



## Client Newsletter

# Professional Standards

May 2008

## Introduction

The Victorian **Professional Standards Act 2003** is part of a national framework of professional standards legislation. The Act allows professional associations and other occupational groups to limit the occupational liability of members of an association to the extent permitted by the Act and the provisions of a scheme approved under the Act.

## The national framework

Professional standards legislation was first enacted in NSW in 1994 to relieve the indemnity insurance crisis sweeping the state at that time. Similar legislation has now been adopted in all jurisdictions in Australia. Professional Standards Councils, established under the legislation in each state and territory, approve and monitor schemes that:

- allow professional associations and other occupational groups to limit the civil liability of members;
- improve professional standards for members by requiring members to meet certain requirements including compulsory insurance and risk management strategies; and

## Summary

In this Newsletter we consider:

1. the national framework of professional standards legislation;
2. the application of the **Professional Standards Act 2003 (Vic) (the Act)**, and schemes approved under the Act which limit the occupational liability of members of those schemes; and
3. the implications for government agencies dealing with professional groups whose members' liability is limited by schemes.

- protect the interests of consumers (including government agencies) receiving services from members of a professional association.

The national administration of state and territory professional standards legislation is governed by the **Intergovernmental Professional Standards Agreement 2005**. Under this Agreement each state and territory has agreed to appoint the same 11 members to each of the 8 Professional Standards Councils. The 11 members comprise 1 member nominated by each state and territory and the Commonwealth except Victoria and New South Wales which have each nominated 2 members. A common secretariat, located within the NSW Attorney General's Department, supports all 8 Councils. The Victorian Department of Justice has also provided administrative support to the Councils.

## Overview of Victorian Professional Standards Legislation

The **Professional Standards Act** was passed in Victoria in 2003. The Professional Standards Council (Victoria) was established in 2005 and is responsible for approving and monitoring schemes under the Act.

### Which industry groups can prepare a scheme?

**Occupational associations**, which are bodies corporate and represent the interests of persons who are members of the same occupational group, **may** prepare schemes to limit the liability of members. An **occupational group** includes a professional group **and** a trade group.

### How is a scheme approved?

The scheme must be submitted to, and approved by, the Council. The approval process includes public notification and the opportunity for public comment or submission and a public hearing. Matters to be considered by Council include:

- The nature and level of occupational liability claims made against members of the association;
- The risk management strategies of the association;
- The cost and availability of occupational liability insurance;
- Insurance standards determined by the association; and
- Complaints procedures and disciplinary measures.

A scheme approved by Council is then submitted to the Minister who may authorise the publication. A scheme commences operation 2 months or more after the date of its publication in the Gazette, as specified in the scheme. A scheme remains in force for a period not

exceeding 5 years from its commencement as determined by Council.

### Who are the members of a scheme?

A scheme will specify which members, or classes of members, of an occupational association will benefit from the scheme.

If a scheme applies to a certain member, it also applies to each **partner** and **employee** of that member, and if the member is a body corporate, to each **officer** of that member. If the partner, employee or officer is entitled to be a member of the association, but is not, the scheme **will not apply** to that person.

A scheme may exempt a member from the application of the scheme.

Members of a scheme **cannot** choose not to be subject to the scheme (unless exempted).

### What liability is limited?

The Act only imposes a cap on **occupational liability**. This is a member's civil liability, as determined by a court, arising (in tort, contract or otherwise) from an act or omission of a member acting in the performance of his or her occupation.

A member's liability for an act or omission **outside** his occupation (or which would not be covered by his occupational liability insurance) will not be capped by a scheme which otherwise applies to the member.

### What liability is not limited?

The Act **does not limit liability** for:

- damages arising from death or personal injury to a person;
- negligence of a legal practitioner acting for a client in a personal injury claim;
- a breach of trust;
- fraud or dishonesty; or
- certain proceedings under the **Transfer of Land Act 1958**.

## Who determines the minimum cap?

A scheme can only affect the liability for damages to the extent to which liability results in damages exceeding the amount (not less than \$500,000) determined by the Council for the purposes of the scheme and specified in the scheme.

The Council determines that amount having regard to the number and amounts of claims made against members within an association, and the need to adequately protect consumers.

## What type of cap may be specified in a scheme?

The cap may be a fixed cap, or an amount which is a multiple of the reasonable fees for the services provided by the member which give rise to the claim.

## Different levels of risk and discretionary caps

A scheme may reflect the levels of risk to which members may be exposed by varying the amount of the cap for different groups within the association. It may also enable a member to apply for a higher cap than would otherwise apply under the scheme in all or specified cases.

## How is a member's liability limited?

Where a claim for occupational liability is brought against a member to whom a scheme applies, and the member is able to satisfy the court that the member has:

- (a) The benefit of an occupational liability insurance policy, or business assets, or a combination of both to at least the value of the cap set by the scheme; or
- (b) The benefit of an occupational liability insurance policy, or business assets, or a combination of both to at least the value of a multiple of the reasonable fee for services provided by the member specified in the scheme,

then the member's liability will be limited in accordance with the scheme.

## Is there a limitation on the amount of damages?

The cap is a limitation on the amount of damages that may be awarded for a **single claim**. It does not limit the amount of damages that may be awarded for **all claims** arising out of a single event.

