



Medical Indemnity (Competitive Advantage Payment) Bill 2005

Medical Indemnity Legislation Amendment (Competitive Neutrality) Bill 2005

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Law and Bills Digest Section

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Medical Indemnity (Competitive Advantage Payment) Bill 2005 Medical Indemnity Legislation Amendment (Competitive Neutrality) Bill 2005

Date Introduced: 16 June 2005

House: House of Representatives

Portfolio: Health and Ageing

Commencement: The Medical Indemnity (Competitive Advantage Payment) Bill commences from 1 July 2005. In respect of the Medical Indemnity Legislation Amendment (Competitive Neutrality) Bill, sections 1 to 3 commence on the day the Act receives Royal Assent. Schedules 1 and 2 commence from 1 July 2005. Schedule 3 commences from 1 July 2004 (being tied to the commencement of schedule 2 to the *Medical Indemnity Legislation Amendment (Run-off Cover Indemnity and Other Measures) Act 2004*).

Purpose

The purpose of the Bills is to remove competitive advantages said to have accrued to certain medical defence organisations (MDOs) as a result of government assistance to the medical indemnity market and to lessen the financial burden on medical practitioners and health professionals imposed under the original scheme of assistance.

Background

In April 2002, United Medical Protection Limited (UMP) and its wholly owned subsidiary Australian Medical Insurance Limited (AMIL), who together provided indemnities to approximately 60 per cent of Australian doctors, went into provisional liquidation. As a result, the entire medical indemnity regime in Australia was undermined.

In response to this crisis the Government rolled out a series of measures to alleviate the upward pressure on insurance premiums and the unsustainable operating environment that existed for some medical indemnity providers. The measures included the Run-off Cover Indemnity Scheme, the High Cost Claims Scheme, the Exceptional Claims Scheme, the Medical Indemnity Premium Subsidy Scheme and the Incurred But Not Reported (IBNR) Indemnity Scheme.

In May 2002, the provisional liquidator appointed to UMP/AMIL, Mr David Lombe, identified three major factors contributing to the failure of UMP/AMIL:

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- the lack of reserving for long term liabilities and consequently insufficient premium pricing and failure to account for incurred but not reported risk
- the lack of management experience within the organisation, and
- the adverse financial impact of the amalgamation which created the UMP Group.¹

At the time the provisional liquidator was appointed, UMP/AMIL was in severe financial difficulties. UMP and AMIL had a deficiency of net assets of \$49.869 million and \$38.6 million respectively.² In addition to this, UMP/AMIL had an estimated IBNR liability of \$455 million.³

IBNR (incurred but not reported) Indemnity Scheme

Following the appointment of the provisional liquidator, the State and Federal Governments implemented a series of measures to help re-establish the UMP Group. The scheme whereby the Federal Government put in place arrangements to pay for UMP/AMIL's unfunded IBNR claims⁴ was one such measure. When established, the scheme was to be funded by imposing a levy (the 'IBNR levy') on doctors who were members of UMP/AMIL on 1 July 2000.⁵ The legislative arrangements for the IBNR scheme are set out in Part 2 Division 1 of the *Medical Indemnity Act 2002*.

Doctors became aware of the size of the IBNR levy when they received the levy notices in August 2003. Essentially doctors were required to pay 50% of their annual subscription to UMP/AMIL for the financial year that commenced on 1 July 2000. This was in addition to their normal insurance premiums. Once doctors were aware of the size of their liabilities under the scheme, they expressed strong opposition to the proposal. At a time when premium levels were already regarded as being unaffordable or nearing unaffordable levels for some parts of the medical profession, the doctors regarded the imposition of this levy as completely unsustainable.

Following significant opposition from the medical profession to the IBNR levy, the Government, on 3 October 2003, agreed to an eighteen month moratorium on IBNR levy payments in excess of \$1000. The *Medical Indemnity Amendment Act 2003* and the *Medical Indemnity (IBNR Indemnity) Contribution Amendment Act 2003* implemented the IBNR levy moratorium.

