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THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

**NATIONAL HEALTH REFORM AMENDMENT (INDEPENDENT
HOSPITAL PRICING AUTHORITY) BILL 2011**

EXPLANATORY MEMORANDUM

(Circulated by authority of the Minister for Health and Ageing,
the Hon. Nicola Roxon, MP)

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NOTES

In this Explanatory Memorandum, a reference to a section in bold italics (*section 60*) is a reference to a section as it will appear in the National Health Reform Act 2011 as amended by this Bill.

A reference to an item in bold type (**item 120**) is a reference to an item in Schedule 1 or Schedule 2 to this Bill.

NATIONAL HEALTH REFORM AMENDMENT (INDEPENDENT HOSPITAL PRICING AUTHORITY) BILL 2011

INTRODUCTION AND OUTLINE

This Bill once enacted establishes the Independent Hospital Pricing Authority (“Pricing Authority”) as set out in the National Health Reform Agreement agreed to by the Council of Australian Governments (COAG) on 2 August 2011.

The National Health and Hospitals Network Act 2011 (the NHHN Act) established the Australian Commission on Safety and Quality in Health Care (“the Commission”). The National Health Reform Amendment (National Health Performance Authority) Bill 2011, which is currently before Parliament, will amend the NHHN Act to change its title to the National Health Reform Act 2011 (the Reform Act), will amend the provisions relating to Australian Commission on Safety and Quality in Healthcare to include secrecy and disclosure of information provisions, will establish the National Health Performance Authority and provide for its functions, powers and liabilities, and will provide for other consequential amendments.

This Bill will amend the Reform Act to provide for the establishment of the Independent Hospital Pricing Authority, provide for its functions, powers, accountabilities and liabilities, provide for the establishment of committees and bodies assisting the Pricing Authority, and other machinery provisions.

FINANCIAL IMPACT

In the 2010-11 Budget the Government allocated funding of \$91.8 million for the Pricing Authority and \$118.6 million for the Performance Authority over four years as shown in the table below.

| Expense (\$m) | 2010-11 | 2011-12 | 2012-13 | 2013-14 |
|-------------------|---------|---------|---------|---------|
| Pricing Authority | 3.8 | 31.8 | 28.5 | 27.7 |

The Government also decided to offset part of the cost of the new arrangements by adjusting funding for the existing Hospital Accountability and Performance Program to ensure there is no duplication. This offset will provide a saving of \$9.1 million (\$5.1 million in 2011-12 and \$3.9 million in 2012-13), resulting in an estimated net cost of the Performance Authority of \$109.5 million over four years.

COMMENCEMENT

Clause 2 provides that the Bill once enacted, apart from Schedule 1, commences on the day the Act receives Royal Assent.

Schedule 1, which contains the substance of the amendments and new provisions in the Bill, commences on proclamation on a day which must be later than the day on which the substantive provisions of the *National Health Reform Amendment (National Health Performance Authority) Act 2011* commences.

However, if Schedule 1 is not proclaimed within six months beginning on the later of:

- the start of the day the Act receives Royal Assent; and
- the commencement of Schedule 1 to the *National Health Reform Amendment (National Health Performance Authority) Act 2011*

then the amendments commence on the day after the end of that period.

The Government intends to set a date by proclamation which will allow the members of the Pricing Authority to be appointed (subsection 4(1) of the *Acts Interpretation Act 1901*) before the Pricing Authority comes into being.

SCHEDULE 1 – GENERAL AMENDMENTS

Part 1 – Amendments

Part 1 of the Bill amends the *National Health Reform Act 2011* (the Reform Act) to provide for consequential and other amendments in view of the inclusion of provisions relating to the Independent Hospital Pricing Authority (the Pricing Authority) and other related amendments.

Sections 3 (Object) and **4 (Simplified Outline)** of the Reform Act are amended to include a reference to the Pricing Authority (**Items 1-2**).

Insertions of new definitions in relation to the Pricing Authority and other related matters are made to **section 5** by **Items 3 to 17** and an amendment to an existing definition is made to the definition of “vacancy” to include a reference to the Pricing Authority and the Clinical Advisory Committee established under Part 4.10 of Chapter 4 of the Reform Act (**Item 17**).

Item 12 defines “official of the Pricing Authority as any of the following: a member of the Pricing Authority; the Pricing Authority CEO; a member of the staff of the Pricing Authority; a person whose services are made available to the Pricing Authority under section 174 and a person engaged as a consultant by the Pricing Authority. **Item 15** defines “protected pricing Authority information” as information that was obtained by a person in the person’s capacity as an official of the Pricing Authority and which relates to the affairs of a person other than an official of the Pricing Authority. Both of these definitions are required under Part 4.14 in relation to the secrecy provisions.

New **subsections (3) and (4)** are added under section 6 of the Reform Act (**Item 18**). These amendments have the effect of setting the minimum number of members of the Pricing Authority (9 members) and the Clinical Advisory Committee (9 members). **Subsection 6(3)** provides that for the purposes of a reference in the Act to a vacancy in the office of a member of the Pricing Authority or to the *Acts Interpretation Act 1901* to a “vacancy” in the membership of a body, there are taken to be 7 offices of members of the Pricing Authority in addition to the Chair of the Pricing Authority and the Deputy Chair of the Pricing Authority. **Subsection 6(4)** provides a similar provision in relation to a vacancy in the office of a member of the Clinical Advisory Committee to the effect that a reference to a vacancy in the office of a member of a Clinical Advisory Committee, there are taken to be 8 offices of members of that Committee, in addition to the Chair of that Committee.

Consequential amendments are made to **paragraphs 54H(1)(a)** (*Disclosure of protected information by the Commission Board Chair to certain agencies*) and **120(1)(a)** (*Disclosure of protected information by the Chair of the Performance Authority to specified bodies or persons*) to include a reference to the Pricing Authority (**Items 19-20**). These provisions would allow these bodies to disclose protected information to the Pricing Authority.

