

<b>COMPLAINANT:</b>	<b>Mr Andrew Gartrell</b>
<b>MEMBER:</b>	<b>Mr Andrew Saunders</b>
<b>DATE OF COMPLAINT:</b>	<b>13<sup>th</sup> July 2017</b>
<b>COMPLAINTS COMMITTEE MEMBER/S</b>	<b>Chris Shaw (Chair)</b>
<b>DATE OF DECISION:</b>	<b>20<sup>th</sup> August 2018</b>

### Background

- 1 On 13 July 2017, the API received a Complaint made by Andrew Gartrell (**Complainant**) against Andrew Saunders (**Member**).
- 2 The Member was engaged by the Complainant to assist with a Development Application (**DA1**) to subdivide a Homestead Property. The two subdivisions are referred to as Sunnyside Homestead (**Homestead**), and Homeward Bound Orchard (**Orchard**).
- 3 The Member conducted a valuation in 2014 of 'Sunnyside Homestead' 299 Nancarrow Lane, Nashdale via Orange NSW 2800 (**Property**), for the purpose of determining the fair market value for First Mortgage purposes. The Member's partner's, Mr Staniforth and had conducted previous valuations of the Property.
- 4 The Complainant alleges that the Member;
  - a. Erroneously submitted DA1 which resulted in the Property permanently losing its residential usage entitlement.
  - b. Proceeded to conduct valuations for the Property on the basis that it still had a residential usage entitlement.
  - c. Subsequently colluded with a finance provider to improperly lodge a further development application (**DA2**) to relocate a building envelope without the Complainants instruction, consent or knowledge.

### The Complaint

- 5 The Complainant informs that in 2006/2007 the Member was engaged to prepare DA1 to subdivide a portion of the Homestead which the Complainant was in the process of purchasing.
- 6 The Complainant advises that he was informed by the Member that DA1 allowed a dual usage of the Homestead as both a dwelling and fruit export sales office. That the Homestead was subsequently valued several times as a residence with full dwelling entitlement which the Complainant took as an assurance that the Homestead could continue to be used as a residence.
- 7 While attempting to sell at a later date the Complainant subsequently learned that the Homestead had lost its residential usage entitlement pursuant to DA1 which resulted in the Homestead now being limited in its use to a rural fruit sales office.
- 8 The Complainant alleges that the signature and handwriting on the front page of DA1 was not signed or written by him and raises questions regarding the authenticity of the documents. The Complainant has requested forensic analysis of the document but has not seen fit to obtain and provide such analysis to support his claim.

