Medical Indemnity (Prudential Supervision and Product Standards) Act 2003

No. 37, 2003

An Act to make provision in relation to medical indemnity cover for health care professionals, and for related purposes

Note: An electronic version of this Act is available in SCALEplus (http://scaleplus.law.gov.au/html/comact/browse/TOCN.htm)

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[*Assented to 2 May 2003*]

The Parliament of Australia enacts:

Part 1—Introductory

Division 1—Preliminary

1 Short title

This Act may be cited as the *Medical Indemnity (Prudential Supervision and Product Standards) Act 2003*.

2 Commencement

This Act commences, or is taken to have commenced, on 1 July 2003.

3 Objects

The objects of this Act are:

(a) to ensure that health care professionals have access to medical indemnity cover that is provided by properly regulated insurers; and

(b) to specify minimum standards for medical indemnity cover that is provided to health care professionals.

Division 2—Interpretation

4 Definitions

General

(1) In this Act:

APRA means the Australian Prudential Regulation Authority.

arrangement includes a contract of insurance.

ASIC means the Australian Securities and Investments Commission.

breach the minimum cover rules has the meaning given by subsection (8).

claim:

(a) means a claim or demand of any kind (whether or not involving legal proceedings); and

(b) includes proceedings of any kind including:

(i) proceedings before an administrative tribunal or of an administrative nature; and

(ii) disciplinary proceedings (including disciplinary proceedings conducted by or on behalf of a professional body); and

(iii) an inquiry or investigation;

and ***claim*** against a person includes an inquiry into, or an investigation of, the person's conduct.

claims-made based cover has the meaning given by subsections 6(2) and (3).

claims period, in relation to a regulated insurance contract, has the meaning given by subsection 21(3).

client, in relation to a regulated insurance contract, has the meaning given by subsection 21(2).

come into effect, in relation to an arrangement, has the meaning given by subsection (4).

compensation claim means a claim for compensation or damages that is made against a health care professional in relation to a health care incident.

complying offer has the meaning given by section 24.

compulsory new contract offer, in relation to a new regulated insurance contract, means an offer under section 22.

compulsory offer period, in relation to an offer made under section 23, means the period referred to in paragraph 24(2)(b) in relation to the offer.

constitutional corporation means a corporation to which paragraph 51(xx) of the Constitution applies.

enter into, in relation to certain arrangements, has a meaning affected by section 7.

entity means:

(a) a body corporate; or

(b) a partnership; or

(c) any other unincorporated association or body of persons; or

(d) a trust.

general insurer has the same meaning as in the *Insurance Act 1973*.

health care means any care, treatment, advice, service or goods provided in respect of the physical or mental health of a person.

health care incident, in relation to a health care professional, means an incident that occurs in the course of, or in connection with, the provision of health care by the health care professional.

health care professional:

(a) means an individual who provides health care (whether for reward or not and whether as an employee, as part of a business or on some other basis); and

(b) includes:
(i) a medical practitioner; and
(ii) a registered health professional.

incident includes:
(a) any act, omission or circumstance; and
(b) an incident that is claimed to have occurred.

incident-occurring based cover has the meaning given by subsection 6(4).

indemnify has a meaning affected by subsection (2).

medical practitioner means an individual registered or licensed as a medical practitioner under a State or Territory law that provides for the registration or licensing of medical practitioners.

minimum cover amount has the meaning given by section 16.

new regulated insurance contract means a regulated insurance contract to which section 22 applies.

otherwise uncovered prior incidents for a health care professional has the meaning given by subsection 21(4).

payable, in relation to a compensation claim, has the meaning given by subsection (7).

provide a financial service has the meaning given by section 766A of the *Corporations Act 2001*.

provide medical indemnity cover has the meaning given by section 5.

prudential standard means a standard determined by APRA under section 32 of the *Insurance Act 1973*.

registered health professional: an individual is a ***registered health professional*** if:
(a) the individual practises a health care related vocation; and
(b) the individual must be registered under a State or Territory law to practise that vocation.

regulated insurance contract has the meaning given by subsection 21(1).

relevant constitutional connection has the meaning given by subsection (6).

renew has the meaning given by subsection (5).

without medical indemnity cover has the meaning given by subsection (3).

Indemnify

(2) To avoid doubt, a person may, for the purposes of this Act, ***indemnify*** someone else by either:
  (a) making a payment; or
  (b) agreeing to make a payment.

Note: A person may indemnify someone else by making a payment even if the payment was not preceded by an agreement to pay.

Without medical indemnity cover for a health care incident

(3) For the purposes of this Act, a health care professional is ***without medical indemnity cover*** for a health care incident if:
  (a) the health care incident occurs during a particular period; and
  (b) there is no arrangement under which the health care professional will, or may, be indemnified for compensation claims made against the health care professional in relation to health care incidents occurring during that period.

When arrangement comes into effect

(4) For the purposes of this Act, an arrangement under which a person provides medical indemnity cover for a health care professional ***comes into effect*** on the first day on which, under the arrangement, a claim against the person providing the cover may be made.

Renewal of arrangement

(5) For the purposes of this Act, an arrangement is ***renewed*** if:
  (a) the arrangement is renewed; or

(b) the period of the arrangement is extended;

whether this happens:

(c) because of action taken, or not taken, by a party or parties to the arrangement; or

(d) automatically; or

(e) by force of law.

