



api 11/5 **SPIER CONSULTING**

REGULATORY STRATEGIES & SOLUTIONS

Mr Scott Gregson  
General Manager  
Adjudication  
ACCC  
PO Box 1199  
Dickson ACT 2602.

14 April 2005

Dear Sir,

**Variation to Authorisation A90545- Australian Institute of Valuers and Land Economists – (now Australian Property Institute).**

Thank you for your advice on the next steps in the above matter. This note follows on from our conversation and emails from Jason Byrne and Isabelle Arnaud.

As you point out Authorisation A90545 was granted on 29 April 1994, subject to certain conditions being met. I understand that those conditions were met.

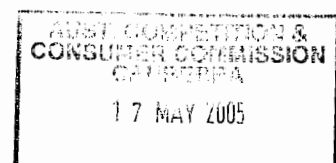
Authorisation A90545 was limited in its coverage in that it authorised the Australian Institute of Valuers and Land Economists Code of ethics and clauses 10.2 and 11 of the Constitution and clause 24 of its By-laws.

I confirm that the API's application for minor variation only seeks authorisation for those changes to the Code of ethics and the clauses of the Constitution and By-laws previously authorised.

I attach the amendments to the Constitution and By laws that the API wishes to be treated as minor variations to Authorisation A90545. See **Attachment A**.

In the ACCC decision on A90545 it said at para 10.8 that there may be other clauses of the then AIVLE Constitution, Code of Ethics and By laws that may have TPA implications and in particular it mentioned clause 22 of the by laws.

The API has considered that matter and is of the view that it does not have TPA implications. API membership is very open, the only criteria being educational qualifications and some clearly stated and objective character criteria. Unlike other associations the API does not easily refuse membership and not does it very easily suspend or expel.



I trust that the above assists and hope that the process can be speedily concluded.

Yours truly,

A handwritten signature in black ink, appearing to read 'Hank Spier', written over a diagonal line.

Hank Spier  
Director  
For the API.

## **Attachment A to letter to ACCC dated 14 May 2005.**

Changes sought to be covered by minor variation application are;

- Clause 8 of the Constitution dealing with Fundamental Rules. [ this was previously Clause 10 ]
- Clause 9 of the Constitution [ previously Clause 11 ] dealing with complaints.
- Sections 27 -30 of the By laws [ previously Clause 24 ] dealing with complaints.

The Code of Ethics/Conduct Rules is largely unchanged.

In each case where authorization is sought I have attached current provisions of the governance documents which indicate the changes. Underlined text indicates an addition , a strikethrough indicates a deletion .

**API**

**CONSTITUTION.**

## **Clause 10: Clause 8: Fundamental Rules**

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### **8.1 Professionalism and Skill**

8.1.1 A Member must at all times carry out work entrusted to him to the best of his knowledge and ability in accordance with proper professional principles.

### **10.1 Skill**

~~A Member must at all times carry out work entrusted to him to the best of his knowledge and ability in accordance with proper professional principles.~~

### **8.2 Professional Practice**

8.2.1 Members must observe the requirements of the Institute's Code of Professional Practice.

8.2.2 The elements of the Code of Professional Practice that Members must observe are:

- a. Code of Ethics;
- b. Rules of Conduct;
- c. Practice Standards;
- d. Compliance with CPD requirements;
- e. Constitution and By Laws.

### **10.2 Code of Ethics**

~~(a) Members must comply with the Institute's Code of Ethics.~~

~~(b) The Institute's Code of Ethics will contain rules governing:~~

- ~~(i) Professional competence;~~
- ~~(ii) Professional conduct;~~
- ~~(iii) Client relationships;~~
- ~~(iv) Personal conduct;~~

~~(v) — Conflict of interest;~~

~~(vi) — Advertising;~~

~~(vii) — Statutory responsibilities~~

~~And any such other matters which may be decided by the membership in annual or extraordinary general meeting or by referendum.~~

~~(e) — The rules of the Code of Ethics shall prescribe standards which shall be published from time to time and may be amended by special resolution of the National Council.~~

**API**

**CONSTITUTION.**

## **Clause 11 Clause 9: Complaints**

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### **9.1 Complaint Made**

9.1.1 If a written complaint against a Member is made to the Institute it will be referred to the Division of which the subject of the complaint is a Member to be dealt with in accordance with the By Laws.

### **11.1 Complaint Made**

~~If a complaint is made to the Institute in writing that a Member has:~~

- ~~(a) — Violated any fundamental rule;~~
- ~~(b) — Committed any criminal offence punishable by imprisonment;~~
- ~~(c) — Knowingly been involved in any dishonest practice or dealing;~~
- ~~(d) — Engaged in conduct prejudicial to the good name of the Institute~~
- ~~(e) — Obtained admission to the Institute by improper means;~~

~~Such complaint shall immediately be referred to the Complaints Committee established under Clause 11.3 by the Council of the Division to which a Member is attached or by the relevant National Professional Board if the Member is not attached to a Division.~~

### **11.2 9.2 Who May Make a Complaint**

9.2.1 A complaint may be made by:

- a. a member of the general public;
- b. a Member or Affiliate of the Institute; or
- c. any Council, Board, Standing Committee or Committee or Group of the Institute.

