



Australian
Competition &
Consumer
Commission

Determination

Application for Minor Variation
of Authorisation A90545

Lodged by

AUSTRALIAN PROPERTY INSTITUTE

Date: 31 August 2005

Commissioners: Samuel
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1. Introduction

- 1.1. The Australian Competition and Consumer Commission (the ACCC) is the Australian Government agency responsible for administering the *Trade Practices Act 1974* (the Act). A key objective of the Act is to prevent anti-competitive conduct, thereby encouraging competition and efficiency in business, resulting in a greater choice for consumers in price, quality and service.
- 1.2. The Act, however, allows the ACCC to grant immunity from legal action for anti-competitive conduct in certain circumstances. One way in which parties may obtain immunity is to apply to the ACCC for what is known as an 'authorisation'.
- 1.3. Broadly, 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.
- 1.4. A party to whom authorisation has been granted may also apply to the ACCC for a minor variation of that authorisation.

2. The Application

- 2.1. On 22 April 2005, the Australian Property Institute (the API) lodged an application for minor variation of authorisation A90545 under section 91A of the Act. The API was formerly known as the Australian Institute of Land Valuers and Land Economists (the AILVE).
- 2.2. On 17 May 2005, the API confirmed that the variations for which it was seeking authorisation were changes to:
 - the API code of ethics;
 - the API rules of conduct;
 - clause 8 of the API's constitution dealing with fundamental rules (previously clause 10 of its constitution);
 - clause 9 of the API's constitution dealing with complaints (previously clause 11 of its constitution); and
 - clauses 27-30 of the API's by-laws dealing with complaints (previously clause 24 of its by-laws);
- 2.3. On 24 August 2005, the API confirmed that it had amended its application for minor variation at clause 28.18.1(b) of the API's by-laws. This proposed variation is set out at paragraph 6.78 of this determination.

The Applicant

- 2.4. The API represents the interests of more than 7,500 property professionals throughout Australia. API members include residential, commercial and plant and machinery valuers, property advisers, property analysts and fund managers, property lawyers, and property researchers and academics.¹
- 2.5. The API's primary role is to set and maintain standards of professional practice, education, ethics and professional conduct for its members and the broader property profession.²
- 2.6. Members are bound by the API:
- Code of Ethics;
 - Rules of Conduct;
 - Professional Practice Standards;
 - By-Laws; and
 - Constitution.
- 2.7. The API has published the *Professional Practice 4th Edition* which represents the API and New Zealand Property Institute's professional practice guidelines. The publication includes codes, rules and standards to make known the API's position for professional practice of its members and property related concepts and principles. It provides guidance to members on a wide range of topics.
- 2.8. The API's national office is located in the Australian Capital Territory and its divisional offices are located in Western Australia, South Australia, Queensland, New South Wales, Victoria and Tasmania.

3. Background to Authorisation A90545

- 3.1. Authorisation A90545 was granted by the Trade Practices Commission (the TPC) on 29 April 1994, subject to certain conditions. The TPC is the predecessor to the ACCC.
- 3.2. The conduct for which authorisation was sought related to a revised code of ethics for AIVLE insofar as implementation of the code could constitute:
- the making of a contract or understanding, or arriving at an understanding, a provision of which would have the purpose, or would or might have the effect, of substantially lessening competition within the meaning of section 45 of the Act; or

¹ <http://www.propertyinstitute.com.au/index2.aspx?division=8>

² Ibid.

- giving effect to a provision of a contract arrangement or understanding which provision has the purpose, or has or might have the effect, of substantially lessening competition within the meaning of section 45 of the Act.
- 3.3. The TPC in its assessment of the AIVLE's application identified a number of potential anti-competitive detriments of the conduct that would, or might, have the effect of substantially lessening competition within the meaning of section 45 of the Act.
- 3.4. In light of these concerns, the TPC granted authorisation subject to a number of conditions. The scope of the authorisation granted was limited in its coverage to the API's code of ethics and accompanying regulations, clauses 10.2 and 11 of its constitution and clause 24 of its by-laws.

Conditions of Authorisation

- 3.5. As discussed above, authorisation A90545 was granted subject to a number of conditions. Those conditions and the manner in which the AIVLE complied with them at the time are set out below:

Condition A (clause 1.4 of code of ethics)

- 3.6. The TPC required that the AIVLE must not enforce any requirement that continuing professional development (CPD) points be derived from AIVLE activities and all references to any such requirement or requirements must be removed from all future AIVLE publications.
- 3.7. In order to comply with this condition, the AIVLE imposed a requirement that members undertake twenty CPD points of which at least ten must be from Valuation and/or Land Economy topics. Those topics are defined as relating to:
- (a) some part of the theory and practice of Valuation or Land Economy; and/or
 - (b) other technical topics pertinent to current or potential employment in Valuation or Land Economy; and/or

Topics which qualify as non-Valuation and/or Land Economy, must relate to:

- (a) personal or business skills designed to increase management or business efficiency.

- 3.8. The TPC accepted the above as adequate compliance.

Condition B (clause 2.1 of code of ethics)

- 3.9. The TPC required that the AIVLE must not enforce clause 2.1 of the code and must delete clause 2.1 or amend it so as to limit its operation to the legitimate

concerns of the Institute and so that any limitation on members making 'damaging' statements is no greater than that imposed by the general law.

3.10. In order to comply with the condition, the AIVLE reworded clause 2.1 to read:

Members must not make false or misleading statements against the Institute, members, or members of the public in relation to professional practice of valuation of property or land economy.

