

Trade Practices Commission

Determination

Application for authorisation

**under sub-section 88(1) of the Trade Practices
Act 1974 by**

**The Australian Institute of Valuers
and Land Economists**

Application No: A90545

**Commissioners: Fels
Broome
Asher
Round
Johns**

File No: CA92/23

Date: 29 April 1994

Summary

1. The application

This application for authorisation was lodged on behalf of the Australian Institute of Valuers and Land Economists (AIVLE) under s. 88(1) of the *Trade Practices Act 1974* and seeks authorisation of a revised code of ethics and of clauses 10.2 and 11 of the Institute's constitution and clause 24 of its by-laws, along with relevant definitions, being the provisions which are concerned with the implementation of the code.

2. The applicant

The AIVLE is a professional association representing valuers incorporated under the *Associations Incorporation Act 1985* of South Australia. The Institute has approximately 6500 members out of a total of approximately 7000 registered valuers and land economists in Australia.

3. Background

At present there is statutory regulation of valuers in each Australian State but not in the Territories. Registration or licensing under the various enactments is a prerequisite to practice in the jurisdiction concerned. Some jurisdictions have statutory codes of behaviour for valuers.

It is expected that in the context of the implementation of mutual recognition principles for goods and occupations between the various Australian jurisdictions, the profession of valuer will be deregulated (deregistered).

4. The code and related provisions

The code enumerates the standards of professional behaviour required of Institute members. The provisions of the constitution and by-laws make the code binding on members and establish the Institute's complaints procedure which is the mechanisms by which the code is enforced.

5. The applicant's submissions

The Institute has submitted that the new code of ethics will satisfy the Commission's statutory test and that the resultant benefits will outweigh any anti-competitive effect. In particular, the Institute has stated that the adoption of the new code of ethics will:

- improve the quality of services offered to consumers by valuers and land economists; and
- lead to better business information being supplied to consumers and business.

6. Submissions of interested parties

A number of submissions were received from interested parties, including FAI Insurance Limited, the Real Estate Institute of Australia and Mr B Raison, a member of the applicant Institute.

7. The statutory criteria

These can be summarised as follows:

- the applicant must be a corporation as defined in s. 4(1) of the Act;
- the persons to be covered by the authorisation are to be named or referred to in the application for authorisation; and
- the Commission shall not grant an authorisation unless it is satisfied in all circumstances that:

the provisions of the subject arrangement would result, or are likely to result, in a benefit to the public; and

that that benefit would outweigh the detriment to the public constituted by any lessening of competition that would result, or would be likely to result, from the subject arrangement.

8. Commission evaluation of the statutory criteria and draft determination

The Commission is satisfied that the AIVLE is a corporation for the purposes of the Act.

The application for authorisation has been made on behalf of the Institute and all present and future members of AIVLE.

The Commission concluded that the conduct it was being asked to authorise would, or might, have the effect of substantially lessening competition

The Commission was satisfied that implementation of the code of ethics would result, or would be likely to result, in a benefit to the public. However, that benefit will be outweighed by the detriment to the public constituted by the potential lessening of competition unless certain anti-competitive provisions are not given effect to.

The Commission issued a draft determination on 14 March 1994, by which, subject to any request for a pre-decision conference pursuant to s. 90A of the Act, the Commission proposed to grant authorisation in respect of application A90545 subject to conditions that deal with the anti-competitive aspects referred to above. These related to:

- an aspect of the Institute's continuing professional development program;
- code provisions dealing with: defamatory statements; kerb-side valuations; criticisms of other members via advertising; and criminal convictions; and
- provisions of the constitution and by-laws dealing with: the finality of decisions of the Institute's appeal body (the National Review Committee), fines that can be imposed on members; costs; and the constitution of the National Review Committee.

9. Section 90A conference

AIVLE requested a conference, to which it submitted that the Commission's requirements relating to kerb-side valuations and the constitution of the National Review Committee were unreasonable. In the course of the conference AIVLE agreed to revise the code in a manner which met the Commission's conditions as they related to kerb-side valuations. AIVLE proposed that where the National Review Committee (maximum four, minimum three members) met for the purpose of hearing the appeal of a member of the public, it would require that at least two members of the committee must be non-members of the Institute; and where the committee met for the purpose of hearing the appeal of a member of the Institute, at least one member of the committee must be a non-member of the Institute.

10. Determination

The Commission found AIVLE's proposed amendments with respect to conditions A, B, C, D, E, F, G and H to meet the requirements of those conditions. It found the amendments proposed with respect to condition I to be acceptable.

The Commission therefore grants authorisation to application A 90545, conditional upon AIVLE fulfilling all the conditions it has agreed to meet in the terms indicated in its submission of 21 April 1994, at the first opportunity and in any event within six months of the date of this determination.

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Attachments

- A** **The code and regulations in respect of which application for authorisation was made**
- B** **Applicant's submission of 21 April 1994**
- C** **List of interested parties**

1. The application

1.1. An application for authorisation was lodged with the Trade Practices Commission (Commission) on behalf of the Australian Institute of Valuers and Land Economists (AIVLE or Institute). The application was made under s. 88(1) of the *Trade Practices Act 1974* (the Act) and sought authorisation of 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 s. 45 of the Act; or**
- 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 s. 45 of the Act.**

1.2. Copies of the code of ethics (described as Draft for Final Approval, 6 August 1993 and referred to in this draft determination as the code) and the accompanying regulations of the code of ethics (described as Draft for Final Approval and referred to in this draft determination as the regulations) have been placed on the Commission's public register and form attachment A to this document. Copies of the AIVLE constitution (described as Amended Constitution (Incorporating Plant and Machinery Valuers Amendments) and referred to in this draft determination as the constitution) and its by-laws (by-laws) were provided in support of the application and were placed on the public register. The regulations summarise various provisions of the constitution and by-laws which are relevant to the implementation of the code.

1.3. The AIVLE subsequently confirmed to the Commission that authorisation is sought in respect of the code and clauses 10.2 and 11 of the constitution and clause 24 of the by-laws, along with relevant definitions, being the provisions which are concerned with the implementation of the code.

2. The applicant:

2.1. The AIVLE describes itself in its application as a professional association representing valuers. Its constitution states that it is incorporated under the *Associations Incorporation Act 1985* of South Australia. The Institute has informed the Commission that it has approximately 6500 members out of a total of approximately 7000 registered valuers and land economists in Australia.

2.2. According to its Constitution, the purposes of AIVLE include the following:

- to raise the status and advance the interests of the professions of valuation and land economy;
- to represent the views and interests of the professions of valuation and land economy; and
- to promote a high standard of integrity and efficiency in the professions of valuation and land economy.

2.3. The AIVLE Constitution provides for a structure consisting of a number of national bodies and State and Territory divisional bodies.

2.4 The principal governing body is the National Council. There are also two National Professional Boards, the National Valuation Board and the National Land Economy Board, which execute and implement policies determined by the National Council in relation to certain matters and manage the affairs of valuers and land economists respectively, within the Institute.

2.5 There is a Divisional Council for each division. The Institute has informed the Commission that there is a division of the Institute in each State and in the Australian Capital Territory. Divisions are established for the purpose of managing the business of the Institute in the State or territory concerned.

3. Background

Regulatory framework

3.1. At present there is statutory regulation of valuers in each Australian State but not in the Territories. Registration or licensing under the various enactments is a prerequisite to practice in the jurisdiction concerned.

3.2. The relevant statutory instruments are:

New South Wales — *Valuers Registration Act 1975*;

Victoria — *Valuers' Qualification Board Rules 1993*;

South Australia — *Land Agents, Broker and Valuers Act 1973*;

Queensland — *Valuers Registration Act 1965-1979*;

Tasmania — *Valuers Registration Act 1974*;

Western Australia — *Land Valuers Licensing Act 1978-84*.

3.3. Generally, applicants for registration must possess a combination of specified educational qualifications and specified levels of experience. Some jurisdictions have additional requirements. In Victoria, for instance, an applicant must successfully complete an examination and in Queensland success in an examination is an alternative to membership of an approved institute. In New South Wales there is a requirement for good character and in Tasmania an interstate applicant must (absent mutual recognition legislation) demonstrate knowledge of the Tasmanian market.

3.4 Membership of AIVLE is relevant to licensing/registration in certain states. Section 19 of the Western Australian Act provides a number of alternative bases upon which the Land Valuers Licensing Board may grant a licence to an applicant, of which membership of AIVLE is one. In Queensland, Western Australia and South Australia membership of AIVLE is not compulsory but can be relied on as an alternative to educational or examination requirements.

3.5 In certain jurisdictions, such as Western Australia and Queensland, the relevant enactment makes provision for the Licensing Board to establish a code of conduct for valuers and for its enforcement. There is some overlap between the provisions of the statutory codes and the AIVLE code. All jurisdictions provide for valuers to lose registration in certain circumstances such as insanity, conviction on serious criminal charges and proven negligence.

Reform of regulatory requirements

3.6. The information in this section has been obtained by the Commission from the Vocational Education, Employment and Training Committee ("VEETAC") Working Party on Mutual Recognition and, in particular, from its *Information Paper on The Review of the Partially Registered Occupations*.

3.7. At a Special Premiers' Conference, held in October 1990, the Prime Minister, Premiers and Chief Ministers (Heads of Government) reached agreement on the need for fundamental regulatory reform in order to enhance the flexibility and competitiveness of the Australian economy. In particular, they agreed on a policy of 'mutual recognition' of standards and regulations by all States and Territories, except where the adoption of uniform national standards was considered to be essential to the efficient working of the Australian economy.

3.8. At a subsequent meeting held on 11 May 1992, Heads of Government agreed to establish a scheme for the implementation of mutual recognition principles for goods and occupations.

