



Australian
Competition &
Consumer
Commission

Draft Determination

Application for revocation of A90545 and the
substitution of authorisation A91522

lodged by

The Australian Property Institute (API)

in respect of

clauses in the API Constitution,
the API Code of Professional Conduct
for Members and associated policies

Date: 17 May 2016

Authorisation number: A91522

Commissioners:

Sims
Rickard
Court

Summary

The ACCC proposes to re-authorise the Australian Property Institute (API) to make and give effect to clauses in the API Constitution, the API Code of Professional Conduct for Members and associated policies.

The ACCC proposes to re-reauthorize the arrangements for a further five years.

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

The application for revocation and substitution

1. On 23 December 2015, the Australian Property Institute (**the API**) on behalf of itself and its current and future members lodged with the Australian Competition and Consumer Commission (**ACCC**) an application for the revocation of authorisation A90545 and the substitution of authorisation A91522 for the one revoked.
2. The API is an industry association which represents the interests of approximately 8 600 property service providers across Australia. API members provide professional property services associated with valuation, finance, law, development, land economics, education, construction and fund management. The API's primary role is to set and maintain standards of professional practice, education and ethics for its members and the broader property profession. The API submits that its members constitute approximately 80 per cent of current providers of property services in Australia.
3. Under existing authorisation A90545¹, the API is allowed to make and give effect to its Constitution and By-Laws which set the standards of professional behaviour required of its members. The existing authorisation (A90545) is subject to a number of conditions which are outlined in paragraph 10 below.
4. Due to a change in its status from an incorporated association to a company limited by guarantee, the API has sought revocation of authorisation A90545 and its substitution with authorisation A91522. The API submits that this change in status requires an application for revocation and substitution as it does not constitute a minor variation.
5. The API seeks re-authorisation for a period of five years.

The Arrangements

6. The API seeks re-authorisation for clauses contained within:
 - a. the API Constitution;
 - b. the API Members Policy;
 - c. the API Complaints Policy;
 - d. the API National Education Board Policy;
 - e. the API Valuation Standards Board Policy;
 - f. the API Australian Property Standards Board Policy;

¹ Authorisation A90545 was granted to API's predecessor body, the Australian Institute of Valuers and Land Economists (**AIVLE**).

- g. the API Appeals Board Policy; and
 - h. the API Code of Professional Conduct for Members (the **API Code**).
- (collectively referred to as the **Arrangements**).

7. The clauses in question relate to:
- a. becoming an API member;
 - b. membership requirements; and
 - c. disciplinary procedures.
8. The API submits that the purpose of the Arrangements is to set and maintain the highest standards of professional practice, education, ethics and professional conduct for members of the API and the broader property profession. Further information about the Arrangements is set out at paragraphs 29-55.

Previous determinations

9. On 29 April 1994, the Trade Practices Commission (**TPC**) granted conditional authorisation (A90545) to the API's predecessor body (the Australian Institute of Valuers and Land Economists) to make and give effect to its Constitution and By-Laws which set the standards of professional behaviour required of its members.
10. The TPC imposed nine conditions of authorisation to ensure that certain clauses in AIVLE's Code of Ethics, Constitution and By-Laws at the time did not result in anti-competitive detriment. The nine conditions relate to:
- a. *The supply of continuing professional development courses*: The TPC did not authorise the requirement that members acquire 50 per cent of continuing development points directly from AIVLE.
 - b. *Defamatory statements*: The TPC did not authorise a blanket prohibition on members making defamatory statements against other members. It considered that this prohibition could be used to prevent a member from bringing a legitimate complaint against another member.
 - c. *Preventing kerb-side valuations* (rather than valuation based on full internal and external inspection of a property): The TPC did not authorise a prohibition on kerb-side valuation and required disclosure if kerb-side valuation was performed.
 - d. *Criticism of other members via advertising*: The TPC did not authorise a clause which prevented "advertising which may potentially injure another member". The TPC considered that this provision provided no public benefit because the general law already provides the appropriate limits on what can be published in advertising.
 - e. *Preventing membership based on criminal convictions*: Originally, the clause excluded members convicted of any offence punishable by imprisonment irrespective of the sentence imposed. The TPC authorised on condition that this clause was amended to read "a member who is convicted of an offence involving dishonesty is in breach of this code of ethics".
 - f. *Limiting a member's rights to external merits and judicial review of decisions of the AIVLE appeals body*: The TPC authorised on condition that appeals against decisions of AIVLE's dispute resolution body may be subject to judicial or merits review.

