



Newsflash

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The incorporation on 12 June 2008 of 13 new prescribed schemes under the limited liability provisions of the Trade Practices Act highlights the potential benefits of section 87AB of the TPA. Michael Russell looks at the benefits and advantages of s87AB, the new prescribed schemes and how they can be applied to reduce risk and exposure.

Section 87AB of the TPA

Under certain State-based professional standards legislation, such as the *Professional Standards Act 1994 (NSW)* (PSA), members of professional schemes may limit their occupational liability.

Historically, a critical problem with the operation of the States' legislation, and their respective occupational schemes, was that they could not limit the exposure of professionals to Federal legislation, particularly the *Trade Practices Act 1974 (Cth)* (TPA).

With this limitation in mind, the Federal Government amended the TPA in 2004 by including limited liability provisions (s87AB). This section operates to limit the occupational liability of certain professionals under the TPA for contraventions of s52 (misleading and deceptive conduct).

The limits on liability relate to occupational liability defined under s87AB as "civil liability

arising directly or vicariously from anything done or omitted by a member of an occupational association in the course of his or her occupation".

For professionals to derive benefit from the TPA provisions they must be a member of a scheme prescribed by regulation under the TPA. By combination of s87AB of the TPA and s28(1) of the PSA, the limitation on liability for misleading and deceptive conduct will only apply if:

- the scheme in question was prescribed by the TPA at the time the contravention occurred
- the cause of action is founded on an act or omission occurring during the period when the scheme is in force, and
- the person who contravened s52 was a member of the scheme in question at the time the contravention occurred.

The existing schemes

Prior to 12 June 2008, only 8 schemes were in operation:

Scheme	Date of Inclusion
The New South Wales Bar Association Scheme	11 May 2006
The Engineers Australia (NSW) Scheme	7 April 2007
The Law Society of New South Wales Scheme	5 July 2007
The Investigative and Remedial Engineers Scheme (NSW)	5 July 2007
The Australian Valuers Institute (NSW) Scheme	5 October 2007
The Institute of Chartered Accountants in Australia (Western Australia) Scheme	25 October 2007
The Institute of Chartered Accountants in Australia (NSW) Scheme	25 October 2007
The CPA Australia Ltd (NSW) Scheme	25 October 2007

Monetary ceilings

The extent to which liability can be limited depends upon the monetary ceiling applicable to the relevant professional scheme.

For example, the New South Wales Bar Association Scheme applies a monetary ceiling of \$1,000,000 in respect of a single cause of action.

The monetary ceilings applicable to the eight originally prescribed schemes are as follows:

Scheme	Monetary Ceiling:
The New South Wales Bar Association Scheme	\$1,000,000
The Engineers Australia (NSW) Scheme	\$1,000,000 to \$8,000,000
The Law Society of New South Wales Scheme	1,500,000 to \$20,000,000
The Investigative and Remedial Engineers Scheme (NSW)	\$1,000,000 to \$10,000,000
The Australian Valuers Institute (NSW) Scheme	\$500,000 to \$1,000,000
The Institute of Chartered Accountants in Australia (Western Australia) Scheme	\$500,000* to \$20,000,000
The Institute of Chartered Accountants in Australia (NSW) Scheme	\$500,000* to \$20,000,000
The CPA Australia Ltd (NSW) Scheme	\$500,000* to \$20,000,000

*Schemes will increase their minimum monetary ceiling to \$750,000 as of 1 July 2008.

For most schemes, the monetary ceiling varies depending on the specific arrangements of individual members or the monetary value of the particular transaction which gave rise to the cause of action such as business size and/or service charge. An example is the Law Society of New South Wales Scheme which has a range of \$1.5m to \$20m depending on the number of principals attached to each scheme member.

Discretionary limit

Scheme members may agree a monetary ceiling higher than the scheme cap. An increase in the limit of liability may be sought by a scheme member in respect of services for a particular transaction. In these instances the scheme member must request, and be granted by the scheme body, the revised cap prior to providing the particular services.

An example is the Institute of Chartered Accountants in Australia (NSW) Scheme which places a discretionary limit of \$75m where services for a transaction are expected to be in excess of \$2m. In these circumstances the scheme member must apply for a discretionary limit prior to providing the services.

Individual scheme changes

Details of each scheme, and how the monetary ceiling is applied, can be viewed at the Professional Standards Council's website and should be checked for any amendments prior to applying the s87AB provisions.

The new schemes

The newly-prescribed schemes commence on 12 June 2008. The new schemes, together with their monetary ceilings, are as follows:

Scheme	Monetary Ceiling:
The Victorian Bar Incorporated Scheme	\$2,000,000
The Professional Surveyors Occupational Association Scheme	\$1,000,000 to \$5,000,000
The Institute of Chartered Accountants in Australia Scheme (5 separate schemes for SA, VIC, QLD, ACT and NT)	\$500,000* to \$75,000,000
The CPA Australia Ltd Scheme (6 separate schemes for WA, SA, VIC, QLD, ACT and NT)	\$500,000* to \$75,000,000
*Schemes will increase their minimum monetary ceiling to \$750,000 from 1 July 2008.	

The effects

The limited liability provisions in the TPA for prescribed occupational schemes allow professionals the protection of the State-based professional standards legislation, as well as protection in respect of actions for misleading and deceptive conduct under s52 of the TPA. With the inclusion of additional schemes even more professionals, across a variety of occupations, can seek the protection afforded by the provisions of s87AB of the TPA.

With this in mind, insurers and brokers are encouraged to familiarise themselves with the monetary ceilings when assessing individual scheme members' particular requirements. Similarly, insureds ought to consider membership in a relevant prescribed occupational scheme (if available) given the benefits which attach to them.

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