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Federal Financial Relations Amendment (National Health and Hospitals Network) Bill 2010

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Contents

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Federal Financial Relations Amendment (National Health and Hospitals Network) Bill 2010

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House: House of Representatives

Portfolio: Treasury

Commencement: Clauses 1 to 3 and anything in the Bill not covered by the table in clause 2 commence on Royal Assent. Schedule 1 commences on 1 July 2011

Links: The links to the Bill, its Explanatory Memorandum and second reading speech can be found on the Bills home page, or through http://www.aph.gov.au/bills/. When bills have been passed they can be found at the ComLaw website, which is at http://www.comlaw.gov.au/.

Purpose

To give effect to the financing arrangements for the National Health and Hospitals Network (NHHN) Agreement entered into on 20 April 2010. In short, the NHHN establishes the Commonwealth as the dominant funder for health services and retains some GST revenue from the state and territory governments to meet its additional funding undertakings.

Brief overview of the Bill

This Bill was previously introduced in the 42nd Parliament. It lapsed when Parliament was prorogued on 19 July 2010. The Bill is unchanged.

Health financing in Australia has traditionally been dominated by claims and counter claims between Commonwealth and state and territory governments about appropriate funding levels and who has made, or should make, the greater contribution. One of the intentions of the Government's health reform package was to 'end the blame game' and reduce cost-shifting. As part of the NHHN, the Commonwealth will fund 60 per cent of the majority of costs associated with public hospitals, including capital and, over time, 100 per cent of primary care services. The Commonwealth also accepted full policy and funding responsibility for primary and aged care. Victoria has not agreed to relinquish responsibility for the Home and Community Care (HACC) program. Western Australia (WA) did not agree to participate in the NHHN or the proposed GST arrangements.

This Bill gives the Commonwealth the power to retain a proportion of GST revenue from the states.[1] The NHHN Fund, to be established by the legislation, will make payments to the states for the

1. In this Digest, 'states' refers to both state and territory governments.

provision of healthcare. In addition to these payments, the states will also receive 'top-up payments' to cover the projected increase in health costs.

The implementation plan for the NHHN notes that 'around a third' of GST revenue will be dedicated to health and hospitals.[2] The actual dollar amounts of GST retained by the Commonwealth are not prescribed in the legislation, as there are still uncertainties about the costs associated with the proposed reforms. There has been speculation in the media that some states will have to sacrifice up to 50 per cent of GST revenue.[3]

Up until 2014-15, the amount of Commonwealth GST funding for health will not be fixed. However, an indication of the Commonwealth's commitment has been provided in the Mid-Year Economic and Fiscal Outlook 2010-11.[4] Thereafter, GST funding will be fixed and indexed according the rate of GST growth.

This Digest provides an overview of current arrangements for health financing in Australia, the proposed NHHN as well as detailed analysis of the Bill.

Current arrangements for health financing

The Commonwealth provides grants to the states to assist them to fund their health expenditures. Currently, Commonwealth and state health funding arrangements are covered by the National Healthcare Agreement.[5] This is a schedule to the Intergovernmental Agreement on Federal Financial Relations, which came into effect on 1 January 2009.[6]

Commonwealth payments to the states for health now take the forms of:

- National Healthcare specific purpose payments (SPPs), and
- National Partnership payments.

The National Healthcare Agreement provides for the payment of a National Healthcare SPP to each state. The National Healthcare SPP bundled together several SPPs, the most notable of which was

2. Commonwealth of Australia (2010), *A National Health and Hospitals Network: delivering the reforms,* May 2010, viewed 12 November 2010, p. 8 http://www.yourhealth.gov.au/internet/yourHealth/publishing.nsf/Content/DeliveringTheReforms/$FILE/DeliveringTheReforms.pdf
3. S Dunlevy, GST row threatens health reforms, *The Australian,* 18 November 2011, p. 1, http://parlinfo/parlInfo/download/media/pressclp/367312/upload_binary/367312.pdf;fileType=application/pdf#search=%22GST%20row%20threatens%20health%20reforms%22
4. The Treasury, *Mid-Year Economic and Fiscal Outlook 2010-11,* Canberra, Commonwealth of Australia, p 113-114, viewed 18 November 2010, http://www.budget.gov.au/2010-11/content/myefo/download/07_Attachment_D.pdf
5. Council of Australian Governments, *National healthcare agreement*, November 2008, viewed 8 November 2010, http://www.coag.gov.au/intergov_agreements/federal_financial_relations/docs/IGA_FFR_ScheduleF_National_Healthcare_Agreement.pdf
6. Council of Australian Governments, *Intergovernmental agreement on federal financial relations*, November 2008, viewed 8 November 2010, http://www.coag.gov.au/intergov_agreements/federal_financial_relations/index.cfm

the former healthcare grants. National Partnership payments are payments for programs such as improving access to emergency departments and preventative health. In 2009–10, the Commonwealth made payments totalling $12.074 billion consisting of National Healthcare SPPs of $11.224 billion and $850 million in National Partnership payments.[7]

The current arrangements will remain in place in 2010–11 when payments for National Healthcare SPPs are expected to be $12.039 billion and National Partnership payments to be $2.703 billion giving a total of $14.742 billion.[8] Current arrangements are effected through the *Federal Financial Relations Act 2009* (FFR Act).

The Commonwealth also provides to the states GST revenue, which the states can spend as they wish. The Commonwealth Grants Commission (CGC) calculates the relativities that it recommends the Treasurer use to divide the GST among the states. The CGC's calculations are based on the horizontal fiscal equalisation principle. This is:

> A distribution of GST revenue to State governments such that, after allowing for material factors affecting revenues and expenditures, each would have the fiscal capacity to provide services and their associated infrastructure at the same standard, if each made the same effort to raise revenue from its own sources, operated at the same level of efficiency and maintained the average per capita net financial worth.[9]

Historically—and prior to the introduction of the GST—the application of the horizontal fiscal equalisation principle meant that New South Wales and Victoria contributed resources to the other states. However, this has changed partly because Queensland's and Western Australia (WA)'s mining sectors have been generating considerable additional revenue, directly and indirectly, for the governments of those states in forms such as royalties and payroll tax. Consequently, Queensland and WA now share with New South Wales and Victoria the cost of equalisation.[10] Put another way, a consequence of the horizontal fiscal equalisation principle is that part of the additional revenue flowing to the Queensland and WA state governments from their mining sectors is, in effect, redistributed to the other states.

The horizontal fiscal equalisation principle is firmly established: successive Commonwealth governments have not sought to end its application and the states cannot agree to its abolition. The attitude of the states to the principle has differed over time depending on whether they have

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7. Australian Government, *Final budget outcome 2009–10*, Commonwealth of Australia, Canberra, 2010, p.59, viewed 3 November 2010, http://www.budget.gov.au/2009-10/content/fbo/html/index.htm
8. Australian Government, *Mid-year economic and fiscal outlook 2010-11*, Commonwealth of Australia, Canberra, 2010, p.70-73, viewed 15 November 2010, http://www.budget.gov.au/2010-11/content/myefo/download/MYEFO_2010-11.pdf
9. Commonwealth Grants Commission, *Report on GST revenue sharing relativities-2010 review. Volume 1-main report*, Commonwealth of Australia, 2010, p, 157, viewed 8 November 2010, http://www.cgc.gov.au/__data/assets/file/0007/18349/2010_Review_final_report_vol_1.pdf
10. Commonwealth Grants Commission, *Report on GST revenue sharing relativities-2010 review. Volume 1-main report*, Commonwealth of Australia, 2010, p, 1, viewed 8 November 2010, http://www.cgc.gov.au/__data/assets/file/0007/18349/2010_Review_final_report_vol_1.pdf

benefited from or borne the cost of fiscal equalisation. Queensland and WA, for example, have at different times supported and condemned the principle.

National Health and Hospitals Network Agreement

On 20 April 2010, all the states, except Western Australia, agreed to the National Health and Hospitals Network (NHHN) Agreement.[11] The NHHN Agreement will establish:

- the Commonwealth as:
  - the majority funder of public hospital services
  - responsible for full funding and policy responsibility for general practice and primary health care, and
  - responsible for full funding, policy, management and delivery responsibility for a national aged care system
- Local Hospital Networks (LHNs) with responsibility for the management of hospitals within their networks
- independent primary health care organisations, known as Medicare Locals, to provide integrated primary health care across a defined geographic region
- the states as:
  - responsible for system-wide public hospital service planning, policy and performance (in conjunction with LHNs) and capital planning, and
  - key partners supporting the Commonwealth's responsibility for system-wide general practice and primary health care policy and service planning coordination.[12]

The following sets out more details of the NHHN Agreement with respect to funding arrangements

What will the Commonwealth fund?

