

API E - News

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Leading the property profession

MARCH 2006

API National Director, Mark Howland resigns

Mark Howland resigned in early March from the position of API National Director. Mark has a strong background in business development particularly in the training and education areas. The current medium term API agenda is focused on professional issues, improved communication and structural and cultural reforms. Whilst Mark has interest in all these areas, the overall balance of the role has shifted, leading to his decision. Mark has made a contribution in many areas, including the stabilisation of the National Office in terms of financial and resources perspective, achieving ACCC authorisation and progressing a number of professional issues including the Financial Services Reform legislation, Desktop Valuations and the regulation of the property industry. I have enjoyed working with Mark and on behalf of National Council and the Australia Property Institute, thank him for his contribution and wish him well for the future.

Grant Warner, Deputy National Director has been appointed to the position of acting National Director.

Barry Brakey, National President

Notification of Annual General Meeting

National Council wishes to advise Members that the Institute's Annual General Meeting (AGM) is to be held on Wednesday 24 May at the Shangri-La Hotel in Cairns, Queensland.

Any Member wishing to bring any motion or business before the Annual General Meeting of the Institute that does not relate to the Ordinary Business of the Institute must give notice in writing to the National Director by 14 April 2006. The National Director will then include such motion(s) or business in the agenda for the next Annual General Meeting.

Members are advised that no motion or business other than the Ordinary Business of the Institute, or the business brought forward by the National Director in accordance with the above (as stipulated in Constitution Clause 3.4.1 or Clause 3.4.2) can come before an Annual General Meeting.

'Ordinary Business' means:

- a. When it relates to the Annual General Meeting of the Institute:
 - (i) to receive and consider:
 - (A) the statement of income and expenditure;
 - (B) the balance sheet;
 - (C) the report of the National Council for the preceding year;
 - (D) reports of any trusts established by the Institute; and,
 - (E) the auditor's report.
 - (ii) to elect auditors; and
 - (iii) to announce the office bearers of the Institute for the ensuing year elected by the National Council.

Rule of Conduct Amendments

Following a recommendation by the National Professional Board, National Council has endorsed the following changes to the Institute's Rules of Conduct.

Rule 1.3 has been amended to read;

Members shall not accept an assignment that is contingent upon or influenced by any condition or requirement for a predetermined result where the exercise of objective judgment is required. Members shall maintain the strictest independence and impartiality in undertaking their professional duties. To this end, no Member shall:

- (a) adopt the role of advocate in a case where their duty is to exercise independence and impartiality;
- (b)
 - (i) act as an advocate and as an expert in the same matter;
 - (ii) act as an advocate in a matter where another member of the same firm has acted as an expert in the same matter
 - (iii) act as an expert in a matter where another member of the same firm has acted as an advocate in the same matter.
- (c) allow the performance of their professional duties to be improperly influenced by the needs or preferences of a client or other party;
- (d) rely upon critical information supplied by a client without appropriate qualification or confirmation from other sources;
- (e) act in any other way inconsistent with the duties of independence and impartiality.

Same Matter is defined as being;

A matter in which it may reasonably be construed that the member, or another representative from the member's firm, has acted or is acting as either an expert or advocate in a related context concerning the subject property.

By-Law Amendments

National Council at its meeting on 3 March endorsed the following By-Law amendments;

Section 5.4.3 Reference to Fire Commissioners Case has been deleted

Section 24.11.2 A new section concerning the requirement for Members joining between October and December in a year to achieve 5 CPD points if they want a CPD Compliance Certificate. The new By-Law reads as follows;

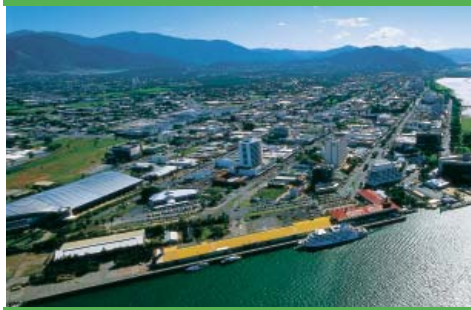
24.11.2 Members joining the Institute or transferring from Affiliate Membership from 1 October to 31 December who request a CPD Compliance Certificate are required to have achieved 5 CPD points for that year.