3.11. The TPC accepted the above as adequate compliance.

Condition C (clause 2.4 of code of ethics)

3.12. The TPC required that the AIVLE must not enforce clause 2.4 of the code except to the extent it requires disclosure of client instructions and must delete clause 2.4 or amend it so as to remove the limitation of non-inspection and kerbside valuations to exceptional circumstances. The reference to clause 2.4 in this condition is a reference to the whole of that clause including sub-clauses 2.4.1 to 2.4.4.

3.13. In order to comply with the condition, the AIVLE substituted clause 2.4 for the following:

It is not acceptable that an internal inspection be foregone as a matter of convenience or based upon a client's general instructions unless such instructions expressly exclude the requirement for internal inspection. Valuation instructions may be accepted from clients who provide separate written instructions for each valuation or each group of valuations on the basis that an internal inspection is not required due to the client's particular requirements. Should such a specific valuation be carried out by a member on the basis of no internal inspection, then the limitations of such a valuation must be clearly noted in the certificate. Failure to make such a notation will be a breach of this Code of Ethics.

3.14. The TPC accepted the above as adequate compliance.

Condition D (clause 2.6 of code of ethics)

3.15. The TPC required that the AIVLE must not enforce clause 2.6 of the code and must delete clause 2.6 or amend it so as to remove any limitation on advertising by members that is calculated to damage the Institute or other members that is more restrictive than the limitations imposed by the general law.

3.16. In order to comply with the condition, the AIVLE substituted clause 2.6 as follows:

Members must be fair and honest in any criticism of the Institute and fellow members. Members must not make false or misleading statements which would injure the Institute or its members.

3.17. The TPC accepted the above as adequate compliance.

Condition E (clause 4.1 of code of ethics)

3.18. The TPC required that the AIVLE must not enforce clause 4.1 of the code and must delete clause 4.1 or amend it to the effect set out in the AIVLE letter to the Commission dated 1 March 1994.

3.19. In order to comply with the condition, the AIVLE substituted clause 4.1 as follows:

A member who is convicted of an offence involving dishonesty is in breach of this code of ethics.

3.20. The TPC accepted the above as adequate compliance.

Condition F (clause 11.16 of constitution)

3.21. The TPC required that the AIVLE must not give effect to clause 11.16 of the constitution so as to prevent, or rely on that clause in any attempt to prevent, a member pursuing remedies which may be available to that member outside the procedures of the Institute; and must amend clause 11.16 to the effect set out in the AIVLE letter to the Commission dated 1 March 1994.

3.22. In order to comply with the condition, the AIVLE substituted clause 11.16 of the Constitution as follows:

The decision of the National Review Committee is final, and must not be called into question by any means whatsoever, subject only to any available recourse to a Court of Law or other external jurisdiction.

3.23. The TPC accepted the above as adequate compliance.

Condition G (clause 24.13(a) and 24.13(b) of by-laws)

3.24. The TPC required that the National Review Committee of the AIVLE must not impose any fine in excess of the maximum that can be imposed by a Divisional Council or National Professional Board pursuant to by-law 24.13(a) and by-law 24.13(b) must be amended accordingly.

3.25. In order to comply with the condition, the AIVLE amended clauses 24.13(a) and 24.13(b) of the by-laws as follows:

The fine to apply under Clause 11.8 of the Constitution is any sum up to a maximum of \$7,500 dollars (clause 24.13(a)).

The fine to apply under Clause 11.14 of the Constitutions is any sum up to a maximum of \$7,500 dollars (clause 24.13(b)).

3.26. The TPC accepted the above as adequate compliance.

Condition H (clause 11.13 of constitution and 24.12 of by-laws)

- 3.27. The TPC required that the AIVLE must amend Clause 24.12 of the by-laws and clause 11.13 of the constitution to the effect that:

Absent a compelling reason to order to the contrary, costs will be awarded to successful parties in proportion to the extent of their success;

and, prior to this amendment being made, there must be no order as to costs made which is inconsistent to this principle.

- 3.28. In order to comply with the condition, the AIVLE amended clause 24.12 of the by-laws and clause 11.13 of the constitution as follows:

In the absence of a compelling reason to order to the contrary, costs of and incidental to the hearing will follow the event and will be awarded by the Divisional Council or National Professional Board accordingly (clause 24.12).

In the absence of a compelling reason to order to the contrary, costs of and incidental to the hearing will follow the event and will be awarded by the National Review Committee accordingly (clause 11.13).

- 3.29. The TPC accepted the above as adequate compliance.

Condition I (clause 1.1 and 11.12(e) of constitution)

- 3.30. The TPC required that the National Review Committee of the AIVLE must at all times be constituted so that a majority of its members are independent of the AIVLE. For these purposes 'independent of the AIVLE' means that the person is not, and has not in the preceding five years been, a member of the AIVLE. The AIVLE must amend the relevant provisions of the Constitution accordingly.

- 3.31. In order to comply with the condition, the AIVLE amended clause 1.1 and 11.12(e) of constitution as follows:

National Review Committee is a tribunal appointed by the National Council in accordance with the By-Laws, being four in number, one (the Chairman) being a duly qualified member of the legal profession and three other appointed members being representatives of the property industry including a maximum of two members of the Institute not being members of the Divisional Council or the relevant National Professional Board which previously examined the complaint (clause 1.1).

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, one of whom will be a non-member of the Institute, who will form a quorum (clause 11.12(e)).

In the case where an appeal is made to the National Review Committee from a member of the public, at least 3 Members will form a quorum of whom at least 2 Members must be non-members of the Institute (clause 11.12(e)).

- 3.32. Although the TPC did not express a view that the above met the requirement of the condition, it did accept the amendment.