ADDITION OF NEW CHAPTER 4– INDEPENDENT HOSPITAL PRICING AUTHORITY

Outline of Chapter

New Chapter 4 (inserted by **item 21** of Schedule 1 to the Bill) establishes the Pricing Authority, and provides for its functions, powers, obligations, liabilities, privileges, membership, appointment, formation of committees associated with its functions, staffing and some elements of its procedures.

The Pricing Authority is an important element of the National Health Reform Agreement, which provides for Commonwealth payments to the States for public hospitals services to be based on a national efficient price calculated by the Pricing Authority. The Agreement also calls for the Pricing Authority to provide advice on a number of other matters.

Detailed Explanation

Part 4.1 – Introduction provides a simplified outline of the *Chapter [section 128]*.

Part 4.2 – Pricing Authority’s establishment, functions, powers and liabilities

This Part establishes the Pricing Authority as a statutory authority *[section 129]* and sets out its object *[section 130]* and its functions *[section 131]*.

The establishment of the Pricing Authority intends to give effect to the agreement between the Commonwealth, the States and the Territories to establish a body to give independent and transparent advice in relation to funding for public hospitals *[subsection 129(2)]*.

The object of the Pricing Authority is to promote improved efficiency in and access to public hospital services by providing independent advice to the Commonwealth, State and Territory governments in relation to the efficient costs of services and developing and implementing robust systems to support activity based funding for those services *[section 130]*.

Its functions include the following: determining the national efficient price for healthcare services provided by public hospitals where the services are funded on an activity basis; determining the efficient cost for health care services provided by public hospitals where the services are block funded; developing and specifying classification systems for health care and other services provided by public hospitals; determining adjustments to the national efficient price; determining data requirements and data standards in relation to data that is to be provided by States and Territories; determining public hospital functions that are to be funded in the State or Territory by the Commonwealth (except where otherwise agreed between the Commonwealth and a State or Territory); advising the Commonwealth, the States and the Territories in relation to funding models for hospitals and costs of providing health care services in the future; considering cost-shifting and cross-border disputes; and doing anything incidental to or conducive to the performance of any of its functions *[subsection 131(1)]*.

The Minister may also specify functions for the Pricing Authority as are specified in a written instrument given by the Minister to the Chair of the Pricing Authority with the agreement of COAG [*paragraph 131(1)(m)*]. Directions under the Minister's powers to direct the Pricing Authority in the performance of its functions will ensure the Pricing Authority will have the authority to carry out all tasks specified in a written policy principle given by COAG.

Subsection 131(2) provides that COAG is to give its agreement for the purposes of *paragraph 131(1)(m)* by a written resolution of COAG which is to be passed in accordance with the procedures determined by COAG.

Subsection 131(3) lists the matters that the Pricing Authority must have regard to in performing its functions. These matters include the following: relevant expertise and best practice within Australia and internationally; submissions made at any time by the Commonwealth, a State or Territory government; the need to ensure that specified qualities apply in relation to health care services and public hospital system (for example those relating to access, safety and quality, and continuity and predictability in the cost) ; and the range of public hospitals and the variables affecting the actual cost of providing health care services in each of the hospitals.

In carrying out its functions the Pricing Authority is to have regard to relevant intergovernmental agreements [*subsection 132(1)*]. However, *subsection 132(1)* does not limit the matters that the Pricing Authority to which regard may be had [*subsection 132(2)*].

Where the National Health Reform Agreement (defined in *section 5*) sets out processes to be followed, or conditions or requirements to be met by the Pricing Authority in performing a function, it must follow the processes, or meet the conditions or requirements, in performing its functions [*subsection 132(3)*]. Thus, the requirements for determining data requirements, for example, set out in clause B86 of the National Health Reform Agreement will need to be followed by the Pricing Authority.

COAG is authorised to give written policy principles to the Pricing Authority about the performance of its functions [*section 133(1)*]. These principles are to be given in accordance with a written resolution of COAG passed in accordance with procedures that it has determined [*subsection 133(2)*]. These principles must be published on the Pricing Authority's website and it must not perform its functions in a manner inconsistent with the policy principles [*subsections 133(3) and 133(4)*]. These principles are not legislative instruments [*subsection 133(5)*]. These policy principles do not determine the law or alter the content of a law. They are developed by COAG to be applied by the Pricing Authority as guiding principles in the performance of its functions. This provision ensures that COAG retains an ability to set parameters around the operations of the Pricing Authority in a way which is binding and with does not rest in the hands of a single jurisdiction.

The Constitutional limits for the Pricing Authority's functions are set out in *section 134*.

The Pricing Authority is given the power to do all things necessary or convenient to be done for or in connection with performing its functions [section 135]. Sections 135 to 137 also provide that as a Commonwealth body it contracts, holds assets and incurs liabilities, and receives money on behalf of the Commonwealth, and has the privileges and immunities of the Crown in right of the Commonwealth.

Part 4.3 – Cost-shifting disputes and cross-border disputes

This Part sets out how the Pricing Authority will proceed in dealing with disputes about cost-shifting and cross-border health costs. This Part reflects clauses A88 – A101 of the National Health Reform Agreement.

Section 138 provides for the definitions of cost-shifting disputes and cross-border disputes. A cost-shifting dispute arises if a Health Minister believes that costs to his or her jurisdiction in relation to health care services are attributable to one or more changes that have been made to the policies, programs or practices of another jurisdiction (the second jurisdiction) and within 2 months after being requested to do so, the second jurisdiction has not reimbursed the costs [subsection 138(1)]. On the other hand, a cross-border disputes arises if: a State/Territory Health Minister believes that costs to his or her jurisdictions in relation to healthcare services are attributable to the provision of public hospital services to residents of another jurisdiction (the second jurisdiction) and an intergovernmental agreement, or an agreement between States, or States and Territories, provides for those costs to be reimbursed, by the second jurisdiction and after being requested to do so, the second jurisdiction has not reimbursed those costs within a specified period [subsection 138(2)]. As defined, cross-border disputes are limited to disputes between States and or a State and a Territory.