Section 24.11.3 (Re-numbered from 24.11.2)

Section 24.11.4 (Re-numbered from 24.11.3)

Section 24.11.5 (Re-numbered from 24.11.4)

API/ PINZ International Property Conference Cairns 24 - 26 May 2006



In May 2006, the joint Australian Property Institute / Property Institute of New Zealand International Property Conference heads to tropical North Queensland. This is the first time this event will be held in Australia and Cairns makes the perfect destination for the conference (and for an extended stay in this beautiful part of the world). Cairns is uniquely placed between two World-Heritage Listed areas - the Great Barrier Reef and the Wet Tropics Rainforests. There are plenty of pre and post conference tour options that can take you exploring these natural treasures.

If you have not been to Cairns before then this conference is the perfect opportunity to discover tropical North Queensland whilst hearing quality speakers, networking and enjoying all that Cairns has to offer. If you have not been to Cairns for a few years or more this is a great chance to see the changing face of Cairns (like the award winning Cairns Lagoon on the Boardwalk).

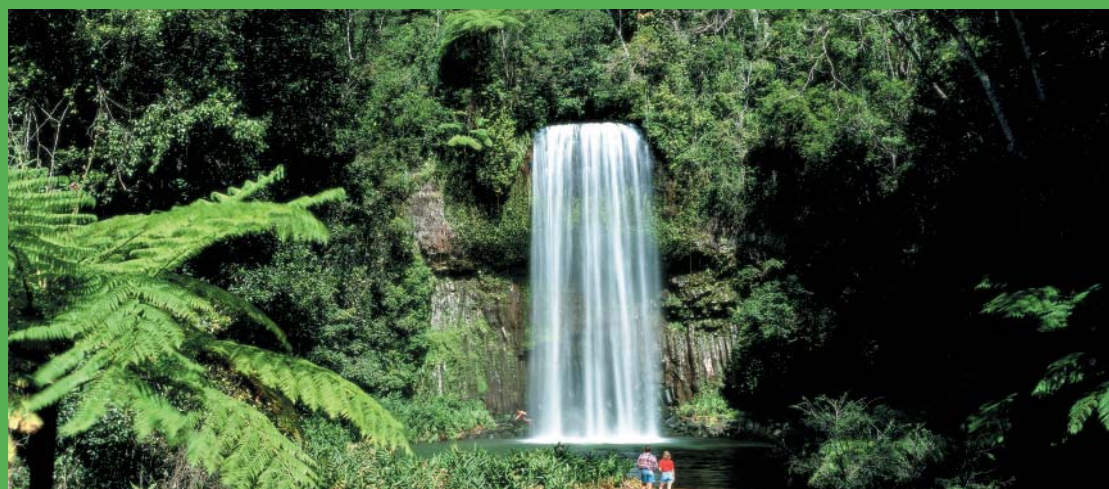
Registration brochure is available on the **conference website** www.api.org.au/cairns

On the conference website you will find the;

- Conference Program
- Pre and Post Conference Tour options
- Accommodation options
- Printable Registration Forms
- On line registration

Registration is a breeze. The Registration Form allows you to register for the conference, book your accommodation, flights, pre & post conference tours and accompanying partners social function tickets all on the one simple form.

The API and PINZ look forward to welcoming you to Cairns in May for what promises to be a fantastic event.



New Chief Executive Officer for the Property Institute of New Zealand

The Property Institute of New Zealand has appointed Glenn Clark as its new Chief Executive Officer. Mr Clark joins the Property Institute of New Zealand from Trustees Executors (formerly Tower Trust) where he was Managing Director. During this time he played a crucial role in resolving high profile and complex commercial issues such as Auckland's Metropolis development and the Rural Super Bonds Scheme which was floated from the Applefields Group.

The Property Institute has worked through a six year establishment phase and its President, Gerald Logan, says Mr Clark's appointment represents the start of a new and exciting direction for members.

"Mr Clark has been appointed following a thorough recruitment process and the Board welcomes the wealth of experience that the new CEO brings to our organisation and the value he will add to the Institute," said Mr Logan.

Mr Clark's experience in New Zealand and overseas also includes marketing, strategic development, investment banking and sharebroking. He holds a Bachelor of Commerce and Administration from Victoria University and a Graduate Diploma in banking from Massey University.

Glenn Clark replaces former CEO Conor English who resigned in December 2005.



AVS Property Valuers North West operates in the Pilbara region of Western Australia and are currently seeking the services of a Licensed Valuer.

An opportunity of a lifetime exists for an eager person with a strong work ethic to earn serious money. Based in Karratha, WA, the position of Valuation Practice Manager will focus on efficiency, professionalism and service.

The position will lead into an equity partnership arrangement for the person who has a passion to become highly successful in their own business.

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- **taking the next step in your property career,**
- **would welcome a change of scenery, and**
- **possess the urge to become financially successful,**
then AVS strongly recommends that you apply for this exciting position.