As noted above, the key feature of the NHHN Agreement is that the Commonwealth will be responsible for most funding of major health care expenditure. In summary, the Commonwealth will fund:

> a. 60 per cent of the national efficient price of every public hospital service provided to public patients
>
> b. 60 per cent of recurrent expenditure on research and training functions funded by states undertaken in public hospitals

11. Council of Australian Governments (COAG), *National health and hospitals network agreement*, 2010, viewed 4 November 2010, http://www.coag.gov.au/coag_meeting_outcomes/2010-04-19/docs/NHHN_Agreement.pdf
12. Australian Government, 'Part 2: Payments for specific purposes', *Australia's federal relations: budget paper no. 3: 2009–10*, Commonwealth of Australia, Canberra, 2010, pp .28-29, viewed 8 November 2010, http://www.budget.gov.au/2010-11/content/bp3/download/bp3_general_revenue.pdf

> c. 60 per cent of block funding paid against a COAG-agreed funding model, including for agreed functions and services and community service obligations required to support small regional and rural public hospitals
>
> d. 60 per cent of capital expenditure, on a 'user cost of capital' basis where possible
>
> e. over time, up to 100 per cent of the national efficient price of 'primary health care equivalent' outpatient services provided to public patients.[13]

The Commonwealth will also assume full responsibility for policy and the funding of general practitioner, primary health care (from 1 July 2011) and aged care. This includes transferring to the Commonwealth from the states funding and policy responsibility for aged care home and community care (HACC) services and related programs.[14] Victoria has declined to transfer responsibility for HACC to the Commonwealth.

How will the Commonwealth finance its undertakings?

Schedule C of the NHHN Agreement details how the Commonwealth proposes to fund its obligations.[15] Funding will come from three sources:

- the National Healthcare SPP
- GST amounts, and
- from 2014–15, top-up payments.

National Healthcare SPP and special payments

Proposed funding under the National Healthcare SPP—which will expire in 2010-11 except for WA which will continue to receive the National Healthcare SPP—is:

> ... a new Healthcare SPP with continuation of funding equal to the current Healthcare SPP, which will be indexed from 1 July 2010 and each year thereafter by the growth factor set out in Schedule D of the IGAFFR [Intergovernmental Agreement on Federal Financial Relations].[16]

The growth factor is the product of:

- a health-specific cost index (the Australian Institute of Health and Welfare health price index)
- the estimated growth in population weighted for hospital utilisation, and
- a technology factor (the Productivity Commission-derived index of technology growth).[17]

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13. Council of Australian Governments, *National health and hospitals network agreement*, op. cit., pp. 4-5.
14. States will have responsibility for funding and regulating basic community care services currently delivered under HACC for those aged under 65 (under 50 for Indigenous Australians) and funding packaged community and residential aged care services delivered on behalf of the Commonwealth under the age of 65 (under 50 for Indigenous Australians).
15. Council of Australian Governments, *National health and hospitals network agreement*, Schedule C-Financing, pp. 28-33.
16. Council of Australian Governments, *National health and hospitals network agreement*, Schedule C-Financing, p. 28.

Under the NHHN, the states have responsibility for funding and regulating HACC services for those aged under 65 (under 50 for Indigenous Australians) as well as delivery of some community and residential aged care packages on behalf of the Commonwealth for this cohort.[18] As a result the SPP for the jointly funded HACC program will cease from 30 June 2011. The transfer of funds associated with the transfer of responsibilities will be included in the calculation of GST to be dedicated in each state from 2011-12.[19]

Special payments will be made under the NHHN. These will replace the current National Healthcare SPP and the National Healthcare SPP adjusted for the financial consequences of the Commonwealth assuming responsibility for HACC and related programs.[20] Each participating state's special payment will be set at a level to ensure a budget-neutral outcome for the Commonwealth.[21] The Commonwealth will draw on each state's GST entitlement (see below) to ensure a budget-neutral outcome.

Special payments are relevant only to states that are signatories to the NHHN Agreement. Although Victoria is a signatory, it did not agree to the Commonwealth assuming responsibility for aged care services under HACC. Victoria will receive special payments but they will not be adjusted for HACC. As a non-signatory to the NHHN Agreement, WA will continue to receive the National Healthcare SPP and existing funding arrangements for HACC will continue.

GST amounts

The proposed GST amounts will be obtained by:

> ... dedicating a proportion of the Goods and Services Tax (GST) such that in the period 2011-12 to 2013-14, the new Healthcare SPP and the dedicated GST will fund the 60 per cent Commonwealth hospital funding contribution outlined in provision 4, 100 per cent of GP and primary health care services undertaken by States, and the budget neutral funding transfer for changes in roles and responsibility in HACC [Home and Community Care] and related programs. The amount of GST dedicated to health care will be fixed from 2014-15, based on 2013-14 costs, and indexed at the rate of overall GST growth.[22]

The legislation does not prescribe the amount of GST and only refers to *amounts* of GST. The one–third of GST that has been widely used as the amount the Commonwealth will retain to fund health expenditure is an *estimate* of the proportion of GST that will be needed. From 2011–12 to 2013–14,

17. Council of Australian Governments, *Intergovernmental agreement on federal financial relations*, schedule D, p. D-3.
18. Council of Australian Governments, *National health and hospitals network agreement*, op. cit., pp. 25-26.
19. Council of Australian Governments, *National health and hospitals network agreement*, op. cit., p. 25.
20. Explanatory Memorandum, p. 13.
21. Explanatory Memorandum, p. 13.
22. Council of Australian Governments, *National health and hospitals network agreement*, Schedule C-Financing, p. 28.

the final amounts of GST dedicated to health funding will be determined annually, in consultation with the states, on the basis of actual expenditure.[23]

Top-up payments

Beginning in 2014-15, the Commonwealth will provide an additional top-up payment. Provision 17(a) of the NHHN Agreement states:

> Under this Agreement, the National Health and Hospitals Network will be implemented so that no State government will be worse off in respect of Commonwealth transfers in the short-term and all will be better off in the long-term. To give effect to this commitment:
>
> a. the Commonwealth government will guarantee additional top-up funding paid to the States of no less than $15.6 billion between 2014-15 and 2019-20, as outlined in provision C3(c) ...[24]

Provisions C3(c)(i) and C3(c)(ii) provide:

> ... from 2014-15, Commonwealth top up funding [will be] determined as follows:
>
> i. the additional top-up payment will reflect the additional expenditure, over and above the growth of the new Healthcare SPP and the fixed dedicated share of the GST, required to fund the 60 per cent Commonwealth hospital funding contribution outlined in provision 4 and 100 per cent of GP [general practice] and primary health care services;
>
> ii. the Commonwealth commits that the payment will be no less than $15.6 billion between 2014-15 and 2019-20.[25]

The top-up payment is considered necessary because hospital costs are growing faster than other costs and GST revenue;[26] hospital costs have been growing at around 10 per cent annually, and are expected to grow at around eight per cent annually over the medium term.[27] These rates are higher than the expected rate of increase in GST revenue of around six per cent annually and the increase in the existing National Healthcare SPP.[28]

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23. Australian Government, 'Part 2: Payments for specific purposes', *Australia's federal relations: budget paper no. 3: 2009–10*, Commonwealth of Australia, Canberra, 2010, p. 31, viewed 8 November 2010, http://www.budget.gov.au/2010-11/content/bp3/download/bp3_general_revenue.pdf
24. Council of Australian Governments, *National health and hospitals network agreement*, p. 7.
25. Council of Australian Governments, *National health and hospitals network agreement*, Schedule C-Financing, pp. 28-28.
26. Australian Government, 'Part 2: Payments for specific purposes', *Australia's federal relations: budget paper no. 3: 2009–10*, Commonwealth of Australia, Canberra, 2010, p. 14, viewed 8 November 2010, http://www.budget.gov.au/2010-11/content/bp3/download/bp3_general_revenue.pdf
27. Ibid.
28. Ibid.

The $15.6 billion commitment was made on the assumption that all states would participate in the NHHN Agreement. The Bill retains the $15.6 billion even though WA, to date, has not signed the NHHN Agreement. However:

> In the event that not all States endorse the NHHN Agreement over this period [2014–15 to 2019–20], the total funding of $15.6 billion may be reduced to reflect this.[29]

It is possible that an amount of less than $15.6 billion will be shared among seven states rather than $15.6 billion among eight states. Although WA is not eligible for a top-up payment, it is unclear if additional funding will be allocated to WA using alternative mechanisms.

Joint intergovernmental funding authorities

The Bill will establish the National Health and Hospitals Network Fund (proposed section 15A). This Fund will make payments to the LHNs through state-based Joint Intergovernmental Funding Authorities (the Funding Authority) established in each state. Each Funding Authority will make payments to its LHNs on the basis of Activity Based Funding (ABF) arrangements. Both the Commonwealth's 60 per cent funding contribution for efficient hospital services together with state ABF will be paid directly to the LHNs.[30]

It is envisaged that there will be 'total transparency' about the funding flows and related services provided by each Funding Authority.[31] The NHHN Agreement notes that Funding Authorities must not be a constraint on 'information flows and reporting requirements' and report to the Commonwealth and relevant state.[32] The NHHN is part of the Intergovernmental Agreement on Federal Financial Relations and public accountability and performance reporting is bound by Schedule C of this Agreement. It is expected that the Funding Authority will report to the COAG Reform Council.