Note: For example, if renewable insurance cover is provided under a contract of insurance (the ***original contract***), a further contract of insurance may exist between the parties to the original contract by force of subsection 58(3) of the *Insurance Contracts Act 1984*.

Relevant constitutional connection

(6) For the purposes of this Act, an arrangement has a ***relevant constitutional connection*** if:

(a) the arrangement provides for insurance with respect to which the Commonwealth Parliament has power to make laws under paragraph 51(xiv) of the Constitution; or

(b) the arrangement is entered into in the course of trade and commerce:

(i) with other countries; or

(ii) among the States; or

(iii) between a State and a Territory; or

(c) the arrangement is entered into in, or is governed by the laws of, a Territory.

Amount payable in relation to compensation claim

(7) For the purposes of this Act, the amount that is ***payable*** in relation to a compensation claim includes an amount that would be paid to meet legal and other expenses that are directly attributable to any negotiations, arbitration or proceedings in relation to the compensation claim.

Breaching the minimum cover rules

(8) For the purposes of this Act, a regulated insurance contract ***breaches the minimum cover rules*** if subsection 17(2), 18(3) or 19(3) applies to the regulated insurance contract.

Claim against health care professional during particular period

(9) A reference in this Act, in relation to:

(a) a contract of insurance under which the insurer provides medical indemnity cover for a health care professional; or

(b) an offer by an insurer to provide medical indemnity cover for a health care professional;

to a compensation claim against the health care professional being made, or having to be made, during a particular period is a reference to any one or more of the following happening, or having to happen, during that period:

(c) the compensation claim being made against the health care professional;

(d) the compensation claim being notified to the insurer;

(e) the health care incident to which the compensation claim relates being notified to the insurer;

(f) a claim being made against the insurer in relation to the compensation claim;

(g) an event prescribed by the regulations.

References to health care professional

(10) A reference in this Act to a health care professional includes a reference to an individual who has been a health care professional at any time.

References to medical practitioner

(11) A reference in this Act to a medical practitioner includes a reference to an individual who has been a medical practitioner at any time.

References to registered health professional

(12) A reference in this Act to a registered health professional includes a reference to an individual who has been a registered health professional at any time.

5 Providing medical indemnity cover

(1) A person ***provides medical indemnity cover*** for a health care professional if, under an arrangement, the person must or may indemnify the health care professional in relation to claims that may be made against the health care professional in relation to health care incidents.

(2) The arrangement:

(a) may be one under which the indemnity is provided at the person's discretion; and

(b) may be, but need not be, an arrangement between the person and the health care professional; and

(c) may be:

(i) one under which the health care professional is indemnified directly; or

(ii) one under which the health care professional is indemnified indirectly through an entity or entities interposed between the person and the health care professional.

6 Claims-made based cover and incident-occurring based cover

(1) This section tells you what is meant by ***claims-made based cover*** and ***incident-occurring based cover*** when those terms are used in this Act. There are some kinds of medical indemnity cover that fall outside both those terms.

(2) For the purposes of this Act, the cover provided for by a contract of insurance is ***claims-made based cover*** if:

(a) under the contract, the insurer provides medical indemnity cover for a health care professional in relation to a compensation claim against the health care professional in relation to a health care incident only if:

(i) the incident occurs during a period specified in the contract (the ***incidents period***); and

(ii) the compensation claim is made against the health care professional during a period specified in the contract (the ***claims period***); and

(b) the incidents period is not a period that has ended before the claims period begins; and

(c) the claims period is fixed.

Note 1: Subparagraph (a)(ii)—subsection 4(9) operates on the reference in this subparagraph to the claim being made during a period.

Note 2: Pure ERB cover (which has a defined incidents period that ends before the claims period begins) does not qualify because of paragraph (b). DDR cover (which does not have a fixed claims period) does not qualify because of paragraph (c).

(3) To avoid doubt, the claims period for the contract is taken to be fixed even if the claims period is capable of being extended:

(a) by agreement between the parties to the contract; or

(b) by renewal of the contract.

(4) For the purposes of this Act, the cover provided for by a contract of insurance is ***incident-occurring based cover*** if:

(a) under the contract, the insurer provides medical indemnity cover for a health care professional in relation to a compensation claim in relation to a health care incident only if the incident occurs during a period specified in the contract; and

(b) under the contract, the insurer provides that medical indemnity cover:

(i) regardless of when the compensation claim is made against the health care professional; and

(ii) whether or not the health care professional has died, become permanently disabled or retired.

Note: ERB cover (which has a fixed claims period) does not qualify because of subparagraph (b)(i) and DDR cover does not qualify because of subparagraph (b)(ii).

7 When certain DDR arrangements are taken to be entered into

(1) For the purposes of this Act, if:

(a) under an arrangement, a person (the ***cover provider***) will or may provide medical indemnity cover of a particular kind for a health care professional; and

(b) the cover provider will or may provide that cover only if:

(i) a particular period has expired; and

(ii) the health care professional dies, becomes permanently disabled or retires; and

(c) the arrangement is not a contract of insurance;

the cover provider is taken to ***enter into*** the arrangement, to the extent to which it relates to that cover, at the earliest time at which:

(d) there are no conditions that need to be satisfied for the cover to be provided for the health care professional; or

(e) the only conditions that need to be satisfied for the cover to be provided for the health care professional are conditions that relate to:

(i) payments being made to the cover provider for the cover; or

(ii) the making of a claim against the cover provider under the arrangement.

