



Australian
Competition &
Consumer
Commission

Determination

Application for Minor Variation of

Authorisation A90545

Lodged by

The Australian Property Institute

Date: 14 November 2007

Authorisation no. A90545

Public Register no. C2007/1760

Commissioners: Samuel
Sylvan
King
Martin
Smith
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The ACCC varies authorisation A90545 to allow:

- changes to API's disciplinary rules to provide for an appeal mechanism for decisions made by the Complaints Committee;
- changes to API's Constitution, By-laws and Rules of Conduct concerning classes of membership, in particular providing for a new Provisional membership class with restricted rights as to the signing of valuation; and
- changes to the Privileges sections of the constitution.

1 Introduction

- 1.1 The Australian Competition and Consumer Commission (the ACCC) is the independent Australia 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 in certain circumstances for conduct that might otherwise raise concerns under the competition provisions of the Act. One way in which parties may obtain immunity is to apply to the ACCC for what is known as an 'authorisation'. The ACCC may 'authorise' businesses to engage in such conduct where it is satisfied that the public benefit from the conduct outweighs any public detriment.
- 1.3 A party to whom authorisation has been granted may also apply to the ACCC for a minor variation.

2 The Application

- 2.1 On 18 September 2007 the Australian Property Institute (the API) lodged an application for minor variation of authorisation A90545 under section 91A of the Act.
- 2.2 Authorisation A90545, as varied by the determinations of 31 August 2005 and 22 February 2007, covers the API's Code of Ethics, Rules of Conduct and specific clauses of the API's Constitution and By-laws along with relevant definitions.

The Applicant

- 2.3 The API, formerly known as the Australian Institute of Land Valuers and Land Economists (the AIVLE), was established in 1926.
- 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

¹ <http://www.propertyinstitute.com.au>

- 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 of the institute are bound by
- Code of Ethics;
 - Rules of Conduct;
 - Professional Practice Standards.
- 2.7 The API has published the *Professional Practice 5th Edition* which represents the API and the Property Institute of New Zealand's professional practice guidelines. The publication defines, clarifies and provides a basic understanding of property related concepts and principles. The publication includes codes, rules and standards to make known the API's position for professional practice.
- 2.8 The API is governed by a National Council, comprised of the National President and one councillor from each State or Territory Division. API's National Council oversees the management and operations of the Institute and is effectively the Institute's Board of Directors.³

Authorisation A90545

- 2.9 Authorisation A90545 was granted to AIVLE by the Trade Practices Commission (the TPC) on 29 April 1994, subject to certain conditions. The TPC is the predecessor to the ACCC.
- 2.10 The scope of the authorisation was limited in its coverage to the API's revised Code of Ethics and specific clauses of the API's Constitution and By-laws, along with relevant definitions, being the provisions which are concerned with the implementation of the code.
- 2.11 The TPC in its assessment of the AIVLE's application identified a number of potential anti-competitive detriments. In light of these concerns, the TPC granted authorisation subject to a number of conditions.

Minor Variation

- 2.12 The minor variations sought by API relate to the following:
- changes to its disciplinary rules to provide for an appeal mechanism for decisions made by the Complaints Committee;
 - changes to its Constitution, By-laws and Rules of Conduct concerning classes of membership, in particular providing for a new Provisional membership class with restricted rights as to the signing of valuation; and
 - changes to the privileges section of the constitution.

² <http://www.propertyinstitute.com.au>

³ <http://www.propertyinstitute.com.au>

3 Statutory provisions

- 3.1 Section 87ZD of the Act defines a minor variation as a single variation that does not involve a material change in the effect of the authorisation.
- 3.2 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.
- 3.3 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 Submissions

Supporting submission from API

- 4.1 In general API submit that the proposed changes are extensive but doubt that any of the changes raise competition issues.
- 4.2 API submit that the changes to the Disciplinary Rules to provide for an appeals mechanism from the Complaints Committee follows from ACCC concerns in its determination on 22 February 2007.
- 4.3 API note the changes to the Constitution, By-laws and Rules of Conduct concerning classes of membership and rules as to signing valuations. In particular providing for a new Provisional membership class with restricted rights as to the signing of valuations. API submit that the reason for these changes is to improve protection to the public and not have student members conducting unsupervised valuations. API note that the rules currently permit this to occur.
- 4.4 API submit that the changes to the Privilege sections in the Constitution are to overcome some confusion in the previous drafting.

Submissions from interested parties

- 4.5 The ACCC invited comments from interested parties in relation to API's application for minor variation. The ACCC received submissions from the following interested parties:
 - Officer of the Valuer-General NSW
 - Landgate
 - Real Estate Institute of Australia
- 4.6 A summary of submissions received by the ACCC is outlined below. Full copies of the submissions received are available on the ACCC website.