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Implications of the new proportionate liability regime

A national regime

The Commonwealth, states and territories have agreed to introduce a nationally consistent proportionate liability regime (PL Regime). Each jurisdiction has introduced its own legislation. This makes it difficult to consider general principles applying across states and raises a number of practical implications, particularly the ability to contract out.

Restoring fairness

The PL Regime applies to claims for economic loss or damage to property in an action for damages (tort, contract, misleading or deceptive conduct or otherwise) arising from the failure to take reasonable care.

Before the introduction of the PL Regime, the legal responsibility of parties to a contract was determined by the principles of joint and several liability. This allowed a plaintiff to recover all its loss from one or more wrongdoers, irrespective of the extent to which they had caused or contributed to the loss.

As wrongdoers have different capacities to pay, a 'deep pockets' approach to litigation has resulted, where claims are often only brought against insured people or those seen to have sufficient funds to pay. The PL Regime aims to overcome the perceived unfairness.

The object of the PL Regime is to divide the loss among the various wrongdoers according to their level of responsibility. In order to recover 100% of loss, a plaintiff must sue each wrongdoer who has contributed to that loss.

Practical issues

Difficulties may arise where one or more wrongdoers is unavailable or there are many concurrent wrongdoers. Depending on the defendants' liquidity, the plaintiff may find that it can only recover a small portion, if any, of its loss. To address this issue, a first step is to ensure that all possible concurrent wrongdoers – for example subcontractors, consultants and suppliers – maintain adequate insurance coverage.

Arbitration and expert determinations raise the problem that responsible third parties can only be joined by mutual agreement. A significant feature of the PL Regime in NSW, Western Australia and Tasmania is that parties are permitted to expressly exclude the operation of the legislation in contracts. Parties should carefully consider their liability when negotiating construction contracts.

A principal would generally want to exclude the PL Regime from its contract to ensure the contractor is fully (as opposed to proportionately) liable. Similarly, a head contractor might exclude the PL Regime from its subcontracts. There is risk both ways, but probably more risk in not excluding the PL Regime from contracts. Joint venture agreements also require particular attention.

In the states and territories where it is not possible to contract out, a principal may wish to protect its interests by structuring the contract to avoid the effect of the Act, with claims arising not from breaches of duties of care, but from contractual indemnities to pay. Careful consideration needs to be given to how this might be achieved in any given project.

In the other states and territories, parties may also consider contracting in a jurisdiction that allows contracting out (say, NSW). However, keep in mind that this may impact any future litigation occurring in a state or territory that does not allow the exclusion.

The right to contract out has not yet been tested by any court and it will be interesting to monitor future developments.

Source: Budd, S and Fabian, D. Minter Ellison Lawyers www.minterellison.com (21/9/05)

Goods and Services Tax (GST) and Real Property

The Minister for Revenue and the Assistant Treasurer, has just announced the retrospective amendment to the GST Act to deal with implications of the Courts decision in the Marana Holdings case.

Given the Government announcement, the proposed draft ruling on Residential Premises and Commercial Residential Premises will no longer be issued on 22 March 2006.

The Government will amend the GST law to remove uncertainty in relation to the GST treatment of some types of real property, the Minister for Revenue and Assistant Treasurer, Peter Dutton, announced today.

"The decision of the Full Federal Court in the Marana Holdings Pty Ltd v Commissioner of Taxation [2004] FCAFC 307 case has resulted in a blurring of the lines between properties that are subject to GST and those qualifying for input taxed treatment", Mr Dutton said.

"The Government will amend the GST law to continue the tax treatment of property that existed prior to the Court's decision".

"It is appropriate that supplies involving properties such as serviced apartments and strata units leased to hotel operators remain input taxed. This is consistent with the Government's policy intent and will avoid the need for many small investors to register for the GST", Mr Dutton said.

The amendments will apply from 1 July 2000. As this measure affects the GST revenue base, it will be subject to the unanimous approval of the State and Territories, which receive the GST revenue.

Source: Information provided by ATO - www.ato.gov.au

Are you looking to recruit new staff?

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API National Office website.**

At a competitively priced rate of \$150 per month (inc GST), advertising on the API National website is an easy, cost effective way of reaching potential employees both nationally and internationally.

For further information about advertising on the API National Office website, in the Australian Property Journal or API National E – News please contact;

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API National Office
(02) 6282 2411
wmartin@api.org.au

Courts remind experts witnesses to maintain their independence

A recent Federal Court decision has highlighted the need for expert witnesses to maintain their independence and avoid altering their expert reports to suit the needs of litigants.