4. Statutory Provisions

- 4.1. Section 87D of the Act defines a minor variation as a single variation that does not involve a material change in the effect of the authorisation.
- 4.2. Section 91A of the Act provides that the ACCC must, if it is satisfied that the proposed variation is a minor variation, invite submissions from interested parties. After consideration of the application and any submissions received, the ACCC may make a determination varying the authorisation or dismissing the application.
- 4.3. Section 91A(4) of the Act provides that the ACCC may grant a minor variation to an authorisation granted under section 88(1), where it is satisfied that the variation would not result, or would be likely not to result, in a reduction in the extent to which the benefit to the public of the authorisation outweighs any detriment to the public caused by the authorisation.
- 4.4. Section 91A(7) of the Act provides that if a person applies for 2 or more variations at the same time and the ACCC is satisfied that the combined effect of those variations, if all were granted, would not involve a material change in the effect of the authorisation, the ACCC may deal with all of those variations together as if they were a single minor variation.

5. Submissions

- 5.1. The ACCC sought submissions from interested parties. A summary of submissions received by the ACCC is outlined below.

Australian Valuation Office (Northern Territory)

- 5.2. The Australian Valuation Office (AVO) submitted that the procedures described in the API proposal are to the benefit of both the public and members of the API.
- 5.3. Further, the AVO submitted that a professional body requires an equitable transparent and effective means of resolving complaints and removing 'bad apples' where necessary.

Department of Land Information (Government of Western Australia)

- 5.4. The Department of Land Information (DLI) submitted that the valuation profession relies to a great extent on the self regulatory aspect provided by

membership to the API, especially in States that do not have legislation which supports licensing of valuers.

- 5.5. The DLI submitted that in Western Australia all land valuers practising as valuers must hold a land valuers licence and are subject to State specific legislation.
- 5.6. The DLI observed a possible shortfall in the API's constitution over its silence in clause 8 in relation to State and Territory jurisdictional legislation that may also exist to control valuers.

Department of Sustainability and Environment (Valuer-General Victoria)

- 5.7. The Department of Sustainability and Environment (DSE) fully supports the proposed minor variations to authorisation A90545.
- 5.8. The DSE submitted that from the perspective of the public good and protection, it considers that the API should be given every encouragement to improve both the entry and quality control standards.
- 5.9. The DSE submitted that the majority of practising valuers in Victoria are included within the Certified Practising Valuer (CPV) members of the API. There are also approximately 50 'sworn valuer' practising members of the Real Estate Institute of Victoria. However, it is believed that most sworn valuers are also members of the API.
- 5.10. The DSE submitted that the Royal Institute of Chartered Surveyors has a valuation chapter to which a number of practising valuers in Victoria belong, but most of these are also CPV members of the API. The majority of valuers practising in Victoria do so under the rules of conduct of the API.
- 5.11. With regard to valuations for Government purposes, the DSE submitted that all valuers engaged by Government and Valuer-General Victoria (VGV) are drawn from a panel of valuers administered by the VGV. These valuers are required to have CPV membership of the API and hold a pre-determined amount of professional indemnity insurance for the provision of valuations to government.
- 5.12. The DSE submitted that the Victorian Government depends upon CPV API members to deliver its valuation services with the added protection of VGV probity monitoring and quality certification. As not all API members have the required skills, experience and operational environment to enable them to always provide soundly based valuation advice, it is essential that the API has an appropriate code of conduct to use for disciplinary purposes.
- 5.13. The DSE submitted that many people believe the API's internal disciplinary processes are ineffective and fundamentally flawed due to their lack of independence.

Land Valuers Licensing Board (Government of Western Australia)

5.14. The Land Valuers Licensing Board advised of no objection to the API's application.

6. ACCC Evaluation

- 6.1. In order to vary an authorisation, the ACCC needs to be satisfied that the minor variation would not result, or would be likely not to result, in a reduction in the extent to which the benefit to the public of the authorisation outweighs any detriment to the public caused by the authorisation.
- 6.2. The extent to which the proposed variations are consistent with the conditions of authorisation is a relevant consideration in determining whether the net public benefits from the authorisation are likely to be affected by the proposed variations.
- 6.3. The following provides an assessment of the proposed variations with regard to ongoing compliance of the conditions and the impact generally, if any, on the net public benefits.

Condition A

- 6.4. The TPC in its original assessment held concern that 50 per cent of CPD activities were to be obtained from AIVLE activities, which had the potential anti-competitive effect of restricting the ability of outside organisations to provide more cost effective courses to members.
- 6.5. As a result, the TPC imposed a condition to the effect that the AIVLE must not enforce any requirement that CPD points be derived from AIVLE activities (see section 3).
- 6.6. The ACCC sought clarification from the API on the extent to which the proposed variations are consistent with the condition. In response, the API referred to its proposed variation at section 24 of its by-laws and in particular by-laws 24.4 and 24.8. The ACCC notes that the API in its application for minor variation had not sought authorisation for clause 24 or its sub-clauses.
- 6.7. Given that the API is not seeking authorisation for the variations to clause 24 or its sub-clauses, the ACCC does not consider it relevant to evaluate these in terms of compliance with condition A.

Condition B

- 6.8. The TPC in its original assessment held concern that clause 2.1 of the code of ethics could, taken literally, prohibit a member bringing a complaint against another member. As a result, the TPC imposed a condition in effect to limit the operation of clause 2.1 to the legitimate concerns of the Institute, so that any

limitation on members making 'damaging' statements was no greater than that imposed by the general law (see section 3).

6.9. The ACCC sought clarification from the API on the extent to which the proposed variations are consistent with the condition. In response, the API advised that clause 2.1 of the code of ethics had been deleted and referred to its proposed variation at clause 1.12 of its rules of conduct.