Local Hospital Networks

As noted above, the Commonwealth will make payments into the National Health and Hospitals Network fund to LHNs through Joint Intergovernmental Funding Authorities. Each state is responsible for the establishment and operation of the LHN.[33] The NHHN Agreement outlines the responsibilities of the states with respect to LHNs and notes that each LHN will operate as a single

29. Explanatory Memorandum, p. 9.
30. Australian Government, 'Part 2: Payments for specific purposes', *Australia's federal relations: budget paper no. 3: 2009–10*, Commonwealth of Australia, Canberra, 2010, p. 14, viewed 8 November 2010, http://www.budget.gov.au/2010-11/content/bp3/download/bp3_general_revenue.pdf
31. Council of Australian Governments, *National health and hospitals network agreement*, op. cit., pp. 13-14.
32. Ibid
33. Council of Australian Governments, *National health and hospitals network agreement*, op. cit., p. 5.

legal entity and be accountable to the relevant state government. It is important to note that the Commonwealth is expressly excluded from any role, directly or indirectly, in the operation of LHNs.[34]

National Health and Hospital Network fund payments

The main component of payments from the National Health and Hospital Network fund will be for public hospital services as set out in provision 16(a) of the NHHN Agreement:

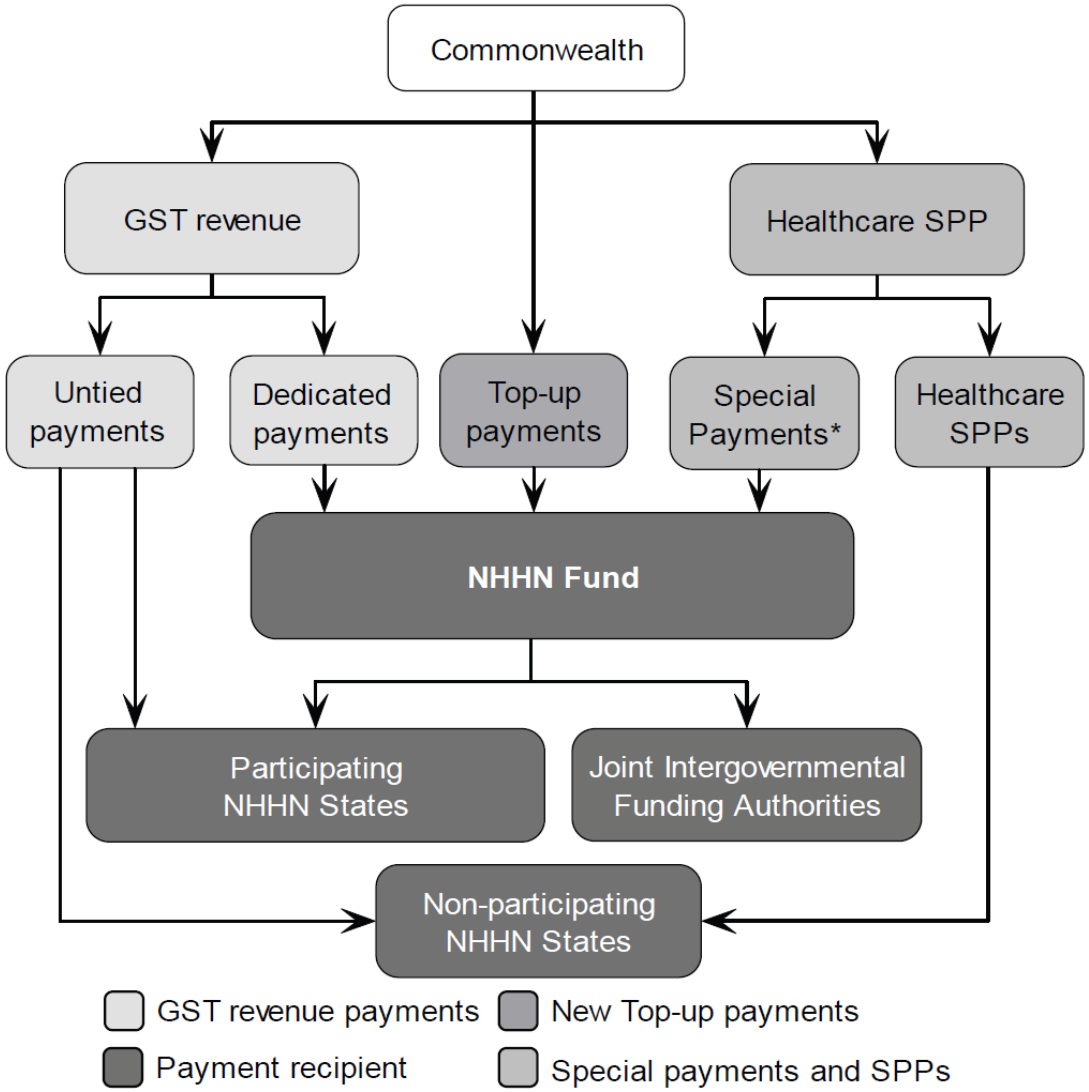
> 16. The Commonwealth Government will, through the National Health and Hospitals Network Fund:
>
> a. pay 60 per cent of the national efficient price of every public hospital service provided to public patients under agreed LHN Service Agreements, including in respect of minor capital directly managed by LHNs, to National Health and Hospitals Network Funding Authorities (Funding Authorities) in each State, as outlined in provisions A8 and A9;

Payments will also be made from the National Health and Hospital Network fund for other services as set out in provision 16(b) of the NHHN Agreement. The fund will:

> b. pay States:
>
> i. into a discrete state-managed fund for:
>
> 1. research;
>
> 2. training; and
>
> 3. block funding paid against a COAG-agreed funding model, including for agreed functions and services and community service obligations required to support small regional and rural public hospitals;
>
> ii. for Commonwealth-funded GP and primary health care services (to the extent that they continue to provide relevant services on behalf of the Commonwealth); and
>
> iii. a capital funding stream to be paid on a user cost of capital basis where possible, other than for minor capital directly managed by LHNs.[35]

The following diagram from the Explanatory Memorandum summarises the proposed arrangements.[36]

34. Council of Australian Governments, *Communiqué,* Meeting 19 and 20 April 2010, Canberra, p. 4, viewed 17 November 2010, http://www.coag.gov.au/coag_meeting_outcomes/2010-04-19/docs/communique_20_April_2010.pdf
35. Council of Australian Governments, *National health and hospitals network agreement*, op. cit., p. 6-7.
36. Explanatory Memorandum, p. 5.



* Adjusted to reflect changes in funding responsibilities under the NHHN Agreement.

Governance

Schedule E of the NHHN Agreement contains the national governance arrangements. Schedule E provides for the creation of:

- an Independent Hospital Pricing Authority (IHPA)
- a National Performance Authority (NPA), and
- the extension of the Australian Commission on Safety and Quality in Health Care's functions.

Provision 19 of the NHHN Agreement summarises the governance arrangements:

> a. The reforms will create new national governance functions including:
>
> a. an Independent Hospital Pricing Authority (IHPA), which will calculate and determine a national efficient price for the purposes of calculating the Commonwealth's payments for public

hospital services, calculate and determine the Commonwealth's payments for block funding paid against a COAG-agreed funding model, and perform other functions as an integral part of the new system;

b. a National Performance Authority (NPA), which will report on the performance of every LHN {Local Hospital Network}, the hospitals within it, every private hospital and every PHCO [Primary Health Care Organisations], through the new Hospital Performance Reports and Healthy Communities Reports;

c. continuation of the role of the COAG Reform Council (CRC) in:

i. reporting on the performance of all jurisdictions against:

1. the existing performance indicators set out in the NHA [National Healthcare Agreement];

2. the new National Standards; and

3. the new national clinical quality and safety standards, as developed by the ACSQHC [Australian Commission on Safety and Quality in Health Care]; and

ii. providing an independent assessment of whether predetermined performance benchmarks have been achieved prior to reward payments being made; and

d. continuation and expansion of the role of the ACSQHC to set national clinical standards for the delivery of health services.[37]

The proposed Bill is silent about possible linkages among the new governance authorities. Effective arrangements are considered necessary to ensure the appropriate balance between efficiency, safety and equity in the health care system.[38] The lack of detail about the proposed arrangements among the new governance authorities was highlighted in public submissions and hearings in the Senate Inquiry into the National Health and Hospitals Network Bill (establishment of the Australian Commission on Safety and Quality and Health Care).[39] The amendments to establish the IHPA and NPA have not yet been introduced into the Parliament.[40] It is possible that these concerns will be addressed in those amendments. It could be suggested, however, that the lack of detail about the proposed governance arrangements for the National Health and Hospitals Network remains an omission from the legislation.

