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No. 173 2002–03

Health Legislation Amendment (Private Health Insurance Reform) Bill 2003

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I N F O R M A T I O N A N D R E S E A R C H S E R V I C E S

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No. 173 2002–03

Health Legislation Amendment (Private Health Insurance
Reform) Bill 2003

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Law and Bills Digest and the Social Policy Groups
20 June 2003

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Health Legislation Amendment (Private Health Insurance Reform) Bill 2003

Date Introduced: 6 March 2003

House: Senate

Portfolio: Health and Ageing

Commencement: The Act, and Parts 2 and 3 and some of Part 4 of Schedule 1, commence on the day of Royal Assent. Most of the Part 1 commences on Proclamation, or failing that, six months after Royal Assent. Items 25-27 in Part 1 commence on Proclamation, but are repealed if that day is not within six months of Royal Assent.

Purpose

To make a variety of changes to the regulation of the private health insurance industry under the *National Health Act 1958* (the NHA) and the *Private Health Insurance Incentives Act 1998*.

Background

Review of the Private Health Insurance Industry

Since coming to office in 1996, the current government has made significant changes to the environment in which private health insurance funds operate. The intention behind changes such as the introduction of gap-cover, Lifetime Health Cover and the 30% private health insurance rebate has been to make private health insurance more attractive to consumers. More recently, the government has turned its attention to the regulation of the private health insurance industry. On 2 April 2002 the Minister for Health and Ageing (the Minister) announced a Governmental review of the rules and regulations governing private health insurance.¹ The review is ongoing, however the proposed legislation ('first stage of reforms') emerges out of recommendations made by the review to date.

In April 2003, the Health Minister, Senator Kay Patterson announced the second stage of reforms associated with the review.² According to the relevant media release, the second stage of reforms will:

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- require funds to disclose additional information on their management expenses to allow consumers greater transparency and give them the ability to compare the funds' performance
- provide incentives to manage disease prevention and health promotion programs
- tackle supply costs (eg: prostheses), which are placing pressure on premiums, and
- introduce a default benefit arrangement for rural and regional private hospitals where these hospitals provide the only services available in their communities, replacing the "second tier" default benefit currently available to hospitals unable to negotiate a contract with a health fund.

The above reforms announced in the second stage of the review are not dealt with in the current Bill. However some of them will be implemented via disallowable Determination, and thus open to parliamentary scrutiny. This Bills Digest deals with the legislative components introduced as part of the *first* stage of reforms in September 2002.³

Regulation of Registered Health Benefits Organisations (RHBOs)⁴

Rule and Product Changes

An ongoing complaint made by the private health insurance industry is the administrative burden associated with changes to their rules and products and the lack of flexibility they have in developing and delivering new products to contributors.⁵ Proposed in Part 1 Schedule 1 of this Bill (particularly items 25-27) are a series of changes designed to deal with these criticisms. The *Explanatory Memoranda* for this Bill states that the proposed changes are intended to:⁶

remove the inefficiencies associated with the existing rule change process, allowing RHBOs to be more responsive to the needs of their members.

Under the current legislative arrangements, health funds are required to notify the Secretary of the Department of Health and Ageing (the Department) of changes to their constitution, articles of association, rules and products. All changes to private health insurance products and the rules governing such products, including increases in excesses and co-payments, additional restrictions on hospital benefits and premium changes etc are subject to this requirement. In the case of premium changes, the changes must be notified at least 14 days in advance of when the change is proposed to take effect.⁷ For all other changes, health funds are required to provide 60 days notice to the Secretary. Where the Minister is of the opinion that a change:

- would or might result in a breach of this Act or of a condition of registration of an organisation

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- imposes an unreasonable or inequitable condition affecting the rights of any contributors, or
- might, having regard to the advice of the Council, adversely affect the financial stability of a health benefits fund

the Minister may disallow the change. Similarly, the Minister may disallow a change increasing premiums if he / she is of the opinion that the change ‘would be contrary to the public interest’.

The Bill proposes two substantial modifications to the existing regulation of private health insurance funds and their products.

The first involves the issue of notification to the Secretary. This will now only be required for where a health fund changes its rules, not where it changes its constitution or articles of association. More importantly, the prescribed period of advance notice will only apply to rules that deal with premiums. Other rule changes must only be notified ‘before com[ing] into effect’. In addition, the current requirement that contributors be ‘informed’ of *any* changes before they take effect will now only apply to changes that are ‘or could be detrimental to the interests of all or any of its contributors’. The second proposed modification replaces the current detailed examination of proposed rule changes against the *National Health Act 1958* (NHA) with a system of monitoring against performance indicators. Each of these proposed modifications is discussed in greater detail below.

In the Private Health Insurance Ombudsman’s (PHIO) latest quarterly bulletin, the PHIO notes that the period of notice given to contributors of changes to fund rules has in the past been ‘inadequate and unreasonable’.⁸ Many contributors have in the past been given as little as two weeks notice of what are often detrimental (to the contributor) changes. Given these concerns, the reduction of scrutiny of rule changes proposed in this Bill may have significant implications for contributors. The primary concern for contributors is that without adequate notice of rule changes they may be unable to upgrade their product or transfer to another funds product and be locked into the reduced benefits for the standard waiting periods.