6.10. The proposed variation at clause 1.12 states:

Members shall be fair and honest in any public criticism of the Institute or fellow members.

6.11. The ACCC considers that clause 1.12 is sufficient in that it allows a member, providing the criticism is fair and honest, to publicly criticise the API or a fellow member. The ACCC considers it important that genuine criticism of fellow members or the API be allowed to take place.

6.12. The ACCC considers that clause 1.12 does not impose limitations on members from making public criticism of the Institute or fellow members beyond that imposed by general law. Therefore, the ACCC is satisfied that the proposed variation continues to satisfy condition B of authorisation.

Condition C

6.13. The TPC in its original assessment held the view that the terms of instruction for carrying out a valuation of property should be a matter between the valuer and the client, subject to a valuation report being suitably qualified. The TPC considered that restrictions limiting the conduct of non-inspection and kerb-side valuations would see a significant increase in overall costs of valuations. As a result the TPC imposed a condition of authorisation in effect to remove the limitation of non-inspection and kerbside valuations to exceptional circumstances (see section 3)

6.14. The ACCC sought clarification from the API on the extent to which the proposed variations are consistent with the condition. In response, the API referred to its proposed variation at clause 1.10 of its rules of conduct.

6.15. The proposed variation at clause 1.10 states:

A valuation shall not be performed by a Certified Practising Valuer without an inspection of the property concerned. The inspection shall be sufficiently comprehensive to enable the Member to complete the valuation in accordance with the Practice Standards of the Institute. Where, however, a client's instructions expressly exclude the requirements for a comprehensive inspection and these instructions are accepted by the member then the limitations to the valuation must be clearly acknowledged by the member and client.

6.16. The proposed variation provides an exception to allow a valuation to be undertaken without a property inspection. The exception exists where a client

provides instruction to expressly exclude a comprehensive inspection, with the member accepting the instruction and both the member and client acknowledging any limitation.

- 6.17. The ACCC considers that clause 1.10 makes sufficient provision for clients to instruct the valuer of their individual requirements and for non-inspection or kerb-side valuations to take place. Therefore, the ACCC is satisfied that the proposed variation continues to satisfy condition C with regard to the conduct of property valuations.

Condition D

- 6.18. The TPC in its original assessment could see no public benefit in authorising more stringent restrictions on advertisements over and above that already available by general law. As a result, the TPC imposed a condition to amend clause 2.6 of the code of ethics in effect to remove any limitation on advertising by members that is more restrictive than the limitations imposed by general law (see section 3).
- 6.19. The ACCC sought clarification from the API on the extent to which the proposed variations are consistent with the condition. In response, the API referred to its proposed variation at clause 1.12 of its rules of conduct.
- 6.20. The proposed variation at clause 1.12 simply requires that members shall be fair and honest in any public criticism of the API or fellow members. Although it makes no reference to advertising, the ACCC considers that the clause does not impose any greater restriction on advertising than the limitations imposed by general law. Therefore, the ACCC is satisfied that the proposed variation continues to satisfy condition D of authorisation.

Condition E

- 6.21. The ACCC sought clarification from the API on the extent to which the proposed variations are consistent with the condition. In response, the API advised that the particular provision to comply with condition E had been deleted. The particular provision deleted was previously found at clause 4.1 of the code of ethics (see section 3).
- 6.22. However, it appears to the ACCC that the proposed variation at clause 1.21 of the rules of conduct may be relevant. The proposed variation at clause 1.21 states:
- A Member who is convicted of an offence involving dishonesty is in breach of these Rules of Conduct.*
- 6.23. The ACCC notes that the above clause is virtually identical to the original clause at 4.1 of the code of ethics, except that the rules of conduct is referred to instead of the code of ethics.

- 6.24. Should it have been the API's intention for clause 1.21 to be the applicable clause, the ACCC considers this to be an editorial amendment only that does not change the effect of the clause and is therefore satisfied that the proposed variation continues to satisfy condition E of authorisation.

Condition F

- 6.25. The API has advised that the particular provision sought to address condition F had been deleted. Therefore, the ACCC considers the proposed variation is not relevant to the assessment of the minor variation application.

Condition G

- 6.26. The TPC in its original assessment was concerned that the National Review Committee when determining an appeal could increase a fine to an amount in excess of the maximum that could be imposed by the body hearing the matter in the first instance. The TPC was concerned that the differential could discourage appeals by a member genuinely aggrieved by a complaints committee decision.
- 6.27. As discussed in section 3, the TPC imposed a condition that the National Review Committee must not impose any fine in excess of the maximum that can be imposed by a Divisional Council or National Professional Board pursuant to by-law 24.13(a) and 24.13(b).
- 6.28. Such a condition had the effect of limiting the fine which could be imposed by the National Review Committee to not exceed the amount which could be imposed by the Divisional Council or the National Professional Board.
- 6.29. The ACCC sought clarification from the API on the extent to which the proposed variations are consistent with the condition. In response, the API advised that the by-laws referred to in the condition have been deleted and replaced by by-law 29.
- 6.30. Although, the API had indicated that the condition has been complied with, little information had been provided to demonstrate ongoing compliance. In seeking further information the API conceded that the condition was not fully met and agreed there was some inconsistency which could be fixed in the future.
- 6.31. The ACCC notes that under the proposed variation at clause 28.18.1 of the by-laws, if a complaint is upheld the Disciplinary Tribunal may impose a fine of any sum up to a maximum of \$5,000. Further, as a consequence of an appeal upheld by the National Review Committee, the penalty may be varied pursuant to clause 29.8.1 of the by-laws.
- 6.32. In this regard it is not clear to the ACCC that condition G continues to be satisfied by the proposed variations. In particular, the ability of a penalty to be varied by the National Review Committee at its discretion with no defined parameters or limits on the sum is of concern to the ACCC. The lack of a defined limit could potentially discourage complainants from lodging an appeal, particularly where a complaint is upheld by the Disciplinary Tribunal.