37. Council of Australian Governments, op. cit., p. 8
38. The Treasury, *Incoming Government Brief - Red Book*, Part 3, revised, Canberra, Commonwealth of Australia, p 16, viewed 12 November 2010, http://www.treasury.gov.au/documents/1875/PDF/Red_Book_Part_3_Redacted_v2.pdf
39. See, for example, the Supplementary Submission from Australian Medical Association and the submission from Catholic Health Australia to the Senate *Inquiry into the National Health and Hospitals Network Bill 2010*.
40. The Independent Hospital Pricing Authority and the National Performance Authority will be established by amendments to the National Health and Hospitals Network Bill 2010, currently before the Senate. See p. 5 of the Explanatory Memorandum of the Bill.

Committee consideration

The Bill was referred to the Senate Economics Legislation Committee on 28 October 2010 for inquiry and report by 31 January 2011. Details of the inquiry are at http://www.aph.gov.au/Senate/committee/economics_ctte/health_finance_10/index.htm

In its report, the Scrutiny of Bills Committee made a number of observations about the Bill. Firstly, it expressed disappointment about the quality of the drafting of the Explanatory Memorandum and requested that the Minister publish a version with appropriate indexing and cross-referencing.[41] Secondly, it noted that the use of non disallowable legislative instruments was consistent with the *Legislative Instruments Act.*[42] Thirdly, it sought the Minister's advice on proposed section 15A and whether it could be subject to approvals through the standard appropriation process and therefore subject to Parliamentary scrutiny.[43]

At the time of writing, the Minister had not yet responded to the concerns raised by the Scrutiny of Bills Committee.

Administrative arrangements and response from state opposition parties

Like most COAG agreements on health, this Agreement was subject to intense negotiations. Although the participating States have agreed 'in principle' to the NHHN and associated changes to GST, it has been reported that not one state has formally signed the Agreement to change the funding arrangements.[44] The Premier of Victoria, Mr John Brumby, signed the National Partnership Agreements, a subset of the NHHN, prior to the state entering caretaker mode before the election, some six months after it was agreed at COAG.[45] The Ministerial Council for Federal Financial Relations website, National Partnership Agreement on Health, details the various agreements between the states and the Commonwealth.

All of the participating states have commenced consultation processes about the proposed boundaries for LHNs and/or Medicare Locals. Most states have introduced legislation to create LHNs.

41. Senate Standing Committee for the Scrutiny of Bills, *Alert Digest 9 of 2010,* 17 November 2010, p. 5, viewed 18 November 2010, http://www.aph.gov.au/Senate/committee/scrutiny/alerts/2010/d09.pdf
42. Ibid, p. 6
43. Ibid, p. 7
44. S Dunlevy and M Franklin, 'States have not signed off on GST handback', *The Australian,* 19 November 2010, p. 7, viewed 19 November 2010, http://parlinfo.aph.gov.au/parlInfo/download/media/pressclp/369772/upload_binary/369772.pdf;fileType=application%2Fpdf#search=%22health%20reform%22
45. S Maiden & M Rout, 'Brumby in 11th hour health deal', *The Australian,* 3 November 2010, p. 4, viewed 4 November 2010, http://parlinfo.aph.gov.au/parlInfo/download/media/pressclp/331609/upload_binary/331609.pdf;fileType=application/pdf#search=%22Brumby%20GST%20Health%20hospitals%22

The state Coalition parties have generally expressed scepticism about the merit of the proposed funding and organisational arrangements and have been critical of the lack of information especially with respect to the amount of GST that each state would have to yield to the Commonwealth. For example, the Queensland shadow health minister, Mr Mark McArdle, claimed that:

> … Queensland would be forced to hand over 42 per cent of its GST revenues, or $11.8 billion out of a total of $27.3 billion GST over three years, for Kevin Rudd's so-called health reforms, with no guarantee it would receive improved health services in return.
>
> Queensland will be handing over 42 per cent of its GST in 2012-2013 compared to 30 per cent for NSW and 24 per cent for Victoria ...[46]

The NSW shadow minister for health, Mrs Jillian Skinner, has stated that the NHHN Agreement would result in extra bureaucratic levels, lacks detail, and would result in a loss to NSW of $8 billion from the current health budget.[47]

In Victoria, the leader of the opposition, Mr Ted Baillieu, is reported as saying, on 3 November 2010, that the public does not know enough about the NHHN Agreement and that he wanted more details, while the shadow minister for health, Mr David Davis, is reported as saying that a coalition government would be committed to a better deal for Victoria.[48] More recently, Senator Cormann has noted that the opposition leaders in Victoria and New South Wales are opposed to the GST handover.[49] At the time of writing, the respective opposition leaders have not yet made a further statement.

Response in the Federal Parliament

The Coalition has indicated that it will oppose the Bill, saying that it is in breach of clause 44 of the 1999 GST Agreement.[50,51] The Shadow Health Minister, the Hon Peter Dutton, has been separately

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46. John-Paul Langbroek, 'Raw deal for Queensland in health budget', Leader of the Opposition, Queensland, website, viewed 16 November 2010, http://www.jplangbroek.com/raw-deal-for-queensland-in-health-budget/
47. J Skinner, 'Health funding', NSW legislative Assembly, *Urgency motion*, 12 May 2010, viewed 16 November 2010, http://www.parliament.nsw.gov.au/prod/parlment/hansart.nsf/V3Key/LA20100512024
48. K Hagan, 'Parties toe-to-toe on hospital beds', *The Age*, 16 November 2010, p. 5, viewed 16 November 2010, http://parlinfo/parlInfo/download/media/pressclp/362634/upload_binary/362634.pdf;fileType=application%2Fpdf#search=%22parties%20toe-to-toe%20on%20hospital%20beds%22
49. S Dunlevy, op. cit.
50. M Cormann (Shadow Assistant Treasurer), *Gillard GST grab a breach of contract*, media release, 18 November 2010, viewed 18 November 2010, http://www.mathiascormann.com.au/media/media_releases/2010.11.18%20-%20GST%20Take%20Over%20Plans.pdf and S Dunlevy, op. cit.
51. Although the 1999 GST Agreement has been superseded by the 2008 Agreement on Federal Financial Relations, the requirement for unanimity is identical. It states: *All questions arising in the Ministerial Council will be determined by unanimous agreement unless otherwise specified in this Agreement*. See clause A6, Schedule A - Intergovernmental Agreement Federal Financial Relations

reported as describing the NHHN Agreement as a "sham reform".[52] Passage of the Bill in the House of Representatives will be subject to the support of the Independents.[53] The Independent for Lyne, Mr Rob Oakeshott, has previously indicated his support for the Government's health reform proposals and urged both 'bipartisan and multipartisan support'.[54] At the time of writing, the position of the remaining Independents was not known.

Both Senator Nick Xenophon and Senator Steve Fielding supported the Coalition's motion in the Senate seeking legal advice on whether the GST clawback breached the 1999 Agreement.[55] They have also been reported as having 'in principle objections' to this Bill.[56] The Greens support the proposed health reforms in principle but have concerns about the lack of integration between primary care and LHNs and the failure to address aged care reform.[57]

Position of major interest groups

Although stakeholders have expressed some misgivings about the proposed NHHN, most have indicated their willingness to work constructively with Government in the implementation.[58] There has been widespread stakeholder interest and comment in response to the Government's consultation papers on various aspects of reform, for example, the recent consultation on the proposed arrangements for Medicare Locals and the Senate Inquiry into the National Health and Hospitals Network Bill 2010 (the establishment of the Australian Commission on Safety and Quality in Health Care).[59]

At the time of writing, submissions to the Senate Inquiry into this Bill have not yet been received. It is likely that the proposed financing arrangements will generate commentary from both academia and stakeholder groups. Professor John Deeble, one of the architects of Medicare, has argued that the financing arrangements of the NHHN 'should terrify any Commonwealth treasurer' as they are a

52. P Jean, 'Govt to test opposition, independents on health', *Canberra Times*, 26 October 2010, p. 4, viewed 16 November 2010, http://parlinfo/parlInfo/download/media/pressclp/313358/upload_binary/313358.pdf;fileType=application%2Fpdf#search=%22dutton%20GST%22
53. S Dunlevy and M Franklin, op. cit.
54. R Oakeshott, Bipartisan support needed on health reform, *media release,* 27 October 2010, viewed 17 November 2010, http://roboakeshott.com/system/files/2010_10_27_health_reform.pdf
55. S Dunlevy, op. cit.
56. P Coorey, 'Crunch time for health, broadband', *Sydney Morning Herald,* 19 November 2011, viewed 19 November 2010, http://parlinfo/parlInfo/download/media/pressclp/371201/upload_binary/371201.pdf;fileType=application%2Fpdf#search=%22coorey%22
57. S Dunlevy, op. cit.
58. See, for example, statements from Catholic Health Australia, Australian Health and Hospitals Association, the Australian Medical Association as well as submissions to various Senate Inquires.
59. See, for example, the submissions to the Senate *Inquiry into the National Health and Hospitals Network Bill 2010*.

