



INFORMATION, ANALYSIS  
AND ADVICE FOR THE PARLIAMENT

INFORMATION AND RESEARCH SERVICES  
PARLIAMENTARY LIBRARY

Bills Digest  
No. 75 2003–04

## Treasury Legislation Amendment (Professional Standards) Bill 2003

ISSN 1328-8091

© Copyright Commonwealth of Australia 2004

Except to the extent of the uses permitted under the *Copyright Act 1968*, no part of this publication may be reproduced or transmitted in any form or by any means including information storage and retrieval systems, without the prior written consent of the Department of the Parliamentary Library, other than by Senators and Members of the Australian Parliament in the course of their official duties.

This paper has been prepared for general distribution to Senators and Members of the Australian Parliament. While great care is taken to ensure that the paper is accurate and balanced, the paper is written using information publicly available at the time of production. The views expressed are those of the author and should not be attributed to the Information and Research Services (IRS). Advice on legislation or legal policy issues contained in this paper is provided for use in parliamentary debate and for related parliamentary purposes. This paper is not professional legal opinion. Readers are reminded that the paper is not an official parliamentary or Australian government document. IRS staff are available to discuss the paper's contents with Senators and Members and their staff but not with members of the public.

## **Inquiries**

Members, Senators and Parliamentary staff can obtain further information from the Information and Research Services on (02) 6277 2646.

Information and Research Services publications are available on the ParlInfo database.

On the Internet the Department of the Parliamentary Library can be found at:

<http://www.aph.gov.au/library/>

Published by the Department of the Parliamentary Library, 2004

INFORMATION AND RESEARCH SERVICES

Bills Digest  
No. 75 2003–04

Treasury Legislation Amendment (Professional Standards)  
Bill 2003

Brendan Bailey  
Law and Bills Digest Group  
18 February 2004

## Contents

Purpose. . . . .	1
Background. . . . .	1
State Professional Standards Legislation. . . . .	1
Proposed Commonwealth PSL. . . . .	2
The Federal Government's Policy Commitment. . . . .	3
The State-Based Professional Standards Councils . . . . .	3
Press Commentary . . . . .	4
Main Provisions . . . . .	6
General Overview . . . . .	6
Bill's Reference to 'Choice of Law Rules' . . . . .	6
Schedule 1—Limitation of liabilities . . . . .	6
<i>Australian Securities and Investments Commission Act 2001</i> . . . . .	6
<i>Corporations Act 2001</i> . . . . .	7
<i>Trade Practices Act 1974</i> . . . . .	7
Concluding Comments. . . . .	7
Endnotes. . . . .	8

# Treasury Legislation Amendment (Professional Standards) Bill 2003

**Date Introduced:** 4 December 2003

**House:** House of Representatives

**Portfolio:** Treasury

**Commencement:** Royal Assent

## Purpose

The purpose of the Bill is to amend the *Trade Practices Act 1974*, the *Australian Securities and Investments Commission Act 2001* and the *Corporations Act 2001* to align these Commonwealth laws with State laws on professional standards. The relevant State laws limit the civil liability of professionals and others while still maintaining appropriate protection for consumers of professional services through such measures as compulsory insurance cover and complaints procedures.

## Background

### State Professional Standards Legislation

The *Explanatory Memorandum* to the Bill points out that the Insurance Council of Australia has stated that professional standards legislation (PSL) is one of four pillars to improve the availability and affordability of professional indemnity insurance.<sup>1</sup> PSL, which is enacted at the State and Territory level, aims to achieve this by:

- the creation of schemes to cap the civil liability of professionals in certain circumstances
- the enhancement of professional standards by way of professional education and other strategies, including risk management
- consumer protection (e.g. by compulsory insurance cover and complaints procedures), and

**Warning:**

*This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.*

*This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.*

- the creation of schemes for supervision and disciplinary procedures carried out by relevant professional bodies.

The purpose of PSL is to stop large civil claims being made as a result of specified types of professional occupational activities.

PSL attempts to provide a degree of certainty to both the professionals and the consumers of professional services. A legislative response is seen as a means of reducing pressure for increasing insurance premiums and reducing any potential for an exodus of professionals from some sectors. PSL also helps in combating tactics by some professionals who may alienate their assets so as to frustrate claimants thus avoiding financial loss or who may even 'go bare' (i.e. fail to take out professional insurance).

Specific professional standards legislation (PSL) has been operating in New South Wales and Western Australia. These statutes are the *Professional Standards Act (NSW) 1994* and the *Professional Standards Act (WA) 1997*, respectively. New legislation was enacted in Victoria on 2 December 2003 (*Professional Standards Act (VIC) 2003*). The Australian Capital Territory will place PSL legislation on its 2004 legislative program.