Section 139 sets out the procedures for the assessment of cost shifting disputes by the Pricing Authority. A Health Minister can request the Pricing Authority to make an assessment about a cost-shifting dispute between his or her jurisdiction and a second jurisdiction [subsection 139(1)]. That request must be made in writing and accompanied by a supporting written submission [subsection 139(2)]. The Pricing Authority must investigate the dispute if satisfied that relevant requirements have been complied with and the jurisdictions have made other reasonable efforts to resolve the dispute [subsection 139(3)]. As soon as practicable after starting the investigation of the dispute, the Pricing Authority must give the Health Minister of the second jurisdiction the written request, a written invitation to make a written submission within a specified period and a copy of the submission that accompanied the request for assessment about the dispute [subsection 139(4)]. Following the investigation, the Pricing Authority must prepare a draft assessment, give copies of that draft to both Health Ministers and invite the Health Ministers to give to the Pricing Authority written comments on the draft assessment within 30 days after receiving them [subsection 139(5)]. The draft assessment must be accompanied by a copy of any submission received by the Pricing Authority. The Pricing Authority must prepare a final assessment and give it to the Health Ministers, where the final assessment finds that cost shifting has occurred, the Pricing Authority must publish that assessment on its website [subsections 139(6) and (7)].

Section 140 sets out the procedures in the making of recommendations by the Pricing Authority on cross-border disputes. A State or Territory Health Minister can request

the Pricing Authority to make recommendations about a cross-border dispute between his or her jurisdiction and another jurisdiction [*subsection 140(1)*]. That request must be made in writing and accompanied by a supporting written submission [*subsection 140(2)*]. The Pricing Authority must investigate the dispute if satisfied that relevant requirements have been complied with and the jurisdictions have made other reasonable efforts to resolve the dispute [*subsection 140(3)*]. As soon as practicable after starting the investigation of the dispute, the Pricing Authority must give the State or Territory Health Minister of the second jurisdiction the written request, a written invitation to make a written submission within a specified period and a copy of the submission that accompanied the request for assessment about the dispute [*subsection 140(4)*]. Following the investigation the Pricing Authority must prepare a draft recommendation, give copies of that draft to both Health Ministers and invite the Health Ministers to give to the Pricing Authority written comments on the draft recommendation within 30 days after receiving them [*subsection 140(5)*]. The Pricing Authority is required to prepare final recommendations and give them to the Health Ministers who are parties to the dispute [*subsection 140(6)*].

Section 141 authorises the Pricing Authority to advise the Commonwealth to adjust its funding in relation to health care services that would be necessary to give effect to final recommendations in relation to a cross-border dispute in specified circumstances. This advice would be given to the Commonwealth if 3 months have passed since the recommendations were given by the Pricing Authority, the recommendations have not been complied with and the Health Minister who requested the recommendations requests the advice to be given to the Commonwealth.

Part 4.4 – Constitution and membership of the Pricing Authority

This Part establishes the Pricing Authority as a body corporate with perpetual succession, with a seal, able to deal with property (real and personal) and sue and be sued. Judicial bodies and persons acting judicially are to take judicial notice of the seal appearing on a document [*section 142*].

The Pricing Authority is to consist of a Chair, a Deputy Chair and 7 other members [*section 143*]. The Pricing Authority therefore consists of 9 members.

The Minister is responsible for appointing all the Board members, including the Chair [*section 144*]. The Deputy Chair must be appointed with the agreement of the Premiers of the States and Territories [*subsection 144(2)*]. The 7 other members must be appointed with the agreement of the Prime Minister and the Premiers of the States and Territories, and must include at least one person with substantial experience or knowledge and significant standing in regional or rural health care [*subsections 144(3) and (4)*]. Members of the Pricing Authority can be appointed on either a full-time or part-time basis [*subsection 144(5)*].

A member can be appointed for up to a maximum five year period as specified in the instrument of authorisation [*section 145*], but may be re-appointed.

The Minister may appoint by written instrument persons to act as Chair, Deputy Chair or member of the Pricing Authority in specified circumstances [*section 146*]. In appointing a person to act as Deputy Chair the Minister must have the agreement of the Standing Council of Health before making an appointment [*subsection 146(5)*].

The Minister must consult the Standing Council on Health before appointing a person to act as a member (other than the Chair or the Deputy Chair) *[subsection 146(6)]*. Anything done by or in relation to a person purporting to act under an appointment is not invalid merely because the occasion for the appointment had not arisen or there was a defect or irregularity in connection with the appointment or the appointment had ceased to have effect or the occasion to act had not arisen or had ceased *[subsection 146(7)]*.

Part 4.5 – Terms and conditions for members of the Pricing Authority

Persons appointed to the Pricing Authority are to receive remuneration as determined by the Remuneration Tribunal, and allowances as prescribed in the regulations *[section 147]*. If no determination of that remuneration by the Tribunal is in operation, a member of the Pricing Authority is to be paid remuneration that is prescribed by the regulations. Section 147 is subject to the *Remuneration Tribunal Act 1973 [subsection 147(3)]*.

Members are required to disclose to the Minister in writing all interests (not limited to financial interests) that conflict or may conflict with their role as a member *[section 148]*. These interests include interests that the member has or subsequently acquires.

A member must also inform other Pricing Authority members as soon as they become aware of an interest (financial or otherwise) in relation to a matter being considered by the Pricing Authority at a particular time, and may not be present or take part in consideration of that matter unless the other members determine otherwise *[section 149]*. The disclosure of the conflict of interest must be made as soon as possible after the relevant facts have come to the knowledge of the member *[subsection 149(2)]*. The disclosure of the conflict of interest must be recorded in the minutes of the meeting of the Pricing Authority *[subsection 149(3)]*. The affected member must not be present or take part in making a determination of whether that member should or should not be excluded from the consideration of the particular matter *[subsection 149(5)]*. This determination must be recorded in the minutes of the meeting of the Pricing Authority *[subsection 149(6)]*.

Full-time members are entitled to recreation leave as determined by the Remuneration Tribunal, and other leave as determined by the Minister (including remuneration), and part-time members may be granted leave of absence by the Chair on the terms and conditions that the Chair determines *[section 150]*.

