

AUSTRALIAN PROPERTY INSTITUTE INC.

NATIONAL OFFICE

**AN AUSTRALIAN CONSUMER LAW:
FAIR MARKETS – CONFIDENT CONSUMERS**

**SUBMISSION TO THE STANDING COMMITTEE OF OFFICIALS OF CONSUMER
AFFAIRS
COMPETITION & CONSUMER POLICY DIVISION
DEPARTMENT OF TREASURY**

MARCH 2009

INTRODUCTION

This submission responds to the document released by the Standing Committee in respect of *An Australian Consumer Law: Fair Markets – Confident Consumers*, namely:

'To improve consumer wellbeing through consumer empowerment and protection, fostering effective competition and enabling the confident participation of consumers in markets in which both consumers and suppliers trade fairly.'

This submission by the Australian Property Institute (API) is in response to the Request for Comment contained within the Information and Consultation Paper by interested parties to make submissions in response to the Information and Consultation Paper. Namely in relation to the three key elements of the reform

- the development of a consumer law to be applied both nationally and in each State and Territory, which is based on the existing consumer protection provisions of the *Trade Practices Act 1974*, and which includes a new national provision regulating unfair contract terms, new enforcement powers and, where agreed, changes based on best practice in state and territory laws;
- the implementation of a new national product safety regulatory and enforcement framework, as part of the national consumer law; and
- the development of enhanced enforcement cooperation and information sharing mechanisms between national and state and territory regulatory agencies.

The Institute fully supports the review being undertaken by the Standing Committee into Australia's consumer laws, particularly in light of the Productivity Commission's assessment that *'while Australia's consumer policy framework has considerable strengths, parts of it require an overhaul.'*

It is also noted that *'Australia's governments will implement the Australian Consumer Law in the following way:*

- *the Australian Parliament will:*
 - *in accordance with the agreed text of the Australian Consumer Law, amend the consumer protection and related provisions of the TPA relating to consumer protection, and also include new provisions providing an administrative underpinning for the Australian Consumer Law;*
 - *enact a version of the Australian Consumer Law as a schedule to the TPA, which includes modifications to take account of the way in which state laws apply to individuals and non-incorporated entities and which takes account of specific administrative and enforcement issues;*

- *enact changes to the investor protection provisions of the ASIC Act and, to the extent necessary, the Corporations Act 2001 which reflect the Australian Consumer Law, with any necessary modifications; and*
- *each State and Territory Parliament will then pass an application Act which will apply the schedule version of the Australian Consumer Law in their jurisdictions and amend or repeal any state and territory legislation affected by or superseded by the new Law.*

The Institute is happy to discuss any of the matters raised in its submission or to provide any additional information required. Arrangements can be made by contacting Mr. Grant Warner, API National Director on telephone no. (02) 6282-2411.

COMMENTS AND RECOMMENDATIONS

Chapter 1

Background to the Reforms

The section on reform states that: “A provision should be incorporated into the new law that addresses Unfair Contract Terms. It also stated that “A term would be unfair when it causes significant imbalance to the parties rights and obligations and would if exercised, result in material detriment to consumers.”

Page 29, Chapter 6 Unfair Contract Terms

Unfair Contract terms are those that cause a significant imbalance in the parties rights and obligations arising under a contract and are not reasonably necessary to protect the legitimate business interests of the supplier.

Submission – Australian Consumer Law

Proportionate liability was introduced to address “Deep Pockets Syndrome” and permitting contracting out would subvert this as those likely to be plaintiffs, would seek to contract out and there will be cases where the parties do not have equal bargaining power.

Hence The Australian Property Institute

Proposes that a model provision be drafted to expressly prohibit contracting out of proportionate liability with the effect of section 7 (3) of the Civil Liability Act 2003 (QLD). Legislation that does not expressly state whether contracting out is permitted creates uncertainty.

It is our view that contracting out subverts the purposes of all legislation

- Contracting out is acceptable between parties of equal bargaining power. But unfair when one of the parties is in a dominant position.
- Joint and several liability can work an injustice on some parties as they may be responsible for only a minor portion of the total loss but because they are covered by insurance and the only ones able to satisfy the judgment, end up providing all of the compensation (they are treated as deep pockets)

It is noted that Western Australia, New South Wales and Tasmania currently expressly permit contracting out.

(Refer Section 3A of the Civic Liability Act 2002 NSW)

However, some jurisdictions explicitly allow contracting out between concurrent wrongdoers. Refer Northern Territory, Western Australia and Tasmania who have similar provisions to Section 36 of the Civil Liability Act 2002 (NSW).

It is the Institute's view that differences between jurisdictions on whether contracting out of proportionate liability is permitted can lead to uncertainty and create difficulties in claims and proceedings.

The Australian Property Institute wishes to state its opposition to the "Contracting Out" of proportionate liability. This provision creates damages to all members of our profession, increases insurance premiums and directly affects consumers with higher cost of valuation and financial services.

Section 7 (3) of the Civil Liability Act 2003 (QLD) expressly prohibits contracting out of proportionate liability. This legislation should be adopted nationally with uniform legislation in all states.

Consumer Law Reforms: Attorney Generals Department **Reform Paper 17/02/09**

Page 31- Question:

What sort of contract terms might be covered by the unfair contract terms provisions?

