

APPLICATION FOR MINOR VARIATION OF AN AUTHORISATION

To the Australian Competition and Consumer Commission:

Application is hereby made under subsection 91A (1) of the *Competition and Consumer Act 2010* for minor variation of an authorisation.

APPLICANT

1. Provide details of the applicants for a variation of authorisation, including:

1.1. Name, Address (registered office), Telephone Number and ACN

Australian Property Institute Limited (API) – ACN 608 309 128

Registered Office:

Level 3, 60 York Street

Sydney

NSW 2000

Phone: (02) 9219 1811

1.2. Contact Name, Position, Telephone Number and Email Address

Ms Amelia Hodge

Chief Executive Officer

Phone: [REDACTED]

Email: [REDACTED]

1.3. Description of Business Activities

The API is a professional peak body, with over 8,000 members, representing the interests of property professionals throughout Australia. The API's primary role is to set and maintain the highest standards of professional practice, education, ethics and professional conduct for its members and the broader property profession.

1.4. Email Address for Service of Documents

Carina Zeccola, Managing Partner – Griffin Legal

Email: [REDACTED]

Phone: [REDACTED]

AUTHORISATION TO BE VARIED

2. Provide details of the authorisation to be varied including:

2.1. Registration number and date of the authorisation which is to be varied

The API are seeking a minor variation of authorisation AA1000553 granted on 25 August 2021 (**the Authorisation**).

2.2. Other persons and/or classes of persons who are party to the authorisation which is to be varied

The proposed minor variation will be made and given effect by the Applicant – being API, the same party subject to the Authorisation. There are no other persons and/or classes of persons who are party to the Authorisation which is to be varied.

The other persons and/or classes of persons who would be affected by the proposed minor variation are API members, the API Board and office holders and employees of API.

PROPOSED VARIATION

3. Provide details of the proposed variation, including:

3.1. A description of the proposed variation

A minor variation of the Authorisation is sought on the basis that the API adopted a new Constitution at its annual general meeting held on 25 May 2022. The adoption of a new Constitution impacts a limited part of the Authorisation, being the conduct which the ACCC authorised at the first dot point in paragraph 5.6 of the ACCC's Final Determination for the Authorisation dated 25 August 2021.

This minor variation is limited in scope to changes to the API Constitution only. API have not amended any of their policies at this time. API confirm that conduct authorised under those policies remains unchanged.

Specifically, API is seeking minor variation in respect of the conduct contained in the API Constitution as follows:

- (a) Clause 5.3 – admission of members;
- (b) Clause 5.4 – application of API policies to members;
- (c) Clause 5.9 – cessation of membership;
- (d) Clause 6.1 – members subject to jurisdiction of API and API policies;
- (e) Clause 6.2 – Professional standards and complaints policy implementation; and
- (f) Clause 15.1 – API board making and amendment of policies.

In respect of the new API Constitution, generally:

- (a) the document was restructured to flow more logically;

- (b) terms were updated to make the document internally consistent and consistent with API's other policies e.g. "Directors" was updated to "the Board" throughout;
- (c) provisions were shortened and clarified, making them easier to interpret and apply;
- (d) provisions relating to meetings of members and directors were updated to reflect recent legislative changes, including in respect of *Corporations Amendment (Meetings and Documents) Act 2022* (Cth); and
- (e) the new Constitution reflects member feedback from the Governance Review – for example, director terms were increased from 2 to 3 years.

Some examples of specific clauses that were updated as part of API's adoption of a new Constitution are detailed below.

Example 1 - Clause 5.3 (new clause 5.4) was updated to clarify the Board's existing role in approving or rejecting an application for membership. The consequence of the new clause remains unchanged, in that applications for membership must be approved by the Board. This clause provides that it is the Board's role to accept (or reject) an application and what occurs if the Board rejected an application. In practice, however, API has no record of rejecting an application for membership in the last 10 years. Any applicant whose application for membership is rejected, can apply again.

Example 2 – New clause 5.7(d) has been added to remove a member who does not have legal capacity. Such person is considered to be of unsound mind or a person whose property is liable to be dealt with under a law relating to mental health. New clause 5.7(d) is intended to capture persons who, owing to their legal incapacity, cannot remove themselves as a member of API. This includes circumstances where a public trustee has been appointed to manage the affairs and property of an individual member.

To further illustrate the proposed minor variation, please find **attached**:

- (a) a high-level summary table, comparing the authorised conduct in the API Constitution to the wording in the new clauses of the newly adopted API Constitution (**Attachment A**); and
- (b) the new API Constitution adopted on 25 May 2022, with relevant clauses highlighted for reference (**Attachment B**).

API Members were the drivers of the changes to the Constitution, which were made to their benefit and helped to clarify their obligations. Extensive consultation on all changes to the API Constitution occurred. The process was carefully considered, transparent and collaborative.

The new API Constitution was adopted following a 6-month review process into the governance structures, systems and documents of the API (**Governance Review**).

The Governance Review involved seeking engagement with and contributions from API members in respect of a number of specific governance issues and reforms raised by both the API Board and the API members themselves. General governance feedback was also invited throughout the Governance Review, which utilised seven different consultation

methods. The API obtained 140 written responses from API Members over the course of the review. There were approximately 22 sessions conducted virtually with Members and groups of representatives of members.

The Governance Review resulted in the preparation of a report into the governance issues and accompanying recommendations for change, which was then considered by the API Board. This then informed the drafting of a new Constitution.

3.2. The reasons for the proposed variation

We seek the ACCC's approval of a minor variation of the Authorisation as the API adopted the new Constitution at its annual general meeting held on 25 May 2022.