Members may resign by writing to the Minister *[section 151]*, and the Minister may terminate a Pricing Authority member's appointment *[section 152]*. The Minister may at anytime terminate the appointment of the Chair of the Pricing Authority *[subsection 152(1)]*. The Minister must terminate the appointment of the Deputy Chair, if requested to do so by a majority of the State/Territory Health Ministers *[subsection 152(2)]*. The Minister can at any time, terminate the appointment of a member of the Pricing Authority (other than the Chair or the Deputy Chair) with the agreement of a majority of the State or Territory Health Ministers that includes at least 3 State Ministers *[subsection 152(3)]*.

The Minister may determine terms and conditions of appointment for Pricing Authority members in relation to matters not dealt with in the Act [*section 153*].

Part 4.6 – Decision-making by the Pricing Authority

The Pricing Authority is to hold the meetings necessary to perform its functions, and the Chair of the Pricing Authority may convene a meeting at any time [*section 154*].

The Chair, or if the Chair is absent, the Deputy Chair, is to preside at meetings [*subsections 155(1) to (2)*]. If both are absent, the members present must appoint a member to preside [*subsection 155(3)*].

Five members constitute a quorum at a meeting, and a question is decided by a majority of members present and voting [*section 156 and subsection 157(1)*]. The person presiding at the meeting has a deliberative vote [*subsection 157(2)*].

The Pricing Authority is authorised to make a decision outside a meeting if a majority of the members entitled to vote on the proposed decision indicate agreement with the decision, that agreement is indicated in accordance with the method determined by the Pricing Authority and all the members were informed of the proposed decision or reasonable efforts were made to inform all the members of the proposed decision [*subsection 158(1)*]. Subsection 158(1) does not apply unless the Pricing Authority has determined that it can make such a decision without a meeting and has determined the method by which members are to indicate agreement with the proposed decisions [*subsection 158(2)*]. Members who would not have been entitled to take part in such a decision at a meeting, because of a conflict of interest, are not entitled to take part in an out of meeting decision [*subsection 158(3)*]. Section 158 ensures the Pricing Authority is able to operate flexibly and rapidly if required.

The Pricing Authority, may subject to Part 4.6 of the Reform Act, regulate the proceedings at its meetings as it considers appropriate and are required to keep minutes at its meetings [*sections 159 to 160*].

Part 4.7 – Delegation by the Pricing Authority

The Pricing Authority may delegate one or more of its powers and functions (other than those functions or powers specified in subsection 161(3)) to a member of the Pricing Authority, the CEO of the Pricing Authority, or an SES or acting SES who is a member of the staff of the Pricing Authority [*subsection 161(1)*]. The delegate must comply with any written directions from the Pricing Authority [*subsection 161(2)*]. The Pricing Authority cannot delegate its functions set out in paragraphs 131(1)(a) to (f) or paragraph 131(1)(j), the making, varying or revoking of a legislative instrument, the giving of advice to the Minister or a function or power under Part 4.8 of the Reform Act [*subsection 161(3)*].

Part 4.8 – Chief Executive Officer of the Pricing Authority

There is to be a Chief Executive Officer (CEO) for the Pricing Authority (referred to as the Pricing Authority CEO) [*section 162*]. The Pricing Authority CEO is responsible for the day to day administration of the Pricing Authority, has the power to do all things necessary or convenient to be done for or in connection with the

performance of his or her duties and must act in accordance with the policies determined and any directions given by the Pricing Authority *[section 163]*.

The Pricing Authority CEO is appointed by the Pricing Authority under a written instrument *[subsections 164(1) to (2)]*. Before appointing the Pricing Authority CEO, the Pricing Authority must consult the Minister *[subsection 164(3)]*. The Pricing Authority CEO holds office on a full-time basis and for the period specified in the instrument of appointment which must not exceed 5 years for each appointment, but can be reappointed *[subsections 164(4) to (5)]*. The Pricing Authority CEO must not be a member of the Pricing Authority *[subsection 164(6)]*.

The Pricing Authority is authorised to appoint an acting Pricing Authority CEO in specified circumstances *[section 165]*. The Pricing Authority CEO must not engage in other paid employment without the approval of the Pricing Authority *[section 166]*

The Pricing Authority CEO is to be paid remuneration that is determined by the Remuneration Tribunal and is to be paid allowances that are prescribed in the regulations *[section 167]*. If no determination of that remuneration by the Remuneration Tribunal is in operation, the Pricing Authority is to be paid that remuneration that is prescribed by the regulations *[subsection 167(1)]*. This section has effect subject to the *Remuneration Tribunal Act 1973* *[subsection 167(3)]*.

The recreation leave entitlements by the Pricing Authority CEO are those that are determined by the Remuneration Tribunal *[subsection 168(1)]*. The Pricing Authority may grant the Pricing Authority CEO leave of absence, other than recreation leave, on the terms and conditions as to remuneration or otherwise that the Pricing Authority determines with the written agreement of the Minister *[subsection 168(2)]*.

The Pricing Authority CEO must disclose to the Minister and the Pricing Authority, in writing, all interests (material, financial, personal and other interests) that the CEO has or acquires that conflict or may conflict with the performance of his or her duties *[section 169]*.

The Pricing Authority CEO may resign his or her appointment by giving the Pricing Authority a written notification of resignation, the resignation takes effect on the day of receipt by the Pricing Authority or on a later day specified in the resignation notification *[subsections 170(1) and (2)]*. The Pricing Authority is required to notify the Minister of such resignation *[subsection 170(3)]*.

The Pricing Authority may terminate the Pricing Authority CEO's appointment for misbehaviour, physical or mental incapacity, if the Authority is satisfied that the CEO's performance is unsatisfactory, in the event of bankruptcy, frequent absence without leave, concealing a conflict of interest or engaging in unapproved employment *[subsections 171(1) to (3)]*. However, before terminating the appointment of the CEO, the Pricing Authority must consult the Minister *[subsection 171(4)]*.

The Pricing Authority, with the written agreement by the Minister, may determine other terms and conditions of appointment that are not specified in the Act applying to the Pricing Authority CEO *[subsection 172]*.

