



Draft determination and interim authorisation

Application for revocation of A91522 and the substitution of authorisation AA1000553 lodged by the Australian Property Institute Limited (API) in respect of certain membership requirements and obligations under its Constitution, Membership Policy, Code of Ethics, Standards Steering Committee Charter, CPD Policy, Rules of Professional Conduct, and Professional Conduct Policy Suite.

Authorisation number: AA1000553

Date: 16 July 2021

Commissioners:

Keogh

Rickard

Brakey

Ridgeway

Summary

The ACCC proposes to re-authorise the Australian Property Institute (API) to make and give effect to certain membership requirements and obligations in its Constitution, Membership Policy, Code of Ethics, Standards Steering Committee Charter, CPD Policy, Rules of Professional Conduct, and Professional Conduct Policy Suite.

Similar membership requirements were most recently authorised by the ACCC on 6 July 2016 for 5 years. The existing 2016 authorisation will expire on 28 July 2021.

The arrangements for which re-authorisation are sought are substantially the same as those authorised in 2016. However, the arrangements are set out in a revised suite of governance and policy documents and some of the requirements have been updated to meet best practice. Examples of more significant updates to the membership obligations and requirements include a new compulsory requirement on property valuer members to also maintain membership in Australian Property Institute Valuers Limited (APIV), additional CPD requirements for certain API members, and new procedures for suspending or cancelling API membership

The ACCC received no submissions in relation to the application for authorisation.

The ACCC considers that re-authorising the specific membership requirements and obligations is likely to result in public benefits, including enforcement of higher industry standards and improvement in consumer protection and confidence. The ACCC considers that the membership arrangements are not likely to result in any significant public detriments.

The ACCC proposes to grant authorisation for a further 5 years.

The ACCC has also granted interim authorisation for the membership requirements and obligations authorised in 2016 to continue while the ACCC completes its assessment of the application for re-authorisation.

The ACCC invites submissions in relation to this draft determination by 2 August 2021, before making its final decision.

1. The application for revocation and substitution

- 1.1. On 6 May 2021, the Australian Property Institute (the **API**) on behalf of its current and future members (together, the **Applicants**) lodged an application to revoke authorisation A91522 and substitute authorisation AA1000553 for the one revoked (referred to as **re-authorisation**) with the Australian Competition and Consumer Commission (the **ACCC**). The Applicants are seeking re-authorisation¹ under subsection 91C(1) of the *Competition and Consumer Act 2010* (Cth) (the **Act**).
- 1.2. The API seeks re-authorisation of its suite of professional standards and associated policy documents for a further 5 years.
- 1.3. The ACCC may grant authorisation, which provides businesses with protection from legal action under the competition provisions in Part IV of the Act for conduct that may otherwise risk breaching those provisions in the Act, but are not harmful to competition and/or are likely to result in overall public benefits.

¹ For information about Authorisations, please see <https://www.accc.gov.au/business/exemptions/authorisation>

- 1.4. In this instance, members of the API compete with each other to provide services within the property industry. The API submits that by becoming a member of the API and agreeing to be bound to API's various membership obligations and policies, as well as provisions which provide for the termination of the membership; this may constitute an arrangement between competitors which has the effect of restricting, preventing or limiting the supply of services within the property industry.

The Applicant

The Australian Property Institute Limited (API)

- 1.5. 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 to set and maintain standards of professional practice, education and ethics for its members and the broader property profession.
- 1.6. The API submits that its members constitute approximately 80 per cent of current providers of property services in Australia. As noted by the ACCC in Determination A91522, membership of the API is voluntary, non-exclusive and is not a mandatory requirement to offer services in the property industry.
- 1.7. The API produces a range of property publications and other professional educational programs and events and online resources. The API also develops software packages providing proforma templates for residential mortgage valuation work undertaken by members of the API.

