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Medical Indemnity (IBNR Indemnity) Contribution Amendment Bill 2003

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Medical Indemnity Amendment Bill 2003

Medical Indemnity (IBNR Indemnity) Contribution
Amendment Bill 2003

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27 November 2003

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Medical Indemnity Amendment Bill 2003

Medical Indemnity (IBNR Indemnity) Contribution Amendment Bill 2003

Date Introduced: 6 November 2003.

House: House of Representatives.

Portfolio: Health and Ageing.

Commencement: Medical Indemnity Amendment Bill 2003: Schedule 1, items 1, 2, 4, 9-11, 14-17, 19, 20 are taken to have commenced on 1 July 2003. Schedule 1, items 3, 5-8, 12, 13, 18, 21-26 commence on the day on which the Act receives the Royal Assent. The items in schedule 2 commence on the day in which the Act receives the Royal Assent. The Medical Indemnity (IBNR Indemnity) Contribution Amendment Bill 2003 is taken to have commenced on 1 July 2003.

Purpose

This Bill has two key purposes. Firstly it makes amendments to the incurred but not reported (IBNR) indemnity scheme which was legislated for by the *Medical Indemnity Act 2002*. In the short term, these amendments lessen the financial burden placed on doctors under the IBNR scheme. Secondly the Bill puts in place arrangements for an 'Exceptional Claims Scheme' (formerly known as the 'Blue Sky Scheme').

Background

The provision of medical indemnity cover to doctors in Australia has been in crisis since early 2002.

The medical indemnity crisis contains three key elements:

- the appointment of a provisional liquidator to Australia's main Medical Defence Organisation (MDO), United Medical Protection/Australian Medical Insurance Limited (UMP/AMIL) in May 2002

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- before entering into provisional liquidation, UMP/AMIL provided indemnities to approximately 60% of medical practitioners nationally
- on 14 November 2003, the Supreme Court of New South Wales released UMP/AMIL from provisional liquidation thereby allowing business operations to return to normal
- MDO's have not made sufficient provision for 'incurred but not reported' claims
 - historically, MDO's provided their members with 'claims incurred' cover. Under a 'claims incurred' policy, doctors were insured against injuries to patients brought about through conduct which took place during the term of the policy. The patient's claim could be notified to the MDO at any time; ie during the term of the policy or once the policy has lapsed (for example, five years after the policy has lapsed)
 - incidents which occur during the term of the policy giving rise to a claim that is reported to the MDO after the policy has lapsed are referred to as 'incurred but not reported' (IBNR) claims
 - UMP/AMIL had unfunded IBNR's approximating \$460 million,
- significant increases in medical indemnity premiums for doctors.

The Government has put in place a range of measures to address the elements of the medical indemnity crisis, including the following:

- The Commonwealth acting as guarantor for claims arising out of medical procedures provided by doctors covered by UMP/AMIL
- Commonwealth funding for the IBNR's of doctors that were members of MDO's at 30 June 2000, where the IBNR's were unfunded
 - To date the only MDO that is regarded as having unfunded IBNR's is UMP/AMIL
- Commonwealth reimbursement to providers of medical indemnity insurance of 50 per cent of insurance payouts that exceed \$500,000 where the incident has been notified on or after 1 January 2003 (this is known as the High Cost Claims Scheme)
- Premium subsidies to obstetricians, neurosurgeons and procedural general practitioners who undertake medicare billable procedures, and
- Measures to ensure that providers of medical indemnity insurance are subject to the same prudential regulatory requirements as other general insurers. This includes prudential supervision by the Australian Prudential Regulatory Authority.

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In addition to these Federal measures, the states and territories have made significant changes to the laws of negligence that are designed to reduce the number of claims and the level of damages payouts in negligence.

Unfunded IBNR's of UMP/AMIL

One of the factors that contributed to UMP/AMIL entering into provisional liquidation in May 2002 was the fact that the MDO had unfunded IBNR's approximating \$460 million. As noted above, the Government announced that it would put in place arrangements to ensure that money was available to pay for the unfunded IBNR's of UMP/AMIL. This was a significant element in bringing the company out of provisional liquidation.