### **9.3 Complaints Procedures**

9.3.1 The National Council has the responsibility of implementing the complaints procedures in accordance with the By Laws.



## **9.4 Appeal**

9.4.1 The Member concerned may appeal against the decision of Divisional Council in accordance with the By Laws.

## **~~11.3 Establishment of Complaints Committee~~**

~~The Divisional Council or National Professional Board, as the case may be, will establish a Complaints Committee who will be appointed and proceed in accordance with the By Laws.~~

## **~~11.4 Appearances and Submissions~~**

~~In dealing with any complaint the duly appointed Complaints Committee may require the complainant, defendant or other witnesses to appear before it in person or provide a written submission.~~

## **~~11.5 Representation~~**

~~The complainant or defendant in complaints proceedings will not be entitled to be represented before the Committee, Divisional Council or National Professional Board except by reason of infirmity or the requirement for an interpreter.~~

## **~~11.6 Investigation by Complaints Committee~~**

~~The duly appointed Complaints Committee will investigate the complain, and advice of its decision will be given to the Divisional Council or National Professional Board together with any recommended penalty in terms of Clause 11.8 of this Constitution.~~

## **~~11.7 Right to Hearing~~**

~~Before reaching any decision regarding any complaint made pursuant to Clause 11.1, the Divisional Council or the relevant National Professional Board, as the case may be, must satisfy itself that the Member has had an opportunity of being heard in regard to the complaint.~~

## **~~11.8 Treatment of Complaint~~**

~~The Divisional Council of the National Professional Board will dismiss or uphold the complaint and if the complaint is substantiated may take all or any of the following actions:~~

- ~~(a) — Reprimand or admonish the Member;~~
- ~~(b) — Impose a fine as specified in the By Laws;~~
- ~~(c) — Recommend to the National Council that the Member be suspended from membership of the Institute for any period not exceeding 2 years;~~
- ~~(d) — Recommend to the National Council that the member be excluded from Membership of the Institute;~~
- ~~(e) — Refer the matter to the Valuers' Registration Board or similarly constituted body in the State or Territory in which the complaint arose.~~

### **~~11.9 Meeting to Deal with Complaint~~**

~~Any resolution of either the Divisional Council or National Professional Board dealing with any complaint shall be passed at a meeting for that purpose with previous notice of the object of the meeting having been given and at the meeting there must be present not less than 75% of the elected or appointed members of the Council or Board and any resolution must be passed by an affirmative vote of not less than 75% of those present. Any party to a complaint who is also a member of the Divisional Council or National Professional Board shall not be entitled to be present at any meeting of such Council or Board at which the complaint is discussed.~~

### **~~11.10 Appeal~~**

~~The Member or complainant may, within a period of 30 days after being notified of the decision of the Divisional Council or National Professional Board, appeal to the National Review Committee against the decision of the Council or the Board by giving notice of appeal to the National Director who will refer the matter to the National Review Committee for hearing.~~

### **~~11.11 Procedures of National Review Committee~~**

~~The following procedures will apply to hearings of the National Review Committee:~~

- ~~(a) — Parties to the hearing may be represented and witnesses called.~~
- ~~(b) — The National Review Committee will regulate its own proceedings and adhere to the rules of natural justice.~~
- ~~(c) — In the absence of the Chairman, the other Members may elect one of their number to act as Chairman.~~
- ~~(d) — The Chairman may exercise a casting vote as well as a deliberative vote.~~

- (e) ~~A decision of the National Review Committee shall not be invalidated in consequence of a vacancy in its membership or the absence of any Member provided that the decision is made by at least 3 Members who will form a quorum.~~
- (f) ~~The National Director will implement the decision of the National Review Committee.~~

### **11.12 Costs**

~~Costs of an incidental to the hearing may be awarded by the National Review Committee against any party to the appeal in its absolute discretion.~~

### **11.13 Consequences of Appeal**

~~The National Review Committee will dismiss or uphold the appeal and if the complaint is substantiated may take all or any of the following actions:~~

- (a) ~~Reprimand or admonish the Member;~~
- (b) ~~Impose a fine as specified in the By Laws;~~
- (c) ~~Suspend the Member from membership of the Institute for any period not exceeding three years;~~
- (d) ~~Exclude the Member from membership of the Institute;~~
- (e) ~~Refer the matter to the Valuers' Registration Board or similarly constituted Body in the State or Territory in which the complaint arose.~~

### **11.14 Reasons**

~~The National Review Committee will give reasons for its determination and advise parties to the hearing and the National Director accordingly.~~

### **11.15 Decisions Final**

~~The decision of the National Review Committee is final, and must not be called into question by any means whatsoever.~~

### **11.16 Fees**

~~Members of the National Review Committee will be entitled to receive such fees, remuneration and disbursements as the National Council in its absolute discretion may determine generally or in any individual case.~~

**API**

**BY LAWS**

## **Clause 24: Complaints**

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### **24.1 Establishment of Complaints Committee**

The Divisional Council or National Professional Board shall establish a Complaints Committee to investigate complaints against members regarding alleged breach of the Constitution, Fundamental Rules or Code of Ethics.