Part 4.9 – Staff and consultants

Pricing Authority staff are to be engaged under the *Public Service Act 1999*, and for the purposes of that Act, the Pricing Authority CEO and staff together constitute a Statutory Agency under that Act, and the Pricing Authority CEO is the head of that Statutory Agency *[section 173]*.

The Pricing Authority may also utilise the services of other Commonwealth and State/Territory public servants and employees in connection with the performance of any of its functions *[section 174]*. Similarly, consultants having suitable qualifications and experience may also be engaged on terms and conditions determined by the Pricing Authority in writing to assist the Pricing Authority deliver its schedule of works *[section 175]*. The use of personnel engaged by the Pricing Authority, but not directly employed by the Pricing Authority, will enable it to meet different work cycles and demands, and is likely to be particularly useful during the establishment phase.

Part 4.10 – Clinical Advisory Committee

This Part establishes a Clinical Advisory Committee *[section 176]* to advise the Pricing Authority on the formulation of casemix classifications for healthcare and other services provided by public hospitals, to provide advice on matters referred to it by the Pricing Authority and to do anything incidental to or conducive to the performance of those functions *[section 177]*.

As the Pricing Authority proceeds to develop new classification systems and review existing ones clinical advice will be very important. One of the reasons for the success of the development of casemix classifications for acute admitted patients in an Australian context in the 1990s and early 2000s was the close involvement of clinicians in the process. Establishment of the Clinical Advisory Committee is an important part of ensuring that casemix classifications are clinically meaningful and will be accepted by the clinical community.

The Clinical Advisory Committee is to consist of a Chair and at least eight other members, appointed by the Minister on a part-time basis after consulting the Pricing Authority *[sections 178-179]*. The Minister must consult the Pricing Authority and the Standing Committee before appointing a person as a Clinical Advisory Committee member *[subsection 179(2)]*. Members must be practicing as clinicians *[subsection 179(3)]*. The definition of “clinician” requires that a person must be providing diagnosis or treatment to be captured by the definition.

Members may be appointed for up to a maximum five year period *[section 180]*, but may be re-appointed. The Minister may also appoint persons to act as members of the Clinical Advisory Committee (as a Chair or as a member), providing they are clinicians *[section 181]*.

The Clinical Advisory Committee may operate at meetings under procedures determined by the Minister by legislative instrument *[subsection 182(1)]*. The matters covered by this instrument include the convening of meetings of the Committee, the number of members constituting a quorum, the selection of a member

to preside at meetings when the Chair is absent and the manner in which questions arising at a meeting of the Committee are to be decided. The Committee may also determine a method for making resolutions without a formal meeting [*subsection 182(2)*]. Subsection 182(2) only applies if the Committee in specified circumstances [*subsection 182(3)*].

Clinical Advisory Committee members are required to disclose to the Minister and the Pricing Authority all interests (personal, material, pecuniary or other interests) that the member has or acquires that conflict or may conflict with the proper performance of their functions as members [*section 183*]. A member must also inform other Clinical Advisory Committee members as soon as they become aware of an interest in a matter being considered by the Committee, and may not be present or take part in consideration of the matter unless the other members determine otherwise [*subsections 184(1) to (2) and (4)*]. The disclosure must be recorded in the minutes of the meeting of the Committee [*subsection 184(3)*]. The affected member must not be present or take part in the determination on whether that member can take part in the Committee's decision making [*subsection 184(5)*]. A determination must be recorded in the minutes of the meeting of the Committee [*subsection 184(6)*].

Clinical Advisory Committee members must not take part in paid employment if it may conflict or conflicts with the performance of their duties as members [*section 185*].

Persons appointed to the Clinical Advisory Committee are to receive remuneration as determined by the Remuneration Tribunal, and allowances as prescribed in the regulations [*subsections 186(1) and (3)*]. If no determination of that remuneration by the Tribunal is in operation, the member is to paid remuneration that is prescribed by the regulations. However, members are not entitled to remuneration if they are employed full-time by a State government, a public statutory corporation that is established for a public purpose by a law of a State and is not a tertiary education institution or a company limited by guarantee, where the interests and rights of the members in or in relation to the company are beneficially owned by a State or a company in which all the stocks or shares are beneficially owned by a State or by a public statutory corporation [*subsection 186(2)*]. A similar rule set out in subsection 7(11) of the *Remuneration Tribunal Act 1973* applies to a committee member who has similar relationships with the Commonwealth or a Territory. Section 186, other than subsection (2), has effect subject to the *Remuneration Tribunal Act 1973* [*subsection 186(4)*].

The Minister may grant leaves of absence to the Chair of the Clinical Advisory Committee on the terms and conditions that the Minister may determine, and the Chair may grant leave of absence to other members on the terms and conditions that the Chair determines [*section 187*].

Members may resign by writing to the Minister, and the Minister may terminate a member's appointment [*sections 188 and 189*]. The Minister may determine terms and conditions for the way Clinical Advisory Committee members holds office in relation to matters not dealt with in the Act [*section 190*].

The Clinical Advisory Committee may establish subcommittees with the approval of the Pricing Authority CEO to assist it in its functions, and may determine terms of reference, terms and conditions of appointment of members and procedures for a subcommittee *[subsections 191(1) and (3)]*. At least one member of the Clinical Advisory Committee must be a member of the subcommittee, but other members may be drawn from outside the Committee *[subsection 191(2)]*.

Section 192 sets out the remuneration and allowances for member of the subcommittee. A subcommittee member is to be paid remuneration as determined by the Remuneration Tribunal, and allowances as prescribed in the regulations *[subsections 192(2) and (4)]*. If no determination of that remuneration by the Tribunal is in operation, the member is to be paid remuneration that is prescribed by the regulations. However, members are not entitled to remuneration if they are employed full-time by a State government, a public statutory corporation that is established for a public purpose by a law of a State and is not a tertiary education institution or a company limited by guarantee, where the interests and rights of the members in or in relation to the company are beneficially owned by a State or a company in which all the stocks or shares are beneficially owned by a State or by a public statutory corporation *[subsection 192(3)]*. A similar rule set out in subsection 7(11) of the *Remuneration Tribunal Act 1973* applies to a committee member who has similar relationships with the Commonwealth or a Territory. Section 192, other than subsection (3), has effect subject to the *Remuneration Tribunal Act 1973* *[subsection 192(5)]*.