The Conduct

- 1.8. The API seeks authorisation for certain clauses within its suite of professional standards and associated policy documents which set standards of professional behaviour and impose certain membership requirements and sanctions on its members. In particular, the API seeks authorisation for:
- *API Constitution* – clauses 5.3, 5.4, 5.9, 6.1, 6.2 and 15.1 (at [Annexure A of API's application](#) for re-authorisation)
 - *API Membership Policy* – section 2, 4, 6, 7, 8, 10 and 14 (at [Annexure B of API's application](#) for re-authorisation)
 - *API Code of Ethics* – clause 2.1 and Fundamental Principals 1-5 (at [Annexure C of API's application](#) for re-authorisation)
 - *API Standards Steering Committee Charter* – section 1, 3 and 4 (at [Annexure D of API's application](#) for re-authorisation)
 - *API CPD Policy* – section 3, 4, 9.1 and 10.1 (at [Annexure E of API's application](#) for re-authorisation)
 - *API Rules of Professional Conduct* - in its entirety (at [Annexure F of API's application](#) for re-authorisation), and
 - *Professional Conduct Policy Suite* (including Appeals Tribunal Policy Suite) (at [Annexure G of API's application](#) for re-authorisation):
 - *Professional Conduct Policy* – sections 1, 3, 4, 5, 7, 10, 13.1, 14, 15, and 16,
 - *Professional Conduct Committee Charter* – sections 4, and 7, and

- *Appeals Tribunal Policy* – sections 3, 4, 5.2, 6, 9, 12.2, 13, 15, and 18.
(collectively referred to as the **Conduct**).
- 1.9. The API advises that the Conduct is substantially the same as the arrangements authorised by the ACCC in 2016, but in a revised suite of governance and policy documents. The purpose of the Conduct is to set and maintain the highest standards of professional practice, education, ethics and professional conduct for members of the API.
- 1.10. In particular, the Conduct continues to provide for:
- membership application procedures, Your location
 - a tiered membership structure,
 - professional standard obligations,
 - professional development and education requirements,
 - complaints and disciplinary procedures, and
 - termination of membership rights.
- 1.11. The Conduct also requires certain members of API (namely, practising valuers) to also become members of API's related body corporate, Australia Property Institute Valuers Limited (**APIV**) and to participate in the APIV professional standards scheme, providing a limit on the civil liability of professionals for occupational claims. APIV holds and maintains the Limited Liability Scheme registration for valuers through the Professional Standards Council.

2. Background

Previous ACCC authorisations

- 2.1. The API's membership requirements and obligations have a long history of ACCC authorisation. On 29 April 1994, the then Trade Practices Commission (**TPC**) originally granted authorisation in accordance with several conditions (A90545) to the API's predecessor body (the Australian Institute of Valuers and Land Economists (**AIVLE**)) to make and give effect to its Constitution and By-Laws which set the standards of professional behaviour required of its members.
- 2.2. The TPC originally 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.
- 2.3. Since the initial authorisation in 1994, the ACCC has considered four applications for minor variations:
- *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.

- *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.
 - *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.
 - *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.
- 2.4. Due to a change in its status from an incorporated association to a company limited by guarantee, the API sought revocation of authorisation A90545 and its substitution with authorisation A91522 in 2015. The ACCC concluded the arrangements were likely to result in a number of material public benefits and unlikely to result in any significant public detriments.
- 2.5. On 6 July 2016 the ACCC granted re-authorisation to the API and its current and future members to make and give effect to clauses in the API Constitution, the API Code of Professional Conduct for Members and associated policies (**the 2016 Authorisation**). In the 2016 Authorisation the ACCC concluded that it was no longer necessary to maintain the conditions of authorisation as they had been met by way of amendments to the various API membership documents and associated policies. The ACCC granted re-authorisation until 28 July 2021.

Changes in arrangements

- 2.6. API advises the arrangements are substantively the same as those considered under the 2016 Authorisation. The API submits that policies have been revised to reflect current and best practices. A summary of changes include:
- *Membership eligibility*: clearer defined categories of membership, rights of members in general meetings and membership obligations.
 - *Membership compliance with rules and standards*: compliances with API's constitution and governing policies, discretionary powers for the Board of Directors, CPD requirements, defining the API Standards Steering Committee's role, policies and procedures for professional misconduct.
 - *New compulsory membership to APIV*: API members who hold the categories of Residential Property Valuer or Certified Practising Valuer must also be members of APIV and participate in the APIV professional standards scheme.
 - *Disciplinary procedures*: procedures for suspending or cancelling membership, professional review and disciplinary assessment procedure, Appeals Tribunal Policy and mechanisms and discretionary powers for the Board of Directors.