### **24.2 Form of Complaint**

Complaints against members shall be in writing and otherwise comply with Clauses 11.1 and 11.2 of the Constitution. The complaint shall be accompanied by such documentary or other evidence as may be available.

### **24.3 Composition of Complaints Committee**

The composition of the Complaints Committee shall be at the discretion of the Divisional Council or the National Council or the National Professional Board and subject to Clause 24.4 shall comprise members of the Institute who shall decide and make recommendations on complaints against members

### **24.4 Chairman of the Complaints Committee**

The Chairman of the Complaints Committee shall be a member of the Divisional Council or National Professional Board instructing the Committee.

### **24.5 Notification**

The Chairman of the Complaints Committee shall advise the member against whom the complaint has been made, the name of the complainant and grounds of complaint. Such advice shall be by registered mail and marked "Confidential" and addressed to no other person than the member concerned.

### **24.6 Discussion**

The Complaints Committee may resolve any matter referred to it by appointing two or more of its members ('the Committee's Appointees') to discuss the complaint with one or more of the parties concerned.

## **24.7 Resolution by Discussion**

In the case of resolution of a complaint by discussion, the terms of such resolution together with the decisions and recommendation of the Committee's appointees will be forwarded to the Divisional Council or National Professional Board in accordance with Clause 11.6 of the Constitution.

## **24.8 Establishment of Panel to hear Complaint**

- (a) ~~Where a complaint is not resolved by discussion the Complaints Committee will appoint a panel to hear and investigate the complaint.~~
- (b) ~~The panel will comprise of:~~
  - (i) ~~Members of the Complaints Committee who have not previously taken part in discussion of the complaint as the Committee's appointees; and/or~~
  - (ii) ~~Subject to the provisions of this Clause, other members of the Institute co-opted by the Complaints Committee.~~

## **24.9 Natural Justice**

The Panel shall regulate its own proceedings and adhere to the rules of natural justice.

## **24.10 Hearing Procedure**

The Chairman of the Panel shall advise the complainant, defendant and any required witnesses of:

- (a) ~~The name of the chairman and members of the panel~~
- (b) ~~The time and date of hearing~~
- (c) ~~The right of the member to be heard in regard to the complaint~~
- (d) ~~Whether or not the defendant, complainant or other witness are required to appear before the Panel or provide a written submission~~
- (e) ~~Required appearances — Confirmation of such appearances to be notified within 24 days of notice~~
- (f) ~~Where an appearance or written submission by the complainant is refused, the complaint may be dismissed without further notice~~

- (g) ~~Where an appearance or written submission by the defendant is refused such action shall be regarded as breach of personal conduct.~~
- (h) ~~The prohibition for the complainant, defendant or other witness to be represented except by reason of infirmity or requirement for an interpreter.~~

### **24.11 Panel's Decision**

~~Within two weeks of completion of the hearing, the Panel shall provide written advice of its decision to the Divisional Council or National Professional Board and also advise any recommended penalty in terms of Clause 24.13 of the By Laws~~

### **24.12 Costs**

~~Costs of an incidental to the hearing may be awarded by the Divisional Council or National Professional Board against any member in its absolute discretion whether or not it dismisses or upholds the complaint.~~

### **24.13 Fines**

- (a) ~~The fine to apply under Clause 11.8 of the Constitution is any sum up to a maximum of \$5 000 (five thousand dollars)~~
- (b) ~~The fine to apply under Clause 11.14 of the Constitution is any sum up to a maximum of \$7 500 (seven thousand five hundred dollars).~~

## **Section 27: Complaints**

### **27.1 Complaints**

27.1.1 In accordance with Constitution Clause 9, if a complaint is made to the Institute in writing that a Member has allegedly:

- a. violated any part of the Institute's Constitution or By Laws, particularly those provisions included in Clause 8 of the Constitution;
- b. committed any civil or criminal offence punishable by imprisonment;
- c. knowingly been involved in any dishonest practice or dealing;
- d. engaged in conduct prejudicial to the good name of the Institute; or
- e. obtained admission to the Institute by improper means, such complaint shall be referred to the Divisional Complaints Officer for consideration and determination in accordance with these By Laws.

