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Director Justice Policy
Department of Attorney General and Justice
GPO Box 6
SYDNEY NSW 2001

National Office

6 Champion Street, Deakin ACT 2600
T 02 6282 2411
F 02 6285 2194
E national@api.org.au

To the Director of Justice Policy

By Email : justice_policy@adg.gov.au

API'S SUBMISSION RE PROPORTIONATE LIABILITY MODEL PROVISIONS

The Australian Property Institute (API) refers to your letter dated 24 January 2014, which invited submissions on the proportionate liability's model provisions (**the model provisions**).

The API's position is essentially the same as that expressed in our letter dated 11 October 2011 (which we **enclose** for ease of reference) save that we would like to highlight the following matters.

Key points

The API makes three observations of the model provisions:

1. First, the API is greatly encouraged by the model provisions. In particular, the API welcomes section 12 of the model provisions, which prohibits 'contracting out'. As outlined in our previous submissions, it is crucially important to our members that any consistent scheme prohibit 'contracting out'. Our concern is that this would lead claimants to issue proceedings in States or Territories where 'contracting out' is permitted.
2. Second, the API supports the definition of 'concurrent wrongdoer' as including "substantially or materially similar loss or damage" (s4(1) of the model provisions) which removes any uncertainty between superior courts and should lead to greater consistency in judicial decision making.
3. However, the API submits that the definition of "apportionable claim" in section 2(2)(a) of the model provisions should be broadened, so that API members are not disadvantaged by section 30 of the Australian Consumer Law, which has the potential to take standard negligence actions against valuers, outside the proportionate liability regimes.
4. The API also notes the "carve out" for consumer claims, and reiterates that such claims against property professionals should be subject to the proportionate liability provisions.

1. The Model Provisions

Proportionate liability is of critical importance to members of the API, particularly for certified practising valuers (CPV) that provide valuation services for mortgage purposes.

Prior to the proportionate liability reforms, the High Court decisions of *I&L Securities* and *Henville -v- Walker* had removed the right to reduce liability due to contributory negligence of its clients. The added injustice, was that usually a borrower that had misrepresented its financial position to a lender was a significant contributing factor to the loss, but the valuer (and its insurers) bore the liability for that conduct pursuant to the principles of joint and several liability.

This made valuers a very difficult risk to insure. As such, the proportionate liability reforms, which at its heart were designed to ease pressure on professional indemnity insurance premiums, were welcomed by the API and its members. The other key plank of the reforms concerning capped liability, which is designed to limit a professional's liability to the amount of available insurance, has also been embraced by the API under its own capped liability scheme.

However, loopholes in the proportionate liability regime can potentially be exploited to effectively circumvent these reforms. The API is keen to ensure that these loopholes are closed. And those loopholes relate to claims against valuers under the Australian Consumer Law, which can obviate the defences available to members under the proportionate liability regime. This is a recurring theme. Judicial interpretation removing the right to claim contributory negligence in defence of section 52 of the *Trade Practices Act* led to the reforms. We now face the same potential risk with section 30, which used to be section 53A of the *Trade Practices Act*. Our suggestion as to how to avoid this problem is set out below. We will firstly deal with the aspects of the model provision which the API vigorously supports.

Contracting Out

The API supports the prohibition on contracting out in section 11 of the model provisions. As we stated in our previous submission dated 11 October 2011, valuers can inadvertently contract out of the defences available under the proportionate liability regime. When they do so, they run the risk of having uninsured claims. That risk should be eliminated and in our view, the model provisions achieve that objective.

Test of concurrent wrongdoer

The API also welcomes the extension of "concurrent wrongdoer" to include including the "substantially or materially similar loss or damage" (s4(1) of the model provisions).

This is no doubt in response to the High Court's interpretation of "concurrent wrongdoers" in *Hunt & Hunt Lawyers v Mitchell Morgan Nominees Pty Ltd*¹ ("**Mitchell Morgan**"). Such an extension overcomes the uncertainty created by Victorian Supreme Court of Appeal's judgment in *St George Bank Ltd v Quinerts Pty Ltd*² ("**Quinerts**"), where Nettle JA (with whom Mandie JJA and Beach AJA agreed) found that the borrower and guarantor were not concurrent wrongdoers with the valuer, largely on the basis that the actions of one wrongdoer have to contribute to the actions of another.³ Indeed, Nettle JA, writing extra-judicially, himself states that "same damage" is a narrower concept than "substantially or materially similar damage".⁴

¹ *Hunt & Hunt Lawyers v Mitchell Morgan Nominees Pty Ltd* (2013) 247 CLR 656.