3.9. The principle of mutual recognition is that any registered practitioner in an occupation in one jurisdiction will be entitled, on notification to the local registration authority, to be registered to practise in another jurisdiction, provided the occupation is equivalent in both jurisdictions and all the required information is provided.

3.10. The purpose of mutual recognition is to increase practitioners' mobility by easing the existing regulatory barriers that may currently impede their movement from one jurisdiction to another. Essentially it removes the requirement for them to go through the whole registration process in the second jurisdiction.

3.11 Mutual recognition legislation has now been passed in all jurisdictions with the possible exception of Western Australia.

3.12. For the purposes of the implementation of mutual recognition, valuers were classified as a partially registered occupation because they are not required to be registered in all jurisdictions. Heads of Government have directed that the partially registered occupations be reviewed so that they either become fully registered or fully deregistered in all States and Territories. In November 1991 Heads of Government agreed that registration of these professions should be removed 'unless there is overwhelming evidence for retention'. There is, therefore a presumption in favour of deregulation (deregistration). The key criterion for deciding to remove registration is an assurance that self-regulation would not pose a risk to public health and safety.

3.13. The VEETAC Working Party on Mutual Recognition has completed its consideration of valuers and its report is expected to be fully considered by all jurisdictions so that a final determination can be reached at the next meeting of the Council of Australian Governments in August 1994. While the report is yet to be released, it is to be expected that in view of the presumption in favour of deregulation and the apparent absence of health and safety implications, it will recommend the removal of registration requirements for land valuers.

3.14. The implementation of deregistration of the profession will require legislation to be passed in the relevant jurisdictions.

3.15. Representatives of the Institute have indicated that they believe the profession of valuer will be deregistered.

3.16. In all the circumstances, the Commission has taken the view that this application is to be assessed on the basis that deregistration of the profession is a real possibility. If this possibility is realised, this would leave the code as the principal, if not

the sole, form of direct regulation of the profession. The consequences of this possibility, so far as this application is concerned, are discussed at paragraph 8.11., below.

4. The code and related provisions

4.1 Authorisation is sought in relation to the code and clauses 10.2 and 11 of the constitution and clause 24 of the by-laws, along with relevant definitions. As would be expected, the code enumerates the standards of professional behaviour expected and required of Institute members. The provisions of the constitution and by-laws make the code binding on members and establish the Institute's complaints procedure. This procedure is the mechanisms by which the code is enforced.

Summary of provisions

4.2 Clause 10.2(a) of the constitution provides that:

Members must comply with the Institute's Code of Ethics.

Clause 10.2(b) is to the effect that the code will contain rules governing: professional competence, professional conduct, client relationships, personal conduct, conflict of interest, advertising and statutory responsibilities.

4.3 The sections of the code can be summarised as follows:

Standard 1

Professional Competence — the provisions of this standard are to the effect that members must

- abide by the principles of professional conduct laid down in the by-laws of the constitution;
- not mislead clients as to their professional or technical ability to complete an instruction;
- disclose the use of critical assumptions in completing an instruction; and
- satisfy the continuing professional development requirements.

The latter include a stipulation that 50 per cent of a member's annual requirement of continuing professional development points be obtained from AIVLE activities.

Standard 2

Professional Conduct — the provisions of this standard state that:

- Members must not make defamatory statements (clause 2.1); and
- fees may be negotiated on a number of bases but not on the basis of a predetermined monetary or financial result of any valuation or feasibility analysis;

and deals with other issues including delay, inspection of property, copyright, misleading statements, bias, responsibility and conflict of interest.

Clause 2.4 restricts the carrying out of valuations without inspecting the property (non-inspection valuations) and without carrying out an internal inspection (kerb-side valuations) to a limited number of 'exceptional circumstances'. Clause 2.6 restricts criticism of the Institute and other members including by way of advertisements.

Standard 3

Client relationships — this standard addresses the issues of disclosure of confidential information, loyalty, fees (members are required to define the fee basis before accepting instructions) and the ways valuers act in their relationships with clients (members are required to conduct themselves in a manner and demeanour which is not detrimental to their professional character nor likely to lessen the confidence of clients or the public in the Institute or the profession).

Standard 4

Personal conduct — this standard provides that:

- members who are convicted of criminal offences punishable by imprisonment are in breach of the code (clause 4.1); and
- members are required, at all times, to abide by the highest moral, ethical and business standards and are to avoid any conduct which could bring, or tend to bring, the Institute or its members into disrepute.

Standard 5

Conflict of interest — this standard provides to the effect that members must not accept or carry out an instruction where there may be a conflict of interest unless there is full disclosure of that conflict of interest.

Standard 6

Advertising — the provisions of Standard 6 are to the effect that:

- members may advertise their professional qualifications, particular areas of expertise, basis of fees and conditions and other issues of a professional nature but advertisements should not involve items likely to reflect on the professional integrity of the Institute or its members;
- members must not include exaggerated or false claims as to their skills, experience and professional competence in any advertisement;
- members should not advertise in a way as to limit competition;
- members may solicit for clients, but must not harass potential clients; and
- members may refer potential clients to previous clients for references but must not include testimonials without prior consent from the previous clients.

Standard 7

Statutory responsibilities — members must abide by any law, statute, regulation or rule applicable to their professional practice.

4.4 The various provisions of the constitution and by-laws which establish the complaint handling and disciplinary mechanism for the code and can be summarised as follows:

Complaints

- **Constitution/clause 11.2 provides that a complaint may be made by a member of the public, a member of the Institute or any council, board, standing committee or committee of the Institute.**
- **Constitution/clause 11.1 provides to the effect that 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; or

E obtained admission to the Institute by improper means,

the complaint shall be referred to the Complaints Committee established by the Council of the Division to which the member is attached or by the relevant National Professional Board if the member is not attached to a Division.

- **Constitution/clause 11.3 and by-laws/clause 24.1 both deal with the establishment of complaints committees. The former provides that the Divisional Council or National Professional Board, as the case may be, will establish a complaints committee. The by-laws provide to the effect that the complaints committee is to investigate complaints against members regarding alleged breaches of the constitution, fundamental rules or code of ethics.**
- **By-laws/clauses 24.3 and 24.4 are concerned with the composition of the complaints committee and provide to the effect that this is at the discretion of the Divisional Council or National Professional Board provided that it is to comprise members of the Institute with the chairman being a member of either the Divisional Council or National Professional Board.**
- **By-laws/clause 24.5 requires the complaints committee to advise the member of a complaint made against him/her.**
- **By-laws/clause 24.6 provides to the effect that the complaints committee may resolve any matter referred to it by appointing two or more of its members to discuss the complaint with one or more of the parties involved.**

- By-laws/clause 24.8 provides to the effect that where a complaint is not resolved by discussion the complaints committee will appoint a panel to hear and investigate the complaint. The panel will comprise members of the complaints committee who have not previously taken part in discussion of the complaint as the committee's appointees and/or other members of the Institute co-opted by the complaints committee.
- By-laws/clause 24.9 provides that the panel shall regulate its own proceedings and adhere to the rules of natural justice.
- Constitution/clause 11.4 provides that 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.
- By-laws/clause 24.10 requires that the chairman of the panel advise the complainant of certain matters including the prohibition on representation (see below) and that: 'where an appearance or written submission by the defendant is refused such action shall be regarded as a breach of personal conduct'.
- By-law/clause 11.5 prohibits representation in complaint proceedings except 'by reason of infirmity or the requirement of an interpreter'.
- Constitution/clause 11.6 requires the complaints committee to investigate the complaint, and advise the Divisional Council or National Professional Board of its decision together with any recommended penalty.
- Constitution/clause 11.7 requires that before any decision regarding a complaint is made, the Divisional Council or the National Professional Board, must satisfy itself that the member has had the opportunity of being heard in regard to the complaint.
- Constitution/clause 11.9 provides that 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 that meeting there shall be present not less than 75 per cent of the elected or appointed members of the council or board and any resolution shall be passed by an affirmative vote of not less than 75 per cent 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.
- Constitution/clause 11.8 provides that the Divisional Council or 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 by the by-laws (being any sum up to a maximum of \$5000 — by law/clause 24.13)

- C recommend to the National Council that the member be suspended from membership for any period not exceeding two years;**
- D recommend to the National Council that the member be excluded from membership of the Institute; or**
- E refer the matter to the Valuers' Registration Board or similarly constituted body in the State or Territory in which the complaint arose.**
- **By-laws/clause 24.12 provides that costs of and incidental to the hearing 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.**

Appeals

- **Constitution/clause 11.10 makes provision for establishment of a National Review Committee.**
- **Constitution/clause 11.11 makes provision for the member or complainant, within a 30 day period after being notified of the decision, to appeal to the National Review Committee against the decision of the Divisional Council or National Professional Board.**
- **Constitution/clause 1.1 provides for the composition of the National Review Committee by defining that term to mean members for the time being of a tribunal appointed by the National Council in accordance with the by-laws being not less than four in number One (the chairman) being a duly qualified member of the legal profession, one a representative of the property industry not being a member of the Institute, and two members of the Institute not being members of the Divisional Council or the relevant National Professional Board which previously examined the complaint.**
- **Constitution/clause 11.12 specifies that the procedures to apply to hearings of the**

National Review Committee including:

- 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.**
- F The national director will implement the decision of the National Review Committee.**

It further provides to the effect that three members form a quorum.