(2) Without limiting subparagraph (1)(b)(i), the period referred to in that subparagraph may be specified as a minimum period during which the health care professional is a member of a particular body.

Division 3—Application of Act

8 Application of Act

(1) This Act does not apply to State insurance (whether or not extending beyond the limits of the State concerned).

(2) This Act does not apply to:

(a) an arrangement under which medical indemnity cover is provided by:

(i) the Commonwealth, a public authority of the Commonwealth or an instrumentality or agency of the Crown in right of the Commonwealth; or

(ii) a State, a public authority of a State or an instrumentality or agency of the Crown in right of a State; or

(iii) a Territory, a public authority of a Territory or an instrumentality or agency of the Crown in right of a Territory; or

(b) an arrangement under which medical indemnity cover is provided by a person to a health care professional who is an employee of the person; or

(c) an arrangement under which medical indemnity cover is provided by an employer in relation to health care provided to the employer's employees:

(i) by an employee of the employer; or

(ii) under a contract between the employer and the person providing the care; or

(d) an arrangement under which medical indemnity cover is provided by a body corporate prescribed by the regulations; or

(e) an arrangement of a kind prescribed by the regulations.

9 Act extends to external Territories

This Act extends to every external Territory.

Part 2—Prudential requirements for provision of medical indemnity cover

Division 1—Provision of medical indemnity cover

10 Medical indemnity cover to be provided only by general insurers and only under contracts of insurance

(1) This subsection applies to a person if, on or after 1 July 2003:

(a) the person:

(i) offers to enter into; or

(ii) invites an offer to enter into;

an arrangement under which the person would provide medical indemnity cover for a health care professional; or

(b) the person enters into an arrangement under which the person provides medical indemnity cover for a health care professional; or

(c) an arrangement under which the person provides medical indemnity cover for a health care professional comes into effect; or

(d) the person offers to renew an arrangement under which a person provides medical indemnity cover for a health care professional; or

(e) an arrangement under which the person provides medical indemnity cover for a health care professional is renewed.

The ***relevant medical indemnity cover*** is the cover referred to in paragraph (a), (b), (c), (d), or (e).

(2) A person (the ***cover provider***) commits an offence if:

(a) subsection (1) applies to the cover provider; and

(b) either:

(i) the cover provider is a constitutional corporation; or

(ii) the cover provider is not a constitutional corporation but the arrangement has, or would have, a relevant constitutional connection; and

(c) either:

(i) the cover provider is not a general insurer; or

(ii) the relevant medical indemnity cover is not, or would not be, effected by means of a contract of insurance.

Penalty: Imprisonment for 12 months.

(3) To avoid doubt:

(a) paragraph (1)(a) applies to offers or invitations that are received in Australia or the external Territories:

(i) regardless of where any resulting arrangement is entered into; and

(ii) whether or not any resulting arrangement is governed by the laws of a State or Territory; and

(b) paragraph (1)(d) applies to offers that are received in Australia or the external Territories:

(i) regardless of where any resulting renewal takes place; and

(ii) whether or not the arrangement is governed by the laws of a State or Territory.

11 Intermediary's responsibilities

(1) A person (the ***intermediary***) commits an offence if:

(a) the intermediary provides a financial service on or after 1 July 2003; and

(b) in the course of providing that service, the intermediary:

(i) arranges, or offers to arrange, for someone to enter into or renew; or

(ii) recommends that someone enter into or renew;

an arrangement under which a person (the ***cover provider***) provides, or would provide, medical indemnity cover for a health care professional; and

(c) either:

(i) the cover provider is a constitutional corporation; or

(ii) the arrangement has, or would have, a relevant constitutional connection; and

(d) either:

(i) the cover provider is not a general insurer; or

(ii) the arrangement is not, or would not be, effected by means of a contract of insurance.

Penalty: Imprisonment for 12 months.

(2) It does not matter whether the intermediary provides the financial service in the intermediary's own right or as a representative of another person.

(3) To avoid doubt, the intermediary commits the offence whether or not the cover provider commits, or would commit, an offence against subsection 10(2).

Division 2—Transitional arrangements

12 Effect of determination under subsection 13(3)

Section applies to body corporate while determination under subsection 13(3) is in force

(1) This section applies to a body corporate while a determination under subsection 13(3) is in force in relation to the body corporate.

Authorisation to carry on insurance business in Australia

(2) APRA must not refuse an application by the body corporate under section 12 of the *Insurance Act 1973* on the basis that the body corporate does not, or would not, meet the requirements of a prudential standard to the extent to which the standard imposes a minimum capital requirement.

Note: This subsection is not relevant for a body corporate if at the time the body corporate applied for a determination under section 13 the body corporate was already a general insurer.

Grounds for revoking authorisation

(3) Paragraph 15(1)(e) of the *Insurance Act 1973* does not apply to the body corporate.

Application of prudential standard imposing minimum capital requirement

(4) Any prudential standard, to the extent to which the standard imposes a minimum capital requirement, does not apply to the body corporate.