- g. *Fines that can be imposed on members*: The TPC authorised on condition that the maximum fine which could be imposed on members was limited.
 - h. *Award of costs following dispute resolution*: The TPC was concerned about the breadth of the discretion given to appeal bodies in the AIVLE dispute resolution regime to award costs. The TPC authorised on condition that costs will be awarded to successful parties in proportion to the extent of their success.
 - i. *Ensuring the independence of the AIVLE appeals body*: The TPC required that the National Review Committee of the AIVLE must at all times be constituted so that a majority of its members are independent of the AIVLE. 'Independent' meant that the person is not and has not in the preceding five years been a member of AIVLE.
11. Since the initial authorisation the ACCC has considered four applications for minor variations. The ACCC assessed each minor variation application with close reference to the TPC's conditions:
- a. *August 2005*: the API sought to vary its Code of Ethics, certain clauses of its Constitution and By-Laws and to introduce new Rules of Conduct. The ACCC authorised several of the minor variations which effectively reorganised or restated provisions previously authorised (in terms of broad principles). Three of the proposed variations were not authorised because the ACCC considered they would result in a reduction in the net public benefit of the authorisation and did not meet one or more of the TPC's conditions.
 - b. *February 2007*: the API sought to vary its complaints and disciplinary regime in the API Constitution and By-Laws. The ACCC authorised several of the proposed variations, but did not authorise one of the proposed variations to the By-Laws which removed the appeal process for API members against any decision of the Complaints Committee. The ACCC considered that this variation would result in a reduction in the net public benefit of the authorisation.
 - c. *November 2007*: the API sought minor changes to address the ACCC's concerns in the application of February 2007 (above) regarding the lack of an appeal process and to introduce a new class of membership (Provisional Membership) which would have restricted rights as to the signing of property valuations. The ACCC authorised each of the proposed variations.
 - d. *November 2008*: the API sought to vary the restrictions placed on Provisional Members and Graduate Members to conduct property valuations. The API also sought to clarify the requirements for Members when providing supervision or co-signing property reports for Provisional Members and Graduate Members. The ACCC authorised each of the proposed variations.

Consultation

12. The ACCC tests the claims made by an applicant in support of its application for authorisation through an open and transparent public consultation process. The ACCC invited submissions from a range of potentially interested parties including businesses and individuals with experience in the property industry, state governments, the federal government and consumer groups.

13. The ACCC received three public submissions from two interested parties: the Real Estate Institute of Australia (REIA) and John Dedes, a land valuer. The API also made a submission in response to Mr Dedes' submission.
14. REIA supports re-authorisation and submits that the Arrangements will result in public benefits and no public detriment.
15. John Dedes opposes re-authorisation. Mr Dedes submits that API's membership requirements do not adequately recognise qualifications and experience. He submits that it is onerous and expensive to become an API member, which has the effect of restricting the number of practising valuers. While Mr Dedes notes that API membership is not a legal requirement to practise as a property valuer in South Australia, he submits that property valuers who are not API members may find it difficult to get work unless they become an API member.
16. In response to Mr Dedes' submission, the API states that it does not impose any obligations on clients of property valuers or employers in the property industry to obtain services from API members. The API also submits that, to the extent that some state and territory government regulations require API membership, this is an acknowledgement of the high regard placed on API members and is evidence of the effectiveness of the arrangements.
17. Public submissions by the API and interested parties are available on the ACCC's Public Register and are considered as part of the ACCC's assessment of the application for authorisation.

ACCC assessment

18. The ACCC's assessment of the Arrangements is carried out in accordance with the relevant net public benefit tests contained in the *Competition and Consumer Act 2010* (Cth) (**the CCA**).²
19. In order to assess the effect of the Arrangements and the likely public benefits and detriments, the ACCC identifies the relevant areas of competition and the likely future with and without the Arrangements.