At the time of preparation of this Bills Digest, PSL was under consideration or development in the other Australian States and the Northern Territory.<sup>2</sup>

## Proposed Commonwealth PSL

This Bill proposes a scheme whereby it adapts the PSL legislation arrangement at the State and Territory level and applies the arrangement to limit civil liability for misleading and deceptive conduct under the Commonwealth's *Trade Practices Act 1974*, the *Australian Securities and Investments Commission Act 2001* and the *Corporations Act 2001*.

The *Explanatory Memorandum* also recognises that there is a constitutional issue that the Commonwealth must observe when it comes to making laws that may be seen to 'prefer' a particular State. Section 99 of the Constitution states:

The Commonwealth shall not, by any law or regulation of trade, commerce, or revenue, give preference to one State or any part thereof over another State or any part thereof.

The task of selecting a PSL scheme (or schemes) for utilisation in connection with a Commonwealth law may present an initial challenge because, as noted above, there are, as yet, only a limited number of States with PSL schemes and the most recently enacted statutory scheme (Victoria) has diverged from the schemes in New South Wales and Western Australia (discussed below under 'Press Commentary').

The proposed Commonwealth scheme will be implemented by Regulations that will prescribe the appropriate PSL scheme or schemes. The Commonwealth scheme may

### **Warning:**

*This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.*

*This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.*

modify the relevant PSL. The Regulations have not yet been issued and the content of the relevant PSL for the Commonwealth laws covered by this Bill is not yet known. It is likely that the Commonwealth regulations will prescribe a 'one size fits all' model for the Commonwealth's jurisdiction.

## **The Federal Government's Policy Commitment**

The Government's stated reasons for the proposed changes to the law, as contained in the Bill, are stated in the *Explanatory Memorandum* as follows:

In the interests of maintaining consistency, which will lead to the best outcome for all Australians in terms of accessing more affordable professional services and maintaining consistency of law reforms across Australia, it is imperative that no jurisdiction deviate from the nationally agreed position.

The amendments made by this Bill will establish a structure under which the Commonwealth, by prescribing State PSL schemes, can support PSL by allowing liability under the relevant Commonwealth legislative provisions to be capped.<sup>3</sup>

Liability will be limited under the Commonwealth laws (for misleading and deceptive conduct) only when the State PSL schemes are prescribed (by Regulations) under the relevant provisions in those Commonwealth laws.

## **The State-Based Professional Standards Councils**

The PSL legislation for New South Wales, Western Australia and Victoria establishes an 11 member Professional Standards Council in each State, respectively. Each State Act specifies that the members of the Council are appointed by the State Minister and those persons shall have 'such experience, skills and qualifications as the Minister considers appropriate to enable them to make a contribution to the work of the Council.'<sup>4</sup>

Using the existing example of PSL in New South Wales, the Professional Standards Council (PSC-NSW) is an independent body appointed by the NSW Attorney General. The PSC-NSW is responsible for:

- determining applications by occupational associations for professional standards schemes
- advising the Attorney General about occupational standards
- monitoring compliance by occupational associations with their risk management strategies, and
- publishing information and conducting forums to assist occupational associations to improve the standards of their members.<sup>5</sup>

### **Warning:**

*This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.*

*This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.*

Professionals who are involved in professional standards schemes through the PSC-NSW scheme are eligible to use and display the trade mark *Cover of Excellence*<sup>TM</sup> term and logo. A licence to use the trade mark is obtained through participating occupational associations. The schemes are legally binding arrangements which aim to improve professional standards. The trade mark conveys values and traits associated with professional conduct including:

- competence
- accountability
- quality
- ethical behaviour and practices
- integrity and honesty
- responsiveness to consumers, and
- acting in the public interest.<sup>6</sup>

In a media release on 19 September 2003, the PSC-NSW (which was meeting in Perth to release a compliance framework for the NSW and WA professions) noted:

Insurance Ministers from across the country in August agreed to establish PSL in all Australian States and Territories. WA and NSW lead the way in developing changes to PSL as part of an approach to have nationally consistent legislation across Australia.<sup>7</sup>

## Press Commentary

Of particular relevance is the press coverage of the different approach taken in the recently enacted Victorian *Professional Standards Act (VIC) 2003*, in exempting a capped liability for a professional breach of fiduciary duty. Both the NSW PSL and WA PSL exclude caps on damages arising from:

- death or personal injury to a person
- negligence or other fault of a legal practitioner acting for a client in a personal injury claim
- a breach of trust
- fraud or dishonesty, or

### **Warning:**

*This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.*

*This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.*



- certain proceedings relating to the transfer of land.

The Victorian legislation adds an additional category of a 'breach of trust *or of fiduciary duty*'.<sup>8</sup> Broadly stated, a fiduciary duty requires a person to act in good faith for the benefit of another and not to profit from the relationship (unless permitted). This type of duty involves avoiding a conflict of interest. Chris Merritt in the *Australian Financial Review* of 28 November 2003 reported that the Victorian Government has received legal advice to the effect:

...that fiduciary duties differ from the professional duties and obligations that a professional person may owe a client as part of a fiduciary relationship.