- 9 The former owner has provided a statement confirming that he did not consent to DA1 instigating the loss of the dwelling entitlement.
- 10 The Complainant informs that in 2008, Patfield and Company were engaged to prepare a valuation for lending purposes. The valuation report describes the Homestead as a dwelling and does not refer to the Homestead as a fruit sales office without residential usage rights.
- 11 In 2010, the Complainant approached Stacks Finance (**Finance Provider**) to refinance his existing loan portfolio. The Finance Provider appointed Mitch Staniforth of Saunders and Staniforth, the Member's Valuation Firm, to conduct a valuation for the Homestead. The Complainant alleges that this valuation report assessed the Homestead as a rural dwelling and at no time was it considered to be a much less desirable and less valuable rural sales office without residential usage.
- 12 In 2012, an additional valuation was conducted by Mitch Staniforth of Saunders and Staniforth at the instruction of the Finance Provider. The Complainant states that it is his understanding that the valuation indicated the property still could be used for residential purposes.
- 13 Upon electing to sell the Homestead in 2013, the Complainant was made aware that the Homestead had not had a residential entitlement since 2006/2007.
- 14 The Complainant discussed the issue with the Member and Raine and Horne Principle Roger Eddy. The Complainant alleges that the Member admitted to the Real Estate Agent Mr Eddy that he had made a terrible mistake and f\*\*\*\*\* up DA1 and subsequent valuations and that he would attempt to correct the mix up. No statement has been provided by the Real Estate Agent to support this statement.
- 15 The Complainant alleges that the Member held numerous discussions with Cabonne Council but that the restriction on residential usage was unable to be reversed or remedied.
- 16 The Complainant was presented with the option of moving a residential usage approval from the Orchard to the Homestead, however the Complainant considered this would significantly devalue the Orchard by leaving the commercial property without a managers residence.
- 17 The Complainant alleges that the Finance Provider engaged the Member's Valuation firm to conduct a valuation of the Homestead on 17 January 2014. The Complainant notes that this valuation report undertaken by the Member includes references to bedrooms and bathrooms and appears to confirm dual usage as both residential and rural sales office despite the Member being aware of the issues regarding residential use.
- 18 The Complainant alleges that the Member deliberately misled the Finance Provider as to the lack of residential entitlement and failed to bring this deficiency to the Finance Provider's attention.
- 19 The Complainant alleges that the Member manipulated the LVR of the Complainant's property portfolio to fit with the Finance Provider's requirements and to not draw attention to what the Complainant says are the Member's earlier errors.
- 20 The Complainant queried the 2014 valuation with the Member and was allegedly advised by the Member that *"houses have come back in value a lot this year but orchards have gone up, I have everything under control and the sum of your LVR across the properties will be fine and more or less unchanged"*.
- 21 The Member contends that it is beyond belief that the Member responsible for preparing DA1 that extinguished the residential entitlement of the Homestead could subsequently provide a valuation report in 2014 which did not detail the lack of residential usage rights.
- 22 The Complainant claims the Member's gross errors misled the Finance Provider into advancing funds significantly over and above the value of the property and entrapped the Complainant into loans and subsequent penalties that could not be repaid by selling the asset.
- 23 The Complainant states that he became trapped in a debt scenario that could not be solved by selling the Homestead as there were no likely buyers for a specialist rural fruit sales office. , The Complainant claims he was forced to fire sale the adjoining fruit packing shed for an amount significantly lower than the property's value and was left without his primary source of income.
- 24 The Complainant asserts the lack of fruit packing income impacted his overall financial position and forced him to sell the Orchard and the property in which the Complainant resided.

- 25 The Complainant informs that whilst there were significant arrears on his loan, at no time was the Lender ever mortgagee in possession of his assets.
- 26 The Complainant alleges that he received correspondence from the Finance Provider requesting that he sign DA2 in blank. The Complainant informs that at the time he was under vast emotional duress and subsequently signed the blank DA2. Such correspondence from the Finance Provider has not been provided by the Complainant.
- 27 The Complainant states that it is his understanding that the signed blank DA2 was then provided to the Member who allegedly completed and submitted DA2 to Cabonne Council.
- 28 The Complainant asserts that despite his requests the Member did not contact the Complainant during the process of completing DA2. The Complainant alleges that the Member was taking instructions directly from a third party to lodge DA2 without the Complainant's proper knowledge or consent. The Complainant states he has never sighted the completed DA2.
- 29 The Complainant informs the Orchard building envelope was located in line with the best and most valuable use of the property as detailed in a 2009 Orchard valuation.
- 30 The Complainant alleges that without his knowledge or consent and with the benefit of DA2 signed in blank, the Member completed the pre-signed DA2 in collusion with the Finance Provider and submitted DA2 to relocate the building envelope to a new location.
- 31 The Complainant speculates the motive to move the building envelope to a position with commanding views meant the property could be quickly marketed to the mass rural lifestyle market. However, the new position would require the removal of a vast number of fruit trees and make it less attractive to a farmer to purchase.
- 32 The Complainant states that he attempted to raise the matter with the Member in an attempt to resolve the matter amicably, however he claims the Member has responded with aggressive and bullying threats from the Member's law firm.
- 33 The Complainant has accused the Member of breaching rules 1.1, 1.7, 1.16, 3.1g, 6.3b, and 6.4d of the API's Code of Professional Conduct (**Code of Conduct**).