The relevant areas of competition

20. The API submits that the relevant areas of competition are those for the supply of services within the property industry. The ACCC considers that the relevant areas of competition are for the supply of property services: including valuations; advisory; sales; acquisition and leasing advice; legal advice; investment analysis and research; and property management in each state and territory.

The likely future without the Arrangements

21. To assist in its assessment of the Arrangements against the authorisation tests, the ACCC compares the public benefits and detriments likely to arise in the future where the Arrangements are in place against the future in which the Arrangements do not occur.

² Subsections 90(5A), 90(5B), 90(6) and 90(7) of the CCA.

22. While the API did not make specific submissions on the likely future without the Arrangements, it submits that there is a risk that professional standards may be weakened if the Arrangements are not authorised.
23. The ACCC considers that without authorisation, the API would be unlikely to enforce its standards of professional conduct due to the risks of breaching the CCA. In particular, the API would find it difficult to sanction API members who have engaged in professional misconduct.

Public benefit

24. The API submits that the Arrangements promote public confidence in the property industry and a higher level of professional standards than would otherwise be achieved.
25. The ACCC considers that the Arrangements have resulted and are likely to continue to result in public benefit by:
- a. requiring higher industry standards than those required by legislation, and
 - b. improving consumer protection and building consumer confidence in the market through the enforcement of those standards.
26. The ACCC considers that the Arrangements have resulted and are likely to continue to result in public benefit by increasing consumer confidence when purchasing property services. Compared to the likely future without, the ACCC considers that the operation and enforcement of the API's professional conduct regime is likely to generate an incentive for API members to deal more equitably with consumers and facilitate self-regulation in the property services industry.
27. The ACCC notes that the API's dispute resolution procedures achieve high coverage in the property services industry and the API can sanction non-compliance by members. Although many consumers would have access to protections under the *Australian Consumer Law*, the ACCC considers that the Arrangements are likely to deliver additional public benefits and promote confidence in property services industry.
28. The ACCC also considers that the Arrangements are likely to result in efficiencies to the extent that they standardise recognised education and training or specifies appropriate member conduct. This is likely to have the effect of promoting higher professional standards than would otherwise be achieved.

Public detriment

29. The API submits that the Arrangements result in no anti-competitive detriment and notes that:
- a. the Arrangements have been in place for some time and are substantially similar to those for which authorisation A90545 was previously granted;
 - b. public detriment would arise if the application were not granted as it would expose existing consumers to the risk that professional standards may be weakened.
30. The ACCC has considered whether the clauses relating to:

- a. becoming an API member;
- b. membership requirements; and
- c. disciplinary procedures

are likely to result in public detriment.

Becoming an API member

31. The requirements to become an API member are broadly outlined in the Arrangements, with further detail and guidance provided in separate documents which are not part of the Arrangements. The API Constitution and API Membership Policy state that the requirements are:

- a. completion of the prescribed membership form;
- b. payment of the prescribed application fee;
- c. proof of the educational qualifications required by the Board;
- d. proof of Approved Professional Experience;
- e. that the applicant has passed any examination and tests required by the Board, such as a professional interview, practical test or a written examination which is developed by the API National Education Board;
- f. that the applicant is of good character and repute.

32. API Boards constituted under the Arrangements have responsibility for maintaining separate documents which provide further detail and guidance about specific aspects of the membership requirements. The separate documents created by these API Boards are generally not part of the Arrangements. For example, the Arrangements, specifically the National Education Board Policy, establish a board of API with responsibility for developing and providing advice on education and entry requirements. However, the Arrangements do not contain a list of educational courses which are recognised as a condition of becoming an API member.³ The policies which establish API Boards also generally include requirements for the constitution and operation of such API Boards, the Boards being ultimately responsible to API Directors. This decision making structure provides a degree of flexibility to allow the API to update its membership requirements as required.

33. The ACCC notes the submission from Mr Dedes that widespread recognition of API membership by clients of property service providers has resulted in a de facto requirement to be an API member in order to supply property services.

34. The ACCC recognises the potential for detriment where requirements for becoming a member of an industry association are capable of lessening competition. For example, some requirements may inappropriately exclude some competitors from supplying services.

