely lead to a substantially lower training rate.
67. As noted earlier, compulsory training requirements remain in place and REIWA's proposed CPD scheme has never come into effect. In these circumstances, and in the absence of any submissions on the issue, the ACCC remains of the view that the scheme, if adopted, would be likely to result in minimal public detriment.
68. The ACCC notes that should significant concerns arise in relation to REIWA's proposed CPD scheme, if adopted, this would be taken into account in any future reauthorisation or revocation decision.

Balance of public benefit and detriment

69. The ACCC considers that REIWA's Membership Framework (namely its Articles of Association, including its proposed CPD scheme, Members' Codes of Practice, Auction Code of Conduct, website (reiwa.com) terms and conditions, agreements between REIWA and its members that give rise to REIWA's Standard Exclusive Agency Forms and its proposed voluntary accreditation scheme) is 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
 - administrative cost savings arising from REIWA's ability to efficiently manage its membership fees and debt.
70. The ACCC has not received any information to indicate that it should depart from its previous view that:
- the potential anti-competitive detriment arising from REIWA's Membership Framework due to exclusionary effects or coordination is likely to be limited
 - 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, and
 - any public detriment likely to arise from REIWA's CPD scheme, if adopted, is likely to be minimal.
71. For the reasons outlined in this draft determination, and subject to the conditions proposed, the ACCC considers that in all the circumstances the proposed conduct for which authorisation is sought is 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 considers that the inclusion of the Proposed Voluntary Accreditation Process and REIWA's website terms and conditions as part of the Membership Framework do not change this net public benefit assessment.
72. The ACCC is therefore satisfied that the tests in sections 90(5A), 90(5B), 90(6) and 90(7) are met.
73. The Act allows the ACCC to grant authorisation subject to conditions.²¹ The ACCC considers that it is appropriate to continue with the same conditions imposed in 2012 that relate to access to forms, as this will mitigate public detriments identified and address concerns previously raised by interested parties in relation to access to standard forms.

Length of authorisation

74. The Act allows the ACCC to grant authorisation for a limited period of time.²² This enables the ACCC to be in a position to be satisfied that the likely public benefits will outweigh the detriment for the period of authorisation. It also enables the ACCC to review the authorisation, and the public benefits and detriments that have resulted, after an appropriate period.
75. In this instance, REIWA seeks authorisation for ten years on the grounds that the previous grants of authorisation to REIWA for substantially the same conduct (A91280, A91026 and A70011) were for a five year period, there has been no change in circumstances that warrants an shorter period of authorisation, and the

²¹ Section 91(3).

²² Subsection 91(1).

ACCC have indicated in the draft determination in authorisation A91569 published on 13 April 2017 that a grant of authorisation for 10 years would be appropriate.²³

76. In light of the assessment of public benefits and detriments outlined, the ACCC considers that ten years is an appropriate period of authorisation.

Draft determination

The application

77. The application was made by The Real Estate Institute of Western Australia (Inc) (REIWA) using a Form B. REIWA, on behalf of its current and future members, has sought authorisation of arrangements contained in its Membership Framework, namely its:
- Articles of Association, including its proposed CPD scheme
 - Members' Codes of Practice
 - Auction Code of Conduct
 - website (reiwa.com) terms and conditions
 - agreements between REIWA and its members that give rise to REIWA's Standard Exclusive Agency Forms and
 - proposed voluntary accreditation scheme.
78. Authorisation is sought as the proposed conduct may result in the applicants making or giving effect to a contract, arrangement or understanding containing a cartel provision within the meaning of the Act or making or giving effect to a contract, arrangement or understanding that may have the purpose or effect of substantially lessening competition within the meaning of section 45 of the Act.
79. Subsection 90A(1) of the Act requires that before determining an application for authorisation the ACCC shall prepare a draft determination.

The net public benefit test

80. For the reasons outlined in this draft determination, the ACCC is satisfied, pursuant to sections 90(5A), 90(5B), 90(6) and 90(7) of the Act, that in all the circumstances the proposed arrangements for which authorisation is sought is likely to result in a public benefit that would outweigh any likely detriment to the public constituted by any lessening of competition arising from the proposed arrangements.

Conduct which the ACCC proposes to authorise

81. The ACCC proposes to grant conditional authorisation A91586 to REIWA and its current and future members for the arrangements contained in the REIWA Membership Framework, namely its:
- Articles of Association, including its proposed CPD scheme
 - Members' Codes of Practice
 - Auction Code of Conduct

²³ REIWA, Form B Application, 22 May 2017, paragraph 2(d).

- website (reiwa.com) terms and conditions
- agreements between REIWA and its members that give rise to REIWA's Standard Exclusive Agency Forms and
- proposed voluntary accreditation scheme.

82. The ACCC proposes to grant 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.
83. The authorisation has been sought and is proposed to be granted in respect of particular documents (REIWA's Articles of Association, Members' Codes of Practice, Auction Code of Conduct and REIWA's website terms and conditions) as they stand at the time authorisation is granted. Any changes to these documents during the term of the proposed authorisation would not be covered by the proposed authorisation.
84. The ACCC proposes to grant authorisation A91586 for ten years.
85. Under section 88(10) of the Act, the ACCC proposes to extend the authorisation to apply to future members of REIWA.
86. This draft determination is made on 31 May 2017.

Interim authorisation

87. On 24 May 2017, pursuant to section 91 of the Act, the ACCC granted conditional interim authorisation in respect of the application for authorisation lodged by REIWA on 22 May 2017. Authorisation was granted in relation to arrangements contained in the REIWA Membership Framework, namely its Articles of Association, including its proposed CPD scheme, Members' Codes of Practice, Auction Code of Conduct, website (reiwa.com) terms and conditions, agreements between REIWA and its members that give rise to REIWA's Standard Exclusive Agency Forms and REIWA's proposed voluntary accreditation scheme.
88. The ACCC granted interim authorisation subject to a number of conditions relating to access to standard forms. The conditions of interim authorisation are in the same terms as those set out at paragraph 82 of this draft determination.
89. Interim authorisation will remain in place until the date the ACCC's final determination comes into effect or until the ACCC decides to revoke interim authorisation.

Next steps

90. The ACCC now seeks submissions in response to this draft determination. In addition, the applicant or any interested party may request that the ACCC hold a conference to discuss the draft determination, pursuant to section 90A of the Act.