3. Consultation

- 3.1. A public consultation process informs the ACCC's assessment of the likely public benefits and detriments from the conduct.
- 3.2. The ACCC invited submissions from a range of potentially interested parties including relevant industry associations and peak bodies, consumer groups, state and federal government and relevant regulatory bodies.²
- 3.3. The ACCC received no submissions from interested parties in relation to the application.
- 3.4. Public submissions by the Applicant are on the ACCC's [Authorisations public register](#) for this matter.

4. ACCC assessment

- 4.1. The ACCC's assessment of the Conduct is carried out in accordance with the relevant authorisation test contained in the Act.
- 4.2. The Applicant has sought authorisation for Conduct that may lessen competition under section 45 of the Act, constitute a cartel provision within the meaning of Division 1 of Part IV of the Act, and may constitute exclusive dealing under section 47 of the Act. Consistent with subsection 90(7) and 90(8) of the Act³, the ACCC must not grant authorisation unless it is 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**).

Relevant areas of competition

- 4.3. To assess the likely effect of the Conduct, the ACCC identifies the relevant areas of competition likely to be impacted.
- 4.4. The API submits that the relevant areas of competition are those for the supply of services within the professional property industry in Australia.
- 4.5. 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 and asset management in each state and territory.

Future with and without the Conduct

- 4.6. In applying the authorisation test, the ACCC compares the likely future with the Conduct that is the subject of the authorisation to the likely future in which the Conduct does not occur.
- 4.7. While the API did not make specific submissions on the likely future without the Conduct, it submits that there is a risk that professional standards may be weakened if the Conduct was not authorised.

² A list of the parties consulted and the public submissions received is available from the ACCC's [Authorisations public register](#).

³ See subsection 91C(7).

- 4.8. Consistent with the view in its 2016 Authorisation, 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 Act. In particular, the API would find it difficult to sanction API members who have engaged in professional misconduct.
- 4.9. A self-regulating body that requires members to meet standards of conduct that exceed those required by law can provide confidence and protection to members and end users, who either wish to join the API or use API members' services.

Public benefits

- 4.10. The Act does not define what constitutes a public benefit. The ACCC adopts a broad approach. This is consistent with the Australian Competition Tribunal (the **Tribunal**) which has stated that the term should be given its widest possible meaning, and includes:

*...anything of value to the community generally, any contribution to the aims pursued by society including as one of its principal elements ... the achievement of the economic goals of efficiency and progress.*⁴

- 4.11. In the 2016 Authorisation, the ACCC concluded that the arrangements had, and would be likely to continue 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 enforcement of those standards.
- 4.12. The API advises that it has a dedicated Complaints Officer who receives initial complaints and conducts an investigation to determine if referral to API's Complaints Committee is required. Under its disciplinary procedures, the API may enforce sanctions on its members. The API's Professional Conduct Policy also allows an aggrieved member to appeal a decision.
- 4.13. Since the 2016 Authorisation, the API submits that it has received 157 formal complaints. The API advises the most common categories of complaints related to errors and delays providing a valuation report, dissatisfaction with the quantum (that is, the assessed property value), poor standards of communication, and undisclosed conflicts of interest.⁵
- 4.14. The API advises that of the 157 complaints received since 2016, 102 were dismissed after a preliminary assessment by the API's Professional Conduct Panel. Of the remaining number, 2 resulted in sanctions, there were 13 charges of professional misconduct, 4 membership suspensions, 27 complaints were withdrawn, and 11 complaints are currently under investigation.⁶
- 4.15. In carrying out its investigations, the Professional Conduct Panel of the API assesses the processes followed by a member in preparing and completing their valuation, and does not assess the accuracy of the valuation itself. The API's disciplinary and complaints handling procedures are subject to external annual review by the Professional Standards Council. Following its 2019 report to the Professional Standards Council, API advises that the council recommended that it continue to

⁴ Queensland Co-operative Milling Association Ltd (1976) ATPR 40-012 at 17,242; cited with approval in Re 7-Eleven Stores (1994) ATPR 41-357 at 42,677.