It therefore attracts different legal remedies from those arising from a breach of contract or negligence.

The advice says not all breaches of duty owed by a professional to a client are breaches of fiduciary duty even though there may be a fiduciary relationship between the two parties.<sup>9</sup>

Chris Merritt notes that Victoria argues that its approach is consistent with the High Court decision in *Breen v Williams* (1995-1996).<sup>10</sup> That court decision concerned an unsuccessful application by Ms Breen, a patient of a plastic surgeon (Dr Williams), for access to the surgeon's medical records on the patient. The patient was interested in joining a US class action over allegedly defective implants. As a precaution, the surgeon offered to provide access to his records on the condition that he was given a legal release from any claim arising from his treatment of the patient. Ms Breen challenged the surgeon's decision. Justices Gaudron and McHugh stated:

In the present case, it is impossible to identify any conflict of interest, unauthorised profit or any loss resulting from any breach of duty.

...

In the present case, there was no breach of fiduciary duty in conditional denial of access because there was no pre-existing duty on the part of Dr Williams to give access to the records.

It is also impossible to identify any profit that Dr Williams may have derived from the relationship beyond the payment of his professional fees. Nor is the case one where Dr Williams seeks to make or has made a profit from confidential information that he obtained in the course of his relationship with Mr Breen.<sup>11</sup>

Victoria has made a refinement to its PSL and appears to take the view that a breach of fiduciary duty is unlikely to arise in the case of professional occupational negligence and that it would be contrary to the interests of consumers to have such damages for a breach of fiduciary duty reduced in terms of a payout. A contrary view from the Law Institute of

**Warning:**

*This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.*

*This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.*

Victoria warns that unless the Victorian PSL is aligned with NSW PSL and WA PSL the national capping scheme will be undermined.<sup>12</sup>

## Main Provisions

### General Overview

In a practical sense, the proposed amendments made by this Bill are relatively straightforward and brief. Relevant parts of Commonwealth laws dealing with civil liability for misleading or deceptive conduct will be subject to PSL capping to align them with the proposed national scheme. The operative mechanism (based on State PSL schemes) to be used by the Commonwealth to cap liability will be prescribed by way of Commonwealth Regulations.

The *Explanatory Memorandum* to the Bill advises that civil liability under the Commonwealth laws is not limited generally (as noted above, the Bill specifically focuses on the issue of contraventions by way of misleading and deceptive conduct). The Regulations will specify when specific limitations apply and the Regulations may, if necessary, modify the effect of the State PSL scheme to ensure that the interests of consumers are protected. The *Explanatory Memorandum* says that no State scheme will be given a preference over another.<sup>13</sup>

### Bill's Reference to 'Choice of Law Rules'

The proposed amendments in the Bill repeat the term '*choice of law rules operate in relation to the contravention in the same way as they operate in relation to a tort*'. This is simply a statement of the existing application in each State and Territory of Australia of their local statute that requires that State or Territory to recognise a limitation law (e.g. a time limit for the commencement of proceedings) of another State or Territory or of New Zealand as part of the substantive law of that place, when relevant. The main factor to consider is where the tort (i.e. negligent act) occurred, irrespective of where the court action is taken. These rules are necessary because variations in limitation periods between jurisdictions can create anomalies.

## Schedule 1—Limitation of liabilities

### *Australian Securities and Investments Commission Act 2001*

**Items 1 to 3** include the insertion of a **new section 12GN** to apply a prescribed PSL scheme to a contravention of existing section 12DA (which deals with misleading or deceptive conduct in relation to financial services) under the *Australian Securities and Investments Commission Act 2001*. Depending on the particular claim, the effect of the

#### **Warning:**

*This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.*

*This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.*

proposed amendments is to limit liability and this may limit the amount of damages recovered in certain circumstances.

### **Corporations Act 2001**

**Items 4 to 8** include the insertion of a proposed **new section 1044B** at the end of Division 4 of Part 7.10 of the *Corporations Act 2001*. Existing Part 7.10 deals with market misconduct and other misconduct relating to financial products and financial services. The effect of the proposed amendments is to limit liability and this may limit the amount of damages a person may recover for misleading or deceptive conduct in relation to financial services. The proposed **new section 1044B** allows a PSL scheme to be prescribed.

### **Trade Practices Act 1974**

**Items 9 to 11** include the insertion of a proposed **new section 87AB** in the *Trade Practices Act 1974*. The proposed new section allows a PSL scheme to be prescribed and applied to damages claims for misleading and deceptive conduct under section 52 of the *Trade Practices Act 1974*. Depending on the particular claim, the effect of the proposed amendments is to limit liability and this may limit the amount of damages recovered in certain circumstances.