The PHIO has indicated that the removal of the 60-day notice requirement to the Department should improve the capacity of funds to provide more notice of changes to contributors.⁹ The Australian Consumers Association (ACA) takes a different approach to this issue. The ACA argues that funds should be required to give policyholders notice of at least 30 days before minor changes take effect, and for major changes (including premium increases) this period of notice should be at least 60 days, thus offering formal protection of contributor’s rights rather than relying on self-regulation.¹⁰

As mentioned above, the proposed amendments will also substitute the current regulation of health funds rules and products with a system of monitoring against a set of performance indicators. These indicators, which are being developed in consultation with industry,¹¹ will be established by regulation rather than through explicit articulation in the

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National Health Act 1953. Thus while neither the Bill nor the *Explanatory Memorandum* contains information as to what will be included in these indicators, the Department's submission to the Senate Inquiry into the Bill notes that the indicators will include the following:

- measures of complaints to the Private Health Insurance Ombudsman
- changes in premiums paid by age cohort
- changes in the number of persons insured in each age cohort
- changes in the number of episodes, and episodes per one hundred members, in each age cohort
- changes in the nature of episodes, and
- changes in benefits paid per member and episode in each age cohort.¹²

While the Bill proposes greater flexibility in rule changes, funds will need to ensure that any rule changes they make do not breach the provisions of the NHA, including community rating. Community rating can be simply defined as the system requiring health funds to charge the same prices (premiums) to different types of consumers. Thus regardless of health status or risk, personal circumstances or characteristics, past claims history etc, health funds must charge consumers the same price. The only exception to this is Lifetime Health Cover, which allows health funds to charge higher rates the older a member (after the age of 30) is when they first join. Currently, despite its wide use, the term 'community rating' is not defined in the NHA.¹³ The Bill defines the term, particularly by linking it with a revised definition of improper discrimination.

In relation to improper discrimination, there has been some concern within the industry that the proposed inclusion of the term 'place of residence' in the revised definition will render the practice of setting different premiums for each State and Territory illegal.¹⁴ Currently, there are different premiums for the same product in different States and Territories. However, it is unlikely that the revised definition will legally impact on this practice. The text of the relevant part of the proposed definition of improper discrimination actually reads:

Discrimination that is related to...any other *characteristic of a person*...including place of residence...that is *likely to result in an increased requirement for profession services* [emphasis added]

Since, as stated above, the current differences between state premiums are a function of the different overall costs of health care between states rather than the characteristics of individuals, these differentials would not on the face of it come within the definition of improper discrimination.

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Overall, given that the proposed performance indicators mentioned above are yet to be publicly released, the question of whether they will be able to adequately regulate the products and rules of private health funds against compliance with community rating and detect breaches of the Act is difficult to assess. Moreover, the administrative burden on the private health insurance industry and the Department under the current regulatory arrangements must be weighed against the need to appropriately regulate the industry and protect consumers from breaches of the principle of community rating and the Act more generally.

Sanctions

Alongside the above changes in the regulation of health funds rules and products, the Bill expands both the Minister's investigative powers and the sanctions that can be applied to a fund breaching the NHA. Whilst these changes are detailed in the Main Provisions section of this Bills Digest, of particular importance are the clarification and expansion of the powers of the Minister in dealing with breaches by funds of legislated requirements, community rating principles and inappropriate administrative practices.

The proposed changes will allow the Minister to seek, within a specified time frame, an explanation from a health fund thought to be in breach of the NHA. The proposed changes also clarify the range of regulatory options available to the Minister following an explanation from a health fund. These are detailed in **new section 73BEC** of the Bill. **New section 73BEG** clarifies the range of regulatory options open to the Minister following an investigation of a health fund. Where the Minister is satisfied that there has been a breach of the NHA, the Minister can take the following action:

- request an enforceable undertaking
- give a direction to the health fund
- impose a further condition of registration on that fund
- revoke the status of the health fund to offer the 30% private health insurance rebate as a premium reduction
- apply to the Federal Court for an order, or
- take action to appoint an inspector, place a health fund under administration or seek the winding up of a health fund.

Other actions open to the Minister where there has not been a breach of the NHA, but where he or she considers the performance of the fund could be improved, include:

- request an enforceable undertaking
- give a direction to the health fund or

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- impose a further condition of registration on the fund.

Further details of the conditions of the above sanctions are provided in the Main Provisions section of this Bills Digest.

There has been some debate in the private health insurance industry over the broad ranging powers that the proposed changes will give the Minister.¹⁵ In particular the apparent lack of limiting conditions on when a Minister may launch an investigation into a fund and the broad ranging investigative powers and associated sanctions available to the Minister have raised particular concerns.

The proposed sanction of the removal of the fund's ability to offer the 30 per cent private health insurance rebate as an upfront premium reduction is of particular interest. The rebate has been the source of significant controversy since its introduction. While the rebate has contributed to lower out of pocket expenses for those with private health insurance there has been some debate over the contribution the introduction of the rebate has made to the growth in membership of private health insurance funds.¹⁶ One concern associated with the rebate is that there are no existing mechanisms to link the rebate with increased efficiency in the industry. The administrative costs of private health insurance funds have been highlighted by a number of commentators and the ALP.¹⁷

If this sanction were applied to a health fund, its contributors would still be able to obtain the private health insurance rebate through the taxation system. According to the Department of Health and Ageing submission to the Senate Inquiry, the removal of the 30 per cent rebate status would be reserved for the most severe breaches of community rating obligations and the NHA, and would only be applied where other interventions (such as enforceable undertakings or directions) are not achievable or appropriate. It is worth noting the removal of a fund's status to offer the rebate as a premium reduction could severely impact on that fund's capacity to compete with other funds and maintain its membership. It is possible that such a sanction would compromise the stability of the fund.