13 APRA determination that minimum capital requirements do not apply

Application for determination

(1) A body corporate that:

(a) is an MDO within the meaning of the *Medical Indemnity Act 2002*; or

(b) is prescribed by the regulations for the purposes of this paragraph; or

(c) is related (within the meaning of the *Corporations Act 2001*) to a body corporate to which paragraph (a) or (b) applies;

may apply to APRA for a determination under subsection (3) that the minimum capital requirements do not apply to the body corporate during the period (the ***transition period***) that starts on 1 July 2003 and ends on 30 June 2008.

(2) The application must be in the form prescribed by the regulations.

Determination that minimum capital requirements do not apply

(3) APRA must determine that the minimum capital requirements do not apply to the body corporate during the transition period if:

(a) when it applies, the body corporate:

(i) is not a general insurer; or

(ii) is a general insurer and is prescribed by the regulations for the purposes of this subparagraph; and

(b) when it applies, the body corporate does not, or would not, satisfy the prudential standards, to the extent to which they impose minimum capital requirements; and

(c) the body corporate lodges a funding plan with the application; and

(d) the funding plan:

(i) is in the form prescribed by the regulations; and

(ii) is certified by an independent auditor and by an independent actuary; and

. (iii) complies with the guidelines issued by APRA under subsection (9).

Note: Paragraph (c)—If a funding plan lodged with an application does not comply with the requirements set out in paragraph (d), the body corporate will need to make another application under this section and lodge another funding plan with that application.

(3A) APRA must make the determination within 30 days after receiving the application.

(3B) The determination must be in writing and APRA must give the body corporate a copy of the determination within 7 days after making the determination.

When determination ceases to have effect

(4) The determination ceases to have effect:

(a) on 30 June 2008; or

(b) if APRA revokes the determination before 30 June 2008—on the day specified in the revocation as the day on which the revocation takes effect.

Revocation of determination

(5) APRA may revoke the determination if and only if:

(a) the body corporate:

(i) fails to meet a commitment given, or a target set, in the funding plan; or

(ii) otherwise fails to comply with the funding plan;

and the failure is substantial; or

(b) the body corporate no longer carries on a business of providing medical indemnity cover for health care professionals; or

(c) the body corporate requests APRA, in writing, to revoke the determination.

(6) The revocation must:

(a) be in writing; and

(b) specify the day on which the revocation takes effect.

The day specified under paragraph (b) must be at least 28 days after the day on which the revocation is made.

(7) APRA must give a copy of the revocation to the body corporate within 7 days after the day on which the revocation is made.

No determinations to be made after 1 July 2005

(8) No determinations under subsection (3) are to be made on or after 1 July 2005.

APRA guidelines

(9) APRA may issue guidelines on:

(a) the matters to be included in a funding plan lodged for the purposes of this section (including the nature of the commitments to be given, and the targets to be set, in the plan); and

(b) the matters as to which an independent auditor or independent actuary is to certify; and

(c) the qualifications an auditor or actuary must have to give certificates for the purposes of this section; and

(d) the necessary degree of independence from a body corporate that an auditor or actuary must have to give a certificate in relation to the body corporate's funding plan.

(10) Without limiting paragraph (9)(a), the guidelines may provide that the funding plan must include a specified commitment by the body corporate to report to APRA in relation to its compliance with the funding plan.

(11) A guideline issued under subsection (9) is a disallowable instrument for the purposes of section 46A of the *Acts Interpretation Act 1901*.

14 Administrative review

An application may be made to the Administrative Appeals Tribunal for review of:

(a) a decision by APRA not to make a determination under subsection 13(3); or

(b) a decision by APRA under subsection 13(5) to revoke a determination made under subsection 13(3).

Note: Section 27A of the *Administrative Appeals Tribunal Act 1975* requires notification of a decision that is reviewable.

15 Application of section 115A of the *Insurance Act 1973*

Section 115A of the *Insurance Act 1973* applies as if a reference to this Part in the definition of ***relevant legislation*** in subsection (5)

of that section included a reference to a funding plan lodged with an application made under section 13 of this Act.

Part 3—Product standards for medical indemnity insurance contracts

Division 1—Minimum cover

16 Minimum cover amount

The ***minimum cover amount*** for the purposes of this Division is:

(a) $5 million; or

(b) such other amount as is prescribed by the regulations.

17 Minimum cover for single claim

Circumstances in which section applies

(1) This subsection applies to a person if:

(a) under a contract of insurance (the ***relevant contract***), the person provides medical indemnity cover for a health care professional; and

(b) the health care professional is:

(i) a medical practitioner; or

(ii) a registered health professional prescribed by the regulations.

Offence

(2) A person (the ***insurer***) commits an offence if:

(a) subsection (1) applies to the insurer; and

(b) the relevant contract is entered into, comes into effect or is renewed at a particular time on or after 1 July 2003; and

(c) the maximum amount payable by the insurer under the relevant contract in relation to a single compensation claim made against the health care professional would, but for subsection (4), be less than the minimum cover amount applicable at that time.

Penalty: Imprisonment for 12 months.

(3) Subsection (2) does not apply if it would be reasonable to assume, at the time the relevant contract is entered into, comes into effect or is renewed, that every health care incident to which the compensation claim would relate would be one occurring outside Australia and the external Territories.

Note: A defendant bears an evidential burden in relation to the matter in this subsection (see subsection 13.3(3) of the *Criminal Code*).