27.1.2 These procedures replace all other complaints procedures issued by the Institute insofar as any complaint that has not proceeded past the investigation stage as at the implementation of these procedures should be considered under these procedures. Alternatively, any complaint that has progressed past the investigation stage should be dealt with under those procedures in place at the time the complaint was initially lodged. For the initial implementation of Sections 27 to 29 inclusive of these revised By Laws, Divisions shall immediately make the appointments necessary under these Sections and these appointments shall be deemed to be made as pursuant to the requirements of these By Laws.

### **27.2 Correspondence**

27.2.1 All correspondence with the Member concerned and the party originating the complaint shall be Confidential.

### **27.3 Other Proceedings**

27.3.1 If any party to a complaint initiates, or advises of an intent to initiate civil or criminal proceedings against any other party to the complaint, or legal proceedings that involve the matter of the complaint are instigated by any party, the Institute complaints procedure shall be suspended until these civil or criminal proceedings are finalised. Both parties shall be informed in writing by the Divisional President of this suspension and advised that the suspension does not indicate that the Institute considers that the Member has or has not a case to answer as this complaint shall only be determined by the Institute following completion or resolution of the civil or criminal proceedings.

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## **27. 4 Divisional Council Authority**

27.4.1 In relation to these complaints procedures, Divisional Councils shall act on behalf of the Institute to the extent that the Constitution and By Laws allow.

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## **Section 28: Complaints Procedure**

### **28.1 Appointment of a Divisional Complaints Officer**

28.1.1 The Divisional Council shall appoint a Divisional Complaints Officer who is a Member of the Institute. The Divisional Complaints Officer shall be appointed on an annual basis at the Divisional Council meeting held immediately prior to the Annual General Meeting of the Division, and will take office from the conclusion of the Annual General Meeting.

28.1.2 At the time of appointing the Divisional Complaints Officer, the Divisional Council shall appoint an Alternate Divisional Complaints Officer in the event that for any reason the Divisional Complaints Officer is unable to perform the Divisional Complaints Officer's duties. In this event, the Alternate Divisional Complaints Officer will act as the Divisional Complaints Officer for the duration the Divisional Complaints Officer as appointed by the Divisional Council is unable to perform the duties of Divisional Complaints Officer.

### **28.2 Divisional Complaints Chairman**

28.2.1 Divisional Council shall appoint one Councillor to be responsible for Divisional complaints procedures. This Divisional Councillor shall be called the Divisional Complaints Chairman. The Chairman shall be appointed on an annual basis at the Divisional Council meeting held immediately prior to the Annual General Meeting of the Division, and will take office from the conclusion of the Annual General Meeting.

28.2.2 At the time of appointing the Divisional Complaints Chairman, the Divisional Council shall appoint an Alternate Chairman in the event that for any reason the Divisional Complaints Chairman is unable to perform the Chairman's duties. In this event, the Alternate Chairman will act as the Divisional Complaints Chairman for the duration the Chairman as appointed by the Divisional Council is unable to perform the duties of Chairman.

### **28.3 Composition and establishment of the Panel and a Complaint Committee**

28.3.1 A Panel comprising not less than seven Divisional Members shall be appointed on an annual basis at the Divisional Council meeting held immediately prior to the Annual General Meeting of the Division, and will take office from the conclusion of the Annual General Meeting.

28.3.2 The Divisional Complaints Chairman shall, on an as required basis, select from the Panel a committee, hereinafter called the Complaint Committee, and a Chairman of that Committee, hereinafter called the Chairman of the Complaint Committee, to investigate a specific complaint. The so formed Complaint Committee shall comprise a minimum of four and a maximum of seven members.

28.3.3 No member who is in any way concerned with the matter in question or who is connected in any business entity, firm, corporation, or department with the Member accused or the party originating the complaint shall participate in any meeting or discussion concerning the complaint.

28.3.4 The Divisional Complaints Officer shall not be a Member of the Complaint Committee, but may be requested to provide advice to the Complaint Committee or to carry out further investigations concerning the complaint.

## **28.4 Disciplinary Tribunal**

28.4.1 The Divisional Complaints Chairman, on behalf of the Institute, shall appoint a Disciplinary Tribunal, including the appointment of a Chairman of that Tribunal, hereinafter called the Chairman of the Disciplinary Tribunal, to hear and determine any disciplinary charge brought against a Member of that Division originating from a complaint.

28.4.2 The Disciplinary Tribunal shall have a minimum of three members at least one of whom shall have legal qualifications, preferably with litigation experience, and one of whom shall be a non-member of the Institute. The non Institute Member may be the Disciplinary Tribunal member with legal qualifications. The Institute Tribunal members shall be from the same Division as the member concerned in the complaint.

28.4.3 No member who is in any way concerned with the matter in question, or who is connected in any business entity, firm, corporation, or department with the Member accused or the party who originated the complaint, shall be a member of the Disciplinary Tribunal.

28.4.4 No person who has previously taken part in mediation or formal discussions concerning the complaint shall sit on the Disciplinary Tribunal.