'scatter gun approach that encourages more of everything'.[60] He also suggested that the $15 billion top-up payment is not additional expenditure, as it would have been incurred by the Commonwealth under the existing National Healthcare Agreement to account for growth in healthcare costs during the Agreement.[61] This Bill is also likely to generate renewed interest in the long standing debate about the merits of a single funder for the provision of health care and alternative health financing models.[62]

Financial implications

The Commonwealth has accepted responsibility to be the dominant funder for health care in Australia. As yet, the precise total of the commitment is unknown as funding for public hospitals is demand driven and based on the number of services provided.[63] However, the Commonwealth will be funding 60 per cent of hospital services provided by the states, including capital. It also has funding and policy responsibility for primary care and aged care (except for HACC in Victoria). In addition, the Commonwealth has committed up to $15.6 billion in top-up payments for the states.[64]

Some of these measures are budget neutral as while the Commonwealth has assumed some additional functions, its additional expenditure will be offset by the diversion of GST revenue from the states.

The 2010-11 Mid-Year Economic and Fiscal Outlook also provides an indication of the GST to be retained for health expenditure by the Commonwealth from each of the states.[65] The table below shows the proportion of GST to be dedicated to health. Although the contributions from each state vary, the total average is less than a third. See table on following page.

60. J Deeble, Health benefit lost in smoke and mirrors, *The Age,* 14 April 2010, p. 19, viewed 16 November 2010, http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;adv=yes;orderBy=customrank;page=0;query=Author%3Adeeble%20Date%3A14%2F04%2F2010%20Dataset%3Apressclp;rec=1;resCount=Default
61. Ibid.
62. See, A Boxall and L Buckmaster, *Options for reforming Australia's health care system*, Background note, Parliamentary Library, Canberra, 16 February 2009, viewed 16 October 2010, http://www.aph.gov.au/Library/pubs/BN/2008-09/HealthReform.htm#_Toc222297149
63. The Commonwealth will be paying for 60 per cent of the efficient price for hospital services – at best the total number of services will be an estimate. See also Explanatory Memorandum, op. cit., p. 6.
64. Explanatory Memorandum, op. cit., p. 6.
65. Mid Year Economic and Fiscal Outlook, op. cit., pp. 70-85

Table: Total GST and dedicated GST ($ millions)

Year/state		NSW	Vic	Qld	WA	SA	Tas	ACT	NT	Total
2010-11	Total GST	14,468	10,977	8,711	3,314	4,427	1,723	868	2,462	46,950
2011-12	Total GST	15,810	11,697	8,853	3,452	4,724	1,821	917	2,726	50,000
	GST dedicated to health	4,774	2,874	3,549	0	1,229	367	456	388	13,636
	Dedicated GST as share of total (%)	**30**	**25**	**40**	**0**	**26**	**20**	**50**	**14**	**27**
2012-13	Total GST	16,847	12,663	9,048	3,651	4,979	1,937	1,000	2,876	53,000
	GST dedicated to health	5,178	3,130	3,880	0	1,330	397	496	424	14,833
	Dedicated GST as share of total (%)	**31**	**25**	**43**	**0**	**27**	**20**	**50**	**15**	**28**
2013-14	Total GST	17,817	13,413	9,702	3,977	5,217	2,006	1,045	2,972	56,150
	GST dedicated to health	5,599	3,398	4,229	0	1,434	427	537	462	16,086
	Dedicated GST as share of total (%)	**31**	**25**	**44**	**0**	**27**	**21**	**51**	**16**	**29**

Source: Mid-year economic and fiscal outlook 2010-11, pp. 113 -114.

Standing appropriation

The Bill is a standing appropriation. This was noted by the Scrutiny of Bills committee:[66]

> The proposed section 15A establishes the NHHN Fund to facilitate the payment of dedicated GST revenue, special payments and top-up payments under the *Federal Financial Relations Act*. The section specifies that the Fund will be a Special Account for the purposes of section 21 of the *Financial Management and Accountability Act* 1997. This means that, by virtue of section 21 of the *Financial Management and Accountability Act 1997*, the consolidated revenue fund is appropriated for these purposes. This proposed new section is, therefore, establishing a standing appropriation.

66. Senate Standing Committee for the Scrutiny of Bills, op. cit., p. 7

Key provisions

Schedule 1—Amendments

Schedule 1 of the Federal Financial Relations Amendment (National Health and Hospitals Network) Bill 2010 (the Bill) amends the *Federal Financial Relations Act 2009* (FFR Act). Section 4 of the FFR Act contains definitions. **Items 1** to **14** of **Schedule 1** insert new definitions or amend existing definitions.

Item 1 inserts 'untied' before the words 'GST revenue grants' in paragraph 3(a) of the FFR Act.

Note: this amendment is necessary because GST revenue will have two components:

- the tied component which the Commonwealth will use to fund health expenditure (the Bill uses the term 'dedicated' to refer to the tied component), and
- the untied component, that is, the GST that the states can spend as they wish.

In other words, only part of participating states' GST will be untied while all of non-participating states' GST will be untied.

Item 2 inserts **proposed paragraph 3(ba)** which is National Health and Hospitals Network payments. **Note**: they are a new form of assistance under the Bill.

Item 6 defines 'joint intergovernmental funding authority'. These authorities are bodies corporate that the states will establish. NHHN funding for hospitals will be paid from the NHHN fund to local hospital networks through these authorities. They are referred to in Provision 8A of the Agreement as a 'Funding Authority' for each state.

Item 7 defines 'local hospital network' as a body corporate that the states will establish.

Item 9 defines 'National Health and Hospitals Network Fund' (NHHN Fund) to mean the fund that **proposed section 15A** establishes.

Note: this is the fund into which Commonwealth will pay money for the National Health and Hospitals Network.

Item 10 inserts a definition of 'national health and hospitals network matter'. These are the activities to which the Commonwealth will contribute funding. They are:

(a) the provision of public hospital services to public patients, or

(b) training in public hospitals, or

(c) research in public hospitals, or

(d) general practitioner medical services, or

(e) primary health care services, or

(f) primary health care equivalent outpatient services or

(g) a matter that:

(i) relates to health care, and

ii) is specified in the regulations.

Item 11 defines a 'non-participating NHHN State' to mean**,** in relation to a financial year, a state that is not a participating NHHN state in relation to the financial year.

Item 12 defines a 'participating NHHN State' to be, in relation to a financial year, a state that is a party to the NHHN Agreement at the start of the financial year.

Item 14 elaborates on the term 'primary health care equivalent outpatient services' used in **item 10** to mean an outpatient service that is provided in a public hospital and is of a kind to be specified by regulation.

Item 15 inserts **proposed section 4A**, which deals with the distribution of GST revenue. It provides that the Parliament acknowledges that the Commonwealth will not seek to amend the following provisions:

- Division 1 of Part 2 (which deals with untied GST revenue grants), and
- Division 2 of Part3A (which deals with dedicated GST revenue payments).

Note: see the comments on **item 15** in the conclusions at the end of this Bills Digest.

Item 17 repeals and inserts **proposed section 5** which contains the formulae to be used to calculate untied GST revenue grants entitlements. **Proposed section 5** distinguishes between participating and non-participating states: **proposed subsection 5(2)** deals with participating states and **proposed subsection 5(3)** with non-participating states. The difference is that participating states will receive, as untied GST grants, their full GST entitlement less the amount dedicated (tied) to health funding, while non-participating states will continue to receive their full GST entitlements.

Item 18 inserts **proposed section 6A** which deals with participating states dedicated GST amounts. This proposed section:

- empowers the Minister to determine that a specified amount is the dedicated GST revenue for a state (**proposed subsection 6A(2)**)
- provides that the state must be a participating state (**proposed subsection 6A(3)**), and
- that the determination is a legislative instrument that is not disallowable under the *Legislative Instruments Act 2003* (the *Legislative Instruments Act*) (**proposed subsection 6A(4)**).

Note that from 2011–12 to 2013–14, the final amounts of dedicated GST will be determined annually, in consultation with the states, on the basis of actual expenditure.[67] In 2014–15, the amount of GST will be fixed, based on 2013–14 costs, and indexed at the rate of overall GST growth.

Section 10 of the FFR Act deals with the national healthcare SPP. **Item 19** repeals section 10 because under the new arrangements, for participating states, special payments will replace the national healthcare SPP.

67. Australian Government, 'Part 2: Payments for specific purposes', *Australia's federal relations: budget paper no. 3: 2009–10*, Commonwealth of Australia, Canberra, 2010, p. 31, viewed 3 November 2010, http://www.budget.gov.au/2009-10/content/bp3/html/index.htm

Item 20 inserts a **proposed section 10A**, which deals with payments to non-participating states of health care assistance in the form of SPPs. **Proposed section 10A**:

- authorises the payments of such SPPs (**proposed subsection 10A(1)**)
- provides that the states must be non-participating states (**proposed subsection 10A(2)**)
- provides that the total amount of assistance payable under subsection 1 must equal the total of assistance available for payment to non-participating states (**proposed subsection 10A(3)**)
- empowers the Minister, to determine, by legislative instrument, the manner in which the total amount of assistance payable to non-participating states will be divided among those states (**proposed subsection 10A(4)**), and
- provides that assistance is payable on condition that the non-participating states spend the money on health care (**proposed subsection 10A(5)**).