- **Constitution/clause 11.13 provides that the costs of and incidental to the hearing may be awarded by the National Review Committee against any party to the appeal in its absolute discretion.**

- **Constitution/Clause 11.14 sets out the sanctions available to the National Review Committee if it upholds the complaint. These are:**
 - A reprimand or admonish the member;**
 - B impose a fine as specified in the by-laws (being any sum up to a maximum of \$7500 — by-law/clause 24.13);**
 - 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; or**
 - E refer the matter to the Valuers' Registration Board or similarly constituted body in the State or Territory in which the complaint arose.**
- **Constitution/clause 11.15 requires the National Review Committee to give reasons for its determination and advise parties to the hearing accordingly.**
- **Constitution/clause 11.16 states that the decision of the National Review Committee is final and must not be called into question by any means whatsoever.**

5. The applicant's submissions

Applicant's general submissions

5.1. Under cover of a letter dated 28 October 1992, AIVLE submitted a document titled *Arguments in Support of Authorisation by the Trade Practices Commission of the AIVLE Code of Ethics*. Submissions made in this document include the following.

'The Australian Institute of Valuers and Land Economists has moved to produce a new code of ethics to cope with a changing industry environment and the increased expectations of a more informed public

Considerable concern has been expressed in the wider community about improper valuation practices. For instance, the (now past) Chairman of the Australian Securities Commission (Mr A. Hartnell) called for more statutory controls over expert valuation reports when he gave evidence on 6 August 1992 to the Joint Committee on Corporations and Securities. When asked by the Chairman of the Joint Committee whether he saw the need for controls over valuers, Mr Hartnell replied:

We do not have any direct controls over them, but we have some indirect controls. We have indirect controls through the enforcement of accounting standards and there are some accounting standards at the present time upsetting the valuation community a great deal — not only them but also their clients.

We have indirect control through the regulation of expert reports in circumstances where expert reports are statutory requirements. I must say, as a general preference, I would prefer more statutory requirements of expert reports rather than less. But that is all we have. Property valuations are the principal concern and they are a main concern to banking regulators and superannuation. They underpin the whole Australian economy.

In order to address concerns such as these, the Institute has prepared a new and stronger code of ethics that requires members to operate at the highest moral, ethical and business standards. At the same time, the Institute also has moved to provide full disciplinary procedures, within the rules of natural justice, for valuers who transgress. These include an independent appeal committee to be chaired either by a judge or a lawyer.'

Applicant's submission in relation to anti-competitive detriment and public benefit.

5.2. The applicant has addressed the statutory criteria, to which the Commission is obliged to have regard, in both an attachment to the application form and the document *Arguments in Support of Authorisation by the Trade Practices Commission of the AIVLE Code of Ethics*.

5.3. The latter document states, in part:

'The Institute believes that the new Code of Ethics will satisfy the Commission's Statutory Test and that the resultant benefits will outweigh any anti-competitive effect. In particular, the Institute is of the view that the adoption of the new Code of Ethics will:

- (a) improve the quality of services offered to consumers by valuers and land economists;
- (b) lead to better business information being supplied to consumers and business.'

The submission then addresses each of these points as follows:

(a) Improved quality of service to customers

The new code of ethics aims to improve the quality of services to consumers through the standards of professional competence, professional conduct and statutory responsibilities [standards 1, 2 and 7]. For instance, these standards will ensure that the professional knowledge and training of members is kept up to date, that members will take

all necessary steps to complete instructions promptly, and that members will inspect properties unless instructed not to do so under specifically defined circumstances.

- (b) The code of ethics also aims to ensure that better information is supplied by valuers and land economists to consumers and business through the standards of professional competence, professional conduct and statutory responsibilities.

For instance, standards 1(c) and 2(i) require that members disclose the use of any assumptions, while standard 7.(b) requires that members be conversant with all laws, statutes, regulations and rules which are relevant to their professional practice.'

5.4. The attachment to the application form includes the following:

'The adoption of this Code of Ethics ... is motivated by a perceived need for public benefit and protection when dealing with its members.

Generally, the code addresses four main issues of interest to the public:

- the role and requirements of the Institute and its members;
- the circumstances under which individuals may register a complaint against a member;
- the procedure to be followed when addressing a complaint, and the penalties which may be applied; and
- the speedy resolution of complaints, relative to the court system.

Specifically, the code covers several areas of member behaviour that are particularly relevant to the public interest by establishing standards for:

- **fair and honest trading from members in their dealings with clients;**
- **quality and competence of service from all members; and**
- **professional conduct and service by all members.**

The code also provides recourse in cases of:

- **false, misleading or offensive advertising by a member;**
- **criminal behaviour, abuse of professional trust, etc; and**
- **conflict of interest situations arising with a member.**

We believe that the public benefit derived from the code of ethics more than compensates for any anti-competitive elements that may be interpreted from it.'

6. Submissions of interested parties

6.1. The Commission invited submissions from interested parties. A list of these interested parties appears at attachment B to this draft determination. Submissions were received from:

**FAI Insurance Limited
Real Estate Institute of Australia (REIA)
Mr B Raison**

6.2. **FAI Insurance Limited** recommended that the interests of the members' clients be protected by requiring the members of the organisation to have a professional indemnity cover.

6.3. The **REIA** advised the Commission that it supported the public benefits of the code and it believed that the areas addressed by the code appropriately covered issues of concern to the general public, member behaviour and courses of action and recourse for breaches of any of the standards of the code. The following points summarise the issues the **REIA** believe should be considered, to further enhance the performance and acceptance of the code:

Standard 1.4 — professional competence

The continuing professional development requirements should acknowledge the operating environment of country members and make appropriate allowance for the difficulties these members may experience, due to their isolation from training facilities and the specific nature of much of the work undertaken by these members.

Standard 2.6 — criticism of the Institute and fellow members

REIA believes that the ability of individual members to criticise fellow members and the Institute must be limited to the promotion of individual's personal skills, or the areas of expertise of their business practices and not be targeted at the professional judgment or deliberations of other members and the Institute.

This approach would encourage the promotion of an individual's professional skills and business practices, but not be at the expense, or denigration, of other members. It would enhance competition within the profession and business skills of individual members.

Standards 6.4 and 6.5 — soliciting for business

REIA supports the soliciting of business from clients of other members, on the basis of the provision of superior professional services, business structure or experience.

Regulations of the code of ethics — right of appeal

Consideration should be given to allowing a right of appeal to an independent body completely distanced from **AIVLE**. This would reinforce the concept of

natural justice, both for the general public and, more particularly, Institute members.

6.4. **Mr Raison** is a member of the AIVLE and made a number of submissions in relation to the code and regulations. These included the following:

In relation to the code:

Standard 1 — professional competence

The CPD requirement in clause 4.1 should either be deleted or 'softened'. He suggested that the surveyor's wording would be more acceptable. That is:

A member shall endeavour to advance the science and practice of surveying and the objects of the Institution and shall continue his professional development throughout his career and encourage the development of his sub-ordinates.

Standard 2 — professional conduct

Mr Raison questioned the stringency of the limitations on non-inspection and kerb-side valuations. He argued for some latitude, for example, in the case of mass produced rating valuations where individual inspection is impossible. He also suggested that the restriction on kerb-side valuations should be modified to apply to only improved properties as an external inspection or even no inspection (for rating) may be acceptable for vacant land.

In relation to clause 2.6 (which deals with criticism of, or actions damaging, other members, including by way of advertising) he submitted that it should be ethical to advertise experience or expertise in a particular field (if the claims are supportable), even if this could damage the standing of another member, as this constituted fair competition.

In addition he suggested various clarifications to clauses 2.9, 2.12 and 2.13.

Standard 3 — client relationships

He suggested that the requirement in clause 3.2, to the effect that valuers must not act against a client's interests, should be deleted or modified on the grounds that:

- the client may be a criminal and the member may have to report a possible crime or fraud; and
- a report has to be independent and the member's valuation could mean a client is unable to get the price or mortgage sought.

Standard 4 — personal conduct

Mr Raison states that the provisions of clause 4.1, which are to the effect that conviction of an offence punishable by imprisonment constitutes a breach of the code, should be amended. He points out that such an offence need not necessarily be a serious one and states that: 'even the most serious offenders may be entitled to another chance after 'serving their time'.

In relation to the constitution and by-laws

Mr Raison suggests that complaints panels could comprise some non-Institute members. He submits that the prohibition on legal representation before a complaints committee could be regarded as a denial of natural justice. He further questions the Institute's ability to enforce clause 11.16 of the constitution, which provides to the effect that a decision of the National Review Committee must not be called into question by any means whatsoever. He submits that 'an unsuccessful member should be entitled to appeal further via the Courts'.

7. The statutory criteria

7.1. As set out above, the AIVLE application has been made under s. 88(1) of the Act and seeks authorisation of 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 s. 45 of the Act; or
- 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 s. 45 of the Act.

7.2. This paragraph sets out the main provisions of the Act relevant to this application. Those in s. 88 are as follows:

88(1) Subject to this Part, the Commission may, upon application by or on behalf of a corporation, grant an authorization to the corporation -

- (a) to make a contract or arrangement, or arrive at an understanding
- (b) to give effect to a provision of a contract, arrangement or understanding where the provision is, or may be, an exclusionary provision or has the purpose, or has or may have the effect, of substantially lessening competition within the meaning of section 45,

and, while such an authorization remains in force -

- (c) in the case of an authorization to make a contract or arrangement or to arrive at an understanding - sub-section 45(2) does not prevent the corporation from making the contract or arrangement or arriving at the understanding in accordance with the authorization and giving effect in accordance with the authorization to any provision of the contract or arrangement so made or of the understanding so arrived at;
- (d) in the case of an authorization to give effect to a provision of a contract -
 - (i) the provision is not unenforceable by reason of sub-section 45(1); and
 - (ii) sub-section 45(2) does not prevent the corporation from giving effect to the provision in accordance with the authorization; or
- (e) in the case of an authorization to give effect to a provision of an arrangement or understanding — sub-s.45(2) does not prevent the corporation from giving effect to the provision in accordance with the authorization.