Private Health Insurance Ombudsman (PHIO)

Also proposed in this Bill are expanded powers for the PHIO. The PHIO is a statutory body whose main role is to provide an independent complaints and advisory service for private health insurance contributors. Medical practitioners, hospitals and RHBOs can also approach the PHIO in relation to problems regarding health insurance arrangements.¹⁸ The current functions of the PHIO are set out in section 82ZRC of the NHA. These functions include the ability to:

- deal with complaints and publish aggregate information on complaints
- conduct investigations, and

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- make recommendations about regulatory practices, and/or industry practices relative to registered health insurance funds.

Some commentators have noted that the PHIO has limited powers compared with the Commonwealth ombudsman.¹⁹ The *Health Legislation Amendment Act (No.2) 1998* expanded the PHIO's powers to include mediation. However the PHIO's annual report for that same year noted that the PHIO continued to lack²⁰

The necessary powers to be fully effective in complaints which cannot be settled by agreement.

The PHIO has, under current arrangements, little legislative remedy where a health fund does not follow its recommendations, although the fund may refer matters to other bodies such as the ACCC. According to Gath, the PHIO is currently equipped with an 'ineffective set of regulatory and enforcement powers'.²¹

The Bill proposes to expand the powers of the PHIO so that the Ombudsman will have greater authority in dealing with complaints and disputes. In particular new sanctions are proposed for health funds who fail to comply with requests from the PHIO. The passage of this Bill will mean that the PHIO can require reports from health funds, hospitals and doctors on action taken on recommendations made by it. While the Bill does not increase the power of the PHIO to make funds comply with recommendations made by the Ombudsman, the power of the PHIO to report to the Minister provides a clear avenue for action to be taken.

State of the Health Funds Report

The Bill proposes the establishment of an annual State of the Health Funds report. The aim of this report will be to provide some comparative information on the performance of health funds. The report will be compiled by the PHIO and negotiations about the format and content of the report are currently being negotiated between the PHIO, the Private Health Insurance Administrative Council (PHIAC)²² and health funds. It is expected that the report will cover three broad areas. These include:

1. Financial status of funds.

Such information could include market share, prudential requirements, management expenses and benefits paid. Some of this information is included already in the [Operations of the Registered Health Benefits Organisations Annual Report](#) produced by PHIAC, and the Standard and Poor's Australian Health Insurance Report. The Standard and Poor's report provides further details on contribution income, contributions as a percentage of market share, operating results, reserves, benefits paid and expense ratio.²³

2. General service indicators.

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Included in this category may be member retention rates, the level of complaints and disputes, internal complaints handling and accessibility of information about the fund and its products.

3. Product information.

Potentially included within the report will be information regarding the different products offered by each fund. In addition, information such as the average price per person covered, the average benefit paid per person etc may be included. Given the variability of fund products and the need for the PHIO not to make recommendations about products this latter type of information is perhaps the most contentious of the information that may be incorporated into the report.

The provision of a comprehensive report by the industry Ombudsman may help to re-focus attention on the products of health funds and their service delivery. Currently much of the public debate about private health insurance is concentrated solely on premiums and ignores the actual products.

Lifetime Health Cover

Lifetime Health Cover (LHC) was introduced in July 2000 and is considered by many analysts to be the most successful of the Federal Government's initiatives to increase private health insurance membership.²⁴ The introduction of LHC has meant that health funds are able to charge different premiums according to the age at which a person first took out private hospital cover. From July 2000, people who delay taking out hospital cover will pay a 2 per cent loading²⁵ on top of their premium for every year they are aged over 30 when they first take out hospital cover. For example, a 50 year old taking out cover in April 2001 would pay 40% more for cover than if they had taken it out a year earlier. Of course, private hospital cover is not compulsory, but a person earning over \$50 000 a year who does not have such cover must pay the annual 1.5% Medicare surcharge.

In response to concerns that it is difficult for funds to run advertising and marketing campaigns that focus consumers' attention on LHC,²⁶ the Bill proposes the establishment of a single LHC birthday. This will mean that irrespective of when a person's actual birthday occurs, people who join a health fund by the next notional birth-date will be deemed to have met the LHC requirement for their age.

There has also been some concern that the legislation concerned with LHC as it is currently framed, unfairly (and unintentionally) disadvantages various persons, including persons overseas on their 31st birthday, persons residing overseas long term, new migrants and Veterans who lose their Gold Card entitlement. Changes to the LHC arrangements proposed in this Bill are designed to address the disadvantages of the aforementioned groups.

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Main Provisions

There are a number of terms that are frequently used in the NHA and the Main Provisions section of this Digest. For use of reference, the NHA definitions are listed below.

Organisation – a society, body or group of persons, whether incorporated or unincorporated, which conducts a health benefits fund

Registered organisation (RO) – an organisation registered under Part VI of the NHA.

Registered health benefits organisation (RHBO) – an organisation registered under Part VI of the NHA for the purpose of conducting a health benefits fund.

