

Bills Digest
No. 138 2002–03

Health Legislation Amendment Bill (No.1) 2003

ISSN 1328-8091

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Published by the Department of the Parliamentary Library, 2003

INFORMATION AND RESEARCH SERVICES

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No. 138 2002-03

Health Legislation Amendment Bill (No.1) 2003

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29 April 2003

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Health Legislation Amendment Bill (No.1) 2003

Date Introduced: 27 March 2003

House: Senate

Portfolio: Health and Ageing

Commencement: Schedule 1 commences on Royal Assent; Schedule 2 commences 90 days after Royal Assent

Purpose

To:

- Amend the *Health and Other Services (Compensation) Act 1995* and the *Health and Other Services (Compensation) Care Charges Act 1995* to ensure that successful claimants for personal injuries compensation repay Medicare and residential care benefits covered by the compensation; and
- Amend the *Health Insurance Act 1973* to expand the coverage of the Australian Childhood Immunisation Register.

The discussion below is divided into two sections:

1. Repayment of Commonwealth benefits
2. Australian Childhood Immunisation Register

Repayment of Commonwealth benefits

Under the *Health and Other Services (Compensation) Act 1995* ('**the HOSC Act**') and the *Health and Other Services (Compensation) Care Charges Act 1995* ('**the Charges Act**'), the Commonwealth can recover Medicare and nursing home/residential care benefits provided in relation to a 'compensable' injury. As the Parliamentary Secretary to the Treasurer, Senator Ian Campbell, noted in the Second Reading Speech:

When plaintiffs go to court to recover damages for personal injuries, the legislation requires that they repay to the Commonwealth the cost of any Medicare and

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residential care benefits received because of the injury for which they have also been compensated as part of the compensation settlement or payment.¹

In a recent Federal Court decision (*Rowell v Health Insurance Commission* [2002] FCA 693), the court held that the Commonwealth could not recover such payments under the HOSC Act if the compensation was not 'fixed or ascertainable' at the time of a judgment or settlement.

According to Justice Merkel,

the legislation has been drafted on the basis that the amount of the compensation is ascertained or is capable of being ascertained at the time of the settlement agreement, so that that amount may be notified [to the Commonwealth]...and the Medicare benefits may be deducted out of it and reimbursed...within the time provided....²

Rowell involved claims by over 3,000 Australian women for loss and damage suffered as a result of defective breast implants manufactured by the US based Dow Corning Corporation. Under the settlement agreement with Dow Corning, the amount paid to Australian claimants would depend on the 'nature and quality of evidence' provided by each individual to a 'claims administrator'.

As Justice Merkel said, 'the amount actually payable to those claimants was not capable of being ascertained at the date of the Settlement Agreement'.³ Consequently, 'the Commonwealth has not become entitled to reimbursement under the [HOSC] Act of the Medicare benefits it paid from the amounts that will become payable to the 3,181 Settlement Option claimants....'⁴

The amendments to the HOSC and Charges Acts in the current Bill aim to overcome the legal obstacle to the Commonwealth's recovery of benefits identified in *Rowell*. As the Explanatory Memorandum notes,

The amendments are based on the premise that the HOSC Act will apply to judgments or settlement in compensation cases regardless of whether the amount of money is fixed at the time of the judgment or settlement or ascertainable at a later date.⁵

The Charges Act mirrors the key provisions in the HOSC Act regarding recovery of benefits by the Commonwealth. These provisions are included in a separate Act because they could be construed as imposing a tax, and the Constitution requires that such Acts deal with no other matters.⁶

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Main Provisions – Schedule 1

Schedule 1 Part 1 amends the HOSC Act to allow recovery of benefits by the Commonwealth even if the amount of compensation can only be ascertained some time after a judgment or settlement is made.

Items 3 and 7 of Part 1 amend section 8 (recovery of Medicare benefit) and section 10 (recovery of nursing home benefit or residential care subsidy) respectively to allow recovery of benefits by the Commonwealth if 'an amount of compensation is fixed under a judgment or settlement'. **Item 1** amends section 3 (definitions) to provide that 'an amount of compensation is fixed' under a court order or agreement if it is 'ascertainable, at some time after the order or agreement is made...'

Item 2 of Part 1 adds **new subsection 3(4A)** which provides that an amount of compensation is fixed at the time it is ascertained. This allows for the type of situation in *Rowell* where at the time of settlement it was unclear whether any particular claimant was entitled to compensation. **New subsection 3(4A)** moves the time for judging whether compensation is 'ascertainable' to when it is actually ascertained. This means personal injuries claimants will not be able to avoid repayment of benefits by arguing that they may never receive any compensation. If and when they do receive compensation they will become liable to repay Medicare and other benefits to the Commonwealth.

Schedule 1 Part 2 makes consequential amendments to the Charges Act.

Australian Childhood Immunisation Register

The Australian Childhood Immunisation Register ('**the Register**') contains information on the immunisation status of children in Australia under the age of seven. The Register is maintained by the Health Insurance Commission under Part IVA of the *Health Insurance Act 1973*.

The Register was set up in 1996. In 1998, as part of the Immunise Australia program, a child's immunisation status was linked to eligibility for the Commonwealth Child Care Benefit and the Maternity Immunisation Allowance. The Health Insurance Commission is responsible for providing information about a child's immunisation status to the Family Assistance Office.

These benefits can be obtained without full immunisation, but only for a limited number of reasons - including if a child has a medical reason not to have a particular vaccination or if the parent(s) of the child have a conscientious objection to immunisation (on personal, philosophical, religious or medical grounds).

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The amendments in the current Bill will expand the coverage of the Register to include overseas 'immunisation encounters' where the Commission is notified by recognised immunisation providers or prescribed bodies. The Second Reading Speech notes that this expanded coverage will mean the Register contains a more complete immunisation record. This will help health professionals identify areas of low immunisation in the event of disease outbreak.

In addition, the expansion of the Register will assist migrants and others whose children have been immunised overseas to claim Commonwealth Child Care and Maternity Immunisation benefits.⁷

Main provisions – Schedule 2

Item 4 of Schedule 2 adds a new definition of 'foreign immunisation encounter' to section 46A of the *Health Insurance Act 1973*. **Item 5** amends the definition of 'immunisation' in section 46A to include 'a vaccine that is administered outside Australia'.

Item 10 repeals the definition of 'vaccine preventable disease' in section 46A containing a list of specific diseases. A 'vaccine preventable disease' will now simply be one that is listed as such in the Australian Immunisation Handbook. The Explanatory Memorandum notes that 'the new provision will more readily accommodate changes, from time to time, in the Australian schedule of childhood immunisations'.⁸

Endnotes

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- 1 Senate, *Debates*, 27 March 2003, p. 9903.
 - 2 [2002] FCA 693 at [41].
 - 3 [2002] FCA 693 at [12].
 - 4 [2002] FCA 693 at [71].
 - 5 Explanatory Memorandum, p. 1.
 - 6 Section 55.
 - 7 Senate, *Debates*, 27 March 2003, p. 9903.
 - 8 Explanatory Memorandum, p. 11.

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