(6) An authorization granted by the Commission to a person under any of the preceding provisions of this section to:

- (a) make a contract or arrangement or arrive at an understanding;
- (b) give effect to a provision of a contract, arrangement or understanding;

- (c) require the giving of, or give, a covenant; or
- (d) enforce the terms of a covenant,

has effect as if it were also an authorization in the same terms to every other person named or referred to in the application for the authorization as a party to the contract, arrangement or understanding or as a proposed party to the proposed contract, arrangement or understanding, or as a person who is or would be bound by, or entitled to the benefit of, the covenant or the proposed covenant, as the case may be.

Sub-section 90(6) and 90(7) provide as follows:

(6) The Commission shall not make a determination granting an authorization under sub-section 88(1), (5) or (8) in respect of a provision (not being a provision that is or may be an exclusionary provision) of a proposed contract, arrangement or understanding, in respect of a proposed covenant, or in respect of proposed conduct (other than conduct to which sub-section 47(6) or (7) applies), unless it is satisfied in all the circumstances that the provision of the proposed contract, arrangement or understanding, the proposed covenant, or the proposed conduct, as the case may be, would result, or be likely to result, in a benefit to the public and that that benefit would outweigh the detriment to the public constituted by any lessening of competition that would result, or be likely to result, if -

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

as the case may be.

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

7.3. These provisions can be summarised as follows:

- The applicant must be a corporation as defined in s. 4(1) of the Act.
- The persons to be covered by the authorisation are to be named or referred to in the application for authorisation.
- The Commission shall not grant an authorisation unless it is satisfied in all circumstances that:

the provisions of the subject arrangement would result, or are likely to result, in a benefit to the public; and

that that benefit would outweigh the detriment to the public constituted by any lessening of competition that would result, or would be likely to result, from the subject arrangement.

7.4. In deciding whether to grant authorisation the Commission must address the relevant statutory criteria and, in particular, it must examine the anti-competitive aspects of the scheme and the public benefits arising from the scheme, and must weigh the two to determine which is the greater.

7.5 The options open to the Commission are to:

- grant the authorisation;
- grant the authorisation on conditions;
- refuse the authorisation; or
- refuse the authorisation but indicate to the applicant how the applications could be restructured to change the balance of detriment and public benefit so that authorisation may be granted.

8. Commission's evaluation of the statutory criteria and draft determination

Corporation

8.1. As previously stated, the Constitution states that the AIVLE is incorporated under the *Associations Incorporation Act 1985* of South Australia. The definition of a corporation in the Act includes a 'trading corporation'. Incorporation under a statute such as an Associations Incorporation Act does not prevent an association from being a trading corporation if its activities warrant that description (*Adamson's Case* (1979) 147 CLR 190). Trading denotes the provision of goods or services for reward (*Re Ku-ring-gai Co-op (No 12)* (1978) 36 FLR 134).

The Institute has advised the Commission that it supplies various services to members who, pursuant to by-laws clause 26, pay an annual subscription. Those services are said to include representation at industry forums, representations to government and regulatory bodies, and development of technical and professional standards. The Institute provides continuing professional development activities, for which it charges, and it also produces and sells texts and other publications.

In view of the above, the Commission was satisfied that the AIVLE is a corporation for the purposes of the Act.

Parties to the authorisation

8.2. Subsequent to lodging its application for authorisation, AIVLE confirmed that its application for authorisation was made on behalf of the Institute and all present and future members of AIVLE.

Anti-competitive detriment and Public Benefit

Public benefit

8.3. The applicant's submissions in relation to public benefit are summarised in chapter 5 of this draft determination. Essentially the AIVLE says that it has moved to produce the code in response to a changing industry environment; the increased expectations of a more informed public and considerable concern expressed in the wider community about improper valuation practices. Thus the code has been framed to:

- (a) improve the quality of services offered to consumers by valuers and land economists; and
- (b) lead to better business information being supplied to consumers and business.

This is achieved, according the AIVLE, by a code that requires members to operate at the highest moral, ethical and business standards backed up by full disciplinary procedures.

8.4. As a general rule the Commission believes that market forces in a competitive environment will deliver goods and services at the best price and quality for consumers.

However, the Commission is supportive of industry self-regulatory codes where these are effective in addressing market problems in a cost effective fashion. In the context of an authorisation application the Commission must, of course, apply the relevant statutory tests in assessing the code concerned.

8.5. The Commission is of the view that it must consider industry codes very carefully where, as in the present case, there is a government predisposition to deregulate the occupation concerned. Prima facie, the Commission would be reluctant to see the efficiency benefits flowing from government deregulation eroded by the erection of a replacement system of industry regulation. On the other hand, the Commission recognises that appropriate industry codes can have particular benefits in a deregulated environment.

8.6. The Commission examined industry self-regulation in its report, *Self-regulation in Australian industry and the professions*, published in 1988. The report identified certain matters as being relevant to the assessment to self-regulatory schemes. These included the existing regulatory framework and the need for some form of regulation. The other matters are:

- ability to contribute to the quality and standard of the service and to remind members of their obligations;
- ability of the industry to regulate its own affairs;
- coverage;
- sanctions;
- complaints/disputes procedures;
- appeals;
- external participation; and
- need for uniformity.

These matters are addressed in the following paragraphs.

8.7. The Commission is of the view that, in as much as the code prescribes clear and stringent ethical standards for valuers and land economists, backed up by an effective enforcement regime, it has the potential to deliver real benefits both to those members of the public who use the services of valuers and land economists and to the public generally. The Commission accepts the Institute's implicit submission that the quality of services supplied by valuers and land economists will be enhanced by their adherence to proper professional standards of honesty, probity and diligence which the Code is calculated to reinforce.

8.8. It must be said, however, that the Commission would have been assisted in its assessment of this matter had it been provided with more specific evidence of the type of practices which, it is said, require regulation. Neither the applicant, nor those who made submissions to the Commission, provided any objective evidence of the extent of

~~improper practices by valuers or of their consequences. Some anecdotal reference was made to valuers participation in the 'excesses of the 80s'.~~

8.9. A most significant public benefit identified by the Commission in the code and regulations is the opportunity for resolution of complaints against members by discussion (by-laws 24.6 and 24.7). In the Commission's view this has the real prospect of providing an avenue for the resolution of some disputes, including some disputes between members and their clients, without resort to more costly procedures. The Commission holds this view notwithstanding its recognition that this is an 'in-house' procedure.

8.10. The Commission also sees potential public benefit in the complaints procedures provided for. Their existence provides some incentive to members to adhere to the provisions of the code. In addition the Commission believes that there may well be circumstance in which clients with genuine grievances against members will derive benefit by having disciplinary action brought against the member concerned through the Institute. However, in the Commission's view, the significant limitation to this potential benefit was to be found in the absence of any power to require a member to compensate a complainant and in the likely partiality of the decision making bodies given that there was no guarantee they would be independent of the Institute. This matter is discussed further below.

8.11. The Commission was of the view that those public benefits it identified had the potential to flow from the code irrespective of whether the occupation of valuer is deregistered by governments. However, if the profession of valuer is to be fully deregistered, then the role played by the Institute is likely to assume a much greater significance. The Institute could well find itself as: the sole accreditation body for practitioners; the sole body responsible for the promulgation and enforcement of industry standards; and the principal facilitator of non-judicial settlement of disputes. The power which a body in this type of position has can be very great. It has a proportionately increased potential to deliver significant public benefit. By the same token, there is a greater potential for abuse. The Commission, in consequence, felt it necessary to look very closely at any potential anti-competitive detriment in the Code in applying the statutory test.

8.12. There was some information before the Commission on the role that AIVLE has played in regulating the affairs of the industry. The Institute (in its letter of 10 August 1993) informed the Commission that it had received 93 complaints in the period 1986-1990. According to the letter, no suspensions had resulted but this was to be understood in the context that serious matters had been referred to the relevant State registration boards. It seemed to the Commission, on the information available to it, that the Institute had little experience in resolving serious matters. Generally, however, it appeared that the Institute should be well placed to carry out a regulatory role given that it is a body of long standing; it is well established financially; and it has around 6500 members, which number represents in excess of 90 per cent of the industry.

8.13. The strength of the Institute's membership means that the code will achieve a high level of coverage and it has the advantage, as against the codes established under the various statutes, of applying uniformly across all members.

Anti-competitiye detriment

Possible anti-competitive detriment identified by the applicant

8.14. At a meeting with Commission staff (held on 23 February 1994) AIVLE identified certain possible anti-competitive detriments associated with the code and its enforcement. These are possible anti-competitive effects flowing from:

- the Institute's capacity to discipline members — potentially resulting in restrictions on their capacity to practise; and
- the fact that the standards being applied by the Institute via the code of ethics would be higher than the minimum requirements imposed by the general law.

In the latter respect the AIVLE representatives pointed to the code's restriction of 'kerb-side' valuations to exceptional circumstances.

Possible anti-competitive detriment resulting from requirements of the code

8.15. There are two types of provision in the code that are of concern to the Commission. Firstly there are those that are inherently anti-competitive. Secondly there are those which are imprecise or wider in scope than is required. The latter enhance the possibility of specious complaints being brought for anti-competitive purposes.

8.16. Clause 1.4 of the code has the effect of making it compulsory for members to satisfy the Institute's continuing professional development (CPD) requirement. The Commission did not have any overall concerns about CPD in view of information provided to the Commission to the effect that:

- CPD is provided to members at minimal cost;
- the costs are subsidised by the Institute and are below costs charged by other professions and commercial operators;
- less than two per cent of members have to drive more than two hours to attend CPD events;
- the CPD requirement can be met by listening to tapes provided by the Institute; and
- the number of hours required is considerably less than that imposed by some other professions.