Schedule 1 - Part 1 Amendments regulating obligations of registered organizations

Item 3 amends the definition of 'improper discrimination' in section 66 of the NHA. The definition will now effectively incorporate the anti-discrimination provisions of existing section 73ABA and paragraph (m) of Schedule 1, plus the additional criteria of 'any other characteristic of a person...including place of residence' (forth dot point below). The 'place of residence' issue is discussed in the Background section of this Digest. 'Improper discrimination' will now be discrimination that is related to any of the following:

- the suffering by a person from a chronic disease, illness or other medical condition or from a disease, illness or medical condition of a particular kind
- the gender, race or sexual orientation of a person
- the age of a person, except to the extent that the person's age may be taken into account under section 73BAAA and Schedule 2²⁷
- any other characteristic of a person (including but not limited to matters such as place of residence, occupation, leisure pursuits) that is likely to result in an increased requirement for professional services
- the frequency of the rendering of professional services to a person
- the amount, or extent, of the benefits to which a person becomes, or has become, entitled during a period, and
- any matter prescribed for the purposes of this paragraph.

The *Explanatory Memorandum* to the Bill comments that the amendment is designed to²⁸

Update the definition of improper discrimination so the term can be used to clarify the principles of community rating in the NHA...(which) prohibits RHBOs from

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discriminating against contributors in relation to access to private health insurance and the use of private health insurance products, except in specified circumstances.

Item 7 inserts **new section 67B**. This new section is actually a slightly modified existing section 74B.²⁹ It requires a RO to 'conduct its health insurance business in accordance with' the provisions set out in **new paragraphs(a)-(e)**. A failure to do constitutes a breach of the NHA, which may result in various regulatory actions by the Minister (see for example **new section 73BEG**).

Item 8 replaces existing subsections 73(2A)-(2B) with a **new subsection 73(2A)**. This prohibits the PHIAC from granting an organisation registration as a RBHO if 'the constitution or rules of the organization permit improper discrimination'.

Item 10 inserts **new sections 73AAF-AAK** into Division 3 of Part VI. Division 3 deals with the conditions of registration for organisations as RHBOs. The main effect of the item is organisations are explicitly required to conform to principles of community rating.

The Explanatory Memorandum comments that:³⁰

[the principle of] community rating underpins the equitable access to private health insurance for all Australians. It prohibits RHBOs from discriminating against contributors in relation to access to private health insurance and the use of private health insurance products, except in specified circumstances....[item 10] will clarify the monitoring and enforcement of the community rating principles. Taken in conjunction with the changes to the monitoring and enforcement regime, this will provide RHBOs with increased flexibility in the conduct of their health insurance business, without requiring Departmental oversight.

New section 73AAF simply provides that registration is subject to the conditions set out in Division 3 and Schedule 1 of the NHA. In part, it replaces existing subsection 73BA(1), which is repealed by **item 16**.

New section 73AAG provides that the Minister may determine guidelines on loyalty bonus schemes³¹ that RHBOs may offer. This new section essentially replaces equivalent provisions in existing subsections 73BA(2A)-(5), which are again repealed by **item 16**. The Minister's determination is a disallowable instrument.

New subsection 73AAH(1) requires the constitution, rules and actions of a RHBO must be 'at all times consistent with the principles of community rating'. Under **new subsection 73AAH(2)-(3)**, any improper discrimination would breach **73AAH(1)**, including where an RHBO's constitution or rules permitted an activity by the RHBO that would be improper discrimination under section 66. *The Explanatory Memorandum* states that:³²

previously, community rating requirements had to be derived from a range of provisions within the NHA. The amendments in this Bill make it easier for RHBOs to identify their obligations and to ensure compliance.

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New section 73AAI prohibits ROs from refusing to sign up new members or cancelling existing membership where this would constitute improper discrimination. However, ROs may refuse to sign up a person in relation to '[permanently] closed health insurance product'. The *Explanatory Memorandum* comments:³³

The ability to close health insurance products to new or transferring contributors will enable RHBOs to:

- manage their products more effectively, in particular to reduce losses on products that have low or no returns due to changes in the broader health industry, and
- enable RHBOs to manage those products without disadvantaging members who are contributing to them.

New section 73AAI applies to both hospital and ancillary cover.

New section 73AAJ prohibits RHBOs from improperly discriminating against any contributor or class or contributors in deciding on whether benefits are payable, and if so, the amount. Note that the *Explanatory Memorandum* comments that the non-discrimination condition in **new section 73AAJ** does not apply to ancillary cover (as opposed to hospital cover tables). However, it is not obvious from the Bill that this is so – presumably the meaning of ‘benefit’ in **new section 73AAJ** excludes ancillary cover benefits.

New section 73AAK allows 'restricted membership organizations' a limited exemption to the community rating conditions contained in **new sections 73AAH-AAJ**. Essentially, the exemption allows them to continue to restrict eligibility by reference to:

- employment or former employment in a profession, trade, industry or calling
- employment or former employment by a particular employer or by an employer included in a particular class of employers, and
- membership or former membership of a particular profession, professional association or union.

Existing section 73B allows the Minister to revoke, change or impose conditions under which an organisation is registered. **Items 13-15** amend various parts of section 73B and will collectively allow the Minister to apply a revocation etc to multiple organisations at the same time.