At the time that the moratorium was announced, the Government also stated that it would set up a policy review process to further consider the medical indemnity issues, such as the IBNR levy scheme. The Medical Indemnity Policy Review Panel (the Panel) considered and reported on this issue in December 2003. It noted the following:

Latest advice from the Australian Government Actuary suggests that while the aggregate IBNR for UMP as at 30 June 2003 is now \$482 million in net present value terms, the levy on doctors need only raise \$261 million. The balance is made up of

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Government funded payments under the High Cost Claims Scheme, subsidies and exemptions.

The Panel considers that it is appropriate for UMP doctors to make a contribution towards the cost of the IBNR liability incurred by UMP.....

If the levy is to be retained, the Panel suggests that any contribution required from doctors should be set as a small percentage of their current income rather than the premium they paid in 2000-01. This would address the problems faced by doctors who have reduced their workload or even left practice since 2000-01.

The Panel also suggests that if the levy is to be retained the length of time a doctor should pay the levy should be linked to the period they belonged to UMP before 30 June 2000. Doctors who were members for only one year should only pay the levy for a year, those who were members for two years should pay for two years and so on up to a maximum period of six years.⁶

The Medical Indemnity Amendment Act 2004 and the *Medical Indemnity (IBNR Indemnity) Contribution Amendment Act 2004* implemented the Panel's recommended changes to the IBNR levy scheme. As well as reducing the amount that doctors were required to pay, these Acts renamed IBNR Indemnity Contributions to 'UMP Support Payments'.

UMP Support Payments will be further reduced under these Bills (see below).

Review of Competitive Neutrality in the Medical Indemnity Insurance Industry

In December 2004, the Federal Government set up a review to inquire into whether the assistance given to the medical indemnity insurance industry was benefiting some industry participants more so than others and if so, to advise on options to redress the imbalance.

The review concluded, amongst other things, that the specific assistance granted by the Government to UMP through the IBNR Indemnity Scheme (and not granted to any other medical indemnity provider) resulted in a competitive advantage to AMIL. The Government assistance through the IBNR Indemnity Scheme meant that the Government assumed responsibility for UMP/AMIL's legacy, allowing the group to concentrate on the future. Other medical indemnity providers who did not benefit from the IBNR Indemnity Scheme needed to manage and fully fund their legacy obligations, as well as competing in the current market place.⁷

The review proposed three options for addressing the competitive advantage received by UMP/AMIL under the IBNR Indemnity Scheme:⁸

- for UMP/AMIL to take back the obligations of the IBNR liability and raise the appropriate level of capital in the market place to cover that liability,

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- for UMP/AMIL to make a regular series of payments to compensate the Commonwealth for the assumption of the IBNR liabilities, or
- for the Commonwealth to provide equivalent support to the other medical indemnity insurers or MDOs.

The review considered the only practical or desirable option was for UMP/AMIL to make regular repayments to the Commonwealth as compensation.

Position of significant interest groups

In submissions to the review of competitive neutrality the AMA stated that:⁹

- the level of Government assistance given to the indemnity industry does not need to be wound back, but if any adjustment is to be made it should be by way of redistribution, fully utilising the level of support granted by the Government
- if restoration of competitive neutrality required some withdrawal of support from an insurer, because of the impact on insurance costs for doctors, mechanisms are required that incorporate an appropriate return to doctors of the full amount of the withdrawn support, to ensure that premiums remained affordable, and
- options to restore competitive neutrality should consider formulae for redistributing any maldistributed government assistance to reduce the indemnity costs of members obliged to pay the UMP Support Payment where that payment poses a burden out of proportion to their colleagues in similar craft groups or practices.

Government Response to the Review of Competitive Neutrality in the Indemnity Industry

In responding to the review, the Federal Government accepted the findings of the review and stated that they would act to remove the competitive advantage by requiring that medical indemnity insurance groups who have benefited from the IBNR Indemnity Scheme make a series of repayments to the Government.