8.17. The Commission was however, concerned by the requirement set out in the Institute's Guide to CPD, that half the annual requirement for CPD points imposed upon members by the code are to be obtained from Institute activities. AIVLE representatives have sought to justify this on the bases that the Institute is best placed to determine CPD content and that directly relevant courses or other activities are not generally available elsewhere. The representatives expressed the concern that, while legal or accounting activities could be useful to members, it was necessary that a proportion of each members annual CPD should be directed to matters directly relevant to valuers and land economists.

8.18 The restriction is, in the Commission's view, at the least potentially anti-competitive. It excluded the possibility that there could be a more cost effective provision of CPD courses to members by outside organisations in respect of 50 per cent of each member's mandated requirement. The Commission could not glean any sufficient compensating public benefit for the requirement. If, as Institute representatives have suggested, the activities provided by the AIVLE are the most apposite and are provided at below comparable costs, then even without some fixed rule it should continue to attract a high level of member participation.

8.19 The Commission would not have any objection to the Institute requiring that certain topics be addressed in the CPD program or to it establishing objective criteria to be met by activities so that participation by members qualified for CPD. Such requirements and criteria would, however, have to be published to members and made generally available on request in advance of the year concerned.

8.20 The Commission did not propose to authorise the Code so as to give effect to the requirement that 50 per cent of CPD points be derived from AIVLE activities. The Commission's view was that any authorisation given would be qualified accordingly.

8.21. Clause 2.1 of the code is a blanket prohibition on members making defamatory statements. In the Commission's view this clearly exceeded any legitimate concern the Institute could have. Taken literally it could prohibit a member bringing a complaint against another member as such a complaint would almost certainly be defamatory, even if not actionably so.

8.22. In a letter dated 1 March 1994, AIVLE informed the Commission that its National Council had decided to have the clause amended to read:

Members must not make false or damaging statements.

This did not address the Commission's fundamental concern as it continued to leave open the possibility that a complaint could be brought against a member in relation to 'false or damaging' statements that have no relevance to the Institute, its members or their legitimate professional concerns. The Commission's comments in relation to clause 2.6, which are set out below, should also be borne in mind in respect of attempts to proscribe damaging statements.

8.23. The Commission did not propose to authorise the code so as to give effect to clause 2.1 as presently drafted or in the form of the proposed amendment. The Commission's intention was that any authorisation given would be qualified accordingly.

8.24. Clause 2.2 of the code is concerned with the bases upon which members are to charge fees. Any restriction in this area is inherently likely to adversely affect competition.

8.25. The Commission nonetheless accepted that it is undesirable for valuers to be able to accept instructions on the basis that the valuation will be a specific figure, or no more than a maximum amount, or no less than a minimum amount, specified in advance by the client. The Commission also accepted that it is undesirable for valuers to accept instructions in relation to a feasibility analysis on the basis of a predetermined outcome specified by the client. Accepting such instructions would clearly open the way to fraud.

8.26. As no other limitation appears to be intended the Commission did not oppose this clause.

8.27. Clause 2.4 of the code has the effect of restricting valuations where no inspection of the property takes place and 'kerb-side' valuations to 'exceptional circumstances'. AIVLE representatives have informed the Commission that this would be interpreted so that such valuations would only be allowed in very narrowly confined circumstances — principally those referred to in sub-clause 2.4.2. They recognised that at present clients frequently direct that an internal inspection not be carried out and that clients also seek non-inspection valuations. The Institute's view, according to its representatives, is that unless the circumstances come within those recognised by the Institute as exceptional, such instructions should be refused. The representatives concede that a requirement for internal inspections would normally lead to valuations being more expensive but claim the motivation for the stringent requirement for internal inspections is protection of the public.

8.28 They rejected the suggestion that the problems associated with non-inspection and kerb-side valuations could be overcome by reports being suitably qualified, on the basis that the valuer had no control over the use to which his valuation report is put once it had been provided, or over alteration that could be made to it.

8.29 The Commission did not accept this position and believed that there would be a significant increase in overall costs of valuations if the proposed restriction were allowed to operate. This would, in the Commission's view, constitute an anti-competitive detriment and the Commission did not believe there would be a compensating public benefit of sufficient magnitude. In the Commission's view the terms of an instruction should be essentially a matter between the client and the valuer. Where there is a risk of damage to third party interests the Commission believed this would be sufficiently addressed by a requirement that a valuation report be suitably qualified. It is further of the view that the possibility of fraudulent alteration is capable of being addressed. One measure that could be adopted, for instance, is having a reference on every page to the fact that the report is qualified.

8.30 The Commission did not propose to authorise the code so as to give effect to clause 2.4 as drafted. The Commission's intention was that any authorisation given would be qualified accordingly.

8.31. Clause 2.6 deals with criticisms of the Institute and other members. The Commission would have no difficulty with a provision which required that criticisms must be fair and honest or that prohibited the making of false or misleading statements aimed at injuring the Institute or other members. However, clause 2.6 apparently extends to prevent any advertisement that could injure another member. In the Commission's view vigorous competition between valuers could well be manifested in advertisements that injure professional reputations and/or businesses. In the Commission's view the general law already provides the appropriate limits on what can be published in advertisements. This being the case, the Commission is unlikely to have difficulty with code provisions that reflect legal requirements, such as those to be found in section 52 of the Act. In this instance, the Commission could see no public benefit in authorising more stringent restrictions.

8.32. The Commission did not propose to authorise the code so as to give effect to clause 2.6 as drafted. The Commission's view was that any authorisation given would be qualified accordingly.

8.33. Clause 4.1 has the effect that any member convicted of a criminal offence punishable by imprisonment is, by reason of that conviction, in breach of the code. This provision is also too wide in the view of the Commission. It extends to any offence punishable by imprisonment irrespective of the sentence in fact handed down and would apply to matters that are, on any view, irrelevant to a member's capacity to properly carry out his/her professional obligations (such as drink driving and persistent refusal to pay parking fines).

8.34. In its letter dated 1 March 1994, AIVLE informed the Commission that its National Council had decided to have the clause amended to read:

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

While the amendment, having removed the reference to offences punishable by imprisonment, would leave members open to complaints in relation to convictions for minor offences involving dishonesty, the Commission assumed that a complaints committee would treat the matter accordingly. The Commission noted that this amendment would create an inconsistency with clause 11.1 of the constitution and presumes this would be amended accordingly.

8.35. The Commission proposed to make any authorisation conditional on clause 4.1 being amended to the effect set out in the AIVLE letter to the Commission dated 1 March 1994.

Possible anti-competitive detriment resulting from restrictions on capacity to practice

8.36. In some jurisdictions membership of the Institute can be a basis upon which a licence/registration can be sought. Institute representatives have said that they doubt this means that loss of AIVLE membership would necessarily lead to loss of registration in those jurisdictions. However, it is to be noted that one of the consequences of a complaint being upheld against a member is that the matter can be referred by the Institute to the member's licensing/registration board. The Commission assumed that an unfavourable report by the Institute would be taken seriously by the relevant board in reviewing that member's licence. Institute representatives appear to concede this and have stated that the circumstances that would lead to a member losing AIVLE membership could also well lead to deregistration. They stress, however, that each licensing board exercises an independent discretion.

8.37. On a related aspect, the AIVLE has informed the Commission that many institutions, such as the major banks, will not, as a matter of practice, obtain valuations from persons who are not members of AIVLE.

8.38. In view of the foregoing it seemed to the Commission that loss of AIVLE membership could, in some circumstances, effectively prevent a person from practising as a valuer or land economist or impose severe restrictions on the person's capacity to practice. This, in the Commission's view, leaves open the possibility that the code, and in particular its enforcement via the complaints procedure, could have substantial anti-

competitive effects - particularly in markets containing a very small number of practitioners.

8.39. In circumstances such as this the Commission is of the view that disciplinary or complaints procedures must have sufficient safeguards to ensure that they are administered fairly and cannot be used for improper anti-competitive purposes. The Commission had a number of concerns in this respect.

8.40. Clause 11.16 of the constitution would appear, taken at face value, to seek to prevent a member having recourse to the courts, or other appropriate dispute reconciliation mechanisms external to the Institute, if he or she continued to feel aggrieved after an appeal. Representatives of AIVLE have informed the Commission that the intention is simply to provide that a decision of the Review Committee is final so far as the procedures of the Institute are concerned.

8.41. The Commission was concerned that the current wording could constitute a false or misleading representation concerning the existence of any right or remedy.

8.42. In its letter dated 1 March 1994, AIVLE informed the Commission that its National Council had decided to have the clause amended by addition of the words

subject only to any available recourse to a Court of Law or other external jurisdiction.

The Commission intends to make any authorisation subject to the condition that:

- Clause 11.16 of the constitution not be given effect to so as to prevent, or be relied on in any attempt to prevent, a member pursuing remedies which may be available to that member outside the procedures of the Institutes; and
- that AIVLE amend clause 11.16 to the effect set out in the AIVLE letter to the Commission dated 1 March 1994.

8.43. The Commission was concerned that the National Review Committee, when determining an appeal could, pursuant to constitution clauses 11.8 and 11.14 and by-laws clause 24.13, increase a fine to an amount in excess of the maximum that can be imposed by the body hearing the matter at first instance. In this respect the Institute wrote to the Commission in its letter of 10 August 1993:

The main reason why the National Review Committee was given the power to impose a higher penalty was in case a Divisional Council made a grossly inadequate decision. However, it was also felt that the National Review Committee should be given a facility to recover any hidden costs associated with the hearing.

8.44. The Commission's concern is that whatever the intention, the effect of the differential will be to discourage appeals and that it could well discourage an appeal by a member genuinely aggrieved by a complaints committee decision. This is in the context that complaints committees will be, according to Institute representatives, comparatively informal in approach and will be, by force of the by-laws, constituted entirely by Institute members.