35. However, the ACCC notes that:

- a. Membership of the API is voluntary, non-exclusive and is not a mandatory regulatory requirement to offer services in the property industry. Property valuers are not required to hold a licence in most states and territories including the Australian Capital Territory, New South Wales, Northern Territory, South Australia, Tasmania and Victoria.

³ The list of API Accredited Courses is published on the API website at <https://www.api.org.au/accredited-courses>

In Queensland and Western Australia, API membership is not a mandatory regulatory requirement, but is one of several ways to demonstrate compliance with the state licensing requirements.

- b. The API recognises educational qualifications conferred by a range of tertiary institutions around Australia, including courses delivered online and face to face. The API does not set fees for these courses.
 - c. API membership fees are also reviewed regularly by the API Board. Annual fees for practicing members are comparable to those charged by other professional associations, being \$530 for a Provisional Member and \$835 for a Fellow.⁴
 - d. Approved Professional Experience requirements are comparable to those required by other professions. The Arrangements grant discretionary power to certain API Boards to consider special case applications for membership or certification where the minimum professional experience requirements are not met.
 - e. The ACCC received no submissions from clients of property services professionals opposing the authorisation.
36. Accordingly, the ACCC considers that the requirements for becoming an API member are not unnecessarily restrictive or onerous and are unlikely to result in public detriment.
37. The TPC imposed a condition in its 1994 Determination which relates to becoming an API member. The condition related to a clause of the AIVLE's Code of Ethics which prevented membership due to a criminal conviction. The TPC was concerned that the clause was wider in scope than necessary and may restrict membership due to matters that are irrelevant to a member's capacity to properly carry out his or her professional obligations. The TPC authorised on condition that this clause was amended to read "a member who is convicted of an offence involving dishonesty is in breach of this code of ethics".
38. Given that the Code was amended in accordance with the condition at the time of the original authorisation and continues to confine the restriction to certain types of offences⁵, the ACCC does not propose to maintain this condition of authorisation.

Membership requirements

39. API members must agree to be bound by the Arrangements as a condition of membership. Much of the guidance on the standards conduct expected of members is contained in the API Code. The API Code provides guidance on managing relations with clients, avoiding conflicts or potential conflicts of interest, practising within the limits of professional qualifications and experience, and maintaining independence and impartiality when conducting property valuations. Members are also required to comply with other API policies created by API Directors or API

⁴ The API's 2016 Membership Fees are listed at <http://www.api.org.au/folder/static/2016-membership-fees>

⁵ The API Membership Policy requires that applicants for admission as a member are "of good character and repute" (for example, clause 3.2). Clause 32.2(d) lists the reasons for which membership may be terminated, including conviction of "(i) an offence punishable with imprisonment for three months or more and which detrimentally impacts the good name and reputation of the API or (ii) any offence in connection with the promotion, formation or management of a corporation."

Boards.⁶ Some such policies are not part of the Arrangements for which the API seeks authorisation.

40. The ACCC recognises the potential for detriment where the rules and standards of an industry association are capable of lessening competition. For example, some rules and standards may inappropriately exclude some competitors from supplying services.
41. In this case, the ACCC considers that the API's membership requirements are transparent and directed at addressing the issues that arise when consumers do not have sufficient information about service providers to determine the quality of services they will receive. Further, decisions about terminating membership are subject to the disciplinary procedures described in further detail below.
42. Accordingly, the ACCC considers that the provisions of the Arrangements which require members to comply with rules and standards are unlikely to result in public detriment.
43. In 1994, the TPC imposed a number of conditions relating to API membership requirements designed to address clauses which were inherently anti-competitive or wider in scope than required.
44. However, the API Code has been simplified since that time, with many of the details now found in API policies not subject to the authorisation application.⁷ The following conditions imposed by the TPC related to clauses which have been removed since the 1994 authorisation:
 - a. *The supply of continuing professional development courses*: The TPC did not authorise the requirement that members acquire 50 per cent of continuing development points directly from AIVLE.
 - b. *Defamatory statements*: The TPC did not authorise a blanket prohibition on members making defamatory statements against other members.
 - c. *Preventing kerb-side valuations*: The TPC did not authorise a prohibition on kerb-side valuation and required disclosure if kerb-side valuation was performed.
 - d. *Criticism of other members via advertising*: The TPC did not authorise a clause which prevented "advertising which may potentially injure another member".
45. Given that the clauses above were removed from the AIVLE's Constitution and By-Laws in accordance with the conditions at the time of the original authorisation and do not appear in the Arrangements, the ACCC does not propose to maintain these conditions of authorisation.