## Limitation of liability must be disclosed

Members of a scheme must disclose limitation of their liability in accordance with a scheme on all documents provided to clients or potential clients that promote or advertise the member or the member's occupation. A scheme will not limit a member's liability if the member fails to disclose this information to the client, whether orally or in writing, before the time that the act or omission giving rise to liability occurred. Failure to disclose the limitation is an offence under the Act.

## When does a scheme apply?

A scheme will limit liability in relation to an act or omission of a member which occurs **during** the period the scheme is in force, regardless of whether the scheme was operative when the proceedings were begun.

## Overview of Approved Victorian Schemes

### What schemes are approved in Victoria?

There are **three schemes approved** in Victoria in respect of the following professional groups:

#### Accountants

1. The Institute of Chartered Accountants in Australia (Vic) Scheme (**ICA Scheme**) which commenced on 3 March 2008
2. The CPA Australia Ltd (Vic) Scheme (**CPA Scheme**) which commenced on 21 April 2008.

#### Barristers

3. The Victorian Bar Inc Scheme (**Victorian Bar Scheme**) which will commence operation on 1 July 2008.

## Features of the Victorian Schemes

The liability caps under each Scheme are as follows:

### ICA and CPA Schemes

- Category 1 services: lesser of \$75 million or 10 times the reasonable fee for services;
- Category 2 services: lesser of \$20 million or 10 times the highest fee in any year over a 3 year period; and
- Category 3 services: lesser of \$20 million or 10 times the reasonable charge for services.

### Victorian Bar Scheme

- \$2 million
- All schemes confer discretionary authority to vary the monetary ceiling in particular cases.
- Both the **ICA Scheme** and the **CPA Scheme** set an amount, above which damages will be capped, of:
  - (a) \$500,000 where the cause of action arises on or before 30 June 2008;
  - (b) \$750,000 where the cause of action arises between 1 July 2008 and 30 June 2009; and
  - (c) \$1M where the cause of action arises after 1 July 2009.

The Victorian Bar Scheme is subject to the statutory amount of \$500,000, above amount which damages will be capped.

- The occupational liability of a member of the **ICA Scheme** or the **CPA Scheme** is capped by reference to the benefit of an insurance policy insuring the member against that liability, or the net current value of business assets, or a combination of both. The Victorian Bar Scheme is capped by reference to the benefit of an insurance policy.
- The **ICA Scheme** intends that the Scheme will be prescribed by Commonwealth regulations so as to cap the liability of members for misleading and deceptive

conduct under the Australian Securities and Investments Commission Act 2001 (Cth), the Corporations Act 2001 (Cth), and the Trade Practices Act 1974 (Cth). The **ICA Scheme** has not yet been prescribed under Commonwealth regulations (see **Liability under Commonwealth legislation** below).

### Interstate schemes

In NSW there are 9 operative schemes covering occupational associations of: engineers (2), accountants (3), solicitors (1), barristers (1), surveyors (1) and valuers (1). There are operative accountants' schemes in Western Australia, South Australia, Queensland, the ACT and the NT. No scheme has been approved in Tasmania.

### Mutual recognition

In New South Wales the Professional Standards Act 1994 has been amended to allow mutual recognition of schemes across jurisdictions. Similar amendments are expected to be made in the other states and the territories shortly.

### Liability under Commonwealth legislation

The Commonwealth Treasury Legislation Amendment (Professional Standards) Act 2004 complements the professional standards legislation in each state and territory. It allows professional standards schemes approved under state and territory legislation to cap liability for misleading or deceptive conduct in certain cases under:

- Section 12DA of the Australian Securities and Investments Commission Act 2001;
- Section 1041H of the Corporations Act 2001; and
- Section 52 of the Trade Practices Act 1974.

However, the Commonwealth Act does not impose the limitation. The professional standards legislation in a state or territory **will only apply** where Commonwealth regulations have prescribed that an approved scheme will limit liability for misleading or deceptive conduct.

Schemes approved in New South Wales and Western Australia have been prescribed by regulations under the Trade Practices Act 1974 (Cth) allowing liability to be limited under that Act.

## Implications for government agencies

- Government agencies who engage chartered accountants, CPAs or barristers to perform services need to be aware of the Victorian **Professional Standards Act 2003**.
- Schemes approved under the Act limit the professional liability of members to whom schemes apply. The **ICA Scheme** and the **CPA Scheme** have commenced operation and the liability of members of those schemes is capped. The Victorian Bar Scheme will cap the liability of its members from 1 July 2008.
- Members of schemes **must disclose** the limitation of their professional liability on all documents provided to government agencies which promote or advertise the member's occupation or **otherwise inform** the agency of the limitation orally or in writing. The form of statement prescribed by the **Professional Standards Regulations 2007** is "Liability limited by a scheme approved under Professional Standards Legislation".
- A scheme limits professional liability arising from an act or omission in the performance of professional services. Liability for an act or omission outside the scope of those professional services will not be capped.
- Indemnity and insurance provisions in contracts for the provisions of services remain important. Liability, other than professional liability that is the subject of the cap, will not be limited and agencies should ensure that indemnity and insurance provisions appropriately manage these risks.
- Each agency should check with its insurer in relation to the level and ambit of professional indemnity cover provided by its insurance. Generally, if the professional liability is one which an agency's insurer would cover, the

agency's insurance will indemnify the loss or damage suffered by the agency. The gap between the actual loss or damage suffered by the agency and the cap specified by the scheme will be borne by the agency's insurer.

- If the professional liability is one not covered by the agency's insurer, the agency's damages will be limited to the amount capped under the scheme.

### For further information

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