The Chair of the Clinical Advisory Committee is required to prepare and provide to the Minister, as soon as practicable after the end of each financial year an annual report for presentation to the Parliament *[section 193]*.

The Pricing Authority may assist the Clinical Advisory Committee and its subcommittees by providing information and making available resources and facilities to the subcommittee *[section 194]*.

Part 4.11 – Jurisdictional Advisory Committee

Section 195 establishes the Jurisdictional Advisory Committee. Section 196 sets out the functions of the Jurisdictional Advisory Committee and provides that the Pricing Authority must have regard to the advice provided by the Jurisdictional Advisory Committee. The Committee's functions include the provision of advice to the Pricing Authority in relation to the following and to do anything incidental to or conducive to the performance of these functions *[subsection 196(1)]*:

- (a) developing and specifying classification systems for health care and other services provided by public hospitals;
- (b) determining adjustments to the national efficient price to reflect variations in the costs of delivering health care services;
- (c) standards and requirements in relation to data relating to health care services provided by public hospitals that are provided by States and Territories;
- (d) developing and maintaining a schedule of public hospitals and the kinds of services provided by each public hospital;
- (e) funding models for hospitals;
- (f) matters that are referred to the Jurisdictional Advisory Committee by the Pricing Authority.

As evident from the Jurisdictional Advisory Committee's functions, the Committee will assist the Pricing Authority in its tasks by facilitating communication and knowledge transfer between different stakeholders in the development of the national efficient price and implementation of activity based funding.

The Jurisdictional Advisory Committee consists of a Chair, a member representing the Commonwealth Government and 8 other members, one to represent each State, the Australian Capital Territory and the Northern Territory *[section 197]*.

The Chair of the Jurisdictional Advisory Committee is to be appointed by the Pricing Authority by written instrument and only a member of the Pricing Authority, the Pricing Authority CEO or an SES staff member of the Pricing Authority (including an acting SES employee) can be appointed as a Chair *[subsections 198(1) and (2)]*. The Committee member representing the Commonwealth is to be appointed, by written instrument, by the Secretary of the Department of Health and Ageing by written instrument *[subsection 198(3)]*. The Committee member representing a State or Territory is to be appointed, by written instrument, by the head of the Health Department of the State or Territory *[subsection 198(4)]*. A Committee member holds office on a part-time basis *[subsection 198(5)]*.

If Chair of the Jurisdictional Advisory Committee is unable to be present at a meeting of the Committee, the Pricing Authority can nominate a person to attend the meeting in the Chair's place *[subsection 199(1)]*. If the Committee member representing the Commonwealth is unable to attend a meeting of the Committee, the Secretary of the Department of Health and Ageing may nominate a person to attend that particular meeting *[subsection 199(2)]*. If the Jurisdictional Advisory Committee member representing a State or Territory is unable to attend a particular meeting, the head of the Health Department of the State or Territory may nominate a person to attend the meeting in the member's place *[subsection 199(3)]*.

Only the body or the person who can appoint the member of the Committee has the power to terminate the appointment of that member *[section 200]*.

An office of a Jurisdictional Advisory Committee member is not a public office for the purposes of Part II of the Remuneration Tribunal Act 1973 *[section 201]*. Therefore they are not entitled to remuneration set out in that Part of that Act.

The Pricing Authority can determine the procedures to be followed by the Jurisdictional Advisory Committee *[section 202]*.

Any Jurisdictional Advisory Committee member who has an interest (personal, material, pecuniary or other interests) in a matter being considered or about to be considered by the Committee must disclose nature of that interest to a meeting of the Committee as soon as possible after the relevant facts have come to the knowledge of the member *[subsections 203(1) and (2)]*. The disclosure must be recorded in the minutes of the meeting of the Committee *[subsection 203(3)]*. That member may not be present or take part in the deliberation or decision on the matter unless the other members determine otherwise *[subsection 203(4)]*. The affected member must not be present or take part in the determination on whether that member can take part in the

Committee's decision making [*subsection 203(5)*]. That determination must be recorded in the minutes of the meeting of the Committee [*subsection 203(6)*].

The Pricing Authority may assist the Jurisdictional Advisory Committee in the performance of its functions by providing information and making available resources and facilities [*section 204*].

Part 4.12 – Other Committees

The Pricing Authority may establish committees to provide advice or assistance to the Pricing Authority in performing its functions [*subsection 205(1)*]. The committees may be made up wholly of Pricing Authority members, wholly of persons who are not members, or a combination of members and non-members [*subsection 205(2)*]. The Pricing Authority may determine the Committee's terms of reference, the terms and conditions of appointment of the members of the committee and procedures to be followed by the committee [*subsection 205(3)*].

Section 206 sets out the remuneration and allowances for a member of a committee established under section 205. A member of a committee is to receive remuneration as determined by the Remuneration Tribunal, and allowances as prescribed in the regulations [*subsections 206(2) and (4)*]. If no determination of that remuneration by the Tribunal is in operation, the member is to be paid remuneration that is prescribed by the regulations. However, members are not entitled to remuneration if they are employed full-time by a State government, a public statutory corporation that is established for a public purpose by a law of a State and is not a tertiary education institution or a company limited by guarantee, where the interests and rights of the members in or in relation to the company are beneficially owned by a State or a company in which all the stocks or shares are beneficially owned by a State or by a public statutory corporation [*subsection 206(3)*]. A similar rule under the *Remuneration Tribunal Act 1973* applies to a committee member who has a similar relationship with the Commonwealth or a Territory. Section 206, other than subsection (3), has effect subject to the *Remuneration Tribunal Act 1973* [*subsection 206(5)*].

The Pricing Authority may assist a committee by providing information and making available resources and facilities [*section 207*].