### **The Member's position with respect to the Complaint**

- 34 Pursuant to clause 7.3(d) of the API Complaints Policy (**the Policy**) the Member was presented with the opportunity to provide a submission in response to the comments made within the complaint. The Member provided an initial submission on 30 October 2017 and a further submission on 20 June 2018.
- 35 The Member denies any error as expressed in the Complaint.
- 36 The Member asserts that the only valuation conducted by him was in 2014 and that this was undertaken with integrity, independence and without bias.
- 37 The Member informs that his valuation was undertaken with professional research, market evidence and analysis and full inspections. The Member states his approach to his valuation is no different to any other valuation done for its intended purpose.
- 38 The Member acknowledges it is not uncommon for him to complete development application forms to assist clients, however the member denies the allegation that he signed the DA1 form and/ or forged the Complainant's signature.
- 39 The Member refutes the allegation that he has made a planning error and informs that the change in Local Environmental Plans has not assisted with the future use of the land.
- 40 The Member contends that the Complainant was well aware of the intent of the LEP clause relied upon to subdivide the Homestead away from the Orchard. He also states that in addition, the Complainant was well aware the Cherry export office was an integral part of DA1.
- 41 The Member informs that the Complainant signed the DA2 form without pressure, was provided with the approval, engaged his own surveyor and provided supporting information to assist with the DA2 application.

- 42 The Member informs that in 2015 he was instructed by the Finance Provider to relocate a dwelling envelope for Lot 200, the Complainant was made aware of the requirement for DA2 to assist with selling the property and proceeded to sign the form. The intent to move the dwelling envelop was based on buyer feedback as to the preferred dwelling location.
- 43 The Member informs that he has notified his insurer of the matter however they have not taken any action, in addition he states that Cabonne Council are not prepared to pursue the Complainant's allegations.
- 44 The Member advises of his reluctance to provide extensive evidence in respect of the allegations made by the Complainant in light of threatened court proceedings.

### Chronology of Events

Date	Event
2006 - 2007	DA application submitted to Cabonne Council to subdivide the Homestead.
30 April 2008	Homestead valued as a residence with full dwelling entitlement – Patfield and Company.
11 July 2010	Homestead valued as a residence with full dwelling entitlement – Mr Staniforth of Saunders and Staniforth.
2012	Homestead valued as a residence with full dwelling entitlement – Mr Staniforth of Saunders and Staniforth.
2013	Complainant elected to sell the Homestead and allegedly discovered it had lost the residential usage entitlement.
17 January 2014	Valuation by the Member
16 March 2015	Complainant received correspondence from Cabonne Council confirming the residential entitlement for the Homestead has been lost in 2007.
21 April 2015	Homestead valued taking into account the non-approved residential usage – Toner and Associates.
23 June 2015	Complainant was allegedly requested to sign the DA in blank for the Orchard.

### API complaints process

- 45 The Complaints Committee was provided with the following materials for consideration:

	Document	Prepared by	Date
a.	Complaint Form	Complainant	13 July 2017
b.	Development Application	Complainant	15 December 2006
c.	Note	Previous Owner	28 October 2015
d.	Valuation Report	Robert Patfield	30 April 2008
e.	Valuation Report	Mr Staniforth of Saunders and Staniforth.	12 January 2010

	<b>Document</b>	<b>Prepared by</b>	<b>Date</b>
f.	Correspondence between Real Estate Agent and Complainant	Roger Eddy and Complainant	6-31 August 2013
g.	Valuation Report	Member	17 January 2014
h.	Confirmation of Homestead Usage	Cabonne Council	16 March 2016
i.	Valuation Report	Gregory Toner	21 April 2015
j.	Correspondence from Lender re DA	Mark Newnham and Complainant	23 June 2015
k.	Valuation Report: non-Subject Property	Mr Patfield of Saunders and Staniforth.	28 April 2009
l.	Correspondence from Complainant to Member	Complainant	12 November 2015
m.	Member's Response	Member	30 October 2017
n.	Member's Further Response	Member	20 June 2018

46 Between 24<sup>th</sup> April 2018 and 1 June 2018, the Chair, Mr Chris Shaw, independently considered this Complaint pursuant to clause 26.7(a) of the Policy.

47 No conflicts of interest were identified.

48 Requirements of the Policy having been met, the Chair reviewed the issues raised by the complaint and made a determination in relation to each issue raised.