² (No 2) [2010] VSCA 68.

³ *Quinerts* at [76]. Note that the *Mitchell Morgan* criticises this approach at [41], noting that there is no requirement in the NSW proportionate liability provisions that the wrongdoer contribute to the wrongful actions of the other wrongdoer in order that they cause the same damage.

⁴ Justice Nettle, paper entitled 'Proportionate Liability', presented by the Hon Justice Geoffrey Nettle at the CPD Seminar, The Lower Banking Chamber, 385 Bourke Street, on 23 February 2011, paragraph 16, p.6.

The model provisions resolve that debate, for the certainty of our members and clients alike and has the support of the API. In short, common law negligence claims are clearly covered by the model provisions. The issue relates to statutory causes of action.

The definition of "apportionable claim"

The problem of section 30 of the ACL

The model provisions define an apportionable claim as ..

"[a] claim is an apportionable claim if it is for economic loss or damage to property in (a) an action for damages (in contract, in tort, under statute or otherwise) where a failure to take reasonable care is an element of the claimant's action (our emphasis added)" (s2(2)(a)).

The model provisions expressly apply to claims under section 18 of the *Australian Consumer Law* (formerly section 52 of the *Trade Practices Act*) but do not apply to section 30 any other provision of the Australian Consumer Law that is relevant to professional negligence claims. Arguably, the definition of apportionable claim means that the proportionate liability provisions will apply to claims under other sections of the *Australian Consumer Law*, but only when the failure to take reasonable care is an *element* of the claimant's action.

Section 30 of the Australian Consumer Law, reads as follows:

30 False or misleading representations about sale etc. of sale

1 A person must not in trade or commerce, in connection with the sale or grant, or the possible sale or grant, of an interest in land or in connection with the promotion by any means of the sale or grant of an interest in land:

(b) Make a false or misleading representation concerning the nature of the interest in the land.

The Federal Court in the case of *Australian Equity Investors, and Arizona Limited Partnership v Colliers International (NSW) Pty Ltd (No. 4)* [2011] FCA 442, held that a market appraisal by Colliers, which referred to the gross realisation value of a development property - i.e. the value the property could be sold for once developed was \$6,250,000 - was a misrepresentation for the purpose of this section (noting that at the time of this case, it was 53A of the *Trade Practices Act*).

It has subsequently been held by Justice Reeves in the Federal Court in *Bennett v Elysium Noosa Pty Ltd (In Liq)*(2012) 202 FCR 72, that a claim under Section 53A is not an apportionable claim.

The market appraisal in the *Arizona* decision was an expression of opinion. It was held to be a misrepresentation due to an error in estimating the value of the property. As a matter of substance, it was a conventional negligence claim and the proportionate liability provisions should apply. Whether or not the provisions actually did apply on those facts, was not a matter considered by the court in *Arizona* for reasons that are not clear from the decision, but following the decision in *Bennett*, that would be the logical outcome.

This line of reasoning could mean that a conventional professional negligence action framed as a claim under s.30 of the *Australian Consumer Law* would avoid the proportionate liability amendments.

It is therefore important that the definition of apportionable claim be extended to expressly include Section 30 to cover such claims, or that the definition of apportionable claim clearly be extended to cover the circumstances in *Australian Equity Investors*.

This could be achieved by making two small changes to the definition of apportionable claim:

- amending the proposed clause 2(2)(b) to read as follows:

(b) An action for damages-

(i)...under the Australian Consumer Law (ACT, section 236 (Actions for Damages) for a contravention of that Law, section 18 (Misleading or deceptive conduct); or

(ii)..under the Fair Trading Act, section 46 (Actions for damages) for a contravention of that Action, section 12 (Misleading or deceptive conduct); or

(iii) under section 30 of the Australian Consumer Law (Misrepresentations in relation to land transactions) where that action in substance alleges a failure to take reasonable care by a qualified property professional.