Note: two points about **proposed section 10A** are noteworthy. First, it does not contain any criteria that the Minister must use in determining the division of assistance among non-participating states. Second, it is presumed that this legislative instrument is disallowable. In the absence of any specific statement that an instrument is not disallowable the *Legislative Instruments Act* will apply. This is in contrast to other legislative instruments in the Bill which expressly state that they are not disallowable and is addressed in the Scrutiny of Bills Alert Digest (see footnote 41).

Item 21 constitutes the bulk of the Bill. **Item 21** inserts **proposed Part 3A—National Health and Hospitals Network payments etc**. It contains five Divisions:

- **Division 1—National Health and Hospitals Network Fund**
- **Division 2—Dedicated GST revenue payments**
- **Division 3—Special payments etc.**
- **Division 4—Top-up payments**, and
- **Division 5—Indirect spending of grants**.

Division 1—National Health and Hospitals Network Fund

Division 1 deals with the establishment of the National Health and Hospitals Network Fund. As noted above, the Commonwealth will pay into (credit) the National Health and Hospitals Network Fund special payments, dedicated GST amounts, and top-up payments. The Commonwealth will pay (debit) from the National Health and Hospitals Network Fund:

- payments for the National Health and Hospital Network
  - payments to Local Hospital Networks for public hospital services which will be channelled through Joint Intergovernmental Funding Authorities (together with state government contributions)
- payments for other services including research and training delivered in public hospitals, block funding for agreed services, community service obligations for small regional and rural hospitals, and funding for major public hospital capital investment.

Proposed subsection 15A(1) establishes the National Health and Hospitals Network Fund. **Proposed subsection 15A(2)** establishes the National Health and Hospitals Network Fund as a special account. Note: the establishment of special accounts is standard procedure in similar instances.

Proposed section 15B deals with the crediting of amounts to the National Health and Hospitals Network Fund. **Proposed subsection 15B(1)** empowers the Minister to determine, in writing, that a specified amount is to be credited to the National Health and Hospitals Network Fund on a specified day (**proposed paragraph 15B(1)(a)**) or a specified amount is to be credited in specified instalments on specified days (**proposed paragraph 15B(1)(b)**). **Proposed subsection 15B(2)** provides that the determination is a legislative instrument but that it is not disallowable under the *Legislative Instruments Act 2003*.

Proposed section 15C states that the purpose of the National Health and Hospitals Network Fund is the making of payments of grants under **proposed sections 15D**, **15E** and **15H**. (These sections are dedicated GST revenue, special payments, and top-up payments respectively).

Division 2—Dedicated GST revenue payments

The provisions in **Division 2** are largely identical with the provisions in **Division 3—Special payments etc.** and **Division 4—Top-up payments**. The following reviews the provisions in **Division 2** and focuses on where these provisions differ from those in **Divisions 3** and **4**.

The provisions in **Divisions 2**, **3** and **4** fall into three categories:

- grants
- conditions, and
- legislative instruments.

Proposed subsections 15D(1) to **15D(4)** deal with grants.

Proposed subsection 15D(1) provides that the Minister may determine that a specified amount is payable to a state, as a grant of financial assistance, for the financial year starting on 1 July 2011 (**proposed paragraph 15D(1)(a)**) or a later financial year (**proposed paragraph 15D(1)(b)**).

Proposed subsection 15D(2) provides that the Minister may determine that a specified amount is payable to a joint intergovernmental funding authority, by way of a grant, for the financial year starting on 1 July 2011 (**proposed paragraph 15D(2)(a)**) or a later financial year (**proposed paragraph 15D(2)(b)**).

Proposed subsection 15D(3) provides that the Minister can make determinations under **proposed subsections 15D(1)** or **15D(2)** only if the state is a participating state.

Proposed subsection 15D(4) provides that the Minister must ensure that the total amount of grants payable under subsection (1) (**proposed paragraph 15D(4)(a)**) and subsection (2) (**proposed paragraph 15D(4)(b)**) for a financial year is equal to the dedicated GST revenue for the state for the financial year.

Proposed subsections 15D(5) to **15D(8)** deal with conditions.

Proposed subsection 15D(5) empowers the Minister to pay a grant under conditions specified in a written determination that the Minister has made.

Proposed subsection 15D(6) provides that at least one of the conditions specified under subsection (5) must require the grant to be spent on one or more specified National Health and Hospitals Network matters.

Proposed subsection 15D(7) deals with the funding of capital expenditure. It provides that if the Minister is satisfied that particular costs are capital expenditure for public hospitals and/or primary health care facilities (**proposed paragraph 15D(7)(a)**) and the capital expenditure has already been incurred (**proposed paragraph 15D(7)(b)**), the Minister may determine that a grant be paid to reimburse those costs.

Proposed subsection 15(D8) avoids duplication of payments by providing that subsection (6) does not apply to a grant specified in a determination that is already in force under subsection (7).

Proposed subsections 15D(9) and **15D(10)** deal with legislative instruments.

Proposed subsection 15D(9) provides that a determination made under subsection (1) or subsection (2) is a legislative instrument but that section 42 (disallowance) of the *Legislative Instruments Act 2003* does not apply to the determination. Determinations made under subsections (5) or (7) are not legislative instruments (**proposed subsection 15D(10)**).

Division 3—Special payments et cetera

Participating states will receive special payments while non-participating states will continue to receive the national healthcare SPP. The total amount payable under **Division 3** is the sum of these two amounts. **Proposed subsection 15F(3)** requires the Minister to determine the amount attributable to participating states, the balance being attributable to non-participating states. The Explanatory Memorandum contains the following explanation:

> Special payments for participating NHHN States
>
> 1.28 From 1 July 2011, the National Healthcare SPPs will be replaced with Special payments for each State participating in the NHHN Agreement and will be paid through a new NHHN Fund. ***[subsections 15E(1) and 15E(2) and section 15B]***
>
> 1.29 The Minister will determine the amounts of the Special payment to be paid through the NHHN Fund to each State and the amounts to be paid through the NHHN Fund to a joint intergovernmental funding authority for each State for a financial year. ***[subsections 15E(1) and 15E(2)]***
>
> 1.30 To provide clarity, section 15E allows the Minister to make multiple determinations and grants. ***[subsections 15E(1) and 15E(2)]***
>
> 1.31 The base funding for the Special payments in a financial year will be the component of total funding for Special payments and Healthcare SPPs payable under subsection 15F(3) attributed to participating NHHN States (the participating NHHN States component). ***[subsections 15E(4) and 15F(3)]***

> · If all States are participating NHHN States, the base funding is the total funding payable under subsection 15F(3). ***[subsection 15E(4) and section 15G]***
>
> 1.32 The total base funding for participating NHHN States can be increased or decreased by the Minister for a financial year based on the total of the adjustments made for each State (State adjustment amounts). ***[subsection 15E(4) and section 15G]***.[68]

Proposed section 15E(4) contains the formula for determining the total special payments payable to the states and to the joint intergovernmental funding authorities. The formula is:

$$\text{Applicable gross amount} + \text{Total positive State adjustment amount} - \text{Total negative State adjustment amount}$$

The applicable gross amount means:

- the participating states component where there are one or more non-participating states, or
- otherwise, the total amount under subsection 15F(1) for the financial year.

Total negative state adjustment amount is defined as the total of any negative state adjustment amounts determined under subsection 15G(2) for the financial year.
Total positive state adjustment amount means the total of any positive state adjustment amounts determined under subsection 15G(1) for the financial year.

Proposed section 15F deals with the total amount payable. The Explanatory Memorandum explains the provisions of this section as follows:

> Funding for Special payments
>
> 1.24 From 1 July 2011, the amendments provide for the Commonwealth to make ongoing financial contributions with either a:
>
> · Special payment (for States participating in the NHHN Agreement); or
>
> · Healthcare SPP (for States not participating in the NHHN Agreement).
>
> 1.25 The amendments ensure total funding for these new payments will be equivalent to the financial assistance States would have received under the existing National Healthcare SPP arrangements in 2011-12, and will be indexed annually by a growth factor determined by the Minister for later financial years. ***[subsections 15F(1), 15F(2) and 15F(4)]***
>
> · The Minister will determine the indexation arrangements by legislative instrument that will be registered on the Federal Register of Legislative Instruments. ***[subsection 15F(2)]***
>
> · The Intergovernmental Agreement provides that the National Healthcare SPP will be indexed by a growth factor that will be the product of: a health specific cost index; growth in population estimates weighted for hospital utilisation; and a technology factor.
>
> 1.26 The Minister will determine by legislative instrument the share of payments that will be paid: ***[subsection 15F(3)]***:
>
> · for States participating in the NHHN Agreement (as Special payments); and

68. Explanatory Memorandum p. 14.

- for States not participating in the NHHN Agreement (as Healthcare SPPs);
  - The Minister's determination will be made on the same basis as the current National Healthcare SPP.[69]

Proposed section 15G deals with the state adjustment amounts referred to in **proposed subsection 15E(4)**. **Proposed section 15G** empowers the Minister to determine that, for a specified state for a specified financial year, a specified amount is a positive state adjustment amount (**proposed subsection 15G(1)**) or a negative state adjustment amount (**proposed subsection 15G(2)**). A determination under subsection (1) or (2) is a legislative instrument, but section 42 (disallowance) of the *Legislative Instruments Act 2003* does not apply to the determination (**proposed subsection 15G(3)**).