- 6.33. Further, the ability of the National Review Committee to vary a penalty would seem to be in contradiction with a condition that, in general terms, requires the penalty to be the same or not exceed the amount which could be imposed by the party hearing the matter in the first instance.
- 6.34. While the ACCC does not have issue with the fine that the Disciplinary Tribunal can impose under the proposed clause 28.18.1, the ACCC is not satisfied that the condition continues to be met by the proposed variation set out at clause 29.8.1, in that the National Review Committee can vary the fine at its discretion.
- 6.35. Therefore, the ACCC is of the view that clause 29.8.1 of the by-laws as proposed by the API in its application for minor variation would result, or be likely to result, in a reduction in the net benefit to the public caused by authorisation A90545.

Condition H

- 6.36. The TPC in its original assessment was concerned at the breadth of the discretions given to bodies which are able to award costs. The TPC held the view that parties could well be discouraged from bringing appeals if they felt there was the potential for capricious departures from the usual judicial principal that 'costs follow the event' (awarded to the successful party absent a compelling reason to do otherwise). As a result, the TPC imposed a condition to the effect that costs awarded are to follow the event (see section 3).
- 6.37. The ACCC sought clarification from the API on the extent to which the proposed variations are consistent with the condition. In response, the API referred to its proposed variation at clause 29.11 of its by-laws.
- 6.38. The proposed variation at clause 29.11.1 states:
- National Council may award costs.*
- 6.39. Further, the proposed variation at clause 29.11.2 states:
- 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.*
- 6.40. The ACCC considered it was not clear from the proposed variation that 'costs would follow the event' and requested clarification from the API as the clause could be interpreted as awarding costs either before or after a hearing.
- 6.41. The API conceded that the condition was not fully met in this regard and agreed there was some inconsistency which could be fixed in the future.
- 6.42. In light of the above, the ACCC is of the view that clauses 29.11.1 and 29.11.2 of the API by-laws as proposed by the API in its application for minor variation would result, or be likely to result, in a reduction in the net benefit to the public caused by authorisation A90545.

Condition I

- 6.43. The TPC in its original assessment held concern that the National Review Committee was not guaranteed to be independent of the AIVLE. As a result, the TPC imposed a condition to the effect that the National Review Committee must at all times be constituted so that a majority of its members are independent of the AIVLE (see section 3).
- 6.44. The AIVLE took exception to condition I, arguing that valuation is a complex area of commerce and professional practice. As discussed in section 3, the AIVLE proposed that the National Review Committee be four in number, one (the Chairman) being a duly qualified member of the legal profession and three other appointed members being representatives of the property industry including a maximum of two members of the Institute not being members of the Divisional Council or the relevant National Professional Board which previously examined the complaint.
- 6.45. Further, the AIVLE proposed that 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, one of whom will be a non-member of the Institute, who will form a quorum. In the case where an appeal is made to the National Review Committee from a member of the public, at least 3 members will form a quorum of whom at least 2 members must be non-members of the Institute.
- 6.46. The TPC found the amendments made by the AIVLE to be acceptable, but did not find that the amendments met the requirements of the condition. The ACCC sought clarification from the API on the extent to which the proposed variations are consistent with the condition. In response, the API referred to its proposed variation at clause 29.6 of its by-laws.
- 6.47. The proposed variation at sub-clause 29.6.1 states:

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

- 6.48. Further, the proposed variation at sub-clause 29.6.2 states:

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.

6.49. The ACCC has noted the concern raised by the DSE that many people believe the API's internal disciplinary processes are ineffective and fundamentally flawed due to their lack of independence. In examining the proposed variation, the ACCC considers that the variation is similar in nature to the original requirements accepted by the TPC. Further, there does not appear to be any reduction in the level of independence required of the National Review Committee.

6.50. In this regard, the ACCC considers that the proposed variation does not reduce the net benefit to the public caused by authorisation A90545. Notwithstanding, the ACCC will raise this issue with the API. The ACCC would not be precluded from reviewing the authorisation and where appropriate initiating revocation or revocation and substitution of authorisation A90545.

Code of Ethics

6.51. The ACCC notes that the variations sought for the API's code of ethics have to a large extent simplified the code to broad principles, values and behaviour. The detail once found in the code of ethics has been moved to the rules of conduct. The code of ethics now contains broad principles with regard to:

- Compliance with standards
- Professional duty
- Competence
- Conflict of interest
- Confidentiality
- The profession

6.52. A copy of the proposed code of ethics is at attachment A.

6.53. The ACCC is satisfied the proposed variations to the code of ethics would be unlikely to result in a reduction in the net benefit to the public caused by authorisation A90545.

Rules of Conduct

6.54. Although the rules of conduct was not originally authorised, much of its content was previously found in the code of ethics. In this regard, the request for the rules of conduct to be authorised as part of the minor variation does not appear to extend the breadth of authorisation, but instead represents a shift of content from one document to another.

6.55. Notably, the rules of conduct are an articulation of the code of ethics to provide interpretation and expansion. There are seven rules which are mandatory for all members in the following categories:

- a) Professional and Personal Conduct
- b) Conflict of Interest
- c) Client Relationships
- d) Advertising
- e) Reference to the Institute
- f) Inducements for the Introduction of Clients
- g) Departure Provisions

6.56. A copy of the proposed rules of conduct is at attachment B.

6.57. The ACCC is satisfied the proposed variations to the code of ethics, now forming the rules of conduct, would be unlikely to result in a reduction in the net benefit to the public caused by authorisation A90545.