Part 4.13 – Reporting obligations of the Pricing Authority

The Minister or a State/Territory Health Minister may require the Pricing Authority to prepare reports and documents on particular matters, and cause to publish these, whether on the internet or otherwise [*section 208*].

The Minister or a State or Territory Health Minister may by written notice, require the Pricing Authority to prepare a report about one or more specified matters relating to the performance of the Authority's functions or to prepare a document setting out specified information relating to the Authority's functions and give copies of those to the requesting Minister as the case requires within the period specified in the notice [*subsections 208(1) and (2)*]. The Pricing Authority is required to comply with a requirement under subsection (1) or (2) [*subsection 208(3)*]. The Minister or the State/Territory Health Minister may publish the report or document provided by the Pricing Authority [*subsection 208(4)*].

The Pricing Authority is also required to keep the Minister and the Standing Council on Health informed of its work and operations [*subsection 209(1)*]. However, it is not required to inform the Standing Council on Health about the performance of its functions or exercise of powers under the *Financial Management and Accountability Act 1997* [*subsection 209(2)*]. The Pricing Authority must give reports, documents and information regarding its operations to the Minister as appropriate [*subsection 209(3)*].

The Pricing Authority must, as soon as practicable after the end of each financial year, prepare and give to the Minister an annual report on the information and advice given by the Pricing Authority in that particular financial year for presentation to the Parliament [*section 210*]. The report must include details of reports published under paragraph 131(1)(g), advice to the Commonwealth, a State or a Territory in relation to funding models for hospitals and recommendations and assessments given to the Commonwealth, a State or a Territory in relation to cost-shifting and cross-border disputes [*subsection 210(2)*].

The Pricing Authority is prohibited from publishing a report (whether on the internet or otherwise) unless the report, and a period of 45 days to comment on the report has been given to the Minister and each State or Territory Health Minister [*section 211*]. However, this requirement does not apply to a report under section 200 which is an annual report prepared and given to the Minister for presentation to the Parliament about its operations during the financial year [*section 212*].

Part 4.14 – Secrecy

A person commits an offence if that person is or has been an official of the Pricing Authority, has obtained information in the course of their work relating to another person (“protected information”) and discloses or use the information, unless the disclosure or use is authorised by Part 4.13 or is compliant with another Commonwealth or a prescribed State law [*subsections 213(1) and (2)*].

The penalty for the offence (two years imprisonment or 120 penalty units or both) is consistent with penalties for similar offences under other health legislation such as the *National Health Act 1953*, *Health Insurance Act 1973* and *Private Health Insurance Act 2007* and reflects the potential seriousness of improper use or disclosure of protected information.

Under subsection 13.3(3) of the Criminal Code a defendant being prosecuted for this offence and wishing to rely on an exception is required to demonstrate that disclosure was covered by one of the exceptions to the offence. It would be difficult for the prosecution to bear the burden of demonstrating that the disclosure was not covered by one of the exceptions, whereas a person disclosing information should reasonably be aware of the basis for their disclosure.

An official of the Pricing Authority is not to be required to produce or disclose protected information to a court or tribunal except where it is necessary for giving effect to the Act [*subsection 213(3)*].

The exceptions from the prohibition for disclosure of protected information set out in this Part include:

- disclosure or use for the purposes of the Act by an official of the Pricing Authority, for the performance of the Authority's functions, for the performance of the official's duties under the Act, or in the course of the official's employment or service as an official of the Pricing Authority **[section 214]**;
- disclosure by an official of the Pricing Authority to the Clinical Advisory Committee and its subcommittees, the Jurisdictional Advisory Committee and other Pricing Authority committees established under section 205 **[section 215]**;
- disclosure by an official of the Pricing Authority to the Minister **[section 216]**;
- disclosure by an official of the Pricing Authority to a State/Territory Health Minister **[section 217]**;
- disclosure by an official to the Secretary of the Department of Health and Ageing or the head of the Health Department of a State or Territory **[section 218]**;
- disclosure by an official of the Pricing Authority to a Royal Commission (in which case the Chair of the Pricing Authority can impose conditions on the use of the information) **[section 219]**;
- disclosure to specified bodies, agencies or persons where the Chair of the Pricing Authority is satisfied that the protected information will enable or assist those bodies or agencies or persons perform or exercise any of its functions or powers **[section 220]**;
- disclosure to an agency, body or person where the Chair of the Pricing Authority is satisfied that the particular protected information will assist the agency, body or person to conduct research **[section 221]** ;
- disclosure of information about the affairs of a person if the person has consented **[section 222]**; and
- disclosure of information that is already publicly available **[section 223]**.

Subsection 215(2) makes it an offence if a person is a member of the Clinical Advisory Committee and its subcommittee, a Jurisdictional Advisory Committee or a Pricing Authority committee established under section 205, protected information has been disclosed under subsection 215(1) to the committee and the person discloses the information to another person or uses the information.

A person does not commit an offence under subsection 215(2) if the disclosure or use is for the purposes of the Act, the disclosure or use is for the purposes of the performance of the functions of the committee under the Reform Act or the disclosure or use is in the course of the person's service as a member of the committee **[subsection 215(3)]**.

The penalty for the offence (two years imprisonment or 120 penalty units or both) is consistent with penalties for similar offences under other health legislation such as the *National Health Act 1953*, *Health Insurance Act 1973* and *Private Health Insurance Act 2007* and reflects the potential seriousness of improper use or disclosure of protected information.

Under subsection 13.3(3) of the Criminal Code a defendant being prosecuted for this offence and wishing to rely on an exception is required to demonstrate that disclosure was covered by one of the exceptions to the offence. It would be difficult for the prosecution to bear the burden of demonstrating that the disclosure was not covered by one of the exceptions, whereas a person disclosing information should reasonably be aware of the basis for their disclosure.