## **28.5 Form of Complaint**

28.5.1 A complaint against a Member shall be in writing, accompanied by such documentary or other evidence as may be available.

28.5.2 On receipt of a written complaint, the Divisional Executive Officer shall advise the party in writing that the matter has been referred to the Divisional Complaints Officer.

## **28.6 Investigation of the Complaint**

28.6.1 On receipt of a written complaint against a Member, the Divisional Complaints Officer is to ascertain whether the complaint complies with the terms of Constitution Clause 9 and By Law Section 27.1.

28.6.2 When determining if a complaint complies, the Divisional Complaints Officer may discuss the matter with the Divisional Complaints Chairman.

- 28.6.3 If the complaint does not comply with Constitution Clause 9 and By Law Section 27.1, the Divisional Complaints Officer shall inform in writing the party who originated the complaint that the complaint does not comply with the requirements of the Constitution and By Laws, the reason why it does not comply, and that no further action will be taken.
- 28.6.4 If the complaint does comply with Constitution Clause 9 and By Law Section 27.1, the Divisional Complaints Officer shall, where considered necessary, attempt to obtain further information from the party who originated the complaint in relation to the complaint. This information, together with the original complaint shall be forwarded to the Member concerned with a request that the Member reply to the issues raised. Both the party who originated the complaint and the Member shall be informed that the Institute is obliged to make available to all concerned any documents lodged in relation to the complaint and therefore cannot accept confidential material in relation to the complaint
- 28.6.5 On receipt of the Member's reply, the Divisional Complaints Officer is to forward the Complaint, any further information from the party who originated the complaint, and the Member's reply to the Divisional Complaints Chairman without a recommendation as to the validity or otherwise of the complaint.

## **28.7 Complaint Committee Procedures**

- 28.7.1 On receipt of the documentation referred to in Section 28.6.5, the Divisional Complaints Chairman shall appoint a Complaint Committee from the Panel, as per Section 28.3.2, to consider the matter.
- 28.7.2 During the course of the Complaint Committee meeting the information obtained from the party who originated the complaint and from the Member in answer to the complaint shall be examined to ascertain whether or not a prima facie case exists.
- 28.7.3 If during the course of its examination of the evidence, the Complaint Committee determines that it requires further information or clarification, the matter shall be referred back to the Divisional Complaints Officer.
- 28.7.4 If during the course of its examination of the evidence, the Complaint Committee determines that there are other issues that need to be addressed, these matters shall be referred back to the Member for comment. The Member's reply shall be examined by the Complaint Committee to ascertain whether a prima facie case exists.
- 28.7.5 If the Complaint Committee determines that the complaint is unsubstantiated, has no validity, or should be dismissed for any other reason, the Member concerned and the party who originated the complaint shall be informed in writing by the Divisional Complaints Chairman of the reasons for the Institute not proceeding with the complaint.

- 28.7.6 If the Complaint Committee determines that the matter may best be solved by Mediation, Mediation shall be offered to both parties. Referral to Mediation does not necessarily imply that a Member has a prima facie case to answer.
- 28.7.7 If the Complaint Committee determines that a prima facie case exists the Committee, in consultation with the Institute's National Prosecutor (see Sections 28.9), shall prepare a disciplinary charge that the Member will be required to defend.
- 28.7.8 Any disciplinary charge emanating from a Complaint Committee is a charge brought against that Member by the Institute and for the purpose of Disciplinary Tribunals and Appeals Procedures the Complainant is the Institute.
- 28.7.9 The Chairman of the Complaint Committee shall have a casting vote if required.

## **28.8 Mediation**

- 28.8.1 If Mediation is offered, and the party who originated the complaint and the Member concerned agree, the Complaint Committee will appoint one person (the Committee's Appointee) to mediate a complaint. The Committee's Appointee will not be a member of the then sitting Complaint Committee, nor will they be eligible to sit on any Tribunal to hear the complaint if it continues to hearing and appeal.
- 28.8.2 The parties present at the mediation will be required to sign a mediation agreement in which they all agree that the information divulged during the mediation, including written documentation, must be confidential unless the parties concerned all agree it may be used outside the mediation. This confidentiality will only apply to information exchanged during the mediation.
- 28.8.3 The Member and the party who originated the complaint personally, or where the party is a company, a duly authorised officer of that company, must attend the mediation if they had previously agreed to mediation.
- 28.8.4 At the conclusion of Mediation, the Committee's Appointee will report the outcome of the mediation to the Chairman of the Complaint Committee that was appointed to consider the matter.
- a. In the case of resolution of a complaint by mediation, the terms of such resolution shall be forwarded to the Chairman of the Complaint Committee appointed to consider the matter who shall advise the Divisional Complaints Chairman. The Divisional Complaints Chairman shall then confirm in writing the resolution of the matter with the party who originated the complaint and the Member concerned.

b. If the matter is not resolved by mediation, the Complaint Committee appointed to consider the matter shall reconvene for further consideration.