Item 20 replaces existing Division 5 of Part VI with a new version. Current Division 5 is headed 'Directions by the Minister' but is to be renamed 'Enforcement and remedies'. The *Explanatory Memorandum* comments:

This new Division is a major reform in the regulation of the private health insurance industry. New Division 5 will result in increased regulatory flexibility by:

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- enabling monitoring of RHBO activities via performance indicators, rather than the assessment of rules that currently takes place in accordance with section 78 of the NHA;
- clarifying the Minister's investigation powers; and
- establishing a range of responses and sanctions that the Minister may take to appropriately deal with breaches or potential breaches of the NHA.

New section 73BEA provides that regulations may be made to establish performance indicators to be used by the Minister 'in monitoring the operations' of ROs. The indicators must be 'framed' as specified in **new subsection 73BEA(2)**, including so as to 'alert the Minister to any practice...that may be contrary to government health policy and therefore require a regulatory response'.

New section 73BEB allows the Minister, if he / she believes that an RHBO may be in breach of the Act, to require the RHBO to provide an explanation of operations with respect to the area of concern. If the RHBO is unable to provide an explanation within the timeframe specified by the Minister, it may request additional time. The Minister may refuse this request, but must give reasons for this.

If the Minister is 'satisfied' with the explanation, the matter ends. If not satisfied, the Minister has a range of responses available to him or her, and the Minister must advise the RHBO that they intend to take one or more of these.

Whether or not the Minister is satisfied that the RHBO has breached the NHA, the Minister may:

- institute a **new Subdivision B** investigation
- request the RHBO to commit to a **new Subdivision C** enforceable undertaking
- give the RHBO a direction in accordance with **new Subdivision D**, and
- impose a further condition of registration on the RHBO under section 73B.

If the Minister is satisfied that a RHBO has breached the NHA, in addition to the options above, the Minister may

- if the RHBO has breached the principles of community rating or failed to comply with a **new section 73BEJ** Ministerial direction, revoke the status of the RHBO to offer the 30% rebate on premiums
- apply to the Federal Court for an order under **new subdivision F**, which includes provision for a fine, and

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- take action under Part VIA, which allows for the appointment of an inspector, application to the Federal Court for the RHBO to be placed under administration or to be wound up.

New Subdivision B (new sections 73BED-BEG) deals with investigations.

New section 73BED replaces the existing power in section 75 for the examination of the records and associated material of an RHBO. The power is now given to the Minister rather than the Departmental Secretary. The Minister may require evidence to be given on oath or affirmation by a person who is or has been an officer, employee or agent of an RO (as is the case in existing section 75).

New section 73BEE covers penalties and related matters for failing to comply with the requirements of **new section 73BED**. A failure to give the relevant information / evidence, including on oath or affirmation if required, attracts a fine of up to 10 penalty units (\$1 100): **new subsections 73BEE(1)-(2)**. The **new subsection 73BEE(1)-(2)** offences are ones of strict liability. In addition, a person knowingly giving false or misleading information is subject to imprisonment of up to 6 months: **new subsection 73BEE(5)**.

Under **new subsection 73BEE(4)**, if a person is required to provide information under **new section 73BED**, that information is required even if the answer to the question, or the production of the document, might tend to incriminate the person or make the person liable to a penalty. However, that information cannot be used in evidence in any proceedings against the person providing the evidence, except for a prosecution for giving false or misleading information.

Where an investigation raises questions about the financial strength or governance of a RO, the Minister may direct the PHIAC to take over the investigation: **new paragraph 73BEF(4)**. The *Explanatory Memorandum* comments that:³⁴

this amendment does not detract from the independence of the PHIAC... [but if the concern is of] a prudential element or effect it is important that it may be handled by the entity which has been specifically established and empowered to deal with such matters.

New section 73BEG sets out the Minister's powers upon completion of an investigation. If the Minister is satisfied that there is a breach of the NHA, he / she must advise the organisation of the 'nature of the breach' and of the action they intend to take. The range of actions include:

- request the RHBO to commit to a **new Subdivision C** enforceable undertaking
- give the RHBO a direction in accordance with **new Subdivision D**
- impose a further condition of registration on the RHBO under **new section 73B**
- revoke the status of the RHBO to offer the 30% rebate on premiums

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- apply to the Federal Court for an order under **new Subdivision F**, which includes provision for a fine, and
- take action under Part VIA, which allows for the appointment of an inspector, application to the Federal Court for the RHBO to be placed under administration or to be wound up.

In situations where the Minister is not satisfied that there has been a breach of the NHA, but he / she considers the performance of a RHBO 'can be improved', the Minister may:

- request an enforceable undertaking in accordance with **new Subdivision C**, or
- give a direction to the RHBO in accordance with **new Subdivision D**, or
- impose a further condition of registration on the RHBO under **section 73B**.

New Subdivision C (sections 73BEH-BEI) deals with enforceable undertakings.

Under **new section 73BEH** the Minister may accept undertakings from RHBOs that will either improve the performance of RHBOs, or if Minister considers the organisation has breached the NHA, that the undertaking is likely to ensure the RHBO will cease to be in breach. A RHBO may withdraw from or vary the undertaking if the Minister consents. A refusal by the Minister regarding an application to withdraw or vary is reviewable by the Administrative Appeals Tribunal (AAT) (**new subsection 105AB(4AAA)**).

Should the Minister consider that the RHBO has breached a **new Subdivision C** undertaking, he /she may apply to the Federal Court for an order of compliance and, if there has been a breach of the NHA, any other order that is 'appropriate': **new section 73BEI**.

New Subdivision D deals with Ministerial directions.