Office of the Valuer-General NSW

- 4.7 The Office of the Valuer-General NSW (OVG NSW) endorses the proposed variations. The OVG NSW considers that the proposed variations provide for a fair and equitable regime in respect of members.
- 4.8 The OVG NSW further submit that the proposed variations create greater transparency.

Landgate

- 4.9 Landgate submits that changes to permit a new Provisional Membership Class, including restricted rights as to signing of valuations will protect the public inasmuch as where required it will control unqualified valuers like students from preparing and carrying out unsupervised valuations.
- 4.10 Landgate further submits that the proposed variations should ensure appropriate governance and training to assist the profession without reducing resources, especially at this time when there exists a general shortage of qualified members of the valuation profession due to overall demand from the property development and finance areas in Australia.
- 4.11 Landgate considers that this will allow the flow of valuation work to continue to benefit the public while ensuring such work does not continue unsupervised and is carried out in a professional manner.
- 4.12 Landgate submits that it has no concerns with the other proposed variations.

Real Estate Institute of Australia

- 4.13 The Real Estate Institute of Australia submit that the proposed variations appear to improve consumer outcomes while having a negligible effect on competition for services provided by suitably qualified professionals.

The ACCC's evaluation

Disciplinary Rules

- 5.1 In the ACCC's determination of 22 February 2007, the ACCC raised concerns in relation to a proposed variation of the By-laws which did not allow a member to appeal against any decision of the Complaints Committee. The ACCC considered that the proposed variation would result, or be likely to result in a reduction in the net benefit to the public caused by authorisation A90545 and denied the request to vary this clause.
- 5.2 The proposed variations formed part of a review of API's complaints regime which among other things allowed for the Complaints Committee to decide on minor breaches and gave it a range of sanctions available including publicly admonishing the member and imposing a penalty of up to \$5000.
- 5.3 Under the previous regime any decision against a member could be appealed as there was no distinction between a breach being minor or major.

- 5.4 The ACCC considered at the time that, although the lack of an appeals process may improve timeliness and cost when dealing with a minor breach, this would be at the expense of procedural fairness and natural justice.
- 5.5 The ACCC notes that the proposed variation now allows for a member the subject of a complaint to seek a review, by the Disciplinary Tribunal, of a decision of the Complaints Committee.
- 5.6 The ACCC considers that the proposed variation alleviates the ACCC's previous concerns by providing for procedural fairness and natural justice.
- 5.7 The ACCC is satisfied that the proposed variation to the Disciplinary Rules would be unlikely to result in a reduction in the net benefit to the public caused by authorisation A90545.

Classes of Membership

- 5.8 API proposes to provide for a new Provisional Membership Class with restricted rights as to the signing of valuations. API submit that the reason for this change is to improve protection to the public and not have student members doing unsupervised valuations.
- 5.9 The ACCC accepts that there is likely to be an increased benefit to the public by preventing student members from conducting unsupervised valuations, which is currently permitted by API's rules.
- 5.10 The ACCC is therefore satisfied that the proposed variation to the Disciplinary Rules would be unlikely to result in a reduction in the net benefit to the public caused by authorisation A90545.

Other Issues

- 5.11 The ACCC note that a number of drafting changes and restructuring of the sections have taken place, including changes to the Privilege sections in the Constitution to overcome confusion in the previous drafting.
- 5.12 The ACCC is satisfied that these proposed variations would be unlikely to result in a reduction in the net benefit to the public caused by authorisation A90545.

6 Determination

- 6.1 On 18 September 2007 the Australian Property Institute lodged an application under s91A of the Act for a minor variation to authorisation A90545. Authorisation A90545 was granted by the ACCC on 29 April 1994.
- 6.2 The ACCC is satisfied that the proposed variations are minor.
- 6.3 The ACCC is satisfied that the public benefit test in section 91A(4) of the Act is met – that is the variations which are the subject of this application are unlikely to result in a reduction in the net benefit to the public that arose from the original authorisation.

6.4 Pursuant to section 91A(3) of the Act, the ACCC makes this determination varying authorisation A90855 to allow:

- changes to its disciplinary rules to provide for an appeal mechanism for decisions made by the Complaints Committee;
- changes to its constitution, by-laws and rules of conduct concerning classes of membership, in particular providing for a new Provisional membership class with restricted rights as to the signing of valuation; and
- changes to the privileges section of the constitution.

6.5 This determination is made on 14 November 2007. If no application for a review of the determination is made to the Australian Competition Tribunal in accordance with section 101 of the Act, it will come into effect on 6 December 2007.