Constitution

Clause 8 of the Constitution

6.58. The API proposes to replace clause 10 of its constitution with new clause 8. Clause 10.2 of the constitution was originally authorised as follows:

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; and
 - (vii) statutory responsibilities.

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

- (c) 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.

6.59. The API proposal with regard to clause 8 and its sub-clauses is as follows:

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.

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:

- (i) Code of Ethics
- (ii) Rules of Conduct
- (iii) Practice Standards
- (iv) Compliance with CPD requirements
- (v) Constitution and By-Laws

6.60. A copy of the proposed constitution is at attachment C.

6.61. The ACCC considers that the proposed variation to clause 8 is consistent with the ongoing requirement of API members to abide by a code of ethics and rules with regard to conduct, professional practice and education.

6.62. Similarly, the requirement for members to observe the constitution and by-laws is not a new requirement, it was previously found in the code of ethics as originally authorised.

6.63. The DLI did observe a possible shortfall in the API's constitution over its silence in clause 8 of the constitution in relation to State and Territory jurisdictional legislation that may also exist to control valuers.

6.64. The ACCC understands that the concern of the DLI was that members must not only abide by the requirements of the API, but also local legislation, regulation and jurisdictional rules guiding behaviour and control of valuers. The DLI had suggested incorporating such a provision to this effect in clause 8.2.2 of the constitution.

- 6.65. The API agreed with the suggestion and considered that it is implied in the professional conduct rules in any case. The API also pointed out that not all jurisdictions have the same provisions as Western Australia and any changes would need to accommodate that.
- 6.66. Overall, the ACCC considers that the replacement of clause 10.2 with clause 8 and its sub-clauses would be unlikely to result in a reduction in the net benefit to the public caused by authorisation A90545.

Clause 9 of the Constitution

- 6.67. The API proposes to replace clause 11 of its constitution with new clause 9. Clause 9 in general covers how a complaint can be made, who may make a complaint, the procedures for making a complaint and appeals. A copy of the proposed constitution is at attachment C.
- 6.68. The ACCC observes that the proposed amendments have shifted much of the procedural requirements for complaints and appeals to the by-laws. In this regard, the ACCC considers that the actual requirements of which API members must abide are largely unchanged.
- 6.69. In light of the above, the ACCC is satisfied that the proposed variation to replace clause 11 with clause 9 would be unlikely to result in a reduction in the net benefit to the public caused by authorisation A90545.

By-Laws

- 6.70. Clause 24 of the by-laws as originally authorised dealt with complaints. Broadly, the clause covered the following categories:
- Establishment of Complaints Committee
 - Form of Complaint
 - Composition of Complaints Committee
 - Chairman of the Complaints Committee
 - Notification
 - Discussion
 - Resolution by Discussion
 - Establishment of Panel to hear Complaint
 - Natural Justice
 - Hearing Procedure

- Panel's Decision
- Costs
- Fines

6.71. The API seeks to replace clause 24 with clauses 27 - 30 of the API by-laws. A copy of the proposed by-laws is at attachment D.

6.72. The ACCC considers that the amendments are consistent with continuing to provide procedures for dealing with complaints, mediation and appeal mechanisms. Such provisions were included to a similar extent in clause 24 as originally authorised. However, the ACCC does have concern with admonishment provisions as detailed below.

Admonishment

6.73. The API by-laws contain certain provisions for penalties to be imposed on an API member where a complaint is upheld by the Disciplinary Tribunal. In particular, the ACCC observes that one penalty the Disciplinary Tribunal has at its discretion is admonishment.

6.74. Clause 28.18.1(b) of the API's proposed by-laws states:

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.

6.75. The ACCC raised a number of issues with the API over this provision. First, it is unclear as to the implications of publishing a member's home address under the relevant provisions of the *Privacy Act 1988*.

6.76. Second, even where the privacy requirements were satisfied, the scope of admonishment as detailed in the clause, i.e. the publishing of a member's home address, seemed to go much further than is necessary as a form of disciplinary action, or as a method of distinguishing members.

6.77. The API in its response noted the ACCC concerns and advised that it will implement an appropriate change when it next changes its constitution and related documents.

6.78. The API advised that the change would be to section 28.18.1(b) of its by-laws and would read something like:

Admonish the Member. Admonishment will become a matter of public knowledge and record and publication of the Admonishment shall include the

full name, company, and city, as well as a brief summary of the reasons for Admonishment.

- 6.79. With regard to the timetable, the API advised that the change could be dealt with as early as October 2005 as the API only requires two readings to be passed by the National Council. The API also confirmed that they would like the change to be considered by the ACCC as part of the API's application for minor variation, the subject of this determination.
- 6.80. In light of the above, the ACCC is satisfied that API's proposed variation set out at 6.78 above would be unlikely to result in a reduction in the net benefit to the public caused by authorisation A90545.

7. Determination

The application

- 7.1. On 22 April 2005, the API lodged an application for minor variation of authorisation A90545 under section 91A of the *Trade Practices Act 1974*.
- 7.2. On 17 May 2005, the API confirmed that the variations for which it was seeking authorisation were changes to:
- the API code of ethics;
 - the API rules of conduct;
 - clause 8 of the API's constitution dealing with fundamental rules (previously clause 10 of its constitution);
 - clause 9 of the API's constitution dealing with complaints (previously clause 11 of its constitution); and
 - clauses 27-30 of the API's by-laws dealing with complaints (previously clause 24 of its by-laws).
- 7.3. On 24 August 2005, the API confirmed that it had amended its application for minor variation at clause 28.18.1(b) of the API's by-laws. This proposed variation is set out at paragraph 6.78 of this determination.

