



30 April 2004

The Secretary
Senate Economics Legislation Committee
Room SG.64
Parliament House
CANBERRA ACT 2600

Dear Dr Bachelard,

Treasury Legislation Amendment (Professional Standards) Bill 2003

The Property Council of Australia welcomes the opportunity to make a submission to the Senate Standing Committee on Economics (the Committee).

The Property Council recognises that proven failure of insurance markets can require balanced intervention by governments.

The Property Council expects all professional associations to strive to continually to improve the conduct and performance of their members; a reward and a duty in itself.

The Property Council completely rejects the flawed notion that professional associations will best achieve improvements in the behaviour and service of their members by inflicting inflexible, liability-shifting, non-market caps on other sectors of the economy while seeking to deny individual firms the opportunity to contract in an otherwise free market.

The Property Council believes that, in its current form, the Treasury Legislation Amendment (Professional Standards) Bill 2003 (the Bill) requires one simple and significant improvement.

Recommendation

The Property Council commends to the Committee the Australian Bankers' Association 'contracting above the caps' amendment (the Amendment) as proposed in their submission of March 2004.

Only once the proposed Amendment is adopted, will the Professional Standards Bill meet the objectives of the Joint Communiqué of the Ministerial Meeting on Insurance Issues (Hobart, 27 February 2004) where "Ministers agreed that any legislation or schemes being developed should be flexible enough to meet the concerns of large purchasers of professional services".

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The Property Council of Australia

The Property Council comprises the leading developers, financiers, owners and managers of investment property in Australia. These members currently own more than \$300 billion of domestic assets.

As participants in the investment community, Property Council members are customers both of the construction industry in particular and professional service providers in general.

Importantly, as real property is an important asset class within collective investment vehicles, the quality and reliability of the advice delivered by professional service providers impacts directly on the retirement wealth of ordinary Australians.

Current deficiencies in the Professional Standards Bill 2003

As it stands, the Bill does not meet the objectives of the Joint Communiqué of the Ministerial Meeting on Insurance Issues, (Hobart, 27 February 2004) where "Ministers agreed that any legislation or schemes being developed should be flexible enough to meet the concerns of large purchasers of professional services".

The unintended and indirect consequence of the Bill is to allow a shift of the financial risk arising out of poor professional advice from the professional to the consumer.

Inflexible, liability-shifting, non-market caps

The transfer of risk will occur because the current state schemes exclude any flexibility in the market distorting caps created through consultation processes that leave out most of the large consumers of professional services.

For instance, even where they agree, individual NSW and WA firms cannot contract above the upper cap on liability for their professional association, unless they are prepared to revert to completely unlimited liability.

Equally problematic, the upper caps on liability are not set by individual contracts between companies or indeed by the market generally.

Worse, the State schemes have, until now, effectively been operating shadow caps; the true extent of liability shifting away from the provider of bad professional advice is unknown.

Contracting above the caps

The Property Council notes the lack of evidence that individual contracting above capped schemes will have any detrimental impact on the professional indemnity insurance market.

The Bill's explanatory memorandum states,

"Available data supports statements that the overwhelming majority of claims are settled within the established caps".

Moreover, as Mr Dallas Booth of the Insurance Council of Australia, E 20 & 21, stated to the Committee,

"I would have thought the real issue is not capping at all; the real issue is the number of claims that are coming in around the average claim size level, which, according to ACCC, is \$23,000 . . . it is the number of claims for \$20,000 to \$50,000 that will ultimately drive the price of PI insurance in Australia."

And again, as ACCC Commissioner Ms Jennifer McNeill has stated to the Committee, E 53,

"it is not clear that a blow-out in claims, and in particular a blow-out in Trade Practices Act claims, has caused the difficulties with professional indemnity insurance."

The straightforward conclusion to be reached here is that, notwithstanding the limitations of caps, the majority of claims are settled within the existing caps, it is the volume of small and medium claims below the cap that drive the price of professional indemnity insurance in Australia and, finally, that contracting above the caps will not have a material impact on the current situation other than to prevent the transfer of the cost of bad advice to the consumer.

The contracting above the caps Amendment

The Australian Bankers' Association Amendment will allow the Bill to preserve the freedom of individual firms to negotiate in the market place in response to the prevailing state of the insurance market at that given time.

Without the ABA Amendment, the Bill will unintentionally support schemes that potentially cause liability to the customer of bad professional advice, where previously it resided with the provider, without creating any meaningful incentives for professionals to improve their risk management procedures.

Therefore, a new sub-section should be added to each of the proposed new sections - 12GNA Australian Securities & Investments Commission Act, 1044B Corporations Act and 87AB Trade Practices Act.

The Property Council commends to the Committee the Amendment as it appears in full on page four of the ABA submission of March 2004.

Yours faithfully



Michael Zorbias
Chief Advocate