The *Explanatory Memorandum* comments that **new section 73BEJ**:³⁵

increases the flexibility of the sanctions available to the Minister to address concerns in relation to improper discrimination. The power to make a direction in relation to day-to-day operation of the RHBO is an important tool in the protection of the principles of community rating.

In cases where the Minister considers that an organisation has given either no or an unsatisfactory explanation under **new Subdivision A** (previously discussed), the Minister may give a direction requiring a RHBO to modify its constitution, rules or day-to-day operations to 'assist in the prevention of improper discrimination': **new subsection 73BEJ(1)**. Similar directions can be given whether or not, as a result of an investigation, the Minister is of the view that the organisation appears have breached the NHA (**new subsections 73BEJ(2)**³⁶ **and (3)**). A direction may include requiring that the organisation 'reconsider' a previous decision on a person's application to join that fund or a current

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member's claim for benefits. A **new section 73BEJ** direction is reviewable by the Administrative Appeals Tribunal (AAT) – see **item 31**.

New Subdivision E deals with removal of entitlement to offer rebate as a premium reduction.

Where the Minister is satisfied that a RO has failed to comply with a Ministerial direction or a community rating condition, **new section 73BEL** allows them remove the eligibility (via section 14A-1 of the *Private Health Insurance Incentives Act 1998*) of a RHBO to offer the Federal Government 30% rebate on private health insurance to contributors as a premium reduction. The *Explanatory Memorandum* comments that:³⁷

while the 30% Rebate may be removed as a premium reduction from a particular RHBO, the 30% Rebate will still be payable to contributors via the taxation system or the HIC.

New Subdivision F deals with the Minister's powers to seek Federal Court sanctions.

Under **new section 73BEM**, if the Minister is satisfied that a RO has breached the NHA, the Minister may apply to the Court for a number of orders. Notably, these include an order to pay compensation to an affected individual, and / or an 'adverse publicity order'. This later type of order requires the relevant organization to:

- to disclose in a way, and to the person or persons, specified in the order, such information to correct or counter the effect of the breach as is so specified; and / or
- to publish, in the way specified in the order, an advertisement to correct or counter the effect of the breach in the terms specified in, or determined in accordance with, the order.

New section 73BEN details the power of the Court to make and enforce orders applied for under **new section 73BEM**. These include fining an officer³⁸ of the relevant RO if the Court is satisfied on the balance of probabilities that the officer 'failed to take reasonable steps to prevent the occurrence of [the relevant breach of the NHA].' A fine may be up to \$10 000.

New section 73BEO relocates existing subsection 74A(8) to prohibit RHBOs from using contributor's funds to cover pecuniary penalties (ie fines) imposed on officers under **new section 73BEN**. The officer (or presumably their professional insurer) must pay the fine, not the employer company. **New section 73BEO** does not detail a specific penalty for breaching the prohibition.

Items 21-38 make a number of mainly consequential amendments to the NHA, many of these are required because of changes introduced by **items 1-20**.

Items 25-28 amend existing section 78 which details the various notice obligations of an RO if it changes its constitution, rules or articles of association. The Minister has the

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ability to disallow any changes under certain circumstances (existing section 78(4)). Currently, if the Minister does not disallow the changes, a registered organization must take all reasonable steps to notify each affected contributor (ie member), explaining (in plain English) the change before the change takes effect.

Under **item 25**, the notification requirement to the Secretary in (**new subsection 78(1)**) will only apply to changes in the RHBO rules, not its constitution or articles of association. A prescribed period of advance notice will only apply to rules that deal with premiums - other rule changes must only be notified 'before com[ing] into effect': **item 26**. Under **item 28 (new subsection 78(7))**, the RHBO must notify contributors only where the rule change 'is, or could be detrimental to the interest of all or any of its contributors'.

Items 29-39 make various consequential changes

Item 40 amends the *Private Health Insurance Incentives Act 1998* by inserting new **paragraph 14A-1(1)(c)**. This will allow the Minister to remove the ability of a RHBO to offer the 30% rebate as a premium reduction if the RHBO fails to comply with:

- a direction given by the Minister under **new section 73BEJ**, or
- the community rating conditions contained in **new sections 73AAH-73AAI**.

As previously mentioned, even if this power is used by the Minister, the 30% rebate will still be payable to contributors in relation to health insurance products offered by the particular RHBO, but only via the taxation system or the Health Insurance Commission.

Part 2 - Amendments increasing the powers of the Private Health Insurance Ombudsman (PHIO)

Currently, complaints may be dealt in a variety of ways. Two of the initial options are that (i) the PHIO may choose to try and mediate between the relevant body / person and the complainant, or (ii) the PHIO may ask the relevant body / person to investigate the matter itself. If these do not produce a satisfactory result, the PHIO may launch its own full investigation, or refer the matter to other bodies, including the ACCC.

Item 42 inserts **new paragraph 82ZRC(c)** so as to broaden the listed functions of the PHIO. These will now include the ability to report and make recommendations to the Minister following the investigation of a complaint or an investigation of the practices and/or procedures of RHBOs.

Item 43 inserts **new subsection 82ZSAA(1)** which allows the PHIO to request information from an officer of an RHBO if a complaint has been received. The request must be for the purpose of determining how best to deal with the complaint. Currently the PHIO does not have this ability.