The elements of the scheme were put in place through the *Medical Indemnity Act 2002*, and the *Medical Indemnity (IBNR Indemnity) Contribution Act 2002*. Essentially, under the scheme, the Government would indemnify UMP for their unfunded IBNR's, where the incident giving rise to the claim occurred before 30 June 2003. A large part of the indemnity would be funded through a levy imposed on members of the MDO. Essentially the levy was worked out using the following formula:

- The first annual contribution would be equal to 50% of the members annual subscription for the financial year that commenced on 1 July 2000. In subsequent years the contribution may vary but it will never exceed 50% of the annual subscription for the year commencing 1 July 2000.
- It is expected that contribution would be paid for 10 years.

The legislation imposing the levy commenced operation on 1 July 2003. The doctors who were subject to the levy expressed strong opposition to its imposition. Some of the complaints were due to the unfair application of the levy on certain groups of doctors, such as those who were members of UMP but did not receive indemnities from the organisation. Other doctors argued that the levy was too high.

As a response to this opposition, the Government announced a number of changes to the scheme. On 3 October 2003 the Government agreed to an eighteen month moratorium on IBNR levy payments above \$1000 per year. The Government also stated that doctors who had already paid a levy in excess of \$1000 per year would have their money refunded. The Government also announced that it would set up a policy review process to further consider the medical indemnity issues.¹

In a media release put out on 10 October 2003, the Minister for Health and Ageing, the Hon. Tony Abbott, announced the following further refinements to the scheme:

- Exempt from the IBNR levy all doctors either employed by public hospitals or who have their private medical incomes returned to those hospitals

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- Exempt all doctors aged 65 and over from the IBNR levy, regardless of practice income
- Exempt all doctors from the IBNR levy who need to retire early because of disability or permanent injury, and
- Exempt doctors and their estates from the IBNR levy liability due in the year of their death.

The Bill makes amendments to the *Medical Indemnity Act 2002* and the *Medical Indemnity (IBNR Indemnity) Contribution Act 2002* to put in place the moratorium arrangements for the IBNR levy.

Exceptional claims

One of the consequences of subjecting MDO's to the same regulatory requirements as providers of other forms of general insurance is that the insurance cover provided to doctors now contains a cap on the amount of damages that may be paid under the policy. The majority of indemnities currently in the market have a cap of \$20 million (although some are now being capped at \$25 million). Prior to the changes to the regulatory arrangements, MDO's did not place a cap on the indemnities.

As a result of these new regulatory arrangements, doctors are concerned that they will be at financial risk if claims against the doctor exceed the capped amount. Doctors argue that they are not covered by insurance for claims in excess of the capped amount and therefore may have to pay for claims out of their own financial assets.

In May 2003, the Federal Government announced details of its 'Blue Sky Scheme', (now known as the Exceptional Claims Scheme) to deal with this problem.² The scheme provides that where a claim is made against a doctor, and that claim exceeds the level of cover as set out in the legislation (either \$15 million or \$20 million), the Government will indemnify the doctor for the amount of the claim that exceeds their level of cover.

At the time the scheme was announced, the Government stated that:

The Government will assume liability for amounts above the insured limit with any payments made under this arrangement funded by the doctor's insurer after the funds have been paid by the Commonwealth.³

It now appears that the Government intends to fully fund the scheme.

The Explanatory Memorandum to the Bill states that:

The Commonwealth will expense the assumption of Exceptional Claims Scheme liability in the Additional Estimates outcome for 2003-2004. The rate at which the

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expense will be met as cash payments is unknown, as the timing of the applications for and payments under the Scheme will be over a number of years.⁴

The Bill amends the *Medical Indemnity Act 2002* to put in place arrangements for the exceptional claims scheme.

Position of significant interest groups/press commentary

A media release addressing the introduction of the Bill into Parliament stated the following:

AMA President, Dr Bill Glasson, today welcomed the introduction of the Medical Indemnity Amendment Bill, which was drawn up in response to concerns raised at the AMA's recent rally in Sydney.