28.8.5 Prior to beginning of the Mediation, the party who originated the complaint and the Member concerned will be required to agree to bear the costs of the mediation equally, including the cost of the Committee's Appointee's time.

## **28.9 Institute's National Prosecutor**

28.9.1 The National President shall appoint a person with legal qualifications and experience in litigation matters as the Institute's National Prosecutor. The Institute's National Prosecutor shall represent the Institute in all complaint matters referred to a Disciplinary Tribunal, except complaints relating to non-compliance with CPD (other than those referred to in Section 28.11).

28.9.2 For matters pertaining to non-compliance with CPD requirements, excepting matters pertaining to Section 28.11, the Chairman of the Continuing Professional Development Committee, or such other nominee appointed by Divisional Council, shall represent the Institute as the Institute's National Prosecutor.

28.9.3 A copy of all documentation relating to any matter before the Institute's National Prosecutor is to be retained in the Institute's National Office.

## **28.10 Disciplinary Tribunal**

28.10.1 Where the Complaint Committee appointed to consider the matter is of the opinion that a prima facie case exists, the Chairman of the Complaint Committee appointed to consider the matter shall refer the complaint, as a complaint by the Institute against the Member, to the Divisional Complaints Chairman who will then appoint a Disciplinary Tribunal for a hearing.

28.10.2 No person who has previously taken part in mediation or formal discussions concerning the complaint shall sit on the Tribunal.

## **28.11 CPD Complaints Referable to the Disciplinary Tribunal**

28.11.1 Where the complaint relates to a disputation over the recognition of activities as eligible for fulfilling the CPD requirements of the Institute, such complaints shall constitute a matter for action under Section 28.10.

## **28.12 CPD Tribunal**

28.12.1 Where the complaint against the member relates to non-compliance with the CPD requirements of the Institute, other than those referred to in Section 28.11, and where the Complaint Committee appointed to consider the matter is of the opinion that a prima facie case exists, the Chairman of the Complaint Committee appointed to consider the matter shall refer the complaint, as a

complaint by the Institute against the Member, to the Divisional Complaints Chairman who will then appoint a Disciplinary Tribunal for a hearing as per Section 28.10.1.

28.12.2 No person who has previously taken part in mediation or formal discussions concerning the complaint shall sit on the Tribunal.

28.12.3 The Chairman of the Divisional CPD Committee or his nominee shall, as the Institute's National Prosecutor as defined in Section 28.9, prepare the disciplinary charge in consultation with the Complaint Committee and shall represent the Institute as the Institute's National Prosecutor before the Disciplinary Tribunal and present evidence in support of the charge.

### **28.13 Notification of Hearing**

28.13.1 The Member concerned shall be informed of:

28.13.2 a. the name of the Tribunal Chairman and members of the Tribunal;

b. the nature of the Complaint and the disciplinary charge that the Member will be required to defend;

c. the time, date and place for the hearing;

d. the right of the Member concerned to be heard in regard to the charge;

e. whether or not the party instigating the complaint may be called to give evidence and/or provide a written submission in statutory declaration form;

f. whether or not other witnesses may be called to give evidence and/or provide a written submission in statutory declaration form.

28.13.3 The party who instigated the complaint shall be informed of the time, date and place of the hearing and whether or not they will be required to give evidence at the hearing.

### **28.14 Admission of Evidence**

28.14.1 No documents will be admitted into evidence that have not been made available to the other party within a reasonable time prior to the hearing. This timeframe will be at the discretion of the Chairman of the Disciplinary Tribunal. If either party wishes to introduce additional documentary evidence, the Chairman may, if necessary, adjourn the hearing to allow the other party sufficient time to consider the evidence.

### **28.15 Representation**

28.15.1 The Member may be represented by legal counsel or other person.

## **28.16 Hearing Procedure**

28.16.1 The procedures for the hearing shall be at the discretion of the Chairman of the Tribunal. These may include:

- a. The introduction by the Chairman of the members of the Tribunal and other parties present.
- b. An explanation that the Tribunal will hear the evidence and will make its decision on the basis of that evidence.
- c. The Institute's National Prosecutor (under Section 28.9) will present evidence to support the charge and may call witnesses as required.
- d. The Member concerned or his representative may present their case in answer to the charge and may call witnesses as required.
- e. The Chairman of the Tribunal, may advise the Tribunal on the exercise of its functions after the cases have been presented by the parties.

28.16.2 A true and proper record of the hearing is to be kept.

## **28.17 Disciplinary Tribunal's Decision**

28.17.1 After the completion of the hearing, the Chairman of the Disciplinary Tribunal shall furnish in writing to the Divisional President, the Tribunal's decision, the reasons for the decision, any penalty to be imposed and/or any recommendation made under Section 28.18.5.