Maximum amount payable for single claim

(4) If:

(a) subsection (1) applies to a person (the ***insurer***); and

(b) the relevant contract is entered into, comes into effect or is renewed at a particular time on or after 1 July 2003; and

(c) a compensation claim is made against the health care professional; and

(d) an amount is payable by the insurer under the relevant contract in relation to the compensation claim; and

(e) the maximum amount payable by the insurer under the relevant contract in relation to the compensation claim would, but for this subsection, be less than the minimum cover amount applicable at that time;

the maximum amount payable by the insurer under the relevant contract in relation to the compensation claim is the minimum cover amount applicable at that time (instead of the maximum amount provided for in the relevant contract).

(5) Subsection (4) does not apply if every health care incident to which the compensation claim relates is one occurring outside Australia and the external Territories.

(6) To avoid doubt, subsection (4) applies whether or not the insurer is convicted of an offence against subsection (2).

18 Minimum annual cover—incident-occurring based cover

Circumstances in which section applies

(1) This subsection applies to a person if:

(a) under a contract of insurance (the ***relevant contract***), the person provides medical indemnity cover for a health care professional; and

(b) the health care professional is:

(i) a medical practitioner; or

(ii) a registered health professional prescribed by the regulations; and

(c) the relevant contract provides for incident-occurring based cover.

Note: For ***incident-occurring based cover***, see subsection 6(4). For the purposes of this section, ERB and DDR cover are not incident-occurring based cover.

(2) For the purposes of this section:

(a) the ***qualifying incident period*** is the period during which a health care incident must occur for the person to provide medical indemnity cover under the relevant contract in relation to the incident; and

(b) there is only one ***relevant period*** and it is the qualifying incident period if the qualifying incident period is a year or shorter than a year; and

(c) the year starting at the beginning of the qualifying incident period, and each succeeding year or part of a year in the qualifying incident period, is a ***relevant period*** if the qualifying incident period is longer than a year.

Offence

(3) A person (the ***insurer***) commits an offence if:

(a) subsection (1) applies to the insurer; and

(b) the relevant contract is entered into, comes into effect or is renewed at a particular time on or after 1 July 2003; and

(c) the maximum amount payable, in aggregate, by the insurer under the relevant contract in relation to all the compensation

claims that are made against the health care professional in relation to health care incidents that occur during a particular relevant period would, but for subsection (5), be less than the minimum cover amount applicable at that time.

Penalty: Imprisonment for 12 months.

(4) Subsection (3) does not apply if it would be reasonable to assume, at the time the relevant contract is entered into, comes into effect or is renewed, that every health care incident to which the compensation claims would relate would be one occurring outside Australia and the external Territories.

Note: A defendant bears an evidential burden in relation to the matter in this subsection (see subsection 13.3(3) of the *Criminal Code*).

Maximum amount payable for multiple claims

(5) If:

(a) subsection (1) applies to a person (the ***insurer***); and

(b) the relevant contract is entered into, comes into effect or is renewed at a particular time on or after 1 July 2003; and

(c) amounts are payable by the insurer under the relevant contract in relation to 2 or more compensation claims (the ***multiple claims***) that are made against the health care professional in relation to health care incidents that occur in a particular relevant period; and

(d) the maximum amount payable by the insurer under the relevant contract in relation to the multiple claims would, but for this subsection, be less than the minimum cover amount applicable at that time;

the maximum amount payable, in aggregate, by the insurer under the relevant contract in relation to the multiple claims is the minimum cover amount applicable at that time (instead of the maximum amount provided for in the relevant contract).

(6) Subsection (5) does not apply if every health care incident to which the multiple claims relate is one occurring outside Australia and the external Territories.

(7) To avoid doubt, subsection (5) applies whether or not the insurer is convicted of an offence against subsection (3).

19 Minimum annual cover—other cover

Circumstances in which section applies

(1) This subsection applies to a person if:

(a) under a contract of insurance (the ***relevant contract***), the person provides medical indemnity cover for a health care professional; and

(b) the health care professional is:

(i) a medical practitioner; or

(ii) a registered health professional prescribed by the regulations; and

(c) the contract does not provide for incident-occurring based cover.

Note: For ***incident-occurring based cover***, see subsection 6(4). For the purposes of this section, ERB and DDR cover are not incident-occurring based cover.

(2) For the purposes of this section:

(a) the ***qualifying claims period*** is the period specified in the relevant contract as the period during which a compensation claim against the health care professional has to be made for medical indemnity cover to be provided in relation to the compensation claim; and

(b) there is only one ***relevant period*** and it is the qualifying claims period if the qualifying claims period is a year or shorter than a year; and

(c) the year starting at the beginning of the qualifying claims period, and each succeeding year or part of a year in the qualifying claims period, is a ***relevant period*** if the qualifying claims period is longer than a year.

Note: Paragraph (a)—subsection 4(9) operates on the reference in this paragraph to the claim having to be made during a period.

Offence

(3) A person (the ***insurer***) commits an offence if:

(a) subsection (1) applies to the insurer; and

(b) the relevant contract is entered into, comes into effect or is renewed at a particular time on or after 1 July 2003; and

(c) the maximum amount payable, in aggregate, by the insurer under the relevant contract in relation to all the compensation claims that are made against the health care professional during a particular relevant period would, but for subsection (5), be less than the minimum cover amount applicable at that time.