The new Constitution is designed to modernise, streamline and refine the corporate governance structure of API. It has been drafted in such a way to prepare API for future governance requirements, to meet the expectations of API members and to comply with the *Corporations Act 2001* (Cth). The new Constitution was also prepared with the Authorisation in mind. At no point in the Governance Review nor preparation of the new Constitution did API intend to substantially change authorised conduct.

We further provide a table of key amendments to the API Constitution and why the amendments were made (**Attachment C**).

We note that not all amendments made relate to the Authorisation. We provide Attachment C to demonstrate that any changes made to API's authorised conduct in the API Constitution, were made as part of a holistic Governance Review and with a view to generally modernise the document.

3.3. Reasons why the proposed variation is minor

Section 87ZP of the *Competition and Consumer Act 2010* (Cth) (**CCA**) defines a minor variation in relation to an authorisation as a single variation that does not involve a material change in the effect of the authorisation.

The proposed variation is properly regarded as "minor" as there have been no changes to the conduct authorised in the Authorisation. The relevant changes to the API Constitution are administrative only and have no effect on the substance of the conduct.

These changes serve to clarify and expand upon the existing obligations of members and the processes available to the Board of API to enact and alter official policies. They are substantively the same as those considered by the ACCC in the Authorisation.

Other clauses that have been amended that were not subject to the Authorisation relate to the eligibility and term of directors on the Board and these have no impact on competition within the market nor negative impact on public benefit.

API accordingly submits that the changes to the Constitution do not materially alter the conduct that has been authorised and that they in turn satisfy the definition of a minor variation under the CCA.

COMPETITION EFFECTS OR NET PUBLIC BENEFIT

We submit that the ACCC should be satisfied that because the changes to the API Constitution are administrative, the public benefit/detriment analysis in the Authorisation remains the same. In varying the Authorisation, there is accordingly no reduction in the extent to which the benefit to the public of the authorisation outweighs any detriment to the public caused by the authorisation (s91A(4), CCA). We have however also specified these per the ACCC's requirements below.

4. **The ACCC will assess whether to grant a minor variation to an authorisation depending on the basis on which the ACCC originally decided to grant authorisation. As applicable, describe the effect of the proposed variation on:**

4.1. Competition in the relevant markets

The proposed variation should have minimal to no impact on competition in the current market, being the supply of services within the professional property industry in Australia. There is no change on the position regarding competition in the relevant markets from that set out in the Authorisation.

4.2. The extent to which the benefit to the public outweighs any detriment to the public

We submit that the amendments to the Constitution provide benefits to the public and membership base of API and do not pose any detriments. The update to the Constitution promotes public trust in API and its processes and requirements. The ACCC has previously considered that the conduct authorised would likely result in limited public detriment. We accordingly submit that the public benefit of the amendments vastly outweighs any possible detriments to the public.

4.3. Provide information, data, documents or other evidence relevant to the ACCC's assessment of the competition effects or net public benefit.

We repeat the comments made on this topic in the Authorisation, particularly as they relate to membership obligations and access.

CONTACT DETAILS OF RELEVANT MARKET PARTICIPANTS

5. Identify and/or provide names and, where possible, contact details (phone number and email address) for likely interested parties such as actual or potential competitors, customers and suppliers, trade or industry associations and regulators.

Actual or potential competitors

Name: Grant Warner, Chief Executive Officer
Organisation: The Australian Institute of Quantity Surveyors
Ph: [REDACTED]
Email: [REDACTED]

Customers and suppliers, Trade or industry associations and regulators

Name: Mark Lim
Organisation: Commonwealth Bank of Australia
Ph: [REDACTED]
Email: [REDACTED]

Name: Lester Cousins, Valuer-General, Western Australia
Organisation: Landgate Western Australia
Ph: [REDACTED]
Email: customerservice@landgate.wa.gov.au

Name: Anna Neelagama, Chief Executive Officer
Organisation: Real Estate Institute of Australia (REIA)
Ph: [REDACTED]
Email: reia@reia.com.au

Name: Graeme Gammie
Organisation: Landgate
Ph: [REDACTED]
Email: customerservice@landgate.wa.gov.au

ADDITIONAL INFORMATION

- 6. Provide any other information or documents you consider relevant to the ACCC's assessment of the application.**

Conclusion

The Applicant submits that the non-substantive changes made to conduct in the API Constitution authorised by the ACCC in the Authorisation constitute a minor variation. The changes do not result in any additional public detriments other than those expressed in the Authorisation. The Applicant requests that the ACCC grant the minor variation of the Authorisation for reasons outlined in this application, above.

API provides the following documents in support of its application for minor variation:

Attachment A – Summary table of changes to authorised conduct

Attachment B – new API Constitution

Attachment C – Table of Key Amendments to API Constitution

DECLARATION BY APPLICANT(S)

Authorised persons of the applicant(s) must complete the following declaration. Where there are multiple applicants, a separate declaration should be completed by each applicant.

The undersigned declare that, to the best of their knowledge and belief, the information given in response to questions in this form is true, correct and complete, that complete copies of documents required by this form have been supplied, that all estimates are identified as such and are their best estimates of the underlying facts, and that all the opinions expressed are sincere. The undersigned undertake(s) to advise the ACCC immediately of any material change in circumstances relating to the application. The undersigned are aware that giving false or misleading information is a serious offence and are aware of the provisions of sections 137.1 and 149.1 of the *Criminal Code* (Cth).



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Signature of authorised person

Chief Executive Officer

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Office held

Australian Property Institute Limited

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(Organisation)

Amelia Hodge

.....

(Print) Name of authorised person

This 10th of October 2022

Note: If the Applicant is a corporation, state the position occupied in the corporation by the person signing. If signed by a solicitor on behalf of the Applicant, this fact must be stated