Section 52 of the *Trade Practices Act 1974* is the main provision that deals with misleading or deceptive conduct. It is noted that the proposed amendments specifically identify section 52 only and do not specify other sections in Part V (consumer protection), such as sections 53 (false or misleading representations). Section 53 is an offence provision that supports section 52 but it is a separate section to section 52 of the *Trade Practices Act 1974*.

## **Concluding Comments**

This Bill forms part of the collective response of the Commonwealth, the States and Territories to curb large damages payouts and to ensure adequate protection is in place for those who rely on professional indemnity insurance cover. The trade-off for consumers and the community in capping the liability of professionals is the implementation of statutory schemes that aim to improve professional standards. Improvements in professional standards will be achieved through compulsory insurance cover, risk management strategies, professional education and complaints and disciplinary mechanisms.

The success of PSL reforms will depend to a large extent on consistent legislation in all jurisdictions and firm regulation of professionals by their professional associations.

#### **Warning:**

*This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.*

*This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.*

Already there is a divergence in the State PSL schemes with the recently enacted Victorian statute.

Small shareholders and investors are reported to be worried about the liability cap. The Australian Shareholders Association president, John Curry, is reported as saying that investors should be able to pursue accountants, financial planners or auditors for the full amount of losses caused by any negligent work.<sup>14</sup>

There is no doubt that ensuring there is an effective national professional standards scheme with capped liability is a challenge of some complexity. The fact that the full measure of loss in a particular case is not recovered from a professional arguably means that some one loses out. This is also likely to be of concern to large businesses that rely upon external professionals. If the large firm faces a liability cap it may have to absorb any residual loss which, in turn, is likely to reduce company returns to shareholders and investors.

Adequate community consultation on this Bill is desirable and the comments expressed in the Minister's Second Reading speech to the House of Representatives on 4 December 2003, on this point, are noted.<sup>15</sup>

## Endnotes

---

- 1 *Explanatory Memorandum*, Treasury Legislation Amendment (Professional Standards) Bill 2003, p. 2. The other three pillars are:
  - amendments to section 54 of the *Insurance Contracts Act 1984*
  - implementing proportionate liability for economic loss, and
  - amending the *Trade Practices Act 1974*.
- 2 The Northern Territory Treasurer, the Hon S. Stirling MLA, has reported to the Northern Territory Legislative Assembly on 19 August 2003—following an Insurance Ministers Council meeting held on 6 August 2003 in Adelaide—that the Northern Territory 'will continue to work with the states and Commonwealth to make the reforms necessary to contain insurance costs': see Northern Territory Legislative Assembly, 'Ministerial Report—Insurance Law Reform', *Hansard*, 19 August 2003, Parliamentary Record No: 14.
- 3 *Explanatory Memorandum*, Treasury Legislation Amendment (Professional Standards) Bill 2003, p. 2.
- 4 *Professional Standards Act 1994* (NSW), s. 40; *Professional Standards Act 1997* (WA), s. 9; *Professional Standards Act 2003* (VIC), s. 43.
- 5 See the web site for the New South Wales Professional Standards Council at: <http://www.lawlink.nsw.gov.au/psc.nsf/pages/whatwedoindex1> .

### **Warning:**

*This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.*

*This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.*

- 6 The trade term and logo are found on the web site for the New South Wales Professional Standards Council at: [http://www.lawlink.nsw.gov.au/psc.nsf/pages/cover\\_1](http://www.lawlink.nsw.gov.au/psc.nsf/pages/cover_1) .
- 7 'New Program to improve compliance with standards', *Media Release*, New South Wales Professional Standards Council, 19 September 2003.
- 8 Paragraph 5(1)(c) of the *Professional Standards Act (VIC) 2003*.
- 9 Chris Merritt, 'Victoria defends exemption clause', *Australian Financial Review*, 28 November 2003, p. 55.
- 10 *Breen v Williams* (1995–1996) 186 CLR 71.
- 11 *Breen v Williams* (1995–1996) 186 CLR 71 at pp. 108–109.
- 12 Chris Merritt, 'State puts national liability cap at risk', *Australian Financial Review*, 28 November 2003, p. 55.
- 13 *Explanatory Memorandum*, Treasury Legislation Amendment (Professional Standards) Bill 2003, p. 2.
- 14 Fiona Buffini, 'Liability cap worries investors', *Australian Financial Review*, 11 August 2003, p. 5.
- 15 Hon Ross Cameron, Parliamentary Secretary to the Treasurer, *Second Reading* speech, Treasury Legislation Amendment (Professional Standards) Bill 2003, House of Representatives, *Debates*, 4 December 2003, p. 23326.

**Warning:**

*This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.*

*This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.*