8.45. In its letter dated 1 March 1994, AIVLE informed the Commission that its National Council had decided to have the by-laws amended so that the same range of fines would apply at both divisional and national level.

8.46. The Commission intends to make any authorisation conditional on the National Review Committee not imposing 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).

8.47. The Commission noted that by-law 24.12 provides to the effect that costs of a hearing before a complaints committee can only be awarded against a member. The Commission would have been concerned had members of the public been at risk of costs at this stage as this could have acted as a powerful disincentive to use of the complaints procedure. However, the National Review Committee is given the power, by clause 11.13 of the constitution, to award costs in respect of appeals and the Commission has been informed by Institute representatives that AIVLE intends to enter arrangements with any member of the public seeking to appeal so that costs could be effectively awarded against that person. The Commission understands that such a person would be required to enter into an agreement to abide by a costs award as a prerequisite to being allowed to pursue an appeal. This clearly would act as a disincentive to any client wishing to pursue a complaint against a member of AIVLE. However, as the member would be at an equal risk in the event of an adverse finding, the Commission will not oppose the thrust of this provision.

8.48. The Commission is concerned however at the breadth of the discretion given to the bodies which are able to award costs. In the Commission's view parties could well be discouraged from bringing appeals if they felt there was the potential for capricious departures from the usual judicial principle that 'costs follow the event' (ie are awarded to the successful party absent a compelling reason to do otherwise).

8.49. The Commission thus intends to impose a condition to the effect that costs are to follow the event.

8.50. The Commission was concerned that the National Review Committee is not guaranteed to be independent of the AIVLE. Clause 1.1 of the constitution provides, by mechanism of the definition, that the National Review Committee shall consist of 'not less than 4' persons and specifies that they will be the chairman, being a member of the legal profession; a representative of the property industry not being a member of the Institute; and two Institute members. clause 11.12 provides, in part, to the effect that a quorum of the committee is three members. It seems that the definition, and particularly the words 'not less than', leaves open the appointment of additional Institute members to the committee. Even if this is not the case, a working committee could well, given the quorum provisions, have a majority of Institute members and indeed could have no independent representation at all, given that there is nothing to prevent the chairman being an Institute member, provided only that he is also a lawyer.

8.51. In its letter dated 1 March 1994, AIVLE informed the Commission that its National Council had decided to have the constitution amended so as to limit the number of members of the National Review Committee to four and require that at least one be a non-member.

8.52. As much of the perceived public benefit in what the Commission is being asked to authorise resides in the complaints handling mechanism, the Commission considered

this a matter of particular importance. The Commission was of the view that once a complaint comes before the final tribunal it is essential that justice not only be done but that it also be seen to be done. In the Commission's view an appeal body consisting of a preponderance of Institute members could not escape the perception of bias in favour of a member as against a non-member or in favour of a 'conventional' member as against a 'maverick' who may be pioneering new pro-competitive practices. Indeed, it may be that such a committee would find it difficult to avoid the actuality of bias. The Commission does not accept that the situation is addressed by the amendment proposed by the National Council in the Institute's 1 March letter.

8.53. The Commission intends to make any authorisation subject to a condition that at all times a majority of the members of the National Review Committee will be independent of the Institute.

Conclusion

8.54. Given the possibility that the Institute may become the sole regulator of valuers and land economists, the Commission felt it necessary to examine the conduct it was asked to authorise with due regard to that possibility.

8.55. In doing so it identified a number of potential anti-competitive detriments and concluded that certain aspects of the conduct would, or might, have the effect of substantially lessening competition within the meaning of s. 45 of the Act.

8.56. On the other hand, the Commission was also satisfied that the conduct would result, or be likely to result, in a benefit to the public, to use the words of the statute. In the Commission's view that benefit has the potential to be particularly significant if the profession is deregistered.

8.57. The Commission was of the view, however, that that benefit would outweigh the detriment to the public constituted by the potential lessening of competition only if certain anti-competitive aspects were not given effect to. These are the matters identified above relating to CPD, defamatory statements, kerb-side valuations, criticisms of other members, criminal convictions, a decision of the National Review Committee being final, the maximum fine differential, costs, and the constitution of the National Review Committee, in respect of which the Commission proposed to impose conditions.

8.58. The Commission's wished to emphasise its view that the statutory test would only be met if all these matters were attended to in accordance with the proposed conditions.

8.59. The Commission noted, in this regard, that as a result of discussions with representatives of the Institute, it had indicated that it would attend to certain of these matters but that some time would be needed to attend to the relevant formalities. They were being dealt with by way of condition so as to enable authorisation to be given in advance of the relevant amendments while requiring that they be carried out within a period of six months.

Draft determination

8.60 For the reasons outlined above, and subject to any request for a pre-decision conference pursuant to s. 90A of the Act, the Commission proposed to grant an authorisation in respect of application A90545 subject to the following conditions:

- A** The AIVLE must not enforce any requirement that CPD points be derived from AIVLE activities and all references to any such requirement or requirements must be removed from all future AIVLE publications.
- B** 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 the limitations imposed by the general law.
- C** 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 kerb-side 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.
- D** 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.
- E** 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.
- F** 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 Institutes; and
 - must amend clause 11.16 to the effect set out in the AIVLE letter to the Commission dated 1 March 1994.
- G** 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.
- H** AIVLE must amend clause 24.12 of the by-laws and clause 11.13 of the constitution so that they provide to the effect that:

absent a compelling reason to order to the contrary, cost 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 with this principle.

- I 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 AIVLE. The AIVLE must amend the relevant provisions of the constitution accordingly.
- J The AIVLE must make the deletions or amendments referred to in conditions B, C, D, E, F, G and H and I at the first opportunity and in any event within six months of the date of authorisation.

8.61 The Commission issued its draft determination on 14 March 1994.

9. Section 90A conference and submissions of interested parties

9.1 AIVLE requested a conference, which was convened on 21 April 1994. It was attended by representatives of AIVLE and the Real Estate Services Council of New South Wales.

9.2 Submissions were made by AIVLE, Real Estate Services Council, Ministry of Fair Trading WA, and Valuers' Qualification Board Victoria.

9.3 Valuers' Qualification Board advised that it is proposed that in Victoria the profession will be co-regulated with AIVLE, rather than de-regulated. The Board observed that the code provides for the referral of certain issues to it, but that it is likely to cease operation in December 1994.

9.4 The Ministry of Fair Trading WA advised that the draft determination should be amended to reflect the correct position - namely that the Land Valuers Licensing Board does not refuse a licence to a person who is not a member of the AIVLE. Paragraphs 3.4 and 8.36 have been amended accordingly for the purpose of this determination.

9.5 The Real Estate Services Council raised a number of issues: It expressed concern over the Commission's condition C (kerb-side valuations), being of the opinion that internal inspection of a property is a fundamental professional standard and not a matter that could properly be left to negotiation. Other issues raised include that of possible double jeopardy for Institute members, costly and time consuming nature of the two-tier complaints system, representation at the Complaints Committee for parties that would otherwise be unfairly disadvantaged, and the provision of written reasons in the event of an adverse finding.

9.6 AIVLE agreed to all the Commission's conditions except for C and I. With respect to those with which it agreed, all proposed revisions fully met the Commission's concerns except the revision proposed for condition B.

Condition B:

9.7 Condition B required that AIVLE amend clause 2.1 of the code so as to limit its operation to the legitimate concerns of the Institute and so that limitations on members were no greater than the limitations imposed by the general law. AIVLE proposed to revise clause 2.1 to read

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

9.8 AIVLE explained that its concern was to prevent false and misleading statements.

9.9 The Commission advised that 'misleading' would be a more appropriate term than 'damaging', from the point of view of meeting the Commission's condition B.

9.10 AIVLE agreed that this amendment should be made to its proposed wording.

Condition C:

9.11 Condition C required the AIVLE to remove the limitation of non-inspection and kerb-side valuations to exceptional circumstances.

9.12 AIVLE stated that many cases can be made out for non-inspection. However, mere financial expediency can lead to a misleading situation. AIVLE recognises the need for special circumstances; it also recognises particular financial dangers however. There are implications for lenders, buyers and valuers themselves of incomplete inspections. AIVLE believed that the kerb-side valuation should be foregone in the interests of the user of the valuation. In most cases internal inspection is a requirement of competent inspection. Sometimes valuations are for third, fourth or fifth parties.

9.13 The Commission suggested that every inspection could carry a notation. Clients could make their own judgement and over time their instructions would be better informed. Further, valuations are often subject to qualifications, such as pest inspection; and the valuer can be protected by making the circumstances of the inspection quite clear. The important thing would be to provide information sufficient so that the client can make the judgement.

9.14 It was agreed that AIVLE would redraft this clause.

Condition I:

9.15 Condition I required that the National Review Committee of the AIVLE must at all time be constituted so that a majority of its members are independent of the AIVLE. The National Review Committee's function is to hear appeals from the findings of the complaints committee.

9.16 AIVLE advised that it took exception to condition I. Valuation is a complex area of commerce and professional practice. It provided examples of a number of professional bodies which required that the majority of members on their appeal boards be members of the respective profession.

9.17 AIVLE proposed to revise the provisions so that the committee is to comprise a maximum of four, and minimum of three, members, one being a member of the legal profession and the others being representatives of the property industry. Where the appeal to be heard is from a member of the public, at least 2 members of the committee are to be non-members of the AIVLE. Where an appeal to be heard is from a member of the AIVLE, it would be possible that all four members of the committee could be members of AIVLE also, if the legally qualified person happened also to be a member of AIVLE. This would not disadvantage members, as the committee deals only with complaints by members against each other. The present situation is that the chairman is Mr Justice Rae Else-Mitchell.

9.18 The Commission advised that there should be at least one non-member on the committee when it dealt with appeals from members.

