



AUSTRALIAN COMPETITION
& CONSUMER COMMISSION

Determination

Application for minor variation of authorisation AA1000553
lodged by
Australian Property Institute Limited
in respect of
giving effect to arrangements in API's new Constitution

14 December 2022

Commissioners Rickard
 Keogh
 Brakey

Summary

The ACCC has decided to vary authorisation AA1000553 previously granted to the Australian Property Institute Limited (API) to make and give effect to certain membership requirements and obligations which set standards of professional behaviour on API's members who provide property valuations and related services.

The API adopted a new Constitution on 25 May 2022, making a number of administrative changes to streamline and clarify membership and disciplinary procedures.

The ACCC is satisfied that the proposed variations are minor and are unlikely to reduce the extent to which the benefit to the public from authorisation AA1000553 outweighs any detriment to the public.

Authorisation AA1000553, as varied, will remain in effect until 16 September 2026, which is the expiry date of the original authorisation.

1. The application for minor variation

- 1.1. On 12 October 2022, the API applied for a minor variation to authorisation AA1000553 granted by the Australian Competition and Consumer Commission (the **ACCC**).
- 1.2. The ACCC granted authorisation AA1000553 on 25 August 2021 until 16 September 2026. The authorisation enables API to make and give effect to certain membership requirements and obligations which set standards of professional behaviour and imposed certain membership requirements and sanctions on API's members (the **Authorised Conduct**).¹
- 1.3. The Authorised Conduct related to certain clauses within API's suite of professional standards and associated policy documents including clauses 5.3, 5.4, 5.9, 6.1, 6.2 and 15.1 of API's Constitution.
- 1.4. The API is seeking a variation to the authorisation to reflect amendments made to its Constitution, adopted at API's Annual General Meeting held on 25 May 2022. The API is seeking a variation to the authorisation to reflect changes to the following clauses of the API Constitution adopted on 25 May 2022: clauses 5.3, 5.4, 5.6, 5.7, 5.8, 7.3, 6.2 and 22.1 (the **Proposed Conduct Change**).
- 1.5. This application for a minor variation was made under subsection 91A of the *Competition and Consumer Act 2010* (Cth) (the **Act**).
- 1.6. The ACCC may grant a variation to an authorisation where it is satisfied that the variation is minor and that the variation would not be likely to result in a reduction in the extent to which the benefit to the public from the authorisation outweighs the detriment to the public caused by the authorisation.

2. Background – the API

- 2.1. The API is an industry association which represents the interests of over 8,000 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

¹ See ACCC Final Determination A1000553 for further details about the Authorised Conduct.

to set and maintain standards of professional practice, education and ethics for its members and the broader property profession. Membership is voluntary, non-exclusive and is not a mandatory requirement to provide services in the property industry. The API (or its predecessor body) has had parts of its membership documents, including its Constitution, authorised since 1994.

- 2.2. On 25 May 2022, API adopted a new Constitution at its AGM. The API submits that its new Constitution was restructured to flow more logically, to update terms for consistency, to shorten and clarify provisions and to reflect legislative changes and feedback from a Governance Review. It submits that the changes to the Constitution were designed to modernise, streamline and refine the corporate governance structure of API.
- 2.3. The API submits that its 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 took place and the new API Constitution was adopted following a 6-month review process into the governance structures, systems and documents of the API.

3. Consultation

- 3.1. Prior to public consultation, the ACCC made an initial assessment that the proposed variation was a 'minor' variation consistent with the definition of a minor variation in the Act.²
- 3.2. The ACCC then invited submissions from a range of potentially interested parties including relevant industry associations and state and federal government stakeholders. No submissions were received.

4. ACCC assessment

- 4.1. Under section 91A, the ACCC may grant an application for minor variation of an authorisation if it is satisfied that:
 - the proposed variation is minor (defined as a variation that does not involve a material change in the effect of the authorisation: s87ZP) and
 - the variation would not be likely to reduce the extent to which the benefit to the public from the authorisation outweighs any anti-competitive detriment caused by the authorisation (the minor variation test).³

The proposed variation is minor

- 4.2. The ACCC is satisfied that the Proposed Conduct Change is minor. The ACCC considers that the Proposed Conduct Change will not involve a material change in the effect of the authorisation that was originally granted.
- 4.3. The Authorised Conduct relates to certain clauses within API's suite of professional standards and associated policy documents including the API Constitution, API Membership Policy, API Code of Ethics, API Standards Steering Committee Charter,

² Section 87ZP(1) of the Act

³ The test in deciding whether to grant a minor variation depends on the basis on which the ACCC originally decided to grant the authorisation. In the case of authorisation AA1000553, the ACCC was satisfied, in all the circumstances, that the conduct would result or be likely to result in a benefit to the public, and the benefit would outweigh the detriment to the public that would be likely to result (authorisation test).