⁶ Two examples of API Boards constituted under policies covered by the Arrangements are the API Australian Property Standards Board (which is responsible for developing policy and providing advice in relation to technical standards and professional conduct for property matters excluding valuation matters) and the API Australian Valuation Standards Board (which has responsibility for valuation matters).

⁷ The ACCC noted in its 2005 Determination in relation to API's application for minor variation of A90545 that the detail once found in the AIVLE's Code of Ethics had been moved to the Rules of Conduct. That minor variation application sought authorisation for the Rules of Conduct.

Disciplinary procedures

46. The disciplinary procedures under the Arrangements are set out in the API Complaints Policy, the API Appeals Tribunal Policy and the API Code of Professional Conduct.
47. The API Complaints Policy provides for: the appointment of a Complaints Officer to investigate complaints; a Complaints Committee to hear charges laid by the Complaints Officer; and an Appeals Tribunal (made up of members of the general community) to hear appeals from decisions of the Complaints Committee.
48. An API member may be found guilty of professional misconduct if he or she:
- a. commits a breach of the API Code;
 - b. is found guilty by a court of law of a criminal offence punishable by imprisonment of three months or more which detrimentally impacts the good name and reputation of the API. The ACCC considers that this would likely meet the TPC's condition regarding disqualification due to criminal convictions;
 - c. engages in conduct which is dishonest or fraudulent;
 - d. engages in conduct which is prejudicial to the good name and reputation of the API; or
 - e. obtained admission to the API by improper means.
49. The consequences for an API member found guilty of professional misconduct include public reprimand, payment of costs, suspension of membership and expulsion of the member from the API.
50. The API Complaints Policy sets out a number of requirements which are intended to ensure that procedural fairness is afforded to members against whom a complaint has been made. For example, the Complaints Officer must give written notice to the member about whom a complaint is made including details of the complaint, the complainant, any action by the Complaints Officer and the member's right to make submissions.
51. The ACCC considers that public detriments could result from disciplinary procedures relating to enforcing standards of professional conduct of an industry association where:
- a. membership of the association is necessary to compete;
 - b. the procedures contain broadly expressed provisions and might be open to subjective interpretation; or
 - c. the disciplinary procedures do not provide members with sufficient procedural fairness.
52. In this case, the ACCC notes that:
- a. Membership of the API is voluntary, non-exclusive and is not a mandatory regulatory requirement to offer services in the property industry.
 - b. The API conducts regular reviews of its complaints handling procedures. It also reports annually to an external body, the Professional Standards Council, in relation to complaints received, sanctions imposed and any steps taken to improve complaints handling. This review process limits

the potential for subjective interpretation of the Arrangements by API disciplinary tribunals.

- c. The Arrangements provide for procedural fairness by requiring that complaints are investigated, complaint bodies are independent, and members are afforded the right to respond to a complaint and request a hearing.⁸

53. Accordingly, the ACCC considers that API's complaints handling procedures are unlikely to result in public detriment.

54. In 1994, the TPC imposed a number of conditions relating to the API's disciplinary procedures. The TPC considered the following conditions were necessary to ensure independence of the appeals body and so that members were not discouraged from seeking a hearing of complaints.

- a. *Limiting a member's rights to external merits and judicial review of decisions of the AIVLE appeals body:* The TPC authorised on condition that appeals against decisions of AIVLE's dispute resolution body may be subject to judicial or merits review.
- b. *Fines that can be imposed on members:* The TPC authorised on condition that maximum fines which could be imposed on members were limited.
- c. *Award of costs following dispute resolution:* The TPC authorised on condition that costs will be awarded to successful parties in proportion to the extent of their success.
- d. *Ensuring the independence of the AIVLE appeals body:* The TPC required that the National Review Committee of the AIVLE must at all times be constituted so that a majority of its members are independent of the AIVLE. 'Independent' meant that the person is not and has not in the preceding five years been a member of AIVLE.