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Information may also be requested under **new subsections 82ZSAA(2)-(3)** if the PHIO tries to mediate the matter, conduct its own investigation etc. The complainant must agree that the request be made: **new subsection 82ZSAA(7)**. According to the *Explanatory Memorandum*, this is for privacy reasons. The RHBO must notify the PHIO if they cannot supply the requested information within the prescribed time: **new subsection 82ZSAA(5)**. The PHIO may extend the time for the request. The RHBO may apply to the AAT for review if the PHIO does not agree to extend the time (**item 53: new subsection 105AB(6AC)**).

New subsections 82ZSAA(8)(9) and (11) deal with penalties and related matters for failing to comply with the PHIO's request for information under **82ZSAA**. As for **new section 73BEE**, failure to comply attracts a fine of up to 10 penalty units (\$1 100) and the offence is one of strict liability. A person knowingly giving false or misleading information in relation to a **new subsection 82ZSAA(1)-(3)** request is subject to imprisonment of up to 6 months.

Under **new subsection 82ZSAA(10)**, if an officer of an RHBO is asked to provide information, that information is required even if it might tend to incriminate the person or make the person liable to a penalty. However, that information cannot be used in evidence against the person providing the evidence, unless in a prosecution for giving false or misleading information.

Existing section 82ZSD enables the PHIO to make recommendations after a RHBO has undertaken an internal investigation under paragraph **82ZSB(1)(b)** or where the PHIO has done its own investigation under paragraph **82ZSB(2)**. **Item 46** provides that the PHIO may ask that a RHBO, hospital, day hospital facility or medical practitioner advise him or her of the action(s) that it intends to take in relation to a recommendation made by the PHIO. It also provides for penalties for a failure to comply with the request or knowingly giving false or misleading information, with respective penalties of 10 penalty units and up to 6 months imprisonment.

Item 47 inserts **new section 82ZSDA** to allow the PHIO to report and make recommendations to the Minister on the outcome of an investigation. The report may incorporate details of any response (or lack of) given by a RHBO to the PHIO and include further recommendations to the Minister for dealing with any issues or problems that have arisen from an investigation.

New subsection 82ZSDA(2) requires the PHIO to consult with the RHBO before reporting to the Minister and invite the organization to comment on criticisms to be made in the report. Any comments must be included in the report to the Minister.

Existing sections 82ZT-ZRTD enable the PHIO to conduct investigations into a RHBO on its own initiative or by the direction of the Minister. **Item 50** gives it the power to obtain information for this investigation as for **item 43**. Similarly, **item 51** mirrors **item 46** by amending existing section 82ZTC to strengthen the PHIO's power to make a

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recommendation to a RHBO and request notification of action taken in relation to the recommendation.

Item 52 performs a similar function to **item 47**, except that it relates to investigations done by the PHIO on its own initiative or by Ministerial direction. As for **item 47**, the PHIO will be required to consult with the RHBO before reporting to the Minister, invite the organization to comment on criticisms etc.

Part 3 - Amendments relating to the State of the Health Funds Report

Items 55-57 amend the NHA to enable the PHIO to produce a proposed annual *State of the Health Funds Report*. Under **item 56**, the Report is to be published in written form and on the PHIO's website, as soon as practicable after the end of each financial year, and will provide 'comparative information on the performance and service delivery of all registered organizations during that financial year': **new paragraph 82ZRC(ba)**. **Item 57** will require RHBOs to publicise, 'in written form and on its website', the existence of the Report and to advise where copies of the Report can be found.

Part 4 - Amendments relating to Lifetime Health Cover (LHC)

An explanation of LHC is contained in the Background section to this Digest.

Part 4 amends a range of LHC provisions contained in Schedule 2 of the NHA. Schedule 2 currently requires a person to take out private hospital cover before his/her 'Schedule 2 application day' to avoid having to pay a LHC loading. In general, this day is a person's 31st birthday. This rule differs for certain refugees or persons overseas at the time when the changes were made.⁴⁰

Under **item 58**, the amendments simply mean that the date for calculating a persons age (if they fail to take out cover before their 'Schedule 2 application day') under existing clause 1 of Schedule 2 of the NHA will be the previous 1 July. Thus if a person who turned 40 on 30 November 2003 took out LHC cover on 1 December 2003, they would actually be considered to be 39 for the purposes of calculating the loading. This slightly revised method for calculating age only applies to persons taking out cover after **item 58** commences.

Subject to some conditions, persons may drop hospital cover for a cumulative total of two years without this affecting whether they will have to pay a premium loading once they take up cover again. There are also limited circumstances in which dropping cover will not count towards this two year limit. **Items 60-61** introduce another circumstance. They amend subclauses 3(1)-(2) of Schedule 2 to assist persons who are out of Australia for more than a year and do not have cover during part or all this time. In such cases, when they return to Australia and resume cover, those days out of Australia for which they do

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not have cover will not be considered as counting towards the two year period mentioned above.

Item 62 inserts **new subclauses 3(3)-(4)** to clarify the position of Norfolk Island residents. For the purposes of the overseas exemption to the 2 year period, **item 62** states a person residing in Norfolk Island is deemed to be overseas. A resident may also stay in Australia for up to 90 continuous days and still be deemed to be overseas.

Items 63 and **64** amend Schedule 2 to provide that the holder of a Department of Veterans Affairs Gold Card, or any persons within any class specified in regulations, are deemed to have hospital cover for the period they hold that card. If a person loses their eligibility for a Gold Card, they have 2 years in which to take out hospital cover without incurring a LHC loading.