## Findings

The Chair addressed the alleged breaches of the Code of Conduct as follows:

<b>Rule 1.1</b>	Members must carry out their professional duties ethically, with honesty, competence, and in good faith, without personal bias, and in a manner which upholds the values and reputation of the property and valuation profession
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49 The Chair finds that there is sufficient evidence to conclude that the Member breached rule 1.1 of the Code of Conduct.

50 The Complaint states that the Member allegedly failed to competently carry out his professional duties. The Member was engaged by the Complainant to provide Town Planning services in the form of providing advice and representation with respect to a development application 2007/0161 for the “*subdivision of two lots and a business for packaging and marketing of cherries.*” The lots being subdivided were lot 15 in DP 621509 and lot 46 in DP 1097737. The consent for the development application incorporated condition 6 as follows:

*“The residential dwelling located on Lot 100 is to be only used as an office. No residential use of the building is permitted.”*

51 It is alleged that the Member failed to bring this limitation to the attention of the Complainant and failed to advise the Member of the consequences of this condition prior to the development

consent being acted upon and therefore enlivened. It is further alleged that the Member later proceeded to undertake valuations ignoring condition 6 of consent 2007/0161.

- 52 The Member has responded by submitting that a number of discussions occurred with the Complainant in 2006 as part of the DA preparation process. The Member submits that Mr Gartrell was keen to separate the dwelling away from the orchard and that on a number of occasions the planning clauses of the old LEP were explained as the property did not enjoy existing use rights, concessional subdivision entitlement or other subdivision options.
- 53 The Member states that he advised the Complainant that Council needed a supporting argument relating to an alternate use for the small lot and that the Complainant agreed that the 'cherry export office' was an option and that the Member considered that would be supported by Council. The Member states that the Complainant was satisfied with that advice and wanted to proceed on that basis. The Member states that the proposed use was very specific and that the Complainant left the Member's office stating that he would collect supporting information. The member refers to this as the 'quarry clause' and says that it was his way of illustrating that a subdivision could be achieved for an alternate use.
- 54 Subsequently, the Member states that he and the Complainant discussed the idea with Council regarding the need for an export base for the cherry exporting business and that the Complainant provided supporting pamphlets to assist in the DA process. The Member submits that the approved DA therefore supported the Complainant's intention.
- 55 The Member concedes that he has not been able to locate a formal written instruction however submits that the Complainant's intent was clear due from his instructions and the supporting information provided by Complainant plus the signed DA form by the Complainant.
- 56 The Member submits that the Complainant was "*excited about the DA and had a 'lets make it happen' approach.*"
- 57 The Member acknowledges that the use of the building for a non-residential export office was an integral part of the DA and states that the Complainant was made aware of the nature of the DA and associated limitations. The Member submits that it was only when the Complainant's financial operations came under pressure many years later that he questioned the intent of the subdivision.
- 58 The Member submits that his only valuation on 'Sunnyside' was in 2014 and that he made clear reference to the town planning history (pages 9 & 10) and associated limitations.
- 59 The Member states that on 28 August 2013, the Complainant and the Member went to Cabonne Council's offices to discuss residential options in conjunction with an alternative approved use. On 14 June 2018 the Member states that he contacted Cabonne Council and that staff confirmed that meeting in 2013 occurred.
- 60 Taking into account the documentation provided by the Complainant and the response by the Member and specifically considering the valuation of 2014 and its contents, it is clear that there is no reference to Condition 6 of the relevant development consent referred to above.
- 61 Acknowledging that the member is entitled to a presumption of innocence and with consideration that the burden of proving the breach of the Code of Conduct falls on the Complainant, it is considered that there is sufficient evidence to conclude that Rule 1.1 of the Code of Conduct has been breached in that the competence of the member is called into question by the lack of specifically drawing attention to Condition 6 in the 2014 valuation.

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**Rule 1.7** A Member must obtain or confirm in writing all instructions and variations of instructions of the client or the client's representatives.

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- 62 The Chair finds that there is insufficient evidence to establish that the Member breached rule 1.7 of the Code of Conduct. Although the Member has not submitted any details of his instructions with respect to the Development Application it is considered that Rule 1.7 should not apply to work undertaken by Members of the API other than valuations. This is consistent with prior determinations of the Complaints Committee.