55. All of these conditions were met by way of amendments to the Constitution and By-Laws. Each requirement continues to apply in clauses in the API Complaints Policy, the API Appeals Tribunal Policy and the API Code of Professional Conduct. In light of this, the ACCC does not consider it necessary to maintain these as conditions of authorisation.

Conclusion on public detriment

56. For the reasons set out above, the ACCC considers that the Arrangements are likely to result in limited, if any, public detriment.

Balance of public benefit and detriment

57. The ACCC may grant authorisation if it is satisfied that, in all the circumstances, the Arrangements are likely to result in a public benefit, and that public benefit will outweigh any likely detriment, including any lessening of competition.

58. The ACCC is satisfied that the Arrangements are likely to result in public benefits by requiring higher industry standards than those required by legislation, and improving consumer protection and building consumer confidence in the market through the

⁸ The API received 18 formal complaints in 2014, 11 of which were dealt with via a process of mediation or recommendations handed down by the Complaints Committee; the remaining seven complaints were dismissed by the Complaints Officer.

enforcement of those standards. The ACCC considers that these public benefits outweigh the likely limited public detriment. Accordingly, the ACCC is satisfied that the relevant net public benefit test is met and proposes to re-authorise the Arrangements.

59. Given the balance of public benefit and detriment, and for the reasons set above, the ACCC does not propose to maintain the conditions previously imposed in relation to authorisation A90545. However, the ACCC would be concerned if the API made or enforced policies which raised the type of concerns identified by the TPC in previous API authorisations, and may re-examine the Arrangements in those circumstances.

Length of authorisation

60. The CCA allows the ACCC to grant authorisation for a limited period of time.⁹ This enables the ACCC to be in a position to be satisfied that the likely public benefits will outweigh the detriment for the period of authorisation. It also enables the ACCC to review the authorisation, and the public benefits and detriments that have resulted, after an appropriate period.
61. The API seeks re-authorisation for five years. There were no submissions from interested parties in relation to length of authorisation.
62. The ACCC proposes to grant authorisation for five years.

Draft determination

The application

63. The application was made by the Australian Property Institute on behalf of itself and its current and future members using a Form FC, under subsection 91C(1) of the CCA for the revocation of authorisation A90545 and the substitution with the new authorisation A91522. Authorisation is sought to make and give effect to the conduct described below.
64. Subsection 90A(1) of the CCA requires that before determining an application for authorisation the ACCC shall prepare a draft determination.¹⁰

The net public benefit test

65. For the reasons outlined in this draft determination, the ACCC is satisfied, pursuant to sections 90(5A), 90(5B), 90(6) and 90(7) of the CCA, that in all the circumstances the Conduct is likely to result in a public benefit that would outweigh any likely detriment to the public constituted by any likely lessening of competition.

Conduct which the ACCC proposes to authorise

66. The ACCC proposes to revoke authorisation A90545 and substitute a new authorisation A91522 for the one revoked. Re-authorisation is for the Australian Property Institute (**API**) on behalf of its current and future members to make and give effect to clauses contained within:

⁹ Subsection 91(1).

¹⁰ For an application of revocation and substitution of a new authorisation, s91C(5) of the CCA requires the ACCC to comply with the requirements of s90A prior to making a determination.

- a. the API Constitution;
- b. the API Members Policy;
- c. the API Complaints Policy;
- d. the API National Education Board Policy;
- e. the API Valuation Standards Board Policy;
- f. the API Australian Property Standards Board Policy;
- g. the API Appeals Board Policy; and
- h. the API Code of Professional Conduct for Members
(together, the **Arrangements**).

67. The ACCC proposes to re-authorise the Arrangements for five years.

Next steps

68. The ACCC now seeks submissions in response to this draft determination. In addition, consistent with section 90A of the CCA, the API or an interested party may request that the ACCC hold a conference to discuss the draft determination.