In addition, the Government's response provided for the funds received from those repayments to be used to reduce the payments of doctors under the UMP Support Scheme.¹⁰

It is now proposed to exempt the following from the requirement to make UMP Support Payments for years starting on or after 1 July 2005:

- medical practitioners who are participating members of a participating MDO and whose gross Medicare billable income is less than or equal to \$50 000
- health professionals who are participating members of a participating MDO and whose gross medical income is less than or equal to \$50 000

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- participating members of a participating MDO if the applicable percentage of the annual subscription for the base year for the member is less than or equal to \$1 000

It is also proposed to:

- reduce the maximum number of years for which a person is liable to make a UMP Support Payment from 6 to 4
- reduce by \$1000 the amount of UMP Support Payment that a participating member of a participating MDO will make for years beginning on or after 1 July 2005.

Main Provisions

Medical Indemnity Legislation Amendment (Competitive Neutrality) Bill 2005

Schedule 1

Items 1 and 14 of Schedule 1 amend the *Health Insurance Act 1973* and *National Health Act 1953* respectively to include the *Medical Indemnity (Competitive Advantage Payment) Act 2005* in the definition of ‘medical indemnity legislation’.

Item 4 of Schedule 1 amends the *Medical Indemnity Act 2002* to include a competitive advantage payment in the definition of ‘medical indemnity payment’.

Item 8 of Schedule 1 amends the *Medical Indemnity Act 2002* by inserting a definition of an MDO’s ‘net IBNR exposure’. An MDO’s net IBNR exposure is the MDO’s IBNR exposure minus any amounts payable under the High Cost Claim Scheme and Run-Off Cover Indemnity Scheme.

Item 10 of Schedule 1 amends the *Medical Indemnity Act 2002* by inserting Division 2A (provisions relating to the competitive advantage payment) into Part 3 of the Act.

The new Division 2A expands on the provisions in the Medical Indemnity (Competitive Advantage Payment) Bill 2005 relating to the competitive advantage payment, including provisions relating to:

- who is liable to pay the competitive advantage payment (**clause 59A**), and
- the process for annual reassessment of participating MDOs’ net IBNR exposure (**clause 59E**).

Under clause 59A a person is liable to pay a competitive advantage payment for a financial year if they are a medical indemnity insurer the financial year is a contribution year and the person is not exempt under **clause 59C**.

Clause 59C provides for regulations to be made specifying persons exempt from the competitive advantage payment.

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The process set out in clause 59E includes:

- the Australian Government Actuary reporting to the Minister an assessment of an MDO's net IBNR exposure at the end of the financial year, including the reasons for that assessment,
- provisions for the HIC to request information from an MDO if the HIC has reasonable grounds for believing that the MDO is capable of giving information relevant to the Actuary's assessment of net IBNR exposure, and
- provision for the Minister to publish in the Gazette the amount of an MDO's net IBNR exposure.

Schedule 2

Item 1 of Schedule 2 amends the *Medical Indemnity Act 2002* to exempt a medical practitioner from the UMP Support Payment if their Medicare billable income is \$5,000 for the 2003 or 2004 contribution years, and otherwise if their Medicare billable income for a contribution year is \$50,000.

Item 2 of Schedule 2 amends the *Medical Indemnity Act 2002* to exempt a health professional from the UMP Support Payment if their gross medical income is \$5,000 for the 2003 or 2004 contribution years, and otherwise if their gross medical income for a contribution year is \$50,000.

Item 3 of Schedule 2 amends the *Medical Indemnity Act 2002* to insert a new exemption a to the UMP Support Payment to participating members of a participating MDO if for the 2005 contribution year if the members applicable percentage of the annual subscription to the MDO is \$1,000 or less.

Item 4 of Schedule 2 amends the *Medical Indemnity Act 2002* to reduce the maximum number of years for which a person is liable to pay the UMP Support Payment from 6 to 4.

Items 6 to 9 of Schedule 2 amend the *Medical Indemnity (UMP Support Payment) Act 2002* to reduce the amount of the UMP Support Payment that members are liable to pay, to be the least of:

- \$4,000 (reduced from \$5,000), and
- the amount by which the applicable percentage of the member's annual subscription for the base year exceeds \$1,000 (reduced from the applicable percentage of the member's annual subscription for the base year), and
- for medical practitioners, 2 per cent of the amount by which the member's gross Medicare billable income for the year exceeds \$50,000 (reduced from 2 per cent of the members gross Medicare billable income for the year), and

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- for health professionals, 2 per cent of the amount by which the member's gross medical income for the year exceeds \$50,000 (reduced from 2 per cent of the members gross medical income for the year).

