



Health Insurance Amendment (Inappropriate and Prohibited Practices and Other Measures) Bill 2007

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Health Insurance Amendment (Inappropriate and Prohibited Practices and Other Measures) Bill 2007

Date introduced: 29 March 2007

House: House of Representatives

Portfolio: Health and Ageing

Commencement: Sections 1 to 3 commence on Royal Assent. The main operative provisions (schedule 1) commence on 1 March 2008. Schedule 2 commences on Royal Assent.

Purpose

The purpose of the Bill is to prohibit certain practices related to the rendering of pathology and diagnostic imaging services provided under Medicare (including inducements between requesters and providers of such services and other payments that do not benefit patients).

The Bill seeks to do this by replacing existing prohibitions on the payment of benefits between providers and requesters of pathology and diagnostic imaging services under the *Health Insurance Act 1973* (the Act) with new, strengthened provisions.

Background

Basis of policy commitment

In early 2000, the Commonwealth initiated a *Review of Commonwealth legislation for pathology arrangements under Medicare*. This was originally supposed to report to the Minister for Health and Aged Care by December 2000, but the [final report](#) was not completed until December 2002.

The 2002 Review concluded that the legislative arrangements for regulating pathology services needed to be updated and streamlined, including the bribery and prohibited offence provisions of the *Health Insurance Act 1973* (HIA). As a result, the Commonwealth commissioned the law firm Phillips Fox to:

- evaluate the effectiveness of the current enforcement and offence provisions in the HIA
- identify compliance arrangements that also apply to providers of pathology services in State jurisdictions or standards of professional conduct generally accepted by medical practitioners

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- identify different options for compliance regimes to regulate pathology services, and
- evaluate each of the identified options.

A [issues and options paper](#) was released in January 2005 and submissions taken. The final report, [Review of Enforcement and Offence Provisions of the Health Insurance Act 1973 as they Relate to the Provision of Pathology Services Under Medicare](#) (the Phillips Fox Review)¹, was released in August 2005.

The Bill implements certain recommendations of the Phillips Fox Review, in particular that:

- it be made clear in the HIA that benefits and bribes between providers and requesters of pathology services are prohibited, and
- the HIA contains an effective enforcement framework in relation to such practices.

These recommendations were made as a result of findings in the Phillips Fox Review that some pathology providers offer inducements for practitioners to refer patients to them or order excess services that may not be clinically necessary. It also found that some medical practitioners were alleged to have demanded payments from pathology providers in return for referring patients to particular pathology services.

Specific allegations reported as part of the Phillips Fox Review included:

- pathology companies (and third parties acting for them) offering inflated rents, gifts, lump sum payments and staff to general practices
- doctors actively soliciting inducements, gifts and benefits.²

The Review authors did not attempt to substantiate any of these allegations. Rather, it suggested that ‘the frequency and consistency of claims made across the sector generates a high level of confidence that such conduct is, in fact, occurring’.³ It found that there was the potential for such inducements to encourage over-servicing.⁴

The Phillips Fox Review found that, while the HIA already includes provisions aimed at preventing over-servicing and prohibited practices in pathology, they have been difficult to apply because they are expressed very broadly and their scope of application is unclear. This has meant that Medicare Australia (formerly the Health Insurance Commission) had been unable to gather evidence necessary to bring cases to court. As such, the main recommendations of the Review were that the Government clarify and strengthen the enforcement and offence provisions under the HIA and simplify the sanctions process.

In response, the Minister for Health and Ageing, Mr Abbott, said that he ‘broadly support(ed) the findings and recommendations of the Review’ and that the Government would ‘consider whether any tightening and strengthening of the pathology provisions as a result of the Review should also be reflected in diagnostic imaging’.⁵ The Government has since decided that the Review recommendations *will* be extended to diagnostic imaging services.

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Rather than simply amend the current prohibited practice provisions, the Government has decided to replace them with new and updated provisions. According to the Regulation Impact Statement for the Bill, this is because the latter option:

... reduces the potential for any ambiguity or inconsistency which might arise from amending the existing requirements. Replacing the current requirements with new and updated provisions sends a stronger message to the industry regarding the Government's expectations in relation to inappropriate payments.⁶

Further, this approach has been taken to ensure that:

- doctors only order those pathology and diagnostic imaging services that are necessary⁷
- the Government is therefore able to 'proactively contain Medicare expenditure on appropriate and relevant pathology and diagnostic imaging services'⁸
- the integrity of agreements between the Government and pathology and diagnostic imaging sectors are not undermined,⁹ and
- 'there is a level playing field for the conduct of pathology and diagnostic imaging business' (such that those business that comply with the spirit of the existing prohibited practices provisions are no longer disadvantaged).¹⁰

Prior to commencement of the new prohibited practices provisions, the Government will develop regulations that will provide details about specific elements of the reforms introduced in the Bill.¹¹

Position of significant interest groups/press commentary

Royal College of Pathologists of Australasia Chief Executive Officer, Dr Debra Graves, is reported to have expressed support for the measures contained in this Bill. She has argued that:

While this is not a widespread problem ... there are reports of a small number of practices that have not acted appropriately, and it is this behaviour the 'anti-rorting' legislation will target.¹²

The measures in the Bill are also reported to have been welcomed by pathology provider organisation, the Australian Association of Pathology Practices (AAPP). According to AAPP President, Michael Guerin:

There's always one rotten apple in the bottom of the barrel, and the AAPP is very keen to create the level playing field and most pathology practitioners in fact play the fair game.¹³

Media reports suggest that the Australian Medical Association (AMA) believes that there are already sufficient regulatory mechanisms in place to address inappropriate interactions

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between requesters and providers of pathology services. According to one report, AMA President, Dr Mukesh Haikerwal, has said that Medicare Australia already has strict guidelines in relation to such activity and that any practitioners suspected of fraud should be referred to the federal police.¹⁴

ALP/Australian Democrat/Greens/Family First policy position/commitments

The ALP and minor parties do not appear to have made public comments on the Bill.

Financial implications

The Explanatory Memorandum states the Bill will have no financial impact. However, as the Bill is designed in part to reduce unwarranted pathology and diagnostic imaging servicing, presumably some savings in Medicare outlays may result, although the precise impact may be difficult if not impossible to quantify.

Main provisions

The Explanatory Memorandum provides detailed coverage of the provisions of the Bill. The following analysis concentrates on the key provisions only, particularly the new civil penalty provisions and the revised criminal offences.

Schedule 1 – Main Amendments

Amendments to the *Health Insurance Act 1973*

Item 32 repeals Division 3 of Part IIB of the HIA which contain the current prohibitions on certain practices in diagnostic imaging services. These are replaced by new Part IIBA (new sections **23DZZIA-DZZIU**) in **item 34**. Part IIBA will cover both pathology services and diagnostic imaging services. *Note that the current prohibitions relating to diagnostic imaging services do not carry any criminal or civil penalty sanctions.* Rather, suspected contravention of the prohibitions are referred to the Medicare Participation Review Committee (the MPRC), a statutory body under the HIA. If the MPRC is satisfied that the prohibitions have been contravened, it may take a range of actions, including making services provided by that person ineligible for Medicare payments.

New Section 23DZZIC provides that Part IIBA binds the Crown (including State and Territory Governments as well as the Commonwealth), but it cannot be prosecuted for a criminal offence or subject to civil penalty. Any unlawful action may however be stopped by the bringing of an injunction through the court system.

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New section 23DZZID defines a number of key terms. Notably a benefit (which may be subject of the Part IIBA prohibitions) can include a potential benefit or an actual benefit.

New section 23DZZIF defines what is a permitted benefit – that is a benefit that is not prohibited under Part IIBA. Amongst other matters, this section deals with what is permitted in cases where a service requester (such as a General Practitioner) owns, or part owns, a pathology or diagnostic imaging service provider, or where a requester and a provider share premises. **New section 23DZZIG** enables the Minister to make a determination that a specified class of benefit is a permitted benefit in relation to specified classes of persons. The Explanatory Memorandum comments that ‘it is intended that determinations will be made in respect of benefits such as gifts, education, hospitality and consumables, and that reasonable limits will be prescribed for such benefits’.¹⁵ These Ministerial determinations are legislative instruments and thus disallowable by Parliament in the usual manner.

In cases where corporations contravene either the criminal or civil penalty provisions in Part IIBA, its executive officers may potentially be subject to the same sanction as if they had contravened the relevant provision themselves: **new sections 23DZZIN** and **23DZZIT**. An executive officer is a person who is ‘concerned in, or takes part in, the management’ of the corporation – this is standard definition in Commonwealth legislation. Where a relevant corporation has contravened a Part IIBA criminal or civil penalty provisions, executive officers are themselves liable if they:

- knew that the contravention would occur, and
- were in a position to influence the conduct of the body in relation to the contravention, and
- failed to take all reasonable steps to prevent the contravention.¹⁶

These elements required for executive officer liability mirror those in other Commonwealth legislation such as section 54B of the *Therapeutic Goods Act 1989*.

New Division 2 (new sections 23DZZII-DZZIN) contains the civil penalty provisions. These are imposed by a court where it is satisfied on the balanced of probabilities that the relevant person has contravened the relevant provisions (see discussion of item 85 below). These are entirely new provisions for the HIA.

New section 23DDZZII usefully summarises the provisions. Essentially:

- A service requester must not ask for or accept a pathology or diagnostic imaging service-related benefit (other than a permitted benefit) from a provider or a person connected to a provider.¹⁷
- A service provider must not offer or provide such a benefit to a requester or a person connected to a requester.

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- A service provider must not make a pathology or diagnostic imaging service-related threat to a requester or a person connected to a requester.

The provisions may also be contravened by a requester or provider if they know that a person connected to him or her has asked for, accepted, offered or provided such a benefit or made such a threat *and* they fail to report the person within 30 days to the Medicare Australia CEO: see **new subsections 23DZZIK(2)-(3)**.

In the context of the above, a threat is something that would either be reasonably likely to induce a requester to request any of those kinds of services from a provider or is related to the business of rendering pathology services or diagnostic imaging services.

The maximum penalty under the civil penalty provisions is 600 penalty units (\$66,000) for an individual (including executive officers of corporations) and 6,000 penalty units (\$660,000) for a corporation.

New Division 3 ((new sections 23DZZIO-23DZZIU)) contains the criminal offences. Many of the elements of the offences are similar to the civil penalty provisions. However, with the criminal offences it is necessary to prove (beyond reasonable doubt) certain levels of intention and/or knowledge on the part of the persons involved in the making or receiving of requests or benefits or the making of threats. In contrast, the civil penalty provisions only require to prove on the balance of probabilities that, for example, the benefit in question would be ‘reasonably likely’ to induce a doctor to request diagnostic imaging or pathology services from the relevant service provider.

The maximum penalty for a Division 3 offence is 5 years imprisonment (and/or 300 penalty units by virtue of subsection 4B(2) of the *Crimes Act 1914*). This applies to a corporate executive officer where the offence was committed by the corporation. The elements to establish the officer’s personal liability in such cases are the same applying as for the civil penalty provisions, but of course the required level of proof is higher – that of beyond reasonable doubt.

Items 39 to 84 amend various elements of Part VB, which deals with the Medicare Participation Review Committee (MPRC). Currently, in cases where persons have been convicted of HIA pathology-related offences or the MPRC considers they have contravened the prohibitions relating to diagnostic imaging services, the MPRC may take a range of actions under the HIA, including making services provided by that person ineligible for Medicare payments. The Bill amends Part VB so that the MPRC will be able to take the same range of actions upon a person’s conviction of a Part IIBA offences or them being subject to civil penalty order.

Item 66 adds **new subsection 124F(6)**. In cases where, under Part IIBA, a person was convicted of an offence or subject to a civil penalty order and the MPRC determines that relevant services were in the course of the relevant offence or contravention of the civil penalty provision, the MPRC may determine that the relevant Medicare benefit not be paid

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to the person. In cases where the payment has been made, it may determine that it be repaid to the Commonwealth.

Item 85 inserts **new Part VIA (new sections 125A-125H)** and deals with civil penalties.

Civil penalties are ordered by the Federal Court upon application by the Medicare Australia CEO: **new subsection 125A(1)**. Applications may be made up to six years after the actual contravention of the relevant civil penalty provision. Civil evidence and procedure rules apply – thus the court only has to be satisfied to the balance of probabilities: **new subsection 125A(4)**.

Persons who aid, abet, counsel, induce, procure a civil penalty convention, or conspire to contravene one, are taken to have contravened it and are thus subject to penalty; **new section 125C**.

No civil penalty order can be made if the person has already been convicted of a criminal offence for substantially the same conduct: **new section 125E**. Nor can criminal proceedings be instituted if a civil penalty order has been made: **new section 125G**. If any criminal proceedings are underway, civil proceedings must be stayed. They can be resumed if the criminal proceedings are unsuccessful: **new section 125F**.

Evidence given by a person in civil proceedings against them is not admissible in criminal proceedings against them where the proceedings are in relation to substantially the same conduct: **new section 125H**. However, evidence is admissible if the criminal proceedings are in relation to giving false evidence. Presumably evidence given in (unsuccessful) criminal proceedings is admissible in subsequent civil proceedings.

Amendments to *Medicare Australia Act 1973*

The *Medicare Australia Act 1973* (MAA) contains certain powers that allow ‘authorised officers’ to require the production of information or conduct searches where there are reasonable grounds for believing Medicare-related offences have been committed. **Items 98-109** amend the MAA so that these powers would apply to situations where it is suspected that a civil penalty provision under the HIA has been contravened.

Schedule 2

This makes some minor procedural amendments.

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Concluding comments

The measures in this Bill appear relatively uncontroversial and have not attracted significant public comment. The move to make it clear that inducements between providers and requesters of pathology services are prohibited under the Act (and that these provisions can be effectively enforced) implements recommendations made to the Government in the *Phillips Fox Review of Enforcement and Offence Provisions of the Health Insurance Act*. However, rather than simply amend the current prohibited practice provisions, the Government has taken the more direct approach of replacing them with new and updated provisions. It seems reasonable to suggest that such an approach may, as the Government argues, send a stronger message to the industry regarding the Government's expectations in relation to inappropriate payments.

Endnotes

1. *Review of Enforcement and Offence Provisions of the Health Insurance Act 1973 as they Relate to the Provision of Pathology Services Under Medicare—Final report to the Department of Health and Ageing (August 2005)*, Phillips Fox Lawyers, 2005.
2. *ibid* p. 45.
3. *ibid* p. 45.
4. *ibid* p. 47.
5. *The Australian Government Response to the 2005 Review of Enforcement & Offence Provisions of the Health Insurance Act 1973 (HIA) as they relate to the Provision of the Pathology Services under Medicare (May 2006)*, Department of Health and Ageing, 2006, p 2.
6. Explanatory Memorandum, p. 16.
7. Hon Tony Abbott, Minister for Health and Ageing, Health Insurance Amendment (Inappropriate and Prohibited Practices and Other Measures) Bill 2007 (Second reading speech), House of Representatives, *Debates*, 29 March 2007, pp. 1-2
8. Explanatory Memorandum, p. 16.
9. Hon Tony Abbott, *op. cit.* p. 2.
10. Explanatory Memorandum, p. 16.
11. Hon Tony Abbott, *op. cit.* p. 4.
12. N. Vanderkroef, 'New laws target kickbacks', *Medical Observer Weekly*, 6 April 2007.
13. C. Nader, 'Unethical doctors to face jail', *Age*, 27 March 2007.
14. N. Vanderkroef, 'New laws target kickbacks', *Medical Observer Weekly*, 6 April 2007.

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15. Explanatory Memorandum, p. 27.
16. **New section 23DZZIH** contains guidance as to whether the executive office did take the necessary 'reasonable steps'.
17. Persons may be connected by family or marriage, business relationship or trustee relationship or some combination of these: see new section 23DZZIJ.

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