



## legal compliance newsletter

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### **Indemnification of directors and officers – Amendments to TPA**

**The *Trade Practices Legislation Amendment Act (No. 1) 2006* came into force on 1 January 2007, amending the *Trade Practices Act 1974 (Cth)* [TPA] by imposing a restriction on corporations indemnifying its officers for breach of the restrictive trade practices provisions in Part IV of the TPA.**

The amendments to the TPA are now in force. From 1 January 2007 the TPA imposes restrictions on corporations indemnifying its officers in respect of a contravention of the restrictive trade practices provisions in Part IV of the TPA. Section 77A(1) provides:

A body corporate (the first body), or a body corporate related to the first body, must not indemnify a person (whether by agreement or by making a payment and whether directly or through an interposed company) against any of the following liabilities incurred as an officer of the first body:

- (a) a civil liability [defined to mean “a liability to pay a pecuniary penalty under section 76 for a contravention of Part IV”];
- (b) legal costs incurred in defending or resisting proceedings in which the person is found to have such a liability.

**An indemnity is void to the extent that it contravenes section 77A. The penalty for breach of section 77A is currently \$2,750 and is a criminal penalty.**

The section imposes an outright prohibition on corporations indemnifying officers, regardless of the absence or presence of good faith. However, the restriction on indemnification only applies to a person who is “an officer” of a body corporate. [The word “officer” has the same meaning as in the *Corporations Act 2001 (Cth)*.] Therefore, **a company is not prohibited from indemnifying a person who is not an officer.**

The maximum penalty for a contravention of Part IV of the TPA is currently \$500,000 for an individual. However, subsection 85(6) of the TPA provides for a court to waive a pecuniary penalty or damages where a person is found to have acted honestly and ought to be excused. In addition, the Explanatory Memorandum suggests that **a company could legally lend funds to an officer to defend proceedings**, subject to those monies being repayable if the officer is found to have contravened the Act.

***Need more information or assistance?* Contact our Legal Compliance experts on:**

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