⁵ API supporting submission to application for reauthorisation AA1000553, 6 May 2021, p 14.

⁶ API supporting submission to application for reauthorisation AA1000553, 6 May 2021, p 15.

monitor trends in complaints data and continue to work with stakeholders and members to help reduce those types of complaints in the future.⁷

- 4.16. The ACCC considers that the Conduct has resulted and is 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 are likely to generate an incentive for API members to deal more equitably with consumers and facilitate self-regulation in the property services industry.
- 4.17. 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. Under the 2016 Authorisation, 75% of complaints received about API members were made by consumers.⁸ Although many consumers would have access to protections under the *Australian Consumer Law*, the ACCC considers that the Conduct is likely to continue to deliver additional public benefits and promote confidence in property services.
- 4.18. The ACCC also considers that the Conduct is likely to result in efficiencies to the extent that they standardise recognised education and training or specify appropriate member conduct; such as making Continuing Professional Development (CPD) courses obligatory and auditing the process. This is also likely to have the effect of promoting higher professional standards than would otherwise be achieved.
- 4.19. The ACCC therefore considers that the Conduct has resulted and is likely to continue 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 enforcement of those standards.

Public detriments

- 4.20. The Act does not define what constitutes a public detriment. The ACCC adopts a broad approach. This is consistent with the Tribunal which has defined it as:

*...any impairment to the community generally, any harm or damage to the aims pursued by the society including as one of its principal elements the achievement of the goal of economic efficiency.*⁹

- 4.21. The API submits that the Conduct will not result in any public detriment and notes that the arrangements substantially similar to those for which authorisation has previously been granted.
- 4.22. In its 2016 Authorisation, the ACCC concluded that the Conduct would likely result in limited public detriment.
- 4.23. The ACCC has considered the likely public detriments resulting from:
- becoming an API member,
 - API's membership requirements and obligations, and

⁷ API supporting submission to application for reauthorisation AA1000553, 6 May 2021, p 14.

⁸ API supporting submission to application for reauthorisation AA1000553, 6 May 2021, p 16.

⁹ Re 7-Eleven Stores (1994) ATPR 41-357 at 42,683.

- API's disciplinary procedures.

4.24. The ACCCs assessment is as follows.

Becoming an API member

4.25. The requirements to become an API member are broadly outlined in the Conduct, with further detail and guidance provided in separate documents which are not part of the Conduct. The API Constitution and API Membership Policy (for which authorisation of certain clauses is sought) state that the requirements are:

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

4.26. API Boards constituted under the Conduct have responsibility for maintaining separate documents which provide further detail and guidance about specific aspects of the membership requirements. The policies which establish API Boards also generally include requirements for the constitution and operation of such API Boards, with 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.

4.27. The API CPD Policy contains a list of CPD accredited courses that API members must satisfy according to their level of membership, which is a condition of API membership. The API CPD policy does not contain a list of accredited educational qualifications, these qualifications are listed separately on its website.¹⁰

4.28. Members of the API who are practising valuers (Residential Property Valuer or Certified Practising Valuer) are required to become a member of the Australian Property Institute Valuers Limited (**APIV**) to participate in the APIV professional standards scheme providing a limit on the civil liability¹¹ of professionals for occupational claims. APIV is a related entity of the API.

4.29. The ACCC recognises there is potential for public 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.

4.30. However, in the circumstances the ACCC notes that:

¹⁰ The list of API Accredited education qualifications is published on the API website at <https://www.api.org.au/membership/community/young-property-professionals/accredited-courses/>

¹¹ APIV Insurance Standards (for the APIV Professional Standards Scheme) – Occupational Liability: Civil liability arising (in tort, contract or otherwise) directly or vicariously from anything done or omitted by a member acting in the performance of the member's occupation in the Valuation of Real Property.