- Clauses that exclude liability for harm resulting from the suppliers to its agents actions.

Page 33- Question:

What types of contracts would be covered by unfair contract terms regulations?

- Professional services, including services provided by lawyers, engineers, surveyors, architects, consultants and others. (i.e Property Valuers?)

All the above support our submission against contracting out of **Proportionate Liability**.

In 2003 the standing committee of attorneys general (SCAG) agreed to introduce a “Nationally” consistent system of proportionate liability for damages for economic loss or property damage and endorsed key features of a model of proportionate liability.

However: SCAG Ministers did not formerly consider the issue of “Contracting Out” of proportionate liability and the approach to this issue differs between jurisdictions.

The purpose of proportionate liability was to replace joint and several liability by providing for distribution of liability between concurrent wrongdoers according to their proportionate share of fault in damages claims involving property damage or purely economic loss.

Contracting out of proportionate liability is also contrary to the provisions of the provisions of the Professional Standards Act 1994 (NSW).

Objects of this act are as follows:

- A) To enable the creation of schemes to limit the civil liability of professionals and others
- B) To facilitate improvement of occupational standards of professionals and others
- C) To protect consumers of the services provided by professionals and others.
- D) To constitute the PSC to supervise the preparation of schemes to assist in the improvement of occupational standards and protection of consumers.

Contracting out provisions are contrary to the above provisions and professions that have adopted limited liability via the PSC Act would be seriously affected and these are:

- i) The Law Society of NSW
- ii) C.P.A Australia
- iii) Engineers Australia (NSW) Scheme
- iv) Australian Property Institute (NSW) Scheme

And any other future associations/organizations that will consider limited liability via the PSC Act.

By Allowing contracting out would destroy the intention and purpose of the PSC Act which was to improve availability and affordability of professional indemnity insurance, whilst maintaining protection for consumers via measures such as compulsory insurance over, continuing education requirements and formal complaint procedures.

Summary:

In the past, the plaintiff was able to choose the most deep pocketed out of a set of wrongdoers and recover the entirety of its loss from that selected defendant, even that the defendant bore only a small share of overall responsibility for the loss.

This meant that insurers for the defendant would have to meet in its entirety at a loss to which the client contributed to a minor extent. It also meant that the insurance policy would single out the defendant to the exclusion of all other parties.

Currently with proportional liability legislation each wrongdoer is only liable as between that wrongdoer and the plaintiff for the wrongdoers own fair share of the plaintiff's loss. This system is fair to the defendants and the insurers and each wrongdoer bears his fair share of liability.

It should be noted in every case brought against a valuer there may be a number of wrongdoers who should share the liability;

1. Any borrower or guarantor who may have made false statements relevant to the loan application i.e borrowers income, credit history etc.
2. Any borrower/guarantor who has made false statements relevant to the value of the property; i.e false rent roll.
3. Any broker or third party who made a false statement regarding the value of the property.
4. financial or legal advisor who negligently advised that the loan should proceed.
5. any broker, agent or anyone who negligently assisted the borrower in making false statements or made false statements on the borrowers behalf.
6. any other valuers who have negligently confirmed the false valuer.
7. final class of wrongdoer is the tenant in the subject property who has falsely confirmed inflated rents.
8. finally there may also be contributory negligence against the mortgagee who may not have taken all reasonable care in entering into the loan.

The Australian Property Institute agrees as in Page 103 of The Australian Consumer Law Reform Paper 17/02/09 which states that;

The ministerial council further proposes that:-

- The new national consumer law should be developed by the agreements of All Australian Governments and make law through an application legislation scheme, with the commonwealth as the lead legislator and the

states and territories applying the new national consumer law (as amended from time to time) as part of their own laws.

- National Consumer Laws should apply to all sections of the economy, opting out of proportional liability is detrimental to consumers and all parties to the contract.

Proportional liability must be law on a National basis if all the Acts passed are to have weight especially the Professional Standards Council Provisions to all professional bodies.

APPENDIX 1 AUSTRALIAN PROPERTY INSTITUTE INC.

The Australian Property Institute, (formerly known as the Australian Institute of Valuers and Land Economists), has enjoyed a proud and long history.

Originally formed over seventy years ago in 1926, the Institute today represents the interests of more than 8,000 property experts throughout Australia. As the peak professional property organisation the API has been pivotal in providing factual and dispassionate advice on a broad range of property issues addressed by the Commonwealth and State/Territory governments since the Institute was formed.

In addition, the Institute's advice has increasingly been sought by overseas bodies such as the United Nations and the World Bank, evidencing a level of expertise within the API and its membership which is recognised globally.

However, as a professional organisation the primary role of the Australian Property Institute is to set and maintain the highest standards of professional practice, education, ethics and discipline for its members.

Institute members are engaged in all facets of the property industry including valuation, property development and management, property financing and trusts, professional property consultancy, plant and machinery valuation, town planning consultancy, property law, and architecture. Membership of the Australian Property Institute has become synonymous with traits and qualities such as professional integrity and client service, industry experience, specialist expertise, together with tertiary level education and life long continuing professional development.

Members are the Institute's greatest asset, and the Australian Property Institute is committed to maintaining a strong base for the future of the property profession through the broadening of the expertise, and knowledge of the membership.

Integrity

The Membership of the Australian Property Institute is bound by:

- A Code of Ethics and
- Rules of Conduct