API CPD Policy, API Rules of Professional Conduct and Professional Conduct Policy Suite.

4.4. The Proposed Conduct Change relates only to the clauses 5.3, 5.4, 5.9, 6.1, 6.2 and 15.1 of API's Constitution. An outline of the previous and new clauses is set out in Appendix 1.

4.5. The Proposed Conduct Change is as follows:

- Previous clause 5.3 replaced by new clauses 5.4 and 5.6.

The contents of clause 5.3 have been separated into 2 new clauses to separate membership applications and membership approval. The new clause 5.6 adds an additional reference to the rejection of an application. Whilst this reference is new, the Board always had to approve an application and as such the effect remains the same. Further, there has never been a right for an individual to appeal the decision to reject their membership application under API's Constitution and as such, this does not represent a change in conduct. The API policy and other documents set up the complaint and committee processes, and these remain unchanged.

- Previous clause 5.4 replaced by new clause 5.3

This change includes additional cross-references to other clauses and the effect of the clause remains the same.

- Previous clause 5.9, replaced by new clauses 5.7, 5.8 and 7.3

The amendments clarify and expand the events and conditions under which a person will cease to be a member of API, including bankruptcy or where a person "becomes of unsound mind" or ceases to have legal capacity.

The new clause 5.7(d) enables the API to remove a member should they become mentally incapacitated and therefore unable to make decisions, including a decision to cease their membership of the API. The new clause 5.8 allows the Board to expel, terminate or suspend a member; however, this is consistent with the existing API's Policies and Professional Conduct Policy which sets out the procedure for suspending or cancelling membership. Clause 7.3 shortens the timeframe in which non-payment of fees triggers a member's removal.

These additions do not represent a change to the conditions under which persons already ceased to be members. The API's Policies govern the procedures for membership and its conditions and these have not changed. As such, the ACCC considers that the changes do not materially change the effect of the authorisation.

- Amendments to clause 6.2

The amendments include terminology changes for consistency and an expanding of the Board's ability to make policies for the hearing and determination of grievances by any Member. This more accurately reflects that the Board makes Policies about member grievances and both expulsion and termination of members. This does not reflect a change in process.

- Previous clause 15.1 replaced by new clause 22.1

This change allows for greater flexibility for Policies created by the Board removing the set effective period of 28 days which previously applied. This allows for greater flexibility; for example, where API wishes to provide more than 28 days' notice. This change does not materially alter the authorised conduct.

- 4.6. The ACCC considers that the proposed variations to the relevant clauses in the Constitution do not materially change the nature or substance of the Authorised Conduct and as such the ACCC is satisfied they are minor.

No reduction in the net public benefit of the arrangements

- 4.7. In its 2021 determination, the ACCC concluded that the arrangements were likely to result in a net public benefit. In particular, the ACCC considered that the arrangements would be likely to result in public benefits arising from:

- requiring higher industry standards than those required by legislation
- improving consumer protection and building consumer confidence in the market through the enforcement of these standards.

- 4.8. The ACCC does not consider that the variations to allow the Proposed Conduct Change are likely to impact on the public benefits. The changes are largely administrative in nature and the effects of the replacement clauses remain largely the same.

- 4.9. In its 2021 determination, the ACCC also considered that the Authorised Conduct was unlikely to result in any significant public detriment. This assessment was informed by the following:

- While there is potential for public detriment where requirements for becoming a member of an industry association or professional body are capable of lessening competition, the requirements for becoming a member of API were deemed not unnecessarily restrictive or onerous. Membership of API is voluntary.
- The provisions of the Authorised Conduct that require API members to comply with rules and standards were deemed to be transparent and aimed at enhancing members' professional knowledge, with the likely effect of improving services provided to the public.
- API's disciplinary procedures, as set out in the API Professional Conduct Policy Suite, API Membership Policy and API Constitution, provide for procedural fairness by requiring complaints to be investigated by independent complaints bodies and affording members the right to respond to a complaint and request a hearing.