In *Universal Music Australia Pty Ltd v Sharman License Holdings Ltd* (Kazaa Case), the trial judge discredited the bulk of the expert evidence given by an American computer scientist, Professor Ross. In cross examination Professor Ross admitted that his expert report was based on an initial 'skeleton' report provided to him by the defendant's instructing solicitors, and that he agreed to their changes to the technical aspects of his report.

The court concluded that Professor Ross was seriously prepared to compromise his independence and intellectual integrity. After this evidence, the court found it might be unsafe to rely upon Professor Ross in relation to any controversial matter.

The defendant's solicitors denied that they had acted inappropriately.

An expert witness' general duty includes:

- An overriding duty to assist the court impartially on matters relevant to the expert's area of expertise.
- A paramount duty to the court and not to the person retaining the expert. Accordingly, an expert witness is not an advocate for the party.

The witness should follow the Federal Court Guidelines for Expert Witnesses or other appropriate guidelines in fulfilling his/her duty.

It is appropriate for lawyers and experts to collaborate on the form of an expert report, but not acceptable for litigants or their lawyers to influence the content.

The Kazaa Case also highlights the need for care to be taken in communications between an expert witness, a litigant, and its lawyers. Generally, such communications are protected from disclosure until the expert report is served on the other party.

The New South Wales government is reported to be considering introducing punitive sanctions against expert witnesses found to have behaved dishonestly or unprofessionally.



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An expert witness' duty

- Assist the court impartially on area of expertise
- Duty to the court and not to the person retaining the expert

Source: Steinepreis, G and Dornan, P Minter Ellison Lawyers www.minterellison.com (13/12/05)

Acceptance of PPP hinges on education

Good public policy can sometimes be controversial, so perhaps we shouldn't be surprised by the heated debate about the role of public-private partnerships (PPPs) in meeting Australia's huge infrastructure needs. But we should be concerned if the debate is so shrill it compromises the genuine efforts of governments to deliver that much-needed infrastructure.

We require more, not fewer, options for financing and maintaining roads, schools, public hospitals, rail and water facilities and other civic assets. PPPs have been proved here and overseas to deliver these assets in an innovative, swift and cost-effective manner, so why are so many voices now being heard that question this?

The critics largely fall into two camps: the predictable and the frustrated. The former will never be won over; they still mourn the privatisation program begun by the Hawke government and the contracting-out policies started during the Greiner era. The latter group comprises ordinary citizens frustrated by the lack of local infrastructure or the unexpected impact of new projects like Sydney's Cross City Tunnel. This larger group's issues must be addressed. The way forward is to:

- Identify more fully the specific infrastructure needs of cities and towns.
- Marshal every funding option including tax revenue, debt and private investment.
- Pursue the best procurement method (PPP, conventional contracting, alliances etc).
- Deliver the projects on schedule and within a whole-of-life budget.

Fortunately, much of this process is now under way. The Council of Australian Governments recently agreed to a regular stocktake of infrastructure needs. So for the first time, there will be an observable national pipeline of prospective capi-

tal works. All governments have also increased budget funding of infrastructure.

The dilemma is that even with these extra resources, some prioritised projects will be too expensive or demanding for governments to deliver. Even if there were more debt-funded infrastructure, some necessary projects would miss

out. This is one reason state and federal ministers have been working on delivering suitable projects under the PPP model. An attraction of this model is that it harnesses the large sums of money that superannuation funds and public companies have available to invest in long-term projects.

In practical terms, expanding the funding options broadens the list of projects that get the green light. Huge projects like CityLink in Melbourne, for example, would never have been built if the only options were more public debt or more taxes. More money through PPPs helps meet the first concern of frustrated critics who want additional local infrastructure. But we must also address the parallel concerns about the perceived impact of some PPPs.

Independent studies of projects as diverse as the Victorian government's PPP for the County Court and the Blair government's large defence projects show they were delivered faster and cheaper than traditional public works models. The competitive pressures of the PPP bidding process, linked with the whole-of-life management approach of these partnerships, led to innovative service delivery outcomes that were simply better than any alternative.

It's true these benefits must be better explained to the public. Ironically, the debate over toll roads is an opportunity to do just that.

Public consultation and education needs a higher priority as the PPP model will take time to bed down.

When we look at the bigger picture it should be clear PPPs are an essential component of any government's means of delivering new infrastructure.

Source: Birrell, M. Minter Ellison Lawyers www.minterellison.com (13/12/05)