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Clause 4 provides for the imposition of a tax in the form of a competitive advantage payment on medical indemnity insurers with a participating MDO.

Clause 5 limits the contribution years in which the tax in clause 4 may be imposed to the financial years 1 July 2005 to 30 June 2015.

Clause 6(1) sets out the formula for calculating the competitive advantage payment, being an applicable percentage of the product of the medical indemnity insurer's net IBNR exposure and the factor of the IBNR exposure which is unfunded.

Clause 6(2) places limitations on the regulations that can be made under the Bill (as provided for in clause 7) insofar that those regulations must not specify an applicable percentage for the purposes of clause 6(1) greater than 15 per cent.

Concluding Comments

The Bills implement the recommendations of the review of competitive neutrality into the medical indemnity industry by providing for a competitive advantage payment from MDOs which benefited from the Government's IBNR Indemnity Scheme.

In this way the Bills are aimed at reducing (and hopefully eliminating) the competitive advantage gained by some medical indemnity insurers through the implementation of the IBNR Indemnity Scheme. The effectiveness of this move will probably be reflected in premiums within the medical indemnity insurance industry.

In addition to the recommendations of the review, the Bills also implement a reduction in the UMP Support Payment, an option suggested by the AMA in its submissions to the review of competitive neutrality. The impact of the Bills therefore is to reduce (and in some cases eliminate) the burden on medical professionals liable to pay the UMP Support Payment.

Endnotes

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- 1 *United Medical Protection & Ors* [2003] NSWSC 1031, p. 21. Further analysis of the collapse of UMP/AMIL can be found in this judgment where Justice Austin considers the

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termination of the appointment of the provisional liquidator and discontinuance of the winding up proceedings for the UMP Group.

2 *ibid.*, p. 14.

3 *ibid.*, p. 19.

4 Historically, MDOs provided their members with 'claims incurred' cover. Under a 'claims incurred' policy, doctors were insured against injuries to patient 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 term of the policy has ended (for example, five years after the term of the policy has ended).

Incidents which occur during the term of the policy, giving rise to a claim that is reported to the MDO after the policy terms have ended are referred to as 'incurred but not reported' claims.

5 The legislation that put this scheme into place was the *Medical Indemnity Act 2002* and the *Medical Indemnity (Enhanced UMP Indemnity) Contribution Act 2002*.

6 Medical Indemnity Policy Review Panel, *Affordable, Secure and Fair: Report to the Prime Minister*, 10 December 2003, Canberra, p. 16–17.

7 Graham Rogers, 'Review of Competitive Neutrality in the Medical Indemnity Insurance Industry', March 2005, p. 36, available at [http://www.health.gov.au/internet/wcms/publishing.nsf/Content/health-medicalindemnity-competitiveneutrality/\\$FILE/ReviewCNMIIM.pdf](http://www.health.gov.au/internet/wcms/publishing.nsf/Content/health-medicalindemnity-competitiveneutrality/$FILE/ReviewCNMIIM.pdf), accessed 3 August 2005, at p. vii.

8 *ibid.*, p. 36.

9 Australian Medical Association, Federal Secretariat, 'Submission to review of competitive neutrality in the medical indemnity insurance market', 27 January 2005, available at http://www.treasury.gov.au/documents/954/PDF/AMA_submission.pdf, accessed 3 August 2005.

10 Minister for Health and Ageing and Minister for Revenue and Assistant Treasurer, 'Reduced payments for doctors; level playing field for medical indemnity insurers', Press Release, 13 May 2005, available at: <http://www.health.gov.au/internet/ministers/publishing.nsf/Content/health-mediarel-yr2005-ta-abb053.htm?OpenDocument&yr=2005&mth=5>, accessed 3 August 2005.

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