63 With respect to confirming instructions in relation to the 2014 valuation, it is considered that the valuation properly sets out the Member's instructions and the person who provided such instructions. No evidence has been provided by the Complainant that the person who provided the instructions took issue with the confirmation of instructions provided in the 2014 Valuation Report. Consequently, due to a lack of evidence no breach of Rule 1.7 is established.

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**Rule 1.16** A Member must not directly or indirectly exert undue pressure or influence on any persons, whether by the offer or provision of any payment gift or favour or otherwise, for the purpose of securing instructions for work, or accept instructions from any person where there is reason to believe that undue pressure or influence may have been exerted by a third party in expectation of receiving a reward for the introduction.

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64 The Chair finds that there is insufficient evidence to establish that the Member has breached rule 1.16 of the Code of Conduct.

65 This allegation is raised in reference to the Complainant's claim that he was coerced into signing DA2 in blank which was utilised by the Member to relocate a building envelope to the Orchard.

66 The Member contends that he was engaged by the Finance Provider and that the Complainant signed the DA without pressure, was provided with the approval, engaged his own surveyor, and provided supporting cherry export information to support the DA.

67 The Member states that the matter was discussed with the Finance Provider at length and that the DA form was explained to the Complainant by Stack the Finance Provider. The Member states that the intent of the relocation of the dwelling envelope was simple. That the Complainant was aware his orchard lot was for sale and that most buyers were impressed with the property, but did not like the dwelling site location. The Member states that as far as her was aware the Finance Provider did not force the Complainant to sign the DA form and the Member certainly did not.

68 The Member states that the fact that the Complainant's land was already for sale is also important and that the pressure in this matter would seem to be related to the Complainant's financial responsibilities. The Member states that the Finance Provider made it clear to him that they were communicating with the Complainant.

69 The Member states that he spoke to the Finance Provider on 6th June 2018 and was able to confirm that an email to the Finance Provider from the Complainant at the relevant time confirms the Complainant's support for the DA as the dwelling envelope relocation wherein the Complainant notes it would improve the sale potential and value. The Finance Provider was not willing to release the email for privacy reasons.

70 Taking into account the documentation provided by the Complainant and the response by the Member and acknowledging that there is a presumption of innocence with the burden of proving the breach of the Code of Conduct falling on the Complainant, it is considered that there is insufficient evidence to conclude that Rule 1.16 of the Code of Conduct has been breached.

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**Rule 3.1g** A member must maintain the strictest independence and impartiality when making a valuation and/or where the exercise of objective judgement is required. In such circumstances, a member must not:

g) act in any way inconsistent with the duties of independence and impartiality.

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- 71 The Chair finds that there is insufficient evidence to establish that the Member breached rule 3.1g of the Code of Conduct.
- 72 The Complainant alleges that the Member breached this rule by colluding with the Finance Provider to relocate the building envelope to within the Orchard.
- 73 The Member asserts the valuations were undertaken after the Complainant completed the subdivision process, and were done with professional research, market evidence and analysis, and full inspections.
- 74 The Member states that he was assisting the Finance Provider in lodging the DA and that the Complainant was aware of this and the selling difficulties in the previous dwelling envelope location and hence signed the DA, as the owner, to enable relocation.
- 75 The member states that planning services were done impartially and as instructed. The Member further states that he was satisfied that the Finance Provider was dealing with the Complainant regarding the DA process and refers to an email from the Complainant to the Finance Provider.
- 76 Taking into account the documentation provided by the Complainant and the response by the Member and acknowledging that the Member is entitled to a presumption of innocence with the burden of proof falling on the Complainant, it is considered that there is insufficient evidence to conclude that Rule 3.1g of the Code of Conduct has been breached.