- 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. 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.
- 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.
- The compulsory requirement to become an APIV member is unlikely to raise competition concerns noting that APIV is a related body corporate to API and the objective of this requirement is to contribute to the improvement of professional standards of relevant API members.
- 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 \$570 for a Provisional Member and \$885 for a Fellow.¹²
- Approved Professional Experience requirements are comparable to those required by other professions. The Conduct grants discretionary power to certain API Boards to consider special case applications for membership or certification where the minimum professional experience requirements are not met.
- The ACCC received no submissions from clients of property services professionals opposing the authorisation.

4.31. 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.

Membership requirements

4.32. API members must agree to be bound by the Conduct as a condition of membership. Much of the guidance on the standards of professional conduct expected of members is contained in the API Code of Ethics. The API Code of Ethics 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.

4.33. 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.

4.34. Under the 2016 Authorisation, API introduced completion of mandatory CPD requirements on members and auditing to monitor compliance with these requirements. The proposed API CPD Policy under the current application for re-authorisation has introduced additional requirements, these include:

- Associate, Provisional and Fellow Members of API must complete 20 CPD points each year
- members in the MAPI (Members of API) category must complete 10 CPD points, where 1 CPD point is accrued per 1 hour of CPD activity or equivalent

¹² The API's 2021 Membership Fees are listed at <https://www.api.org.au/membership/which-membership-is-right-for-you/>

- a minimum of 10 CPD points must be collected in property related topics which are related to your professional services, and
 - minimum of 1 CPD point must be collected in Ethics.
- 4.35. The API offers its own CPD modules, courses and trainings that members can access. The ACCC recognises the potential detriment when requiring members to complete compulsory paid and free courses through the API, however CPD can also be accrued through private study, discussion groups, webinars, conferences and employer training.¹³
- 4.36. The API conducts periodical audits of CPD compliance and members must be able to produce evidence of attendance (for non-API events), and event outcomes (for structured CPD). Evidence for unstructured CPD includes a diary note of the activity and summary of content. The ACCC considers the compulsory CPD requirement under the API CPD Policy is unlikely to restrict competition among property professionals or course providers, as members are able to accrue points outside of the API's offered courses.
- 4.37. 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. Completion of clearly defined CPD courses has the likely effect enhancing member's professional knowledge to better deliver quality services to the public. Further, decisions about terminating membership are subject to the disciplinary procedures described in further detail below.
- 4.38. Accordingly, the ACCC considers that the provisions of the Conduct which require members to comply with rules and standards are unlikely to result in public detriment.

Disciplinary procedures

- 4.39. The disciplinary procedures under the Conduct are set out in the API Professional Conduct Policy Suite, API Membership Policy and the API Constitution.
- 4.40. The API Professional Conduct Policy provides procedures for reviewing complaints about members. The steps involved include the complainant lodging a form and accompanying evidence; a Professional Conduct Officer is assigned to investigate the conduct; a Professional Conduct Panel will hear charges laid by the officer; and an Appeals Tribunal (comprised of Directors of the API Board, Members of the Professional Standards Steering Committee and Members of the Professional Conduct Committee) may hear member appeals of decisions made by the Professional Conduct panel.
- 4.41. API members may be found guilty of professional misconduct if they:
- commit a breach of their Professional Member Obligations, API/APIV Constitution and Valuation standards
 - commits a breach that falls under the classes of valuation figures, competency, ethical duties, personal bias and conflict of interests

¹³ An exhaustive list of CPD courses and requirements can be found here https://www.api.org.au/wp-content/uploads/2020/07/API-CPD-2020-Guide_v1.pdf and here <https://www.api.org.au/professional-development/cpd-rules-requirements/continuing-professional-development-fags/>

- engages in conduct which is dishonest, fraudulent, plagiaristic, defamatory or non-compliant
- engages in conduct which adversely affect the reputation of the API
- commits an offence punishable with imprisonment for three months or more and which detrimentally impacts the good name of the reputation of the API, and
- commits any offence in connection with the promotion, formation or management of a corporation.