Division 4—Top-up payments

Proposed section 15H deals with top-up payments, which begin on 1 July 2014.

Note: Presumably the value of the payments will be in 2010-11 dollars, not 2014-15 dollars, as the amount is to be legislated in 2010-11.

Proposed subsection 15H(1) provides that the Minister may determine that a specified amount is payable to a state, by a grant of financial assistance, for the financial year starting on 1 July 2014 (**proposed paragraph 15H(1)(a)**) or a later financial year (**proposed paragraph 15H(1)(b)**).

Proposed subsection 15H(2) provides that the Minister may determine that a specified amount is payable to a joint intergovernmental funding authority for a state, by way of a grant, for the financial year starting on 1 July 2014 (**proposed paragraph 15H(2)(a)**) or a later financial year (**proposed paragraph 15H(2)(b)**).

Proposed subsection 15H(4) provides that the Minister must ensure that, for the period 1 July 2004 to 30 June 2020, the total of all grants paid to the states and funding authorities must be at least $15.6 billion (**proposed paragraph 15H(4)(e)**) or a lower amount where that lower amount is specified in a determination under subsection (5) (**proposed paragraph 15H(4)(f)**).

Note: if the amount required to fund the Commonwealth's hospital and primary care commitments is less than $15.6 billion, the residual amount will be paid to the states to fund any health services that will assist in ameliorating the growth in demand for public hospital services.[70]

Proposed subsection 15H(5) provides that the Minister may determine a specified amount for the purposes of **paragraph 15H(4)(f)**).

69. Explanatory Memorandum, op. cit., pp. 12-13.
70. Australian Government, 'Part 2: Payments for specific purposes', *Australia's federal relations: budget paper no. 3: 2009–10*, Commonwealth of Australia, Canberra, 2010, p. 30, viewed 11 November 2010, http://www.budget.gov.au/2009-10/content/bp3/html/index.htm

Proposed subsection 15H(6) provides that the Minister must not make an instrument under subsection (5) unless there is at least one non-participating NHHN state in relation to any of the financial years for the period beginning 1 July 2014 to 30 June 2020.

Note: the amount of $15.6 billion was premised on all the states signing the NHHN Agreement. But because WA has not signed the NHHN Agreement, the amount may be less than $15.6 billion. It is not clear whether WA will receive additional funding to account for increases in costs through other mechanisms.

General drawing rights limits are a mechanism for limiting spending under certain Acts, notably annual Appropriation Acts. They do not appropriate money. **Proposed subsection 15H(7)** provides that if an Appropriation Act declares that a specified amount is the general drawing rights limit for the purposes of this section, the total amount covered by drawing rights authorising debits from the National Health and Hospitals Network Fund, must not exceed that general drawing rights limit.

However, if an Appropriation Act does not declare that a specified amount is the general drawing rights limit, drawing rights must not be issued authorising payments from the National Health and Hospitals Network Fund for the purposes of paying grants under subsections(1) or (2) for the financial year (**proposed subsection 15H(8)**).

The purpose of the provisions in **proposed subsections 15H(7)** and **15(H)(8)** is to limit top-up payments, and according to the Explanatory Memorandum:

> *Top-up payments*
>
> 1.54 In addition to section 21A and section 21B, the exemption from disallowance for Top-up payments reflects that the maximum amount of Top-up payments for a financial year is linked to the annual Appropriation Acts, which are subject to Parliamentary scrutiny. **[subsections 15H(7) and 15H(8)]**
>
> · Subsection 15H(7) provides for the annual Appropriation Acts to declare that a specified amount is the general drawing rights limit in relation to a particular financial year.
>
> · The general drawing rights limit will operate by restricting the total amount that may be covered by drawing rights under the Financial Management and Accountability Act 1997, and hence, the amount of Top-up payments that can be paid out from the NHHN Fund in a financial year to States and joint intergovernmental funding authorities for States.[71]

Division 5—Indirect spending of grants

The effect of **proposed section 15J** is that, where the Commonwealth pays a grant to a joint intergovernmental authority (State Funding Authority) which passes the money to an LHN and the LHN in turn (a) spends the money or (b) passes the money to a body corporate (or bodies corporate) which spends the money, then the expenditure of the money by the local hospital network or the body corporate (or bodies corporate) is considered to be spent on NHHN matters, in the circumstances that this was a condition of the grant.

71. Explanatory Memorandum, op. cit., p. 18.

Proposed section 15J provides that where the Commonwealth has paid a grant to a joint intergovernmental authority, the money held by the authority is not considered to be public money. Similarly, where the authority has forwarded all or part of the money to an LHN, the money held by that network is not considered to be public money.

Item 23 adds two provisions. **Proposed subsection 17(2)** empowers the Minister to make advances to a state. Similarly, **proposed subsection 17(3)** empowers the Minister to make advances to a joint intergovernmental funding authority.

Item 24 permits the recovery of overpayments and the topping up of underpayments to the states and joint intergovernmental authorities. **Proposed sections 18(3)** and **18(5)** provide for the recovery of overpayments to states and joint intergovernmental authorities respectively, while **proposed sections 18(4)** and **18(6)** deal with underpayments to the states and joint intergovernmental authorities respectively.

Item 26 empowers the Minister to determine the timing of payments and payments in the form of instalments. **Proposed subsection 19(1A)** deal with payments to the states and **proposed section 19(1B)** with payments to joint intergovernmental funding authorities.

The intent of **item 28** is that where a joint intergovernmental funding authority has not complied with a condition attached to the payment of a grant, the authority must repay the grant if the Minister so determines (**proposed subsection 20(6)**). The method of repayment is a deduction from any money owing to the authority (**proposed subsection 20(9)**).

Item 30 inserts **proposed section 21A**. This provides that when the Minister makes a determination dealing with the dedicated GST for a state or payments to the NHHN fund, the Minister must take into consideration the NHHN Agreement and the Intergovernmental Agreement on Federal Financial Relations. Further, if the determination relates to a particular state or the joint intergovernmental funding authority for a particular state, the Minister must have regard to any other relevant written agreement between the Commonwealth and that state.

Item 30 also inserts **proposed section 21B** which deals with procedures for making determinations that are inconsistent with the NHHN Agreement. This section applies when the determination would result in a substantial financial detriment to one or more of the participating states (**proposed paragraph 21B(1)(d)**. **Proposed subsection 21B(2)** contains the events that must precede the Minister making an inconsistent determination. They are:

- the Minister must give a copy of the proposed determination to the Premier of each state that is a party to the NHHN Agreement (**proposed paragraph 21B(2)(a)**) and
- COAG must have agreed to the making of the determination (**proposed paragraph 21B(2)(b)**) and either:
  - a copy of the proposed determination was given under paragraph (a) at least three months before COAG gave its agreement under paragraph (b) (**proposed subparagraph 21B(2)(c)(i)**) or
  - COAG has agreed to waive the requirement set out in subparagraph (i) (**proposed subparagraph 21B(2)(c)(ii)**) and

- the Minister has tabled a copy of the proposed determination in each House of the Parliament (**proposed paragraph 21B(2)(d)**) and
- each House of the Parliament has passed a resolution approving the making of the determination (**proposed paragraph 21B(2)(e)**).

Note: proposed 21B(2)(e) provides that both Houses of Parliament must approve a Ministerial determination. This is an unusual departure from the usual process of either House being able to disallow a determination. In explaining this process, the Explanatory Statement states:

> The procedure in section 21B is a sign of good faith on behalf of the Commonwealth to the States in regard to the NHHN Agreement. As a result, it is intended to be a high threshold in relation to what is a substantial financial determinate to one or more States. It is intended that this threshold would only be met in exceptional circumstances.[72]

With respect to COAG's role, **proposed subsection 21B(3)** provides that COAG must approve the proposed determination by resolution. Further, the Premier of any state that is not a party to the NHHN Agreement cannot vote on the resolution (**proposed subsection 21B(4)**).

Proposed section 21C deals with the procedures for making determinations that would result in a substantial financial detriment to a non-participating state.

Proposed subsection 21C(1) sets out the scope of **proposed section 21C**. It applies to:

- a determination under subsection 10A(4) (that is, payments of health SPPs to non-participating states) (**proposed paragraph 21C(1)(a)**) or
- a determination under subsection 15F(2) (that is, the way in which the total of grants will be indexed) (**proposed paragraph 21C(1)(b)**) or
- a determination under subsection 15F(3) (that is, in relation to a financial year) (**proposed paragraph 21C(1)(c)**) if:
  - the determination is inconsistent with the Intergovernmental Agreement (**proposed paragraph 21C(1)(d)**) and
  - the inconsistency would result in substantial financial detriment to a non-participating state (**proposed paragraph 21C(1)(e)**).

