Bills Digest
No. 71 2002–03

Medical Indemnity Bill 2002

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Medical Indemnity Bill 2002

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Date Introduced: 13 November 2002

House: House of Representatives

Portfolio: Health and Ageing

Commencement: 1 January 2003

Purpose

The purpose of the four bills is to put into place measures to address the problems regarding medical indemnity insurance.

Background

Insurance crisis

Liability insurance protects the insured against the consequences of being legally liable for injury or damage to third parties. There are a number of types of liability insurance including personal liability, public liability, professional indemnity, medical indemnity and product liability.

The insurance market has recently experienced a number of shocks including the collapse of HIH Insurance and the terrorist attacks on the World Trade Centre towers on 11 September 2002.[1] These large insurance shocks have contributed to the problems currently being experienced in the medical indemnity insurance market.

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Medical Indemnity insurance market

Medical defence organisations (MDO's), state government funds and commercial insurers provide medical indemnities to health professionals such as doctors.[2]

MDO's are not-for-profit mutual organisations. They are established for the benefit of their members rather than for the financial benefit of shareholders. MDO's are not insurers. They do not issue insurance contracts. They provide protection to their members in exchange for a 'subscription' income for membership into the organisation.

There are seven major medical defence organisations in Australia; United Medical Protection, Medical Defence Association of Victoria, Medical Indemnity Protection Society, Medical Defence Association of South Australia, Medical Defence Association of Western Australia, Medical Protection Society of Tasmania and Queensland Doctors Mutual Limited.[3]

Most MDO's rely heavily on reinsurance to protect their financial position. MDO's can raise additional capital under their current structural arrangements by charging increased subscriptions or 'making a call' to members for an additional amount of money.

Since 1999, four of the main MDO's have been required to make a call on their members for additional funds.

Medical indemnity crisis

The following events that relate to the medical indemnity insurance market have occurred in recent months:

- A provisional liquidator was appointed to United Medical Protection (UMP) and its wholly owned subsidiary Australian Medical Protection Limited (AMIL) on 3 May 2002.[4]
  - Collapse of UMP insurance would leave up to 60% of doctors in Australia without professional indemnity cover.[5]
- There has been a large increase in the cost to medical practitioners of subscribing to MDO's.[6]
- MDO's have not made sufficient provision for 'incurred but not reported claims'.
  - One of the features of liability insurance is its 'long tail'. This means that there can be many years between when an injury occurs and the time an insurer receives notice of a claim These claims are referred to as incurred but not reported claims (IBNR's). As IBNR's are claims that have occurred but have not been notified to the MDO, the MDO is unable to assess the amount of money they will need in reserve to meet the cost of these claims.

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Government response to the medical indemnity crisis

On 31 May 2002 the Government announced that it would provide assistance to UMP/AMIL to cover payment for claims finalised and incidents occurring between 29 April and 30 June (subsequently extended to 31 December 2002) made under an existing or renewed policy.

On 23 October 2002 the Prime Minister announced that the Government would implement the following additional set of measures to address the medical indemnity crisis;

- An extension to the 'claims made' guarantee made by the Commonwealth to UMP members from 31 December 2002 to 31 December 2003.
  - This offer is contingent upon the New South Wales Supreme Court allowing UMP and AMIL to continue in provisional liquidation and authorising the Provisional Liquidator to accept the extension of the guarantee.[7]
- Government funding for incurred but not reported liability (IBNR) of doctors that were MDO's at 30 June 2000, where the IBNR's are unfunded.
- Government reimbursement for medical indemnity providers (both MDO's and medical indemnity insurers) on a 'per claim' basis for 50 per cent of the insurance payouts over $2 million for incidents notified on or after 1 January 2003.
- Provision for premium subsidies to obstetricians, neurosurgeons and procedural GP's who undertake medicare billable procedures.
  - Access to the subsidy conditional upon practitioners attending incident management and quality assurance programs.
- Cost recovery measures.
  - For unfunded IBNR's, there will be a levy imposed on the members.
- Measures to place providers of medical indemnity insurance on an appropriate prudential and commercial footing that will involve an expanded role for the Australian Prudential Regulatory Authority (APRA).

The four bills discussed in this digest put in place the legislative arrangements to give effect to the majority of these measures (prudential regulation by APRA is not covered by the current set of legislative measures).

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Response by the Australian Medical Association

In a recent article in Australian Doctor[8] written by Pamela Burton Legal Counsel for the Federal AMA, Ms Burton wrote that:

> 'The package is a significant step forward in the short term but its goals are very limited in relation to the problem of escalating claims and costs….
>
> We have major problems still with aspects of the package. It does not achieve the long term reforms needed to put medical indemnity on a sound footing….
>
> The Government's choice to subsidise certain high-risk groups within the profession does not address the increasingly unfordable premiums of other groups.

Main Provisions

The medical indemnity legislative package contains four bills; Medical Indemnity Bill 2002, Medical Indemnity (IBNR Indemnity) Contribution Bill 2002, Medical Indemnity (Enhanced UMP Indemnity) Contribution Bill 2002 and the Medical Indemnity (Consequential Amendments) Bill 2002.