Note: Paragraph (c)—subsection 4(9) operates on the reference in this paragraph to the claim having to be made during a period.

Penalty: Imprisonment for 12 months.

(4) Subsection (3) does not apply if it would be reasonable to assume, at the time the relevant contract is entered into, comes into effect or is renewed, that every health care incident to which the compensation claims would relate would be one occurring outside Australia and the external Territories.

Note: A defendant bears an evidential burden in relation to the matter in this subsection (see subsection 13.3(3) of the *Criminal Code*).

Maximum amount payable for multiple claims

(5) If:

(a) subsection (1) applies to a person (the ***insurer***); and

(b) the relevant contract is entered into, comes into effect or is renewed at a particular time on or after 1 July 2003; and

(c) amounts are payable by the insurer under the relevant contract in relation to 2 or more compensation claims (the ***multiple claims***) that are made against the health care professional during a particular relevant period; and

(d) the maximum amount payable by the insurer under the relevant contract in relation to the multiple claims would, but for this subsection, be less than the minimum cover amount applicable at that time;

the maximum amount payable, in aggregate, by the insurer under the relevant contract in relation to the multiple claims is the minimum cover amount applicable at that time (instead of the maximum amount provided for in the relevant contract).

Note: Paragraph (c)—subsection 4(9) operates on the reference in this paragraph to the claim having to be made during a period.

(6) Subsection (5) does not apply if every health care incident to which the multiple claims relate is one occurring outside Australia and the external Territories.

(7) To avoid doubt, subsection (5) applies whether or not the insurer is convicted of an offence against subsection (3).

20 Amount payable by insurer

To avoid doubt, in working out for the purposes of this Division the maximum amount payable by an insurer under a contract of insurance, disregard the following:

(a) any right the insurer may have to a high cost claim indemnity under the *Medical Indemnity Act 2002*;

(b) any right the insurer may have to contribution from another insurer;

(c) any right to which the insurer is subrogated under the contract of insurance.

Division 2—Offers to provide retroactive and run-off cover for otherwise uncovered prior incidents

Subdivision A—Regulated insurance contracts

21 Regulated insurance contracts

Regulated insurance contract

(1) For the purposes of this Division, a contract is a ***regulated insurance contract*** if:

(a) the contract is a contract of insurance under which the insurer provides medical indemnity cover for a health care professional in relation to compensation claims; and

(b) the health care professional is:

(i) a medical practitioner; or

(ii) a registered health professional prescribed by the regulations; and

(c) the cover provided for by the contract is claims-made based cover; and

(d) the contract is entered into, comes into effect or is renewed on or after 1 July 2003.

Note: Paragraph (c)—for ***claims-made based cover***, see subsections 6(2) and (3). For the purposes of this section, ERB and DDR cover are not claims-made based cover.

Client

(2) For the purposes of this Division, the ***client*** for the regulated insurance contract is the other party to the regulated insurance contract (who may be the health care professional or someone else).

Claims period

(3) For the purposes of this Division, the ***claims period*** for the regulated insurance contract is the period specified in the contract as the period during which a compensation claim against the health

care professional has to be made for medical indemnity cover to be provided in relation to the compensation claim.

Note: Subsection 4(9) operates on the reference to the claim having to be made during a period.

Health care professional's otherwise uncovered prior incidents

(4) For the purposes of this Division, the health care professional's ***otherwise uncovered prior incidents*** for the regulated insurance contract are:

(a) for an offer to be made under section 22—the health care incidents:

(i) that occurred before the start of the claims period for the regulated insurance contract; and

(ii) for which the health care professional would otherwise be without medical indemnity cover; and

(b) for an offer to be made under section 23—the health care incidents:

(i) that have occurred, or will occur, before the contract that arises from the offer would take effect; and

(ii) for which the health care professional would otherwise be without medical indemnity cover.

Subdivision B—Insurer's responsibilities

22 Additional offer of retroactive cover when regulated insurance contract entered into, comes into effect or is renewed

Offence—compulsory offer

(1) A person (the ***insurer***) commits an offence if:

(a) a regulated insurance contract is entered into, comes into effect or is renewed; and

(b) the insurer provides medical indemnity cover for a health care professional under the regulated insurance contract; and

(c) the insurer does not make an offer (the ***compulsory offer***) to the client that satisfies all of the following subparagraphs:

(i) the offer is an offer to provide medical indemnity cover for the health care professional in relation to all compensation claims that are made against the health care professional, during a period that includes the whole of the claims period for the regulated insurance contract, in relation to the health care professional's otherwise uncovered prior incidents;

(ii) the offer is made at the same time as the insurer makes the offer or the invitation that leads to the regulated insurance contract or the renewal;

(iii) the offer is a complying offer.

Note 1: For ***complying offer***, see section 24.

Note 2: Subparagraph (c)(i)—subsection 4(9) operates on the reference in this subparagraph to the claims being made during a period.

Penalty: Imprisonment for 12 months.

(1A) In determining whether an offer made by an insurer to provide medical indemnity cover for a health care professional satisfies subparagraph (1)(c)(i), disregard:

(a) an otherwise uncovered prior incident of the health care professional; or

(b) a compensation claim in relation to an incident of that kind;

if it is reasonable and appropriate for the insurer to exclude the incident or claim from the cover being offered, having regard to:

(c) the nature of the health care provided by the health care professional during the period during which the otherwise uncovered prior incident occurred; and

(d) the kinds of exclusions that are usually provided for in contracts of insurance that provide similar cover to the cover being offered; and

(e) any other relevant consideration.