9.19 The Real Estate Services Council stated that consumer protection was unequivocally the role of the Council. While considering there to be a nexus between the services of the valuer and internal inspections, they agreed with the compromise proposed with respect to condition C.

9.20 After the conference, AIVLE provided the Commission with a revised submission, which is attached at B.

10. Conclusion

10.1 By means of a revised submission to the Commission on 21 April 1994, AIVLE advised of the following proposed amendments to its code/constitution.

Condition B

10.2 AIVLE proposes to amend clause 2.1 of the code 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.'

Condition C

10.3 AIVLE proposes to delete clause 2.4 and substitute a new clause 2.4 as follows:

'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.'

Condition I

10.4 AIVLE proposes to amend clause 1.1 of the constitution to read 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 representative 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.'

and clause 11.12(e) of the constitution to read as follows:

'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.'

10.5 The Commission considered the proposed amendments and revisions and found those pertaining to conditions A to H to meet the requirements of those conditions. It found the amendments proposed with respect to condition I to be acceptable.

10.6 Agreement now having been reached on all matters, the Commission proposes to authorise the conduct the subject of the application.

Final Observations

10.7 The Commission notes that authorisation has not been sought for provisions of the constitution or by-laws except for those specifically referred to in the application. Any authorisation given pursuant to application A90545 will, in consequence, not extend to the provisions of the constitution or by-laws except for those specifically referred to in the application.

10.8 In this context, the Commission notes the possibility that other provisions of the constitution might have the potential to result in contraventions of the Act. As an example it points to the possibility that the provisions for admission to membership of AIVLE in clause 22 of the by-laws have the potential to be applied in an anti-competitive way.

10.9 . The Commission observes further, notwithstanding that the body of rules put before it is called a code of ethics by the applicant, that those rules and requirements encompass not only matters of ethics but go to matters of commercial conduct and practice in several respects.

11. Determination

11.1 The Commission grants authorisation to the conduct the subject of application number A90545. This authorisation is conditional upon AIVLE fulfilling all the conditions it has agreed to meet in the terms indicated in its submission of 21 April 1994, at the first opportunity and in any event within six months of the date of this determination.

11.2 This determination is made on 29 April 1994. If no application for a review of this determination is made to the Trade Practices Tribunal in accordance with section 101 of the Trade Practices Act 1974, this determination will come into force on 21 May 1994. If an application for review is made to the Tribunal, the determination will come into force:

- where the application is not withdrawn - on the day on which the Tribunal makes a determination on the review; or
- where the application is withdrawn - on the day on which the application is withdrawn.

Attachment A

The Code and the Regulations

**AUSTRALIAN INSTITUTE OF VALUERS AND LAND ECONOMISTS
I N C O R P O R A T E D****CODE OF ETHICS**
Draft for Final Approval, 6 August 1993**STANDARD 1: PROFESSIONAL COMPETENCE**

(1.1)

Members shall abide by any principles or standards of professional conduct of a technical nature that are laid down in the By-Laws of the Institute's Constitution.

(1.2)

Members must not mislead clients as to their professional or technical competence to complete an instruction.

(1.3)

Members must disclose the use of any critical assumption, its purpose, and its effect on an instruction.

(1.4)

Members must satisfy the Continuing Professional Development requirements of the Institute. The purpose of the CPD Program is to extend the knowledge of members to continuing changes to property law, building codes, building construction, valuation techniques and procedures, together with revision, development of existing knowledge and further research and innovation in property matters. Such a program ensures the capacity of each member to continue to provide high quality advice to the client. Failure to satisfy the CPD requirements is a breach of this Code of Ethics.

STANDARD 2: PROFESSIONAL CONDUCT

(2.1)

Members must not make defamatory statements.

(2.2)

Fees may be negotiated on any mutually agreeable basis including an ad valorem basis or on the basis of a premium for success, however, fees may not be negotiated on the basis of a predetermined monetary or financial result of any valuation or feasibility analysis.

(2.3)

Members should take all necessary steps to complete instructions promptly and should inform clients of any unavoidable delays and the reasons for those delays.

(2.4)

Members when undertaking a valuation must inspect properties unless under exceptional circumstances they are instructed not to do so by their client. Any such instruction should appear in the certificate of a valuation report.

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(2.4.1)

Accepted Valuation Practice Standards require an internal inspection of all properties.

(2.4.2)

It is recognised that there will be exceptional circumstances where a valuer will not carry out an internal inspection.

Examples of exceptional circumstance include, but are not limited to, instructions from a client who is not in possession of the property (eg. in cases of matrimonial disputes or company takeovers which require complete confidentiality of interest), or where due to prohibitive geographic isolation an internal inspection of the property is not practical. It must be noted that exceptional circumstances do not extend to valuations for mortgage purposes where an internal inspection is mandatory in all situations.

(2.4.3)

It is not acceptable that an internal inspection be forgone as a matter of convenience, or based upon a client's instructions that do not meet the criteria of exceptional circumstances.

(2.4.4)

In most cases limiting conditions imposed may be such that the valuer should decline the instructions.

(2.5)

Members must not reproduce any work or reference prepared and presented by any other member, person, body or authority and claim it as their own.

(2.6)

Members must be fair and honest in any criticism of the Institute and fellow members, and must not injure or endeavour to injure, either directly or indirectly, the professional reputation or business of the Institute or any member by any advertisement or by making any false, malicious or misleading statement or communication to any person or persons.

(2.7)

Members must not mislead a client or any other party either by issuing a false or misleading statement or by omitting to include in any statement information which is relevant to the matter in question.

(2.8)

Members must develop and communicate analyses and opinions to their clients without bias or partiality at any time to the interests of their clients or themselves.

(2.9)

Members must include in reports references to any relevant assumptions, conditions, requirements and limitations arising from their instructions or inquiries or imposed from any other source.

(2.10)

Members acknowledge that when signing reports as a primary professional they accept full responsibility for the content of those reports including content that may be the result of inquiries or development by others.

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(2.11)

Members must fully cooperate with any request for information and directives of the Institute where a complaint has been lodged or a prima facie breach of the Code of Ethics has been determined.

(2.12)

Members must not accept payments from a third party which may affect their relationship with a client.

(2.13)

Members must not accept instructions for reports beyond their reasonable competence unless the report is completed in conjunction with a person of adequate competence. Where such a report is undertaken in conjunction, the member must advise his/her client of the conjunction arrangement prior to issue of the report, and both parties must jointly sign the report.

STANDARD 3: CLIENT RELATIONSHIPS

(3.1)

Members must not disclose to any other person or party any confidential information provided to or by a client in confidence without the written permission of the client or unless so directed by a lawful authority.

(3.2)

Members must act with loyalty to a client and must not take any action which would serve to disadvantage their client.

(3.3)

Members must define their fee basis prior to accepting any instruction from a client.

(3.4)

Members must conduct themselves in a manner and demeanour which is not detrimental to their professional character nor likely to lessen the confidence of clients or the public in the Institute or the profession.

STANDARD 4: PERSONAL CONDUCT

(4.1)

A member who is convicted of a criminal offence punishable by imprisonment is in breach of this Code of Ethics.

(4.2)

Members are, at all times, to abide by the highest moral, ethical and business standards and are to avoid any conduct which could bring, or tend to bring, the Institute or its members into disrepute.

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STANDARD 5: CONFLICT OF INTEREST

(5.1)

Members must not accept or carry out any instruction where there may be, or be reasonably construed to be, a conflict of interest and must withdraw from any instruction if such a conflict of interest arises or becomes known after the instruction has been accepted, unless such conflict of interest is fully disclosed in writing to all relevant parties and all such parties agree that the instruction may be accepted or continued by the member.

STANDARD 6: ADVERTISING

(6.1)

Members may advertise their professional qualifications, particular areas of expertise, basis of fees and conditions and other issues of a professional nature. Any advertisement should not involve items likely to reflect on the professional integrity of the Institute or its members.

(6.2)

Members must not include exaggerated or false claims as to their skills, experience and professional competence in any advertisement.

(6.3)

Members must not advertise in such a way as to limit competition.

(6.4)

Members may solicit for clients, but must not engage in activities that include the harassment of potential clients.

(6.5)

Members may refer potential clients to previous clients for references of good service, but must not include testimonials in any form of advertising without prior consent from the previous clients.

STANDARD 7: STATUTORY RESPONSIBILITIES

(7.1)

Members must abide by any law, statute, regulation or rule relevant to their professional practice.

**REGULATIONS OF THE
CODE OF ETHICS**

Introduction

The following administrative arrangements apply in the case of any complaint made against a member of the Institute, including any Breach of the Code of Ethics. These arrangements are also found in Clause 11 of the Institute's Constitution and Clause 24 of the By-Laws.

Who May Make a Complaint

(Constitution/Clause 11.2) A complaint may be made by:

- A. a member of the public;
- B. a Member of the Institute; or
- C. any Council, Board, Standing Committee or Committee of the Institute.

Submission of Complaints

(By-Laws/Clause 24.2) 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 any documentary or other evidence as may be available.

Complaints

(Constitution/Clause 11.1) 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; (or)
- E. obtained admission to the Institute by improper means,

such complaint shall immediately be referred to the Complaints Committee established under Clause 11.3 (of the Constitution) 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.

Establishment of a Complaints Committee

(Constitution/Clause 11.3) 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.

(By-Laws/Clause 24.1) The Divisional Council or National Professional Board shall establish a Complaints Committee to investigate complaints against members regarding alleged breaches of the Constitution, Fundamental Rules or Code of Ethics.

Composition of a Complaints Committee

(By-Laws/Clause 24.3) The composition of a Complaints Committee shall be at the discretion of the Divisional Council or National Professional Board and subject to Clause 24.4 (of the By-Laws) shall comprise members of the Institute who shall decide and make recommendations on complaints against members.