- amending proposed clause 2(2)(a) as follows:

"[a] claim is an apportionable claim if it is for economic loss or damage to property in (a) an action for damages (in contract, in tort, under statute or otherwise) where in substance, the claimant's action alleges a failure to take reasonable care. ~~is an element of the claimant's action.~~

In the submission of the API, a "qualified property professional" could be appropriately defined as:

Qualified property professional means a licensed estate agent or agent's representative; or a member of the Australian Property Institute that is suitably authorised under the guidelines of the Australian Property Institute to provide the valuation or other professional opinion that is the subject of the claim against them.

The proposed reference to the "substance" of the claim, picks up a line of authority in Victoria where the Supreme Court has focused on the reasons behind the claim, rather than the form of the claim, when deciding whether or not the proportionate liability provisions apply. The Hon. Justice Macaulay, in his paper entitled 'Proportionate Liability - Is it achieving its aims?'⁵, noted that several decisions on the current Victorian proportionate liability provisions have rejected the argument that the plaintiff has to allege in its pleadings that the defendant has failed to exercise reasonable care.⁶

Further, as Barrett J stated in *Reinhold v NSW Lotteries Corporation (No 2)*⁷:

A case no doubt needs to be pleaded and proved by one or more defendants so as to engage the statutory provision. But it will be the findings ultimately made that determine whether the statutory conditions compelling the court to adopt the proportionate approach are satisfied.

⁵ Delivered at the Australian Insurance Law Association Seminar, dated 2 December 2010.

⁶ Hon. Justice Cameron Macaulay, in his paper entitled 'Proportionate Liability - Is it achieving its aims?', delivered at the Australian Insurance Law Association Seminar, dated 2 December 2010, p.19 of 27, citing *Dartberg Pty Ltd v Wealthcare Financial Planning Pty Ltd* (2007) 244 ALF 552; *Woods v De Gabriele* [2007] VSC 177; *Reinhold v New South Wales Lotteries Corporation (No 2)* [2008] NSWSC 187.

⁷ [2008] NSWSC 187, 32, as cited in Justice Nettle paper, above no 3, at p.8, paragraph 21.

The API submits that it is appropriate to make the suggested amendments to the definition of apportionable claim to first focus a court's attention on the substance of the claim not form; as well as specifically apply the proportionate liability scheme to claims against our members under section 30 of the *Australian Consumer Law*.

The carve out for Consumer claims

As we stated in our 11 October 2011 submissions, the API remains concerned about the 'carve out' for consumer claims.

Under section 2(3)(c) of the model provisions, the following are proposed as options for the various jurisdictions to adopt:

(b) a claim by an individual in an action for damages under the Australian Consumer Law (ACT) other than an action mentioned in subsection (2)(b)(i);

(c) a claim by an individual in relation to -

(i) goods taken to have been acquired by the individual as a consumer within the meaning of the Australian Consumer Law (ACT), section 3(1)(a), as limited by that law, section 3(2);
or

(ii) services taken to have been acquired by the individual as a consumer within the meaning of that Law, section 3(3)(a);

...

It is noted that the change from the consultation draft, eliminates section 18 claims by individuals, but leaves open claims by individuals for misleading and deceptive conduct under the Fair Trading Act in each state. As such, the modifications to the model provisions from the 2011 consultation draft, do not materially alleviate the risk. It means that actions by individuals who have acquired a valuation for domestic or household use, can bring claims that are not subject to the proportionate liability provisions.

It is submitted that the carve out should be modified, to ensure that consumer claims against Qualified property professionals as defined above, are subject to the proportionate liability laws. This would ensure that for example, an individual contributor to a mortgage fund cannot get around proportionate liability defences, by framing a claim against a property professional as a consumer claim. Or a borrower that complains that they have not received sufficient finance from a lender because of a property valuation, also have the claim subject to proportionate liability defences.

Summary

The API emphasises that proportionate liability is a key consideration for its members. The API looks forward to further steps being made to harmonize proportionate liability across Australian jurisdictions, to ensure a fairer future for its valuers.

Yours faithfully,



A.L. McNamara
Professional Standards Manager
Australian Property Institute