- 4.10. The ACCC considers that the Proposed Conduct Change will not result in any change to the ACCC's previous assessment of public detriments. The ACCC does not consider the Proposed Conduct Change will lessen competition in the supply of property services or impose unnecessarily restrictive or onerous membership requirements.

- 4.11. Therefore, for the reasons outlined, the ACCC considers that the Proposed Conduct Change will not result in any reduction in the net public benefits of the Authorised Conduct.

5. Determination

- 5.1. The ACCC is satisfied that the Proposed Conduct Change is a minor variation as defined by section 87ZP of the Act.
- 5.2. The ACCC is also satisfied that the test in section 91A(4)(b) of the Act is met. That is, the Proposed Conduct Change would not result, or would not be likely to result, in a reduction in the extent to which the benefit to the public of authorisation AA1000553 outweighs any detriment to the public caused by the authorisation.
- 5.3. Pursuant to section 91A(3) of the Act, the ACCC makes this determination varying authorisation AA1000553.
- 5.4. This determination is made on 13 December 2022. If no application for a review of the determination is made with the Australian Competition Tribunal, the determination will come into force on 4 January 2023.

Appendix 1 – Table of relevant changes to Constitution

Previously authorised clause	New proposed clause(s)
<p>Clause 5.3 Admission of Members</p> <p>A person will become a Member, and the Directors will direct the Company Secretary to record a Member’s name in the Register of Members kept by the Company, only upon meeting the criteria applicable to the relevant category of membership set out in this Constitution and the Policies and provided the Member has submitted an application, which is accepted by the Directors, in which the Member undertakes to:</p> <ul style="list-style-type: none"> (a) be bound by this Constitution and the Policies (including Policies specific to the relevant category of Membership); (b) pay the fees and subscriptions determined to apply to the Member under clause 7; and (c) support the Company in the encouragement and promotion of its Objects. 	<p>Clause 5.4 Membership Application</p> <p>(a) A person may apply to become a Member by:</p> <ul style="list-style-type: none"> (i) completing the specified application form determined by the Board, from time to time and delivering it to the Company, including agreeing to: <ul style="list-style-type: none"> (A) be bound by this Constitution and the Policies (including Policies specific to the relevant category of Membership); and (B) support the Company in the encouragement and promotion of its Objects. (ii) satisfying the Board that they meet the criteria applicable to the relevant category of Membership set out in this Constitution and the Policies as determined by the Board, from time to time; and (iii) paying any fees and subscriptions determined by the Board, from time to time to apply to the Member under clause 7. <p>(b) A person becomes a Member when their name is entered on the Register of Members.</p> <p>Clause 5.6 Membership Approval</p> <ul style="list-style-type: none"> (a) The Board may approve or reject an Application for Membership. (b) If the Board approves an application for Membership, the Secretary must as soon as possible:

	<ul style="list-style-type: none"> (i) enter the new Member on the Register of Members, and (ii) write to the applicant to tell them that their application was approved, and the date that the Membership started. <p>(c) If the Board rejects an application, the Secretary must write to the applicant as soon as possible to tell them that their application has been rejected, but does not have to give reasons.</p>
<p>Clause 5.4 Subject to this Constitution, the Policies of the Company will set out:</p> <ul style="list-style-type: none"> (a) the categories of Membership (b) the criteria to be met by each category of Member; (c) the categories of Affiliate Members and the privileges and benefits of each category of Affiliate Member which will not include the right to receive notice, attend to or to vote at, General Meetings; and (d) the procedure for suspending or cancelling Membership. 	<p>Clause 5.3 Subject to this Constitution, the Policies of the Company will set out:</p> <ul style="list-style-type: none"> a) the categories of Membership in accordance with clauses 5.1 and 5.2; b) the criteria to be met by each category of Member; c) the privileges and benefits of each category of Membership, including voting rights, and any right to receive notice or attend General Meetings; d) the procedure for suspending or cancelling Membership.
<p>Clause 5.9 Cessation A person ceases to be a Member on:</p> <ul style="list-style-type: none"> (a) resignation; (b) death; (c) the termination of their Membership according to this Constitution or the Policies; (d) without limiting anything else in this clause 5.9, that Member no longer meeting the requirements for Membership according to clause 5.4. 	<p>Clause 5.7 Cessation of Membership A person will cease to be a Member, on:</p> <ul style="list-style-type: none"> (a) resignation – by providing the Company fourteen (14) days prior written notice; (b) death; (c) bankruptcy; (d) becoming of unsound mind or a person whose property is liable to be dealt with under a law relating to mental health;