Offence—entering into regulated insurance contract etc. before response to compulsory offer received

(2) A person (the ***insurer***) commits an offence if:

(a) a regulated insurance contract is entered into, comes into effect or is renewed; and

(b) the insurer provides medical indemnity cover for a health care professional under the regulated insurance contract; and

(c) the regulated insurance contract is entered into, comes into effect or is renewed before the client has given the insurer a written response to the compulsory offer.

Penalty: Imprisonment for 12 months.

Offence—record keeping

(3) A person (the ***insurer***) commits an offence if:

(a) a regulated insurance contract is entered into, comes into effect or is renewed; and

(b) the insurer provides medical indemnity cover for a health care professional under the regulated insurance contract; and

(c) the insurer does not keep a copy of the following:

(i) the compulsory offer;

(ii) the client's written response to the compulsory offer;

(iii) any other offer that the insurer makes to the client, while the compulsory offer is open for acceptance by the client, to provide medical indemnity cover for the health care professional in relation to an otherwise uncovered prior incident of the health care professional;

(iv) any invitations that the insurer makes to the client, while the compulsory offer is open for acceptance by the client, to make an offer to enter into a contract of insurance under which the insurer would provide medical indemnity cover for the health care professional in relation to an otherwise uncovered prior incident of the health care professional;

for the period of 5 years starting on the day on which the compulsory offer is made.

Penalty: Imprisonment for 6 months.

Defences for offences against subsections (1), (2) and (3)

(4) Subsections (1), (2) and (3) do not apply if:

(a) the regulated insurance contract provides medical indemnity cover for the health care professional in relation to all the compensation claims referred to in paragraph (1)(c); or

(b) the health care professional has no otherwise uncovered prior incidents; or

(c) every health care incident covered by the regulated insurance contract is, or would be, one occurring outside Australia and the external Territories.

Note: A defendant bears an evidential burden in relation to the matter in this subsection (see subsection 13.3(3) of the *Criminal Code)*.

(4A) In determining whether a regulated insurance contract provides the cover referred to in paragraph (4)(a) for a health care professional, disregard:

(a) an otherwise uncovered prior incident of the health care professional; or

(b) a compensation claim in relation to an incident of that kind;

if it is reasonable and appropriate for the insurer to exclude the incident or claim from the cover provided by the contract, having regard to:

(c) the nature of the health care provided by the health care professional during the period during which the otherwise uncovered prior incident occurred; and

(d) the kinds of exclusions that are usually provided for in contracts of insurance that provide similar cover to the cover being offered; and

(e) any other relevant consideration.

(5) Subsection (1) does not apply if:

(a) the insurer makes an offer for the purposes of subsection (1); and

(b) the only reason why the offer does not satisfy subparagraph (1)(c)(i) is that the offer does not extend to some of the health care professional's otherwise uncovered prior incidents; and

(c) the insurer has reasonable grounds for believing that the offer does extend to all the health care professional's otherwise uncovered prior incidents.

Note: A defendant bears an evidential burden in relation to the matter in this subsection (see subsection 13.3(3) of the *Criminal Code).*

Compulsory offer has no effect in certain circumstances

(6) A compulsory offer made by an insurer for the purposes of subsection (1) ceases to have effect if the winding up of the insurer starts before the offer is accepted.

Note: An insurer must not carry on insurance business after the winding up of the insurer has started: see section 116 of the *Insurance Act 1973*.

Effect of subsection (1)

(7) Subsection (1) has effect subject to section 116 of the *Insurance Act 1973*.

Note: This means that an insurer does not have to make a compulsory offer for the purposes of subsection (1) once the winding up of the insurer has started.

23 Additional offer of run-off cover when particular events happen during claims period for regulated insurance contract

Offence—compulsory offer

(1) A person (the ***insurer***) commits an offence if:

(a) the insurer provides medical indemnity cover for a health care professional under a regulated insurance contract; and

(b) an event prescribed by the regulations for the purposes of this paragraph occurs during the claims period for the regulated insurance contract; and

(c) the insurer does not make an offer (the ***compulsory offer***) to the client that satisfies all of the following subparagraphs:

(i) the offer is an offer to provide medical indemnity cover for the health care professional in relation to compensation claims that are made against the health care professional in relation to the health care professional's otherwise uncovered prior incidents and the offer satisfies the requirements specified in the regulations for the purposes of this subparagraph;

(ii) the offer is made within 28 days after the insurer becomes aware of that event;

(iii) the offer is a complying offer.

Note: For ***complying offer***, see section 24.

Penalty: Imprisonment for 12 months.

(2) Without limiting subparagraph (1)(c)(i), the regulations made for the purposes of that subparagraph may specify requirements in relation to:

(a) the compensation claims to be covered by the contract being offered; and

(b) the limits on the amounts payable by the insurer under the contract being offered (whether in relation to an individual compensation claim or in relation to compensation claims made during a particular period).

Without limiting paragraph (a), the regulations may specify the compensation claims by reference to the period during which the compensation claims can be made.