4.42. It should be noted for transparency, the Professional Conduct Policy does not contain a list of professional misconduct; only the sanctions if a member is found guilty of professional misconduct. This may likely cause confusion for members and/or interested parties seeking information on professional misconduct. The categories of professional misconduct is included in the Professional Review Form (located in the Professional Conduct Policy Suite).¹⁴

4.43. 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.

4.44. The API Professional Conduct Policy sets out a number of requirements which are intended to ensure that procedural fairness is afforded to members against whom a Professional Review has been made. For example, the Professional Conduct Officer must give written notice to the member about whom a complaint is made including details of the review, the complainant, any action by the Professional Conduct Officer and the member's right to make submissions.

4.45. The outcomes of professional misconduct are recorded and reported to the Professional Standards Council (required by a scheme registered under the Professional Standards Legislation in a State or Territory) by the Professional Conduct Officer, who has the discretion to decide what is contained on the register in relation to each Professional Review and/or Disciplinary Assessment.¹⁵

4.46. Information relating to the proceeding can be disclosed to the court and tribunal, regulatory authority (state, territory or Commonwealth), Australian legal practitioner, police officer, current and former client of the member.¹⁶

4.47. The Professional Conduct Officer may not disclose any information with respect to the details of any Active and/or Closed Professional Review and/or Disciplinary Assessment if:

- the information may expose the Professional Conduct Officer or any other officer of the API to liability for civil damages,
- the information would or could prejudice, impede or in any other manner adversely affect the investigation of a Professional Review and/or Disciplinary Assessment, or
- would deny procedural fairness to the Member.¹⁷

¹⁴ Annexure G: Professional Conduct Policy Suite - Professional Review Form - Page 31 to 42

¹⁵ Annexure G: Professional Conduct Policy Suite - Professional Conduct Policy - Clause 21

¹⁶ Annexure G: Professional Conduct Policy Suite - Professional Conduct Policy - Clause 22.2

¹⁷ Annexure G: Professional Conduct Policy Suite - Professional Conduct Policy - Clause 22.3

4.48. Generally, the ACCC considers that public detriments could result from disciplinary procedures relating to enforcing standards of professional conduct of an industry association where:

- membership of the association is necessary to compete,
- the procedures contain broadly expressed provisions and might be open to subjective interpretation, or
- the disciplinary procedures do not provide members with sufficient procedural fairness.

4.49. In this case, the ACCC notes that:

- Membership of the API is voluntary, non-exclusive and is not a mandatory regulatory requirement to offer services in the property industry.
- 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 Conduct by API disciplinary tribunals.
- The Conduct provides 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.

4.50. Accordingly, the ACCC considers that API's complaints handling procedures under the Conduct for which re-authorisation is sought are unlikely to result in public detriment.

Balance of public benefit and detriment

4.51. Therefore, for the reasons outlined in this draft determination, the ACCC is satisfied that the Conduct is 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 enforcement of those standards. The ACCC considers that these public benefits outweigh the limited public detriment. Accordingly, the ACCC is satisfied that the authorisation test is met and proposes to re-authorise the Conduct.

Length of authorisation

4.52. The Act allows the ACCC to grant authorisation for a limited period of time.¹⁸ 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.

4.53. In this instance, API seeks re-authorisation for 5 years in order to provide ongoing certainty and stability to API members in respect of the enforceability and application of the above described Conduct.

4.54. There were no submissions from interested parties in relation to length of authorisation.

¹⁸ Subsection 91(1) of the Act.

4.55. The ACCC proposes to grant authorisation for 5 years.

5. Draft determination

The application

- 5.1. On 6 May 2021 the Australian Property Institute (the **API**) on behalf of itself and its current and future members (together, the **Applicants**) lodged an application to revoke authorisation A91522 and substitute authorisation AA1000553 for the ones revoked (referred to as re-authorisation). This application for re-authorisation is made under subsection 91C(1) of the Act.
- 5.2. Subsection 90A(1) of the Act requires that before determining an application for authorisation, the ACCC shall prepare a draft determination.