While the Bill addresses some of the AMA's short-term concerns, Dr Glasson reminded the Government that a number of long term issues must be addressed well before the next election.

"The AMA has concerns about the timeframe of the Government's 18 month moratorium on the IBNR levy, outlined in Tony Abbott's media release today," Dr Glasson said.⁵

Main Provisions

IBNR indemnity scheme

Schedule 1 of the Medical Indemnity Amendment Bill 2003 (MIAB) and the Medical Indemnity (IBNR Indemnity) Contribution Amendment Bill 2003 (MICAB) makes amendments to implement the IBNR levy scheme moratorium. These amendments will apply to members of UMP/AMIL who are required to pay the IBNR levy.

The Bill puts in place arrangements so that for the first 18 months of the IBNR levy arrangements (commencing on 1 July 2003) the maximum amount of an IBNR levy that a doctor will need to pay will be \$1000 per annum [**Item 2 Schedule 1 (MICAB)**].

From 1 January 2005, the IBNR scheme arrangements will revert to the arrangements that are currently set out in the *Medical Indemnity Act 2002*.

The Bill also puts in place arrangements so that payments made by doctors under the IBNR levy scheme that exceed the new arrangements, can be refunded. [**Item 1 Schedule 1 MICAB, Item 19 and 20 MIAB**].

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Exceptional claims indemnity scheme

Schedule 2 of the MIAB puts in place arrangements for the exceptional claims indemnity scheme.

Under the exceptional claims indemnity scheme, the Commonwealth will assume liability for 100% of the damages that are payable that exceed the doctor's insurance cap.

Medical indemnity cases may take years to finalise and in the intervening period, a doctor may wish to know that their claim will be covered by the scheme. The scheme has been set up so that a doctor will be able to apply for and receive a determination as to whether they will be entitled to receive an exceptional claims indemnity. The doctor will be notified of their eligibility through being granted a 'qualifying claims certificate'.

To be eligible to receive a qualifying claims certificate the following criteria must be met:

- a claim needs to be against a doctor for compensation or damages in relation to the medical service provided by the doctor
- the incident needs to have occurred in Australia
- the doctor and the incident needs to be covered by a contract of insurance
- the cover provided by the insurer needs to equal or exceed the contract threshold (\$15 million for a claim notified between 1 January 2003 and 1 July 2003 and \$20 million for a claim notified after 1 July 2003 or any other amount as specified in the regulations)
- the insurer needs to be a general insurer within the meaning of the *Insurance Act 1973*, and
- the insurer needs to have entered into the contract in the ordinary course of business (**section 34E**).

The application for the exceptional claims indemnity may be made by the doctor or a person acting on the doctor's behalf and must be in accordance with **section 37A**, in particular, it must be in writing using a form approved by the HIC, be accompanied by the relevant information and made within the timeframes set out in the section.

In relation to the final decision to issue a qualifying claims certificate, the HIC must decide whether to issue the certificate within 21 days of receipt of the application (**sub-section 34I(1)**) and the decision of the HIC is appealable to the Administrative Appeals Tribunal (**sub-section 34K(6)**).

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The final size of the damages claim against the doctor will not be known until the case has been finalised. It may take years for a final determination to be made. In the intervening period, the cover provided by the doctor's insurance policy (\$15 million or \$20 million) may have been exceeded and the doctor may be required to pay ongoing costs associated with the case (eg the patient's medical expenses, legal fees etc). To ensure that a doctor does not have to personally finance a claim prior to a final determination being made regarding damages, a doctor will be able to receive preliminary payments from the HIC, where the qualifying claims certificate has been issued.