Section 220 authorises an official of the Pricing Authority to disclose particular protected information if the Chair of the Pricing Authority is satisfied that the information will enable or assist any of the following agencies, bodies or persons to perform or exercise any of their functions or powers: the National Health Performance Authority; the Commission; the Standing Council on Health; the Australian Health Minister's Advisory Council; the Australian Institute of Health and Welfare; the Australian Statistician; a State/Territory government body that has functions relating to health care; an agency person specified in a legislative instrument made by the Minister with the agreement of COAG. COAG is to give its agreement by a written resolution of COAG passed in accordance with determined procedures [**subsection 220(2)**]. The disclosure of protected information must be authorised by the Chair of the Pricing Authority [**subsection 220(3)**]. If protected information is disclosed to an agency, body or person set out in subsection 220(1), that agency, body or person must not disclose or use the information for a purpose other than the purpose for which the information was given to that agency, body or person [**subsection 220(4)**].

Section 221 authorises an official of the Pricing Authority to disclose protected information to an agency, body or person to assist in the conduct of research. For this section to apply, the Chair of the Pricing Authority must be satisfied that the protected information will assist an agency, body or person to conduct research [**subsection 221(1)**]. An official of the Pricing Authority can disclose the information to the agency, body or person concerned if that disclosure is authorised by the Chair of the Pricing Authority [**subsection 221(2)**]. In addition, an official of the Pricing Authority must not disclose protected information if the information is likely to enable the identification of a particular patient [**subsection 221(3)**].

The Chair of the Pricing Authority may delegate any or all of his function or powers under Part 4.14 to the Pricing Authority CEO, who must comply with any directions from the Chair in exercising the delegation [**section 224**]. The delegation must be made in writing and the directions must also be in writing.

Part 4.15 – Other matters

The Pricing Authority must publish on its website at least once each financial year a statement setting out its work program and seek submissions from interested parties (giving a deadline of at least 30 days after the publication of the statement) about the work program [**section 225**].

The Minister may by legislative instrument give general directions to the Pricing Authority in relation to the performance of its functions and the exercise of its powers [**subsection 226(1)**]. Before giving a direction, the Minister is required to consult the Standing Council on Health [**subsection 226(2)**]. A direction must be of a general nature only and must not be a direction to change a particular national efficient price for health care services provided by public hospitals or a particular efficient cost for

health care services provided by public hospitals. The Government intends to use this power to ensure that the Pricing Authority carries out the detailed tasks specified in the National Health Reform Agreement.

Section 227 makes it clear that the Pricing Authority cannot direct the CEO in performing functions or exercising powers under the *Financial Management and Accountability Act 1997* and the *Public Service Act 1999*.

ADDITION OF CHAPTER 5 - MISCELLANEOUS

This Chapter includes several provisions relating to privacy and confidentiality, a statement of the relation between this Act and State laws, the non-application of the *Commonwealth Authorities and Companies Act 1997* and regulation making power.

The Australian Commission on Safety and Quality in Health Care, the Pricing Authority or the Performance Authority must not publish or disseminate information likely to lead to the identification of a particular patient without consent [*subsections 228(1) and (2)*]. Consent may be given by

- the patient, if the patient is aged 18 or more; or
- if the patient is dead, the patient's surviving partner who was his or her partner immediately before the patient died and living with him or her immediately before he or she died; or
- a person authorised under the regulations to give consent to the publication or dissemination of the information [*section 228(3)*].

For the purposes of subsection 228(3), a person is taken to have been living with his or her partner at a particular time if they were not living together at that time only because of a temporary absence from each other or illness or infirmity of either both of them [*subsection 228(4)*].

The Reform Act is intended to operate concurrently with State or Territory law to the extent possible [*section 229*].

The *Commonwealth Authorities and Companies Act 1997* does not apply in relation to the Performance Authority or the Pricing Authority. Both Authorities are to be subject under the *Financial Management and Accountability Act 1997* [*section 230*].

Regulations can be made by the Governor-General, prescribing matters required or permitted to be prescribed under the Act, or necessary or convenient to give effect to the Act [*section 231*].

Part 2- Transitional provisions [Item 22-23]

Item 22 - Appointment of Pricing Authority CEO

The Minister is authorised to appoint a person to act as the Pricing Authority CEO before the end of the 6 months period from the commencement of Item 22 during the vacancy in the office of the Pricing Authority CEO, so long as no appointment has previously been made [*subitem 22(1)*]. However, before making that appointment, the Minister must consult the Standing Committee on Health and the appointment must be in writing [*subitems 22(2) and (3)*]. Anything done in relation to a person purporting to act under an appointment is not invalid merely because of the occasion for the appointment has not arisen or there was defect or irregularity in the appointment or the appointment has ceased to have effect or the occasion has not arisen or had ceased [*subitem 22(4)*]. If a person is acting as the Pricing Authority CEO in accordance with an appointment under this Item, the Pricing Authority must not appoint anyone under subsection 165(1) of the National Health Reform Act to act as the CEO [*subitem 22(5)*]. The appointment of the acting CEO under subitem 22(1) is terminated immediately before the end of the 6 month period beginning at the commencement of Item 22 [*subitem 22(6)*]. However, subitem 6 does not prevent the person from being appointed by the Pricing Authority, under subsection 165(1) of the *National Health Reform Act 2011*, to act as the Pricing Authority after the end of the six month period [*subitem 22(7)*].

Item 23 – Appointment of Clinical Advisory Committee Members

Item 23 provides that for the purposes of subsection 179(2) of the Reform Act, if the Minister appoints members of the Pricing Authority in accordance with section 4 of the *Acts Interpretation Act 1901* before commencement of this item, and the appointment took effect at the commencement of this item, and before the commencement of this item the Minister consulted the relevant persons about the appointment of a member of the Clinical Advisory Committee, the Minister is taken to have consulted the Pricing Authority about the appointment of the Clinical Advisory Committee member. This is a significant provision, as the Minister has responsibility under the Reform Act for appointing a Clinical Advisory Committee member after consulting with the Pricing Authority [*subsection 179(2)*]. However, the Pricing Authority will not commence until a proclamation is made specifying a date on which the Authority is to commence and this transitional provision is necessary in order for the Minister to meet his or her obligations to consult with the Authority on the appointment of a Clinical Advisory Committee member prior to that date.