	<p>(e) the expulsion of the Member in accordance with this Constitution or the Policies;</p> <p>(f) without limiting anything else in this clause 5.7, that Member no longer meeting the requirements for Membership.</p> <p>Clause 5.8 Expulsion of Member</p> <p>The Board may resolve to:</p> <p>(a) expel or terminate a Member in accordance with clause 6.2(a)(iv); or</p> <p>(b) suspend a Member – for such period and on such terms determined by the Board,</p> <p>where this Member contravenes the terms of this Constitution or the Policies as determined by the Board.</p> <p>Clause 7.3 Non-payment of fees</p> <p>(a) ...</p> <p>(b) If the Fee remains unpaid for more than thirty-one (31) days from the due date, the Member will be removed from the Register of Members and will be required to reapply for Membership in accordance with the Policies and this Constitution.</p>
<p>Clause 6.2 Professional Standards Policies</p> <p>(a) The Directors may make a Policy or Policies:</p> <p>(i) for the hearing and determination of:</p> <p>(A) grievances by any Member who feels aggrieved by a decision or action of the Committee (or a State Committee); and</p>	<p>Clause 6.2 Professional Standards Policies</p> <p>(a) The Board may implement Policies:</p> <p>(i) for the hearing and determination of:</p> <p>(A) grievances by any Member; and</p>

<p>(B) disputes between Members relating to the conduct or administration of the Company, and;</p> <p>(C) complaints by a member of the public;</p> <p>(ii) for the discipline of Members;</p> <p>(iii) for the formation and administration of a Professional Standards Committee which must be independent of any party before it on the matter which is the subject of the appeal in question; and</p> <p>(iv) for the termination of Members.</p> <p>(b) The Directors or the CEO in their sole discretion may refer an allegation (which in the opinion of the Directors is not vexatious, trifling or frivolous) by a complainant (including a Director or a Member) that a Member has:</p> <p>(i) breached, failed, refused or neglected to comply with a provision of this Constitution, the Policies or any other resolution or determination of the Directors or any duly authorised Committee; or</p> <p>(ii) acted in a manner unbecoming of a Member or prejudicial to the Objects and interests of the Company; or</p> <p>(iii) prejudiced the Company or brought the Company or themselves into disrepute, and for the avoidance of doubt, will include breach of a law which subjects that Member to criminal sanctions,</p>	<p>(B) disputes between Members relating to the conduct or administration of the Company; and</p> <p>(C) complaints by a member of the public;</p> <p>(ii) for the discipline of Members;</p> <p>(iii) for the formation and administration of a Professional Standards Committee which must be independent of any party before it on the matter which is the subject of the appeal in question; and</p> <p>(iv) for the expulsion or termination of Members.</p> <p>(b) The Board or the CEO in their sole discretion may refer an allegation (which in the opinion of the Board or CEO is not vexatious, trifling or frivolous) by a complainant (including a Director or a Member) that a Member has:</p> <p>(i) breached, failed, refused or neglected to comply with a provision of this Constitution, the Policies or any other resolution or determination of the Board or any duly authorised Committee; or</p> <p>(ii) acted in a manner unbecoming of a Member or prejudicial to the Objects and interests of the Company; or</p> <p>(iii) prejudiced the Company or brought the Company or themselves into disrepute, and for the avoidance of doubt, will include breach of a law which subjects that Member to criminal sanctions,</p>
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<p>for investigation or determination either under the procedures set down in the Policies or by such other procedure and/or by persons as the Directors or the CEO consider appropriate.</p>	<p>for investigation or determination either under the procedures set down in the Policies or by such other procedure and/or by persons as the Board or the CEO consider appropriate.</p>
<p>Clause 15.1 Making and amending Policies</p> <p>(a) In addition to the Policies made pursuant to clause 6.2, the Board may from time to time make Policies:</p> <ul style="list-style-type: none"> (i) that are required to be made under this Constitution; and (ii) which in their opinion are necessary or desirable for the control, administration and management of the Company's affairs and may amend, repeal and replace those Policies. <p>(b) The Policies referred to in clauses 6.2 and 15.1(a) take effect 28 days after the service of the Policy on the Members and will be in force and effect on and from that date.</p>	<p>Clause 22.1 Making and amending Policies</p> <p>The Board may from time to time make Policies:</p> <ul style="list-style-type: none"> (a) that are required to be made under this Constitution; or (b) which in their opinion are necessary or desirable for the control, administration and management of the Company's affairs and may amend, repeal and replace those Policies.