The HIC will make a final determination as to the doctor's eligibility under the scheme, once a final decision regarding the size of the claim against the doctor is known. **Proposed section 34L** sets out where the exceptional claims indemnity is payable. In particular the section states that the indemnity will be payable provided the:

- qualifying claims certificate has been issued
- the claim is valid, that is the liability is
 - under a judgment or order of a court
 - under a settlement of the claims, or
 - another form of liability of the practitioner that relates to the claim
- if the liability is under a settlement of the claims or a consent order by the court, the legal practitioner has given a statutory declaration certifying that the amount of the liability is reasonable (**section 34M**),
- the defence of the claim against the practitioner was conducted appropriately. The legislation states that the defence of a claim is conducted appropriately if the defence is conducted 'prudently' (see **paragraph 34(2)(b)**). Interestingly the legislation does not specify what constitutes 'prudence', and
- the size of the claim exceeds the contract limit (ie \$15million or \$20 million).

If there has been an overpayment by the HIC in the preliminary payment stage, the doctor will be required to repay to the HIC the overpaid amount.

In relation to the decision to make an exceptional claims indemnity payment, the HIC must make a final decision regarding the doctor's eligibility within 21 days of receiving the application. The decision to pay an exceptional claims indemnity is appealable to the AAT (**section 34L(5)**).

The legislation sets out:

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- that payments may be reduced where contribution from a third party is made in relation to the compensation claim (**sections 34S, 34T, 34U**)
- that the responsibilities of the doctor and the doctor's representatives (such as the MDO) in relation to the appropriate way to handle the payment of the exceptional claim indemnity from the HIC (**section 34Q**)
- how the exceptional claims scheme interacts with the High Cost Claim Scheme (**section 34D**), and
- a mechanism for determining a protocol so that the HIC can pay ongoing costs for managing and defending a claim and the Minister can set out the conditions for the payments (**section 34X**).

In relation to the scheme the HIC has information gathering powers **item 27-31**. In particular, the HIC has the power to request that a person give the information to assist in determining whether a qualifying claim certificate should be given, changed or revoked and whether an exceptional claims indemnity should be paid. Failure to provide the information is an offence.

Concluding Comments

This Bill puts in place revised arrangements for the IBNR levy scheme and legislates for the exceptional claims scheme.

The operation of the initial IBNR levy scheme, which was legislated for by the *Medical Indemnity Act 2002*, commenced operation in July 2003. Once doctors realised the size of the levy they were required to pay under the scheme, they expressed strong opposition to the proposal. In response to this opposition, the Government has placed a moratorium on the IBNR levy so that doctors will not be required to pay more than \$1,000 annually under the arrangements. This moratorium will be for 18 months. At this point in time, the legislation provides that the previous arrangements will re-apply once the 18 month time period has lapsed. It is expected that these arrangements will be considered during the Government's policy review process.

The Bill also puts in place an 'exceptional claims scheme' for doctors so that they will be covered for claims against them that exceed the limit on their insurance policy (generally either \$15 million or \$20 million). It is unclear how frequently these new arrangements will be used bearing in mind that the largest medical insurance judgement to date has been the decision in *Diamond v Simpson*⁶ where the court awarded damages of \$10,998,692. The recent changes to tort law may also mean that the size of the damages awards will decrease. Nevertheless under the current arrangements, doctors may potentially be

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financially at risk and as a result the 'exceptional claims scheme' is necessary. This scheme will be funded by the Commonwealth.

Endnotes

- 1 *Media Release*, Mr Tony Abbott, Minister for Health and Ageing, 3 October 2003: [<http://www.health.gov.au/medicalindemnity/statement.htm>], 24 November 2003.
- 2 Medical Indemnity Package Finalised, *Media Release*, Senator Hon Helen Coonan, Minister for Revenue and Assistant Treasurer, [<http://assistant.treasurer.gov.au/atr/content/pressreleases/2003/039.asp>], 24 November 2003.
- 3 *ibid*
- 4 *Explanatory Memorandum* Medical Indemnity Amendment Bill 2003, Medical Indemnity (IBNR Indemnity) Contribution Amendment Bill 2003, p. 2.
- 5 'AMA challenges changes introduced in Medical Indemnity Amendment Bill' *Media Release*, Dr Glasson, 7 November 2003. [<http://www.ama.com.au/web.nsf/doc/WEEN-5T327S>].
- 6 2003 ATPR 81-965.

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