## **28.18 Penalties**

28.18.1 If the complaint is upheld, the Disciplinary Tribunal may impose one or more of the following penalties:

- a. Reprimand the Member.
- b. Admonish the Member. Admonishment will become a matter of public knowledge and record and publication of the Admonishment shall include the full name and home suburb of the Member. If the full name and home suburb do not clearly distinguish the Member being Admonished from another Member then the street name should be published and subsequently the street number if required for distinction between Members.
- c. Impose a fine of any sum up to a maximum of \$5,000 (five thousand dollars).



d. Suspend the Member from Membership of the Institute for any period not exceeding two years. Admonition shall be implemented with suspension of Membership.

Suspension commences either:

(i) 30 days after the date of notification of suspension. The date of notification of suspension shall be seven days after the date of the letter to the Member advising of the suspension.

(ii) If an appeal is lodged and referred to the National Review Panel who directs that the appeal will not proceed to a full hearing by the National Review Committee, 14 days after the date of notification by the National Director to the parties concerned of this decision, provided there is no insistence for the appeal to continue to the National Review Committee as allowed for in Section 29.4.3. The date of notification of shall be deemed to be seven days after the date of the letter to the Member advising that the appeal will not proceed to a full hearing by the National Review Committee.

(iii) If an appeal is lodged and heard and dismissed by the National Review Committee, the date of notification by the National President to the Member that the appeal was dismissed. The date of notification shall be deemed to be seven days after the date of the letter to the Member advising that the appeal has been dismissed.

28.18.2 When determining any penalty, the Disciplinary Tribunal may take into consideration any penalty imposed on the Member as a result of legal proceedings brought against the member as specified in Section 27.3.1.

28.18.3 A suspended Member must comply with the Institute's CPD requirements and provide a return for each year as normally required.

28.18.4 If a suspended Member breaches the conditions of suspension, then the penalty shall be expulsion from Membership unless, on application by the Member, the Divisional Council or National Council resolve otherwise.

28.18.5 In addition to, but not to the exclusion of, the penalties listed in 28.18.1, the Disciplinary Tribunal can recommend to the National Council that the Member be excluded from Membership of the Institute.

28.18.6 When imposing a penalty for non-compliance with CPD, the Disciplinary Tribunal shall impose such penalty in accordance with Section 24.14.4 of the By Laws.

28.18.7 No penalty shall be imposed on the Member until the completion of the Institute's appeal procedures.

## **28.19 Action by Divisional Council and National Council**

- 28.19.1 Divisional Council and National Council cannot vary the decision or penalty imposed by the Disciplinary Tribunal.
- 28.19.2 National Council can either accept or reject any recommendation of the Disciplinary Tribunal made under Section 28.18.4.
- 28.19.3 National Council shall meet as soon as practicable to consider any recommendation from the Disciplinary Tribunal made under Section 29.18.4.
- 28.19.4 If National Council accepts the recommendation of the Disciplinary Tribunal made under Section 28.18.4, Section 28.20 shall apply.

## **28.20 Notification of Decision**

- 28.20.1 The Member concerned and the party who instigated the complainant shall be informed in writing by the Divisional President of the Tribunal's decision, the reasons for the decision, and any right of appeal against the decision.
- 28.20.2 The Parties concerned shall be advised that the Tribunal's decision will be available for collection or delivery from the Division's office at a specified date and time via the form requested by the parties.

## **28.21 Fees**

- 28.21.1 The Divisional Complaints Officer, Members of the Complaint Committee appointed to consider the matter, and members of the Disciplinary Tribunal shall, at the discretion of the Divisional Council, be entitled to receive such fees, remuneration and disbursements as the Divisional Council in its absolute discretion may determine generally or in any individual case.

## **28.22 Re-Hearing**

- 28.22.1 If as a result of an appeal the National Review Committee directs that the matter is to be returned to the Division where the original Disciplinary Tribunal hearing was held for a re-hearing, no member of the Tribunal who originally heard the complaint shall be involved in the re-hearing.

## **Section 29: Appeal Process**

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### **29.1 Appeal**

29.1.1 In accordance with Constitution Clause 9.4, the Member concerned may, within 30 days of being notified of the Disciplinary Tribunal's decision, appeal against that decision by notice in writing to the National Director. The date of notification shall be deemed to be seven days after the date of the letter to the Member advising of the Disciplinary Tribunal's decision.

29.1.2 The National Director shall notify the appropriate Divisional President that an appeal has been lodged and shall request copies of the relevant correspondence and records of proceedings held by that Divisional Council. This documentation may include:

- a. the original complaint,
- b. the charge formulated from this complaint,
- c. all correspondence and written evidence in relation to the matter,
- d. the record of the Disciplinary Tribunal's hearing.