The major amendments are contained within the Medical Indemnity Bill 2002 (MIB).

The Medical Indemnity (IBNR Indemnity) Contribution Bill 2002 and the Medical Indemnity (Enhanced UMP Indemnity) Contribution Bill 2002 are both taxation bills and form part of the cost recovery measures.

The separate taxation Bills are necessary to satisfy the requirements of section 55 of the Constitution which states, in part:

> Laws imposing taxation shall deal only with the imposition of taxation, and any provision therein dealing with any other matter shall be of no effect.

The Medical Indemnity (Consequential Amendments) Bill 2002 contains a series of consequential amendments to legislation necessary to implement the Government's measures.

Unless specifically mentioned, all reference to clauses in the following discussion are references to the Medical Indemnity Bill 2002.

Proposed Part 1 of the Bill sets out the object of the Bill and key definitions including 'medical defence organisation'. Included in the list of MDO's are the seven major MDO's operating in Australia (as listed above).

Proposed Part 2 of the Bill sets out the regime for Commonwealth indemnity arrangements.

Incurred but not reported claims

Proposed Division 1 of Part 2 of the Bill deals with Commonwealth payments that are to be made for unfunded IBNR's made by doctors. Essentially this division provides that if MDO's do not have sufficient money to fund their IBNR's, the Commonwealth will pay money to the MDO's to fund payment of the claims.

Under **proposed Division 1** all MDO's will be participating MDO's and hence entitled to Commonwealth payment for incurred but not report claims unless the Minister determines that the MDO is not a participating MDO (**clause 12**).

The legislation states that the Minister will consider a number of factors before making a determination that an MDO is non participating, but essentially, if the MDO has sufficient funds to pay their incurred but not reported liabilities, the Minister can make a determination that the MDO is non participating (**clause 13**). The effect of this determination will be that the MDO will not be entitled to funding.[9]

Under **proposed Division 1** claims relating to incidents will be covered by the scheme where the incident meets the following criteria:

- the incident occurred before 30 June 2002
- the incident occurred in the course of the practice of a medical profession by a person who was a member of a participating MDO at the time of the incident
- the person had incident-occurring based cover with the MDO on 30 June 2002, and
- the incident was notified to the MDO after 30 June 2002 (**clause 14**).

Under the proposed arrangement the MDO (or insurer) will make the payment initially and then will be reimbursed by the Commonwealth in accordance with **clause 16** or if the insurer or MDO or insurer is in external administration under proposed **clause 17**.

The Commonwealth may pay all or only a percentage of the claim. The amount of the payment made by the Commonwealth to the MDO or insurer will be determined by multiplying the 'adjusted amount' (**clause 21**) paid by the insurer with the 'unfunded IBNR factor' (**clauses 21-23**). The unfunded IBNR factors is an amount determined by the Minister and is calculated by considering the extent to which the MDO had sufficient available assets to cover its IBNR exposure.

There are a number of exceptions where IBNR payments will not be made, including where the incident or all of the incidents to which the claims relate occurred whilst treating a public patient in a public hospital (**clause 19**). If some of the incidents related to

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treatment of a public patient in a public hospital the Commonwealth will not pay for that part of the claim which can be attributed to the public hospital services (**clause 20**).

High cost claims

Proposed Division 2 sets out the arrangements for the high cost claim indemnity scheme. Essentially this Division provides that the Commonwealth will pay for 50 per cent of the insurance payouts over $2 million by MDO or insurers up to the limit of the insurance.

Clauses 29 and 30 provide that the Commonwealth will make a payment to the MDO or insurer where;

- a claim has arisen from an incident that has occurred in Australia (or an external territory) in the course of practice of the medical profession
- the claim was notified to an MDO or an insurer after 1 January 2003
- the amount to be paid is greater than $2 million or an amount set by the regulations (the 'high cost claim threshold'), and
- the MDO has paid the amount or is liable to pay the amount.

There are a number of exceptions to the payment being made including where the claim relates to an incident that occurred during the course of treatment of a public patient in a public hospital (**clause 32**). If part of the claim relates to treatment of a public patient in a public hospital, the Commonwealth will pay only in relation to that part of the claim that arose from the private sector treatment.

Proposed Division 3 sets out the administrative arrangements for the two schemes including application procedures (**clause 36**), date for payment of a claims (**clause 37**), recording keeping by MDO's (**clauses 39 and 40**), information gathering powers of the Health Insurance Commission (HIC) (**clause 38**) and procedures for the recovery of overpayments (**clauses 41-42)**.

Medical indemnity subsidy scheme

Proposed Division 4 sets out the arrangements for the medical indemnity subsidy scheme. Under this scheme, the Minister will be entitled to formulate a scheme to make payments to medical practitioners to help them meet the cost of purchasing medical indemnity insurance. The legislation does not identify the practitioners that will receive the subsidy nor does it specify the amount of the subsidy. The bill provides that these details will be determined by the Minister (**clause 43**). The Prime Minister, in his announcement on 23 October 2002 stated that the premium subsidy would be provided to obstetricians, neurosurgeons and GP-proceduralists.

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Financing the schemes

The Bill sets out arrangements for the funding of the new arrangements.