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**Rule 6.3b** When undertaking a valuation, a member must take reasonable steps to:

- b) ascertain and verify such relevant facts and information as a prudent valuer would have ascertained or verified in order to provide a professional valuation of the property.
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- 77 The Chair finds that there is sufficient evidence to establish that the Member breached rule 6.3b of the Code of Conduct.
- 78 The Member points out that in the 2014 valuation he referred to opportunities available under the then new Cabonne LEP 2012 that allowed for dwelling use in conjunction with another approved uses. He nominates examples discussed with Council's senior planner Heather Nicholls and the Complainant which included a cafe or professional consultant office (such as an agronomist). The Member submits that he spoke with Heather Nicholls (from Cabonne Council) on 14 June 2018 and confirmed that she recalled the meeting with the Complainant and the Member where these issues were discussed.
- 79 The Member states that the limitations were set out in the 2014 Valuation report and that further discussion occurred with the Finance Provider to further explain these limitations once the report was received by the Finance Provider.
- 80 The Member submits that it was the Finance Provider who provided the instructions for the Valuation to be undertaken and as such the Member concludes that the obligations had been satisfied.
- 81 Notwithstanding these submissions a review of the 2014 valuation failed to identify any reference to the limitation placed on the property by way of the imposition of condition 6 in development consent 2007/0161. The failure to reference condition 6 ignores a significant restriction imposed on the property and thus the value of the property.
- 82 It appears that notwithstanding that the Member was aware of the restriction imposed by condition 6, that it was not highlighted in the Valuation Report. This is sufficient to establish a breach of rule 6.3b.

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**Rule 6.4d** A Member must include in a valuation report:

d) a statement of all assumptions made in arriving at an opinion of value and all conditions, requirements or limitations arising from the client's instructions or arising due to any other circumstances;

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- 83 The Chair finds that there is sufficient evidence to establish that the Member breached rule 6.4b of the Code of Conduct.
- 84 Based upon the omission to address the impact of condition 6 of DA 2007/0161 and the impact of that condition on the valuation of the property, it is apparent that the Member failed to make an adequate statement of limitations "arising due to any other circumstances." As such it is concluded that the Member breached rule 6.4d of the Code of Conduct.

### **Breach of Code of Conduct**

- 85 Pursuant to clause 11.6(a) of the API's Complaints Policy and with reference to the matters set out above, the determination is that the member has breached Rule 1.1 (with respect to competence and undertaking a valuation in a manner which upholds the values and reputation of the property valuation profession) and Rules 6.3b and 6.4d of the API's Code of Conduct.

### **Sanctions**

- 86 The matters set out in clause 12.2 of the API's Complaints Policy have been considered. The breaches identified above and the circumstances that lead to the breaches are technical. Care needs to be taken in all instances to ensure that where existing development consent conditions impact on the useability of a property that such limitations are clearly notified in the valuation report so that they can properly be considered with respect to their impact on the property's valuation.
- 87 Consideration has been given to the submissions made on behalf of the Member and an educative approach is deemed to be an appropriate response and in the public interest. The findings as set out in this determination are deemed to be sufficient for the Member to be aware of and to ensure that in future relevant development consent conditions are clearly set out in valuation reports produced by the Member.
- 88 Pursuant to clause 12.1 of the API's Complaint's Policy, the following sanctions are imposed on the Member:
- (a) The Member is ordered to undertake the following training and provide proof of successful completion to the API's Complaints Officer within 3 months of this Report.
    - (i) The Reflexive Matrix
      - (A) Reflexive Matrix Module – Communication in a professional Context
      - (B) Reflexive Matrix Module – Communication and Principles
- <https://www.api.org.au/course/the-reflexive-matrix>
- (b) The Member is required to provide an undertaking to the API that in future the Member will ensure that relevant development consent conditions that impact on the value of a property are clearly set out in any valuation report for which the Member is responsible.
  - (c) This report and the findings set out herein are to be published on the API's website, pursuant to clause 12.1(o) and 12.5 of the API's Complaints Policy. Any features identifying the Member or the Member's firm are to be redacted.

**Advice**

89 The Member is advised that clause 13.1 of the API's Complaints Policy allows for an application to be made to the API's Appeals Tribunal for a review of the Complaints Committee's decision. Clause 13.4 of the API's Complaints Policy requires that any appeal to the Appeals Tribunal must be by way of a notice of appeal submitted to the API's Complaints Officer within 21 days of receipt of the API's Complaints Committee decision set out herein.

I confirm that this is an accurate account of the determination of the Complaints Committee in relation to this complaint.



Date 22 August 2018

**Chris Shaw**  
**Chair of the API Complaints Committee**