Item 69 inserts a **new paragraph 5(1)(e)** to clarify that, for certain persons over 31 years returning to Australia for the first time since turning 31, their 'Schedule 2 application day' is the later of:

- the first anniversary of the day the person returned to Australia; or
- the first anniversary of the day that this amendment comes into effect.

Items 68-71 make amendments to similarly allow new arrivals to Australia (other than refugees) a year to take out hospital cover without incurring a LHC loading.

Concluding Comments

This Bill forms part of the on-going review of health insurance regulation currently being undertaken by the Commonwealth Government. The review will be continuing throughout 2003 and further recommendations to the Minister and Cabinet regarding the regulatory regime covering private health insurance can be expected.

In the context of the Commonwealth Government's significant changes to the private health insurance industry, this Bill can be viewed as another step towards reducing regulation within the sector. Interestingly, reduced regulation has not corresponded with a reduction in government subsidy for the industry.

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Endnotes

- 1 Senator the Hon Kay Patterson Minister for Health and Ageing '[Government to reform regulation of private health insurance](#)' *Media Release*, 2 April 2003.
- 2 Senator the Hon Kay Patterson Minister for Health and Ageing, [Stage Two Reforms Drive Private Health Fund Efficiency](#), *Media Release*, 3 April 2003.
- 3 The Parliamentary Library publication, *The Regulation of Private Health Insurance Premiums* discusses some of the early non-legislative changes to the regulation of private health premiums that were detailed in the first stage of reforms released as part of the review.
- 4 Organisations must be registered under Part VI of the NHA in order to conduct a private health fund business – such organisations are 'RHBOs'. In the Background section of the Digest, the term RHBOs and health funds are interchangeable.
- 5 Industry Commission, *Private Health Insurance*, Report No. 57, 28 February 1997.
- 6 At p.3.
- 7 Health funds can apply to the Minister for a lesser notification period: existing paragraph 78(1A)(ab).
- 8 Private Health Insurance Ombudsman, Quarterly [Bulletin No 26](#) (1 January to 31 March 2003).
- 9 PHIO submission to the Senate Community Affairs Legislation Committee Inquiry into the Health Legislation Amendment (Private Health Insurance Reform) Bill 2003.
- 10 ACA submission to the Senate Community Affairs Legislation Committee, Inquiry into the Health Legislation Amendment (Private Health Insurance Reform) Bill 2003.
- 11 Department of Health and Ageing Submission to the Senate Community Affairs Legislation Committee, Inquiry into the Health Legislation Amendment (Private Health Insurance Reform) Bill 2003.
- 12 *ibid.*
- 13 In fact, the term only appears once, at subsection 73BAA(3).
- 14 See the Medibank Private, Medical Benefits Fund of Australia, Australian Private Hospitals Association and Australian Health Insurance Association submissions to the Senate Community Affairs Legislation Committee, Inquiry into the Health Legislation Amendment (Private Health Insurance Reform) Bill 2003.
- 15 See the Medibank Private and Australian Health Insurance Association submissions to the Senate Community Affairs Legislation Committee, Inquiry into the Health Legislation Amendment (Private Health Insurance Reform) Bill 2003.
- 16 See in particular Jim Butler 'Policy Change and Private Health Insurance: did the cheapest policy do the trick?' *Australian Health Review*, 2002, 25(6): 33-41; Russell Schneider 'Health managing risk in the private sector' *Australian Health Review* 2002 29(6): 49-53.
- 17 See in particular Stephen Smith, Shadow Minister for Health and Ageing, '[Affordable Health Care for Australians and the nation](#)', Paper presented to the Health Insurance Summit, 24 July

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2002 Hilton Sydney; Joanne Gray, 'An unhealthy prognosis', *Australian Financial Review*, 27 February 2002.

- 18 PHIAC, [Annual Report](#), Commonwealth of Australia, 2002.
- 19 Shaun Gath, 'Enhanced Consumer Rights in Private Health Care: have the "Lawrence amendments" delivered?' *Journal of Law and Medicine* 6(3): 241–252
- 20 Private Health Insurance Complaints Commissioner, Annual Report, Commonwealth of Australia, 1998, p. 7.
- 21 Gath, op. cit.
- 22 The Private Health Insurance Administration Council is a body appointed by the Health Minister under Part VIAA of the NHA to carry out various advisory, supervisory and information functions.
- 23 See PHIAC, [Operations of the Registered Health Benefits Organisations Annual Report 2002](#) and Standard & Poor's *Australian Health Insurance Report 2002*.
- 24 Bulter, op cit.
- 25 The maximum loading is 70%
- 26 See *Explanatory Memorandum* at p. 16.
- 27 These relate to Life Health Cover.
- 28 At p. 20.
- 29 The modification is the new paragraph 67B(a).
- 30 At p. 21.
- 31 See paragraph (ma) of Schedule 1 of the NHA.
- 32 At p. 22.
- 33 At p. 22.
- 34 At p. 28.
- 35 At p. 29.
- 36 **New subsection 73BEJ(2)** applies where 'there appears to be a breach of the [NHA] involving improper discrimination by the organization'.
- 37 At p. 30.
- 38 In most cases an 'officer' will be a director of the RO.
- 40 Persons born before 1 July 1934 are exempt from LHC loading.

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