The statutory test

- 7.4. Pursuant to section 91A(2) of the Act, the Commission is satisfied that the variations sought by the API are minor variations.
- 7.5. Pursuant to section 91A(4) of the Act, for the reasons outlined in section 6 of this determination, the ACCC concludes that the minor variations would not result, or would be likely not to result, in a reduction in the extent to which the benefit to the public of authorisation A90545 outweighs any detriment to the

public caused by authorisation A90545, except for clauses 29.8.1, 29.11.1 and 29.11.2 of the API by-laws.

- 7.6. Pursuant to section 91A(4) of the Act, the ACCC concludes that the minor variations set out at clauses 29.8.1, 29.11.1 and 29.11.2 of the API by-laws, would result, or would be likely to result, in a reduction in the extent to which the benefit to the public of authorisation A90545 outweighs any detriment to the public caused by authorisation A90545.

Conduct authorised

- 7.7. Pursuant to section 91A(3) of the Act, the ACCC makes a determination varying authorisation A90545 for the following variations:

- a) the entire API code of ethics;
- b) the entire API rules of conduct;
- c) clause 8 of the API's constitution;
- d) clause 9 of the API's constitution; and
- e) clauses 27 - 30 of the API's by-laws, except for clauses 29.8.1, 29.11.1 and 29.11.2 of the API's by-laws.

- 7.8. The ACCC varies authorisation A90545 for clause 28.18.1(b) of the API's by-laws as set out at paragraph 6.78 of this determination.

- 7.9. The ACCC by this determination does not vary authorisation A90545 for the variations set out at clauses 29.8.1, 29.11.1 and 29.11.2 of the API's by-laws.

- 7.10. This determination is made on 31 August 2005. If no application for review of this determination is made to the Australian Competition Tribunal (the Tribunal) in accordance with section 101 of the Act, this determination will come into force on 22 September 2005.

- 7.11. If an application for review is made to the Tribunal, this determination will come into force:

- a) Where the application is not withdrawn - on the day on which the Tribunal makes a determination on the review and grants authorisation; or
- b) Where the application for review is withdrawn - on the day on which the application is withdrawn.



Australian Property Institute

Code of Ethics

June 2001

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(Formatted December 2004)

Code of Ethics

This Code is a public statement of the principles, values and behaviour expected of Members of the Institute.

1. Compliance with standards

Members shall at all times observe the requirements of the Code of Ethics, the Rules of Conduct and the Practice Standards of the Institute.

2. Professional duty

It is the duty of Members to render service to their clients and employers with fidelity, to practise their vocation with integrity, honour and professionalism, to act impartially and objectively when providing independent advice, and to respect the public interest.

3. Competence

A Member shall not accept instructions in a matter where, based on a reasonable objective standard, the Member does not have the competence, skill and/or experience to complete the assignment to the acceptable professional standard in accordance with this Code of Ethics, the Rules of Conduct and the Practice Standards of the Institute, unless the assignment is completed in conjunction with a qualified and suitably experienced practitioner.

4. Conflict of interest

Members shall consider and identify any actual or potential conflict of interest when carrying out their professional duties, and shall not act in a matter where such conflict or potential conflict has been identified by the Member or any other interested party unless all interested parties have been made aware of the situation and have consented to the Member continuing in the task.

5. Confidentiality

Members must observe the requirements of confidentiality in their dealings with clients and the public.

6. The profession

Members shall at all times conduct business in a manner befitting their profession and the Rules of Conduct of the Institute and in accordance with reasonable public expectations of professional persons.

Addendum

The inclusion of reference to 'Guidance Notes' was an oversight and that their deletion is deemed to apply retrospectively to the date on which they were first included.



Australian Property Institute

Rules of Conduct

10 March 2003

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Rules of Conduct

The Rules of Conduct are an interpretation and expansion of the Code of Ethics of the Institute. These Rules are mandatory for all Members.

Rule 1: Professional and Personal Conduct

- 1.1 Members shall conduct their professional duties and activities in a manner that reflects credit upon themselves and their profession. High standards of competence, honesty, loyalty, integrity and fairness shall be observed at all times.
- 1.2 Members are bound by and agree to abide by all Fundamental Rules which include the Code of Ethics, Rules of Conduct, Constitution, By-Laws, Practice Standards and compliance with CPD as adopted by the Institute.
- 1.3 Members shall not accept an assignment that is contingent upon or influenced by any condition or requirement for a predetermined result where the exercise of objective judgment is required. Members shall maintain the strictest independence and impartiality in undertaking their professional duties. To this end, no Member shall:
 - (a) adopt the role of advocate in a case where their duty is to exercise independence and impartiality;
 - (b) allow the performance of their professional duties to be improperly influenced by the needs or preferences of a client or other party;
 - (c) rely upon critical information supplied by a client without appropriate qualification or confirmation from other sources;
 - (d) act in any other way inconsistent with the duties of independence and impartiality.
- 1.4 Members shall not provide any advice or make any statement without reasonable foundation unless it is appropriately qualified or limited.
- 1.5 Members shall not claim or present professional qualifications which may be subject to erroneous interpretations or which they do not possess.
- 1.6 Members shall not accept instructions beyond their competence; however, assignments may be undertaken in conjunction with a person having the required competence after disclosure to the client.
- 1.7 Fees may be negotiated with a client on any agreed basis that does not:
 - (a) infringe any statute, rule of conduct or regulation;