29.1.3 This material will be provided to the Member by the National Director.

29.1.4 The Member is to notify in writing the basis of the appeal including all documentation necessary to allow the appeal to be heard within 60 days of receipt of the documentation listed in Section 29.1.2. The date of receipt of the documentation shall be deemed to be seven days after the date of the letter forwarding the material to the Member. If the Member considers more time is necessary to prepare the appeal, he may submit a request in writing to the National President for an extension of time.

29.1.5 If the Member does not comply with the 60 day requirement noted in Section 29.1.4, and an approval for extension of time has not been granted by the National President, the appeal shall be deemed to be abandoned.

### **29.2 Establishment of National Review Panel**

29.2.1 National Council shall appoint as many Members as deemed appropriate from time to time to comprise the National Review Panel. Members of the National Review Panel should have legal qualifications.

### **29.3 Determination by a Member of the National Review Panel**

- 29.3.1 The National President shall nominate one member of the National Review Panel to receive the written appeal and copies of the documentation referred to in Section 29.1.2. This member, in consultation with the Chair of the National Review Committee if necessary, shall make an assessment of the appeal and give directions, based on Section 29.3.2, as to whether the appeal should proceed to a hearing by the National Review Committee or should be otherwise dealt with.
- 29.3.2 For the purpose of Section 29.3.1, the only circumstances that could result in an appeal not proceeding to a hearing by the National Review Committee are:
- a. The appeal is without merit.
  - b. The grounds of the appeal are such that the decision of the Disciplinary Tribunal should be set aside without the need for the formality of the appeal process.
- 29.3.3 The National Review Panel member shall inform the National Director of his decision.

### **29.4 Notification of National Review Panel Determination**

- 29.4.1 The National Director shall inform the Member, the National President and the Divisional President of the Division from which the appeal emanated of the decision of the National Review Panel.
- 29.4.2 If the decision is to proceed to a full hearing of the appeal by the National Review Committee, the National Director shall advise the Member of the requirement for a cash lodgement deposit, and an undertaking to pay any shortfall between this lodgement and the actual cost of the National Review Committee hearing shall be determined by National Council. The Member shall also be advised that this payment is designed to only cover the costs of the hearing itself, not parties costs.
- 29.4.3 In the circumstances listed in Section 29.3.2a, the Member shall have a right to insist on the appeal being heard by the National Review Committee by giving notice in writing to the National Director within 30 days after being notified of the decision of the member of the National Review Panel. The date of notification shall be deemed to be seven days after the date of the letter to the Member advising him of the decision of the National Review Panel.

### **29.5 Withdrawal of Appeal**

- 29.5.1 A Member may withdraw his appeal by giving notice in writing to the National Director.
- 29.5.2 The notice referred to in Section 29.5.1 must be received no later than seven days before the day scheduled for the hearing and as advised to the Member.

After this time the appeal will continue to hearing and the Member will be responsible for costs incurred by the National Review Committee.

## **29.6 National Review Committee**

29.6.1 The National Review Committee, including the Chairman, shall be a four member Appeal Tribunal appointed from time to time by National Council. The Chairman, who must possess legal qualifications, shall be appointed by National Council. Neither the previous Divisional Complaints Officer, any member of the Complaint Committee appointed to consider the matter, any person involved in any mediation of the complaint, any member of the Disciplinary Tribunal that originally dealt with the matter, or any member of the National Review Panel that made the initial assessment of the appeal shall sit on the Committee.

29.6.2 In the case where an appeal is against a Disciplinary Tribunal decision originating from a complaint by a member of the public, at least two Members of the National Review Committee must be non-Members of the Institute.

## **29.7 Conduct of Appeal Hearing**

29.7.1 The procedure and conduct of the appeal hearing will be at the discretion of the Chairman of the National Review Committee.

29.7.2 Any party may be represented by legal counsel or other person.

## **29.8 Consequences of Appeal**

29.8.1 The National Review Committee may uphold the appeal, dismiss the appeal, and may vary the penalty.

## **29.9 Notification to National Council**

29.9.1 The National Review Committee shall inform the National Council of its decision and make a recommendation as to the awarding of costs.

## **29.10 Action by National Council**

29.10.1 The National Council cannot vary the decision of the National Review Committee.

## **29.11 Costs Awarded by National Council**

29.11.1 National Council may award costs.

29.11.2 Costs of the hearing and reasonable costs of the parties may be awarded but payments to any party of damages or financial redress shall not be awarded.

## **29.12 Notification to Parties**

29.12.1 The National President on behalf of National Council shall advise the parties of its decision including details of any penalty imposed and the awarding of costs.

## **29.13 Quorums**

29.13.1 Subject to the requirements of Section 29.6.2, a decision of the National Review Committee shall not be invalidated in consequence of a vacancy in its Membership or the absence of any Member provided that the decision is made by at least three Members.

## **29.14 Fees**

29.14.1 Members of the National Review Panel and the National Review Committee shall be entitled to receive such fees, remuneration and disbursements as the National Council in its absolute discretion may determine generally or in any individual case.