Offence—entering into new contract before response to compulsory offer received

(2A) For the purposes of making an offer to provide the cover referred to in subparagraph (1)(c)(i) for a health care professional, disregard the regulated insurance contract referred to in paragraph (1)(a) in determining the health care professional's otherwise uncovered prior incidents.

(2B) In determining whether an offer made by an insurer to provide medical indemnity cover for a health care professional satisfies subparagraph (1)(c)(i), disregard:

(a) an otherwise uncovered prior incident of the health care professional; or

(b) a compensation claim in relation to an incident of that kind;

if it is reasonable and appropriate for the insurer to exclude the incident or claim from the cover being offered, having regard to:

(c) the nature of the health care provided by the health care professional during the period during which the otherwise uncovered prior incident occurred; and

(d) the kinds of exclusions that are usually provided for in contracts of insurance that provide similar cover to the cover being offered; and

(e) any other relevant consideration.

(3) A person (the ***insurer***) commits an offence if:

(a) the person provides medical indemnity cover for a health care professional under a regulated insurance contract; and

(b) paragraph (1)(b) applies to the regulated insurance contract; and

(c) after the insurer makes the compulsory offer, the insurer subsequently enters into a contract of insurance with the client to provide medical indemnity cover for the health care professional in relation to an otherwise uncovered prior incident of the health care professional; and

(d) the contract referred to in paragraph (c) is not entered into in response to the compulsory offer; and

(e) the contract referred to in paragraph (c) is entered into before the client has given the insurer a written response to the compulsory offer.

Penalty: Imprisonment for 12 months.

Offence—record keeping

(4) A person (the ***insurer***) commits an offence if:

(a) the insurer provides medical indemnity cover for a health care professional under a regulated insurance contract; and

(b) paragraph (1)(b) applies to the regulated insurance contract; and

(c) the insurer does not keep the following:

(i) a copy of the compulsory offer;

(ii) either a copy of the client's written response to the compulsory offer or a written record (made within 14 days after the end of the compulsory offer period) of the

client's response, or failure to respond, to the compulsory offer;

(iii) a copy of any other offer that the insurer makes to the client, while the compulsory offer is open for acceptance by the client, to provide medical indemnity cover for the health care professional in relation to an otherwise uncovered prior incident of the health care professional;

(iv) a copy of any invitations that the insurer makes to the client, while the compulsory offer is open for acceptance by the client, to make an offer to enter into a contract of insurance under which the insurer would provide medical indemnity cover for the health care professional in relation to an otherwise uncovered prior incident of the health care professional;

for the period of 5 years starting on the day on which the compulsory offer is made.

Penalty: Imprisonment for 6 months.

No offences if regulations not in force

(4A) The insurer commits an offence against subsection (1), (3) or (4) only if regulations are in force for the purposes of subparagraph (1)(c)(i) both:

(a) when the event referred to in paragraph (1)(b) occurs; and

(b) when the period of 28 days referred to in subparagraph (1)(c)(ii) ends.

If this is so, the requirements that the compulsory offer must satisfy are those specified in the regulations as in force when the event referred to in paragraph (1)(b) occurs.

Defences for offences against subsections (1), (3) and (4)

(5) Subsections (1), (3) and (4) do not apply if every health care incident covered by the regulated insurance contract is, or would be, one occurring outside Australia and the external Territories.

Note: A defendant bears an evidential burden in relation to the matter in this subsection (see subsection 13.3(3) of the *Criminal Code)*.

(6) Subsection (1) does not apply if:

(a) the insurer makes an offer for the purposes of subsection (1); and

(b) the only reason why the offer does not satisfy subparagraph (1)(c)(i) is that the offer does not extend to some of the health care professional's otherwise uncovered prior incidents; and

(c) the insurer has reasonable grounds for believing that the offer does extend to all the health care professional's otherwise uncovered prior incidents.

Note: A defendant bears an evidential burden in relation to the matter in this subsection (see subsection 13.3(3) of the *Criminal Code)*.

Compulsory offer has no effect in certain circumstances

(7) A compulsory offer made by an insurer for the purposes of subsection (1) ceases to have effect if the winding up of the insurer starts before the offer is accepted.

Note: An insurer must not carry on insurance business after the winding up of the insurer has started: see section 116 of the *Insurance Act 1973*.

Effect of subsection (1)

(8) Subsection (1) has effect subject to section 116 of the *Insurance Act 1973*.

Note: This means that an insurer does not have to make a compulsory offer for the purposes of subsection (1) once the winding up of the insurer has started.

24 Complying offer

Complying offer test—general

(1) For the purposes of section 22 or 23, a person (the ***insurer***) who provides medical indemnity cover under a regulated insurance contract makes a ***complying offer*** to the client to provide medical indemnity cover for a health care professional if and only if:

(a) the offer is to provide medical indemnity cover for the health care professional under a contract of insurance; and

(b) the offer complies with subsection (2).

The offer must be made to the health care professional's legal personal representative if the health care professional has died.

(2) The offer complies with this subsection if and only if:

(a) the offer is made in writing; and

(b) the offer remains open for acceptance by the client for a period of at least 28 days after the day on which the offer is made; and

(c) the procedures for dealing with claims under the contract being offered are substantially the same as those provided for in:

(i) the proposed regulated contract (if the offer is made for the purposes of section 22); or

(ii) the current regulated contract (if the offer is made for the purposes of section 23); and

(d) the claims and incidents covered, and the exclusions from the claