



National Health Amendment (Contenance Aids Payment Scheme) Bill 2010

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National Health Amendment (Contenance Aids Payment Scheme) Bill 2010

Date introduced: 12 May 2010

House: House of Representatives

Portfolio: Health and Ageing

Commencement: Sections 1 to 3 on Royal Assent; Schedule 1 on 1 July 2010

Links: The [links](#) to the Bill, its Explanatory Memorandum and second reading speech can be found on the Bills page, which is at <http://www.aph.gov.au/bills>. When Bills have been passed they can be found at ComLaw, which is at <http://www.comlaw.gov.au/>.

Purpose

The purpose of the National Health Amendment (Contenance Aids Payment Scheme) Bill 2010 (the Bill) is to amend the *National Health Act 1953* (the Act) to enable the Minister to formulate the Contenance Aids Payment Scheme (CAPS).¹

Background

As part of the 2009-10 Budget, the Federal Government announced the introduction of the CAPS, replacing the Contenance Aids Assistance Scheme (CAAS).

Under the CAAS, continence products were provided to eligible Australians through a sole supplier.

CAPS is designed to give consumers greater flexibility and choice when purchasing continence products. To ensure consumer awareness and facilitate informed decision making, the Government has developed a range of resources to be made available at the [Bladder and bowel website](#). This is in addition to the information sessions that have been conducted around Australia.

All people receiving assistance under the CAAS will continue to receive assistance under CAPS.² The Bill details the transition arrangements for the new scheme and work has

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1. Explanatory Memorandum, National Health Amendment (Contenance Aids Payment Scheme) Bill 2010, p. 1.
 2. To be eligible for CAPS/CAAS, you must be aged five years and over and have permanent and severe incontinence caused by an eligible neurological condition. Other eligible conditions which cause permanent and severe incontinence are also subsidised, provided the applicant has a valid Centrelink Pensioner Concession Card. In all cases the condition must

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already commenced with health professionals, suppliers and consumers to ensure a smooth transition.³

From 1 July 2010, payments will be made directly to clients through the CAPS by Medicare Australia. Clients will purchase their own products according to need and preferences. Although the payment will be specified in the legislative instrument, according to publicly available information, the maximum amount available does not differ from CAPS.⁴ The Budget papers note that payments of up to \$479.40 per year will be made under CAPS, indexed annually.⁵

Important features of this Bill are the accountability and transparency arrangements. There is provision for a review of decisions made under the scheme by the Administrative Appeals Tribunal. The Commonwealth is also empowered to investigate claims of ineligibility or improper use of funds.⁶

Committee consideration

At the time of writing, the Bill had not been referred to any parliamentary committee.

Financial implications

CAPS will be funded by a special (standing) appropriation enabled under section 137 (1) of the Act⁷ and is expected to deliver savings to Government of \$10.7 million over four years.⁸

be verified by a health professional. See the '[eligibility](#)' section of the 'CAPS – FAQs' page on the [Bladder and bowel website](#).

3. Department of Health and Ageing, Contenance Aids Payment Scheme: FAQs, Bladder and bowel website, viewed 9 June 2010, <http://www.bladderbowel.gov.au/furtherinfo/caps/capsfaqs.htm>
4. Department of Health and Ageing, Contenance Aids Payment Scheme: FAQs, Bladder and bowel website, viewed 9 June 2010, <http://www.bladderbowel.gov.au/furtherinfo/caps/capsfaqs.htm>
5. Australian Government, *Budget measures: budget paper no. 2: 2009-10*, Commonwealth of Australia, Canberra, 2009, viewed 11 June 2010, http://www.budget.gov.au/2009-10/content/bp2/html/bp2_expense-16.htm
6. J. Elliot (Minister for Ageing), 'Second reading speech: National Health Amendment (Contenance Aids Payment Scheme) Bill 2010', House of Representatives, *Debates*, 12 May 2010, p. 3203.
7. Ibid

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Main provisions

Schedule 1 – amendments of the National Health Act 1953

Item 2 inserts a new Part III. This will allow the establishment of the Contenance Aids Payment Scheme by legislative instrument.

Proposed subsection 12(1) enables the Minister to formulate CAPS by legislative instrument, under which the Commonwealth makes payments towards cost of buying products that help manage incontinence.

Under **proposed subsection 12(2)**, eligibility criteria for participation in the scheme will be stated in the legislative instrument.

Proposed subsection 12(3) provides for the scope of the legislative instrument, which includes: the application process, conditions for participation, amount payable in each financial year, investigations process to ensure integrity of the scheme and the functions and powers of the Medicare Australia CEO in relation to the scheme.

Proposed subsections 13(1) and (2) enable the Secretary of the Department of Health and Ageing or Medicare Australia CEO (the official) to request information relevant in determining the eligibility for CAPS and the contribution amount. The official may request the relevant information from a person whom the official believes, on reasonable grounds, is capable of giving such information.

Under **proposed subsections 13(4) and (6)**, failure to comply with such a request for information would be a strict liability offence attracting a penalty of 30 penalty units.⁹ However, under **proposed subsection 13(5)**, an individual may be excused from complying with such a request if doing so might tend to either incriminate or expose him or her to a penalty.

Strict liability offences do not require fault to be proven and the requirement to prove fault has been a basic and important protection of criminal law. The concern about using strict liability offences stems from the general premise that it is unfair to subject people to:

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8. Australian Government, *Budget measures: budget paper no. 2: 2009-10*, Commonwealth of Australia, Canberra, 2009, viewed 11 June 2010, http://www.budget.gov.au/2009-10/content/bp2/html/bp2_expense-16.htm
 9. One penalty unit is equal to \$110: *Crimes Act 1914* section 4AA. In certain circumstances, additional pecuniary penalties — up to five times the amount of maximum pecuniary penalty imposed on a natural person convicted of the same offence — may be imposed on corporations: see *ibid.*, subsection 4B(3).

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criminal punishment for unintended actions or unforeseen consequences unless these resulted from an unjustified risk (ie recklessness).¹⁰

The Government has further stated that:

Commonwealth Governments and Parliaments have long taken the view that any use of strict or absolute liability should be properly justified.¹¹¹⁶⁹

Whilst the second reading speech states that the power in proposed section 13 to request information ‘will enable prompt investigation into any claims of ineligibility or improper use of funds’, neither the speech nor the Explanatory Memorandum appear to contain any justification or rationale for making the failure to comply with the request (except under subsection 13(5)) an offence of strict liability. While there may be valid reasons for making it so, it would be useful if the Government provided these reasons.

Applicants who are not considered eligible for CAPS can have their decision reviewed under **proposed section 14**.

Proposed subsection 14(2) provides that the Medicare Australia CEO must give the person signed notice which states: the decision, the date the decision has effect, the reasons for the decision, that the person can apply for a review of the decision within 28 days of receiving notice and how a person can apply for a review.

Under **proposed subsection 14(4)**, if an application for a review of a decision is made under **proposed subsection 14(3)**, the Medicare Australia CEO must review the decision and give the person signed notice which states: the decision, the day in which the decision has effect and if the person is not eligible to participate in the scheme, the reasons for the decision and that within 28 days of receiving the notice the person may apply to the Administrative Appeals Tribunal (AAT) for a review of the Medicare Australia CEO’s decision.

Proposed subsection 14(5) enables the AAT to review the decision.

Review of eligibility to participate in CAPS is provided for in **proposed subsection 15**.

Under **proposed subsection 15(1)**, this section applies if the Medicare Australia CEO decides that a person who is participating in CAPS is no longer eligible to do so.¹²

10. As to the meaning of ‘strict liability’, see *Criminal Code Act 1995* section 6.1. See also Attorney-General’s Department, [A Guide To Framing Commonwealth Offences, Civil Penalties and Enforcement Powers](#), Canberra, December 2007, pp. 24, 26-27.

11. *Ibid.*, p. 25.

12. Suppliers of continence products are not participants in CAPS.

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The rest of the provision mirrors **proposed section 14**, which relates to determining eligibility to participate in CAPS.

Item 3 deals with the transitional provisions for people receiving assistance under the Continence Aids Assistance Scheme (CAAS) immediately before 1 July 2010. These people will be transferred to CAPS under **subitem 3(2)**, provided they completed the transfer form and provide bank account details to Medicare Australia before 30 November 2010.

Subitem 3(3) provides that these people will be entitled to receive payment under CAPS from 1 July 2010.

Subitem 3(3) ensures that the Medicare Australia CEO cannot decide that a person is not eligible to participate in CAPS until 1 July 2011.

Concluding comments

Under the proposed amendments, it appears that continuity of care will be ensured as the Government has indicated that eligibility criteria for the CAPS is unchanged from the CAAS and existing clients will be automatically transferred. New clients can apply for CAPS from 1 July 2010 and are subject to the same eligibility criteria as the previous scheme.

The introduction of the CAPS is designed to give consumers greater choice and flexibility. Although this is to be commended, this approach may disadvantage those who lack the time, skills and knowledge to negotiate a 'better deal' for themselves or on behalf of those they are caring for. Much of the information about the transition arrangements and suppliers is available by the internet and this may disadvantage clients who do not have access. There has been little stakeholder comment about the introduction of CAPS.

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