- (b) depend on a client-nominated particular outcome of any valuation or other independent objective advice.
- 1.8 No Member shall pay by commission, allowance or other benefit any person who may introduce clients to them without appropriate disclosure.
- 1.9 Members shall not accept payment or favours from another party which may affect their relationship with a client.
- 1.10 A valuation shall not be performed by a Certified Practising Valuer without an inspection of the property concerned. The inspection shall be sufficiently comprehensive to enable the Member to complete the valuation in accordance with the Practice Standards of the Institute. Where, however, a client's instructions expressly exclude the requirements for a comprehensive inspection and these instructions are accepted by the member then the limitations to the valuation must be clearly acknowledged by the member and client.
- 1.11 Members shall not reproduce any work or reference prepared and presented by any other Member, person, body or authority which creates the impression that it is their own.
- 1.12 Members shall be fair and honest in any public criticism of the Institute or fellow Members.
- 1.13 Members shall include in reports, references to any relevant assumptions, conditions, requirements and limitations arising from their instructions or inquiries, or imposed from any other source.
- 1.14 Members shall retain for as long as legally required, adequate file notes which substantiate their opinions by way of inquiry, objective comparison, deduction and calculation.
- 1.15 Where information critical to the assignment being undertaken is relied upon by a Member, the source of that information should either be disclosed in the relevant report or contained in the working papers supporting the relevant report and be appropriately attributed in either case, unless the information is protected by confidentiality, or the member is prevented by privacy or other like laws from disclosing or referring to the source.
- 1.16 Members shall accept full responsibility for the content of their reports. Where the report relies on professional opinion from outside experts, the degree of reliance must be indicated.

- 1.17 Co-signatories to reports shall indicate the extent of their involvement or the capacity in which they are signing.
- 1.18 Members will fully cooperate with any request for information or directive from the Institute where a complaint has been lodged or where there is deemed to be a prima facie breach of the Rules of Conduct.
- 1.19 Members shall not maliciously or carelessly do anything to injure, directly or indirectly, the reputation, prospects or business of other Members.
- 1.20 Instructions accepted by Members should preferably be in writing and/or be confirmed in writing by the Member in sufficient detail to avoid any misinterpretation. Any variations or extensions of the original instructions should similarly be confirmed in writing.
- 1.21 A Member who is convicted of an offence involving dishonesty is in breach of these Rules of Conduct.

Rule 2: Conflict of Interest

Members shall not accept or carry out any instruction where there may be, or may reasonably be construed to be a conflict of interest. Members shall withdraw from any instruction if a conflict of interest arises or becomes known after an instruction has been accepted. An exception to this rule is where the conflict of interest is disclosed to and accepted by the party or parties.

- 2.1 Where a conflict of interest arises or could arise a Member shall promptly disclose the relevant facts to the client and where appropriate:
 - (a) advise the client to obtain independent professional advice;
 - (b) inform the client that neither the Member nor the firm can act or continue to act for the client unless the appointment or instruction is confirmed in writing acknowledging the actual or potential conflict of interest; and
 - (c) disclose the matter in any relevant document or report.
- 2.2 Where a conflict arises or could arise between the interests of different clients of a Member or a firm or company of which a Member is a partner, director or employee, a Member shall promptly disclose the relevant facts to the instructing client and where appropriate:
 - (a) advise the client to obtain independent professional advice;
 - (b) inform the client that neither the Member nor the firm can act or continue to act for the client unless the appointment or instruction is confirmed in writing acknowledging the actual or potential conflict of interest, and disclose the matter in any relevant document or report.

Rule 3: Client Relationships

- 3.1 Members shall not disclose to any other person or party any confidential information provided directly or indirectly by a client or to a client without the permission of the client except where there is a legal requirement for disclosure or the information is of public or common knowledge.
- 3.2 Members shall conduct themselves in a manner and demeanour which is neither detrimental to their profession nor likely to lessen the confidence of clients or the public in the Institute or the profession.
- 3.3 Members shall act promptly and efficiently in the servicing of the client's instructions.
- 3.4 Members shall, in the case of unavoidable delay, communicate to the client the progress being made in respect of the instructions issued to the Member.
- 3.5 Consistent with the duty of a Member to preserve the confidentiality of a client's affairs, a Member shall not accept a retainer to act for another person in any action or proceedings against, or in conflict with, the interests of the client.

Rule 4: Advertising

- 4.1 Any advertisement by a Member must not reflect adversely on the professional integrity of the Institute or its Members.
- 4.2 Members shall not include exaggerated or false claims in any advertisement.

Rule 5: Reference to the Institute

- 5.1 No Member or Members shall:
 - (a) purport to represent the views of the Institute unless expressly authorised to do so
 - (b) publicise the Institute or its Members generally in terminology which has not either already appeared in an advertisement published by the Institute or received the approval of the Institute.

Rule 6: Inducements for the Introduction of Clients

- 6.1 No Member shall invite instructions for work except in accordance with these Rules.
- 6.2 No Member shall directly or indirectly exert undue pressure or influence on any persons, whether by the offer or provision of any payment, gift or favour or otherwise, for the purpose of securing instructions for work, or accept instructions from any person where there is reason to believe that undue pressure or influence may have been exerted by a third party in expectation of receiving a reward for the introduction.

Rule 7: Departure Provisions

- 7.1 Where a Member considers circumstances exist that warrant departure from or non-compliance with any rule herein, the Member's report shall include a statement that outlines the reasons for the departure or non-compliance and any impact on the content of the report.

API

CONSTITUTION.

Clause 10: Clause 8: Fundamental Rules

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.~~

~~(c) 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.~~

Clause 11 Clause 9: Complaints

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

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.

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.

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

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.