The authorisation test

- 5.3. Under subsections 90(7) and 90(8) of the Act, the ACCC must not grant authorisation unless it is satisfied in all the circumstances that the Conduct is 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 from the Conduct.
- 5.4. For the reasons outlined in this draft determination, the ACCC is satisfied that the Conduct would be likely to result in a benefit to the public and the benefit to the public would outweigh the detriment to the public that would result or be likely to result from the Conduct, including any lessening of competition.
- 5.5. Accordingly, the ACCC proposes to grant re-authorisation.

Conduct which the ACCC proposes to authorise

- 5.6. The ACCC proposes to revoke authorisation A91522 and grant authorisation AA1000553 in substitution to enable the Applicants to continue to agree to be bound by certain professional standards and obligations.
- 5.7. The API seeks authorisation for certain clauses within its suite of professional standards and associated policy documents which set standards of professional behaviour and impose certain membership requirements and sanctions on its members. In particular, API seeks authorisation for:
 - *API Constitution* – clauses 5.3, 5.4, 5.9, 6.1, 6.2 and 15.1 (at [Annexure A of API's application](#) for re-authorisation)
 - *API Membership Policy* – section 2, 4, 6, 7, 8, 10 and 14 (at [Annexure B of API's application](#) for re-authorisation)
 - *API Code of Ethics* – clause 2.1 and Fundamental Principals 1-5 (at [Annexure C of API's application](#) for re-authorisation)
 - *API Standards Steering Committee Charter* – section 1, 3 and 4 (at [Annexure D of API's application](#) for re-authorisation)
 - *API CPD Policy* – section 3, 4, 9.1 and 10.1 (at [Annexure E of API's application](#) for re-authorisation)
 - *API Rules of Professional Conduct* - in its entirety (at [Annexure F of API's application](#) for re-authorisation), and

- *Professional Conduct Policy Suite* (including Appeals Tribunal Policy Suite) (at [Annexure G of API's application](#) for re-authorisation):
 - *Professional Conduct Policy* – sections 1, 3, 4, 5, 7, 10, 13.1, 14, 15, and 16
 - *Professional Conduct Committee Charter* – sections 4, and 7, and
 - *Appeals Tribunal Policy* – sections 3, 4, 5.2, 6, 9, 12.2, 13, 15, and 18.

(collectively referred to as the **Conduct**).

5.8. The ACCC proposes to grant authorisation AA1000553 for 5 years.

5.9. This draft determination is made on **16 July 2021**.

6. Interim authorisation

6.1. The existing 2016 Authorisation (A91522) is due to expire on 28 July 2021. In order to enable due consideration to be given to the application for re-authorisation, the ACCC has decided to suspend the operation of authorisation A91522 and grant interim authorisation in substitution.¹⁹ The ACCC has decided to grant interim authorisation for the following reasons:

- interim authorisation will maintain the status quo, allowing the Applicants to ensure that best practice governance standards are maintained, while also minimising uncertainty and disruption that will be experienced if interim authorisation is not granted,
- interim authorisation is not likely to result in any significant changes to the market dynamics or prevent the market from returning to its pre-authorisation state if final authorisation of the Conduct is not granted, given the Applicants have been operating under existing authorisation A91522 since 2016 (and previous authorisations since 1994),
- the ACCC considers its final determination in this matter is unlikely to come into effect before the existing authorisation A91522 expires, and
- for the reasons set out in this draft determination, the ACCC considers the Conduct is likely to result in public benefits, which would outweigh the likely limited public detriment.

6.2. The ACCC grants interim authorisation on the same terms as authorisation A91522.

6.3. Interim authorisation will remain in place until the date the ACCC's final determination comes into effect or until the ACCC decides to revoke interim authorisation.

7. Next steps

7.1. The ACCC now invites submissions in response to this draft determination by 2 August 2021. In addition, consistent with section 90A of the Act, the Applicants or an interested party may request that the ACCC hold a conference to discuss the draft determination.

¹⁹ This decision is made under s 91(2)(f) of the CCA.