Financing the IBNR indemnities

Proposed Division 6 states that the Consolidated Revenue Fund is appropriated for the purposes of paying the IBNR indemnities, high cost claim indemnities and subsidies under clause 43.

Arrangements for the funding of the IBNR scheme are contained within proposed **Part 3 Division 1** and the Medical Indemnity (IBNR Indemnity) Contribution Bill 2002 (MIICB).

The IBNR arrangements will be subsidised by requiring that all members of MDO's to make a payment each financial year if:

- They are members of participating MDO's
- They were ordinarily resident in Australia or an external Territory on 30 June 2000, and
- They have not been exempted under section 52 (**clause 51**).

The IBNR contribution is imposed as a tax on doctors. (**clause 4 MIICB**)

Under the Bill, the indemnity contribution payable by the doctor is a percentage of the doctor's annual subscription to the MDO (**clause 54 and clause 6 MIICB**).

Financing the UMP indemnity contributions

In his announcement of 31 May 2002 the Prime Minister stated that UMP members would be levied to pay for the cost of the guarantee that was provided by the Government. UMP members will however only be required to pay this levy if UMP goes into liquidation and has to call against the guarantee.

Arrangements for the funding of the UMP indemnity guarantee are contained within **proposed Division 2 of Part 3** and the Medical Indemnity (Enhanced UMP Indemnity) Contribution Bill 2002 (MIECB).

A person is required to pay an enhanced UMP indemnity contribution if:

- The person was a member of UMP on 1 July 2002 (**clause 58**)
- The year has been declared to be a contribution year (**clause 58** and **clause 5 MIECB**)
- The person was ordinarily resident in Australia or an external Territory on 1 July 2002 (**clause 58**), and
- They have not been exempted from making the payment (**section 59**).

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The amount of the UMP indemnity contribution will be equal to the Commonwealth payments made in the previous financial year divided by the number of members of UMP on 1 July 2002 (**clause 6 MIECB).**

The UMP indemnity contribution will be imposed as a tax on the doctors **(clause 4 MIECB**).

Proposed Division 3 of Part 3 sets out the administrative arrangements for the collection of the medical indemnity contributions, including deferring payment of the indemnity contribution (**clause 62**), payments by instalments (**clause 63**), discounts for lump sum payments (**clause 64**), and late payments penalties (**clause 65**).

Amendments contained within the Medical Indemnity (Consequential Amendments) Bill 2002

The explanatory memorandum to the Medical Indemnity (Consequential Amendments) Bill 2002 sets out that the key objectives of the Bill are to:

- Amend the secrecy provision of the *Health Insurance Act 1973* and the *National Health Act 1953* to include reference to the medical indemnity legislation
- Amend the definition of offences in the *Health Insurance Commission Act 1973* to allow the HIC to investigate offences against the medical indemnity legislation, and
- Require the HIC to include in its annual report material on the operation of the medical indemnity legislation.

Concluding Comments

The package of legislative reforms is designed to ease the pressure being placed upon providers of medical indemnity. Principally it targets incurred but not reported claims and high cost claims with funding support being offered to medical indemnity providers who have claims that fall within these two categories. The package also puts in place the arrangements for the Government to provide subsidies to certain sectors of the medical profession seeking medical indemnity cover. Whilst the bills do contain some mechanisms to recover the cost of the proposed measures, some parts of the package, it would appear, will be funded directly from Commonwealth revenue.

The legislative package does not however contain measures to monitor the effectiveness of the Government's assistance in reducing costs of medical indemnity, and the Bill does not contain any prudential regulatory measures to address the operations of medical indemnity providers.

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Endnotes

1 A more detailed analysis of the insurance crises can be found in the current issues brief by David Kehl, 'Liability Insurance Premium Increases: Causes and Possible Government Responses', *Current Issues Brief*, Department of the Parliamentary Library, March 2002: http://www.aph.gov.au/library/pubs/CIB/2001-02/02cib10.pdf.

2 Commercial insurers have recently left the medical indemnity market and as a result there are now only MDO and government funding for medical indmenities.

3 *Explanatory Memorandum*, Medical Indemnity Bill 2002 (and others), p. 4.

4 Chris Field, 'Medical Indemnity Agreement (Financial Assistance-Binding Commonwealth Obligations) Bill 2002', *Bills Digest No 24*, 2002–03, Department of the Parliamentary Library: http://www.aph.gov.au/library/pubs/bd/2002-03/03bd024.htm, p. 4.

5 *Explanatory Memorandum*, Medical Indemnity Bill 2002 (and others), p. 4.

6 *Explanatory Memorandum*, Medical Indemnity Bill 2002 (and others), p. 4.

7 Members and creditors of UNP voted on 27 November 2002 to continue with the provisional liquidation of the group for another 12 months.

8 Pamela Burton, 'AMA Impact Statement' *Australian Medicine*, 18 November 2002, p. 18.

9 The Australian Government Actuary will provide the Minister with a written report which sets out whether the Actuary considers that the MDO has unfunded IBNR's. The Actuary must rely on information collected by the HIC in relation to the MDO (**clause 13**).

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