(By-Laws/Clause 24.4) The Chairman of a Complaints Committee shall be a member of the Divisional Council or National Professional Board instructing the Committee.

Notification of a Complaint

(By-Laws/Clause 24.5) The Chairman of the Complaints Committee shall advise the member against whom the complaint is made, the name of the complainant and the grounds of the complaint. Such advice shall be by registered mail and marked "confidential" and addressed to no other person than the member concerned.

Resolution by Discussion

(By-Laws/Clause 24.6) 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.

(By-Laws/Clause 24.7) In the case of resolution of a complaint by discussion, the terms of such resolution together with the decision 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.

Establishment of a Panel to Hear a Complaint

(By-Laws/Clause 24.8) Where a complaint is not resolved by discussion the Complaints Committee will appoint a panel to hear and investigate the complaint. The panel will comprise of:

- A. Members of the Complaints Committee who have not previously taken part in discussion of the complaint as the Committee's appointees; and/or
- B. Other members of the Institute co-opted by the Complaints Committee.

Natural Justice

(By-Laws/Clause 24.9) The Panel shall regulate its own proceedings and adhere to the rules of natural justice.

Appearances and Submissions

(Constitution/Clause 11.4) 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.

(By-Laws/Clause 24.10) The Chairmen of the Panel shall advise the complainant, the defendant and any required witnesses of:

- A. the name of the Chairman and members of the Panel;
- B. the time and date of the hearing;

- C. the right of the member to be heard in regard to the complaint;
- D. whether or not the defendant, complainant or other witnesses 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 a breach of personal conduct;
- H. the prohibition for the complainant, defendant or other witnesses to be represented except by reason of infirmity or requirement for an interpreter.

Representation

(Constitution/Clause 11.5) 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.

Investigation by a Complaints Committee

(Constitution/Clause 11.6) The duly appointed Complaints Committee will investigate the complaint, 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 (the) Constitution.

Right to Hearing

(Constitution/Clause 11.7) Before reaching ^{any} decision regarding any complaint made pursuant to Clause 11.1 (of the Constitution), the Divisional Council or the relevant National Professional Board, as the case may be, must satisfy itself that the Member has had the opportunity of being heard in regard to the complaint.

Decision of the Panel

(Constitution/Clause 11.9) 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 that meeting there shall be present not less than 75% of the elected or appointed members of the Council or Board and any resolution shall 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.

(By-Laws/Clause 24.11) 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 11.13 of the Constitution.

Treatment of a Complaint

(Constitution/Clause 11.8) The Divisional Council or National Professional Board will dismiss or uphold the complaint and if the complaint is substantiated may take all or any of the following:

- A. reprimand or admonish the Member;
- B. impose a fine as specified by the By-Laws;
- C. recommend to the National Council that the Member be suspended from membership for any period not exceeding two years;
- D. recommend to the National Council that the Member be excluded from membership of the Institute; (or)

- E. refer the matter to the Valuers' Registration Board or similarly constituted body in the State or Territory in which the complaint arose.

Fines

(By-Laws/Clause 24.13)

- A. The fine to apply under Clause 11.8 of the Constitution is any sum up to a maximum of \$5000 (five thousand dollars).
- B. The fine to apply under Clause 11.13 of the Constitution is any sum up to a maximum of \$7500 (seven thousand five hundred dollars).

Costs

(By-Laws/Clause 24.12) 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.

Right of Appeal

(Constitution/Clause 11.10) 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.

Composition of the National Review Committee

(Constitution/Clause 1.1) 'National Review Committee' means the members for the time being of a tribunal appointed by the National Council in accordance with the By-Laws being not less than 4 in number, 1 (the Chairman) being a duly qualified member of the legal profession, 1 a representative of the property industry not being a member of the Institute and 2 members of the Institute not being members of the Divisional Council or the relevant National Professional Board which previously examined the Complaint.

Procedures of the National Review Committee

(Constitution/Clause 11.11) 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 the consequences 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.

Costs

(Constitution/Clause 11.12) Costs of and incidental to the hearing may be awarded by the National Review Committee against any party to the appeal in its absolute discretion.

Consequences of Appeal

(Constitution/Clause 11.13) 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; or
- E. refer the matter to the Valuers' Registration Board or similarly constituted body in the State or Territory in which the complaint arose.

Reasons

(Constitution/Clause 11.14) The National Review Committee will give reasons for its determination and advise parties to the hearing and the National Director accordingly.

Decisions Final

(Constitution/Clause 11.15) The decision of the National Review Committee is final, and must not be called into question by any means whatsoever.

Fees

(Constitution/Clause 11.16) 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.

Attachment B

Amended Response by the

Australian Institute of Valuers and Land Economists

to the

Draft Determination by the Trade Practices Commission

Re Application for Authorisation No. 90545

21 April 1994

Response by the
Australian Institute of Valuers and Land Economists

The Draft Determination handed down on 14 March 1994 by the Trade Practices Commission made nine (9) major rulings in relation to the Code of Ethics of the Australian Institute of Valuers and Land Economists (AIVLE). Each of these is discussed below:

- A. *The AIVLE must not enforce any requirement that CPD points be derived from AIVLE activities and all references to any such requirement or requirements must be removed from all future AIVLE publications.*

This requirement originally was inserted to ensure that the smaller Divisions of the Institute had the financial resources to provide high quality and relevant courses which would be accessible to members. However, whilst this is still an important consideration, the AIVLE agrees to delete all references to the requirement that fifty per cent of CPD points must be derived from AIVLE activities.

The AIVLE proposes to replace such requirement with the requirement that Members undertake twenty CPD points of which at least ten must be from Valuation and /or Land Economy topics.

Valuation and/or Land Economy topics, are defined as those 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.

B. *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 the limitations imposed by the general law.*

The AIVLE proposes to reword 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".

- C. *The AIVLE must not enforce 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.*

The AIVLE recognises that there have always been circumstances where no internal inspections of a property may be feasible eg. in the case of mass appraisal revaluations and bulk revaluations where properties are grouped homogeneously and/or sampling techniques are applied. However, the AIVLE also is of the view that, in the absence of the above cases and the most exceptional circumstances, kerbside valuations, without internal inspections will be detrimental to the public interest, as members will not be able to carry out their task with satisfactory diligence and determine the layout, building integrity and presence or otherwise of contamination. This is especially true where a valuation report is prepared for mortgage purposes. From this point of view, the issuing of kerbside valuations without full internal inspection clearly is unprofessional and cannot be condoned by the AIVLE. The AIVLE seeks the approval of the Trade Practices Commission to:

delete the whole of Clause 2.4 and to substitute a new Clause 2.4 as follows:

It is not acceptable that an internal valuation 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.

- D. 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.*

The AIVLE proposes to delete Clause 2.6 entirely and to substitute a new 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."

- E. 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.

The AIVLE proposes to delete Clause 4.1 entirely and to substitute a new Clause 4.1 as follows:

"A member who is convicted of an offence involving dishonesty is in breach of this Code of Ethics."

- F. 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.

The AIVLE proposes to delete Clause 11.16 of the Constitution entirely and to substitute a new Clause 11.16 in 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.

(the proposed amendment will require a special Annual General Meeting of the Institute).

- G. 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.

The AIVLE proposes to amend By-Law 24.13(a) and By-Law 24.13(b) as follows:

"(a) The fine to apply under Clause 11.8 of the Constitution is any sum up to a maximum of \$7,500 (seven thousand five hundred 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).

- H. *The AIVLE must amend Clause 24.12 of the By-Laws and Clause 11.13 of the Constitution so that they provide to the effect that:*

absent a compelling reason to order to the contrary, cost 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 with this principle.

The AIVLE proposes to amend By-Law 24.12 to read 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."

The AIVLE also proposes to amend Clause 11.13 of the Constitution to read 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 National Review Committee accordingly."

- I. 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.

The AIVLE believes that the ruling of the TPC in relation to the composition of the National Review Committee is unreasonable and unfair as appeals of a technical nature properly should be heard by a majority of members of the Review Committee who are appropriately qualified in either Valuation or Land Economy. In this connection the AIVLE would like to point out that other Professional Institutes require that the majority of the members on their Appeal Boards must be members of that profession, eg:

. **Certified Practising Accountants**

All members of the Review Board must be members of the Institute. At Divisional level seven of the ten members must be members of the Institute.

. **Institute of Chartered Accountants**

At least one of the six members to be a non-accountant.

. **Institution of Engineers**

All members of the Review Board must be members of the Institute.

Law Society

Twelve of the fifteen members of the Professional Conduct Committee to be members of the Society.

Medical Practitioners of South Australia

Three of the five members to be qualified medical practitioners.

The AIVLE proposes to amend Clause 1.1 in the Constitution to read 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 representative 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.

The AIVLE also proposes to amend Clause 11.12(e) of the Constitution to read as follows:

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.

Attachment C

List of interested parties

Association of Risk and Insurance Managers of Australia
Australian Association of Permanent Building Societies
Australian Bankers Association
Australian Consumers Association
Australian Federation of Consumer Organisations
Australian Federation of Credit Unions
Australian Finance Conference
Australian Institute of Bankers
Australian Insurance Association
Australian Local Government Association
Australian Merchant Bankers Association
Australian Society of Certified Practising Accountants
Australian Society of Real Estate Agents and Valuers
Building Owners and Managers Association of Australia
FAI Insurance Limited
Insolvency Practitioners Association of Australia
Institute of Chartered Accountants in Australia
Institute of Financial Services
Insurance Council of Australia
Mortgage Bankers Association of Australia
Mortgage Insurers Association of Australia
National Institute of Accountants
Real Estate Institute of Australia
Real Estate Services Council

As well as 48 members of AIVLE randomly selected from each State and Territory.