Proposed subsection 21C(2) contains the procedures for making determinations. The Minister must not make the determination unless:

- the Minister has given a copy of the proposed determination to the Premier of the state (**proposed paragraph 21C(2)(a)**) and
- the Premier of the State has agreed, in writing, to the making of the determination (**proposed paragraph 21C(2)(b)**) and either

72. Explanatory Memorandum, paragraph 2.37, p. 28. For a previous provision to this effect, see Scrutiny of Bills Committee Report on the Education Services for Overseas Students (Registration Charges) Amendment Bill 2000, 17th Report, 29 November 2000, pp. 526-527

- a copy of the proposed determination was given under paragraph (a) at least three months before the Premier of the State gave his or her agreement under paragraph (b) (**proposed subparagraph 21C(2)(c)(i)**) or
- the Premier of the State has agreed, in writing, to waive the requirement set out in subparagraph (i) (**proposed subparagraph 21C(2)(c)(ii)**) and

- the Minister has tabled a copy of the proposed determination in each House of the Parliament (**proposed paragraph 21C(2)(d)**) and
- each House of the Parliament has passed a resolution approving the making of the determination (**proposed paragraph 21C(2)(e)**).

Drafting concerns and outstanding matters

According to the Explanatory Memorandum, the purpose of **proposed section 4A** is to provide certainty about future funding arrangements.[73] However, this should be seen as a statement of intent. The provision has no legally binding force because a parliament cannot bind a future parliament. It is likely that that debates about health funding arrangements will remain an ongoing issue. Section 1.3 of *A New Tax System (Goods and Services) Act 1999* contained a similar provision.

It is unclear how **proposed section 15E(4)** and the related **proposed section 15G**—which relate to special payments—meet their objectives as stated in the Explanatory Memorandum. The drafting of these provisions—especially **proposed section 15E(4)**—is unclear. At a minimum, the definitions of total negative state adjustment amount and total positive state adjustment amount are almost tautological and require clarification.

Proposed section 21B allows the making of determinations that are inconsistent with the NHHN Agreement. This raises several questions which are not clarified by the Explanatory Memorandum. First, **proposed section 21B** seems to contradict **proposed section 4A** whose supposed aim is to provide certainty. Further, **proposed section 21B** does not define 'substantial financial detriment to one or more States' nor does it mention who would be responsible for deciding that a substantial financial detriment would exist. On the other hand, it could be argued that **proposed section 21B** provides flexibility and that the safeguards (for example, that a COAG approval and decision must be tabled in parliament) are adequate to prevent any potential abuse of the **proposed section 21B**. Furthermore, if the Minister/Government wanted to build a health facility, for example a hospital, in a non-NHHN state under this legislation, it is not clear what the process would be.

The Bill leaves several matters outstanding. For example, the Explanatory Memorandum notes that:

> The extent of expenditure covered under the Commonwealth's new funding commitments will be finalised with participating States as part of the implementation of the NHHN reforms. This is not covered in the amendments to the FFR Act.

73. Explanatory Memorandum, op. cit., p. 11.

This contains the potential for further conflict over cost shifting. It can be expected that the Commonwealth and the states will all try to define expenditure in a way that best suits their particular interests. As noted previously, the Bill is silent on the proposed governance arrangements and the links between the various governance authorities established under the NHHN. It is possible, however, that these concerns may be addressed when amendments to the National Health and Hospitals Network Bill to establish the IHPA and NPA are introduced.[74]

Concluding comments

There has long been debate about the benefits of federalism and the provision of health care. It could be argued that the NHHN Agreement is yet another nail in the federalism coffin. The trend since Federation has been for the Commonwealth government to acquire more and more financial power, to the detriment of the states, and for the Commonwealth to use this power to become increasingly involved in areas traditionally the preserve of the states such as health and education.[75] The 'dedication' of part of the GST to fund health expenditure is symptomatic of this trend and can be considered nothing more than another specific purpose payment. However, the states are not being coerced to participate in this Agreement as illustrated by WA's non-participation.

The impact of the NHHN Agreement is twofold with respect to the ability of the states to spend revenue, including from the GST, as they wish. On the one hand, the dedication of part of GST revenue to health reduces the amount of GST that participating states can spend as they wish. On the other hand, the Commonwealth's assumption of additional funding responsibilities will allow the states to divert funds which the states would previously have spent on health, to spending on other purposes, such as education or public transport.

Despite assertions that the proposed health reform package would 'end the blame game', there is still scope for cost-shifting and disagreement about the adequacy of funding. In many respects, little has changed: the majority of funding for public hospitals remains the responsibility of the Commonwealth and service delivery and policy for public hospitals remains the responsibility of the states, further entrenching the existing dichotomy. Participating states may use the NHHN Agreement to shift costs and responsibility onto the Commonwealth. Some States may use the assumption by the Commonwealth of additional responsibility for health funding as an opportunity to reduce their own health expenditures, and to shift more responsibility from themselves to the Commonwealth for health system failures.

Further, while the Commonwealth and the states continue to share responsibility for funding health expenditures, the 'blame game' over responsibility for errors and inefficiencies is unlikely to cease. **Proposed subsection 15D(7)** allows the Commonwealth to fund 60 per cent of public hospital capital

74. These amendments may only be introduced sometime after the Bill potentially passes Parliament.
75. For a discussion, see D James, *Federal-state financial relations: the Deakin prophesy*, Research paper, no. 17, 1999–2000, Parliamentary Library, Canberra, 2000, viewed 15 November 2010, http://www.aph.gov.au/library/pubs/rp/1999-2000/2000rp17.pdf

expenditure. This could be a double-edged sword. On the one hand, this provides scope for the states to acquire new equipment that they might otherwise not be able to obtain, provided they have the resources to do so. On the other hand, the knowledge that the Commonwealth will fund the bulk of capital expenditure carries the risk that the states will be tempted to 'gold plate' some purchases.

The mere substitution of Commonwealth funding for state funding cannot by itself guarantee improved services. It remains to be seen whether the proposed efficient funding of hospital services will improve productivity in the delivery of hospital services or reduce elective surgery waiting lists. It could also be argued that there is little in this Bill, and the NHHN more broadly, to advance equity and access to hospitals or reduce the concentration of hospitals in metropolitan areas. There have also been criticisms that this funding approach does little to encourage prevention and other less costly approaches such as hospital in the home or outreach services to prevent hospitalisation.[76]

The so-called top-up payments seem to be rather paltry. The legislation provides for $15.6 billion over six years with the possibility of the overall amount being reduced, as WA has not yet signed the Agreement. On the best case scenario, $15.6 billion will be distributed among seven states, over six years which would be a small proportion of the overall health budget. The Minister notes that the top-up payments are designed to cover the increase in health costs of 10 per cent per annum currently and projected to be eight per cent in the medium term. It is possible that the top-up payment will fall short of what the Minister has predicted if health costs grow faster than expected.

Moreover, it is uncertain whether the proposed arrangements for dedicated GST will prove adequate. As noted above, the amount of dedicated GST will be fixed from 2014-15, based on 2013–14 costs, and indexed at the rate of overall GST growth. However, if health costs outstrip the GST growth rate, the amount of dedicated GST beyond 2014–15, is likely to be insufficient. This could lead to pressure for the Commonwealth to devote an ever-increasing proportion of GST to fund health expenditures.

Although conditions have been placed on the participating states on how this funding is to be spent (see **proposed section 15D, 15E, 15H**), the accountability mechanisms for this expenditure are not included in this legislation. It appears that accountability for expenditure is through reporting to the COAG Reform Council, rather than the Parliament. This may limit the extent to which the states, and the Commonwealth, can be held accountable for health expenditure.

Many of the participating states are facing elections in the short to medium term. As highlighted previously, it is not clear if the state opposition parties will honour the Agreement. Election outcomes aside, the legislation is not clear on what the arrangements, for either health funding or GST arrangements, might be should a state choose to no longer be part of the NHHN.

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76. I A Scott, *Operating hospitals differently*, *Presentation to the AHHA-AIHPS Congress 2010,* Adelaide, 23 September 2010, viewed 16 November 2010, http://www.aushealthcare.com.au/publications/publication_details.asp?sr=0&pid=308

This Bill changes the GST arrangements for the states, alters the funding arrangements for public hospitals and transfers the responsibility for aged and primary care services back to the Commonwealth. Given the uncertainties about the total cost of reform, it remains unclear whether the Commonwealth's commitment will be sufficient for the Commonwealth to maintain its promise of being the 'dominant funder' for healthcare, both now and into the future.

Members, Senators and Parliamentary staff can obtain further information from the Parliamentary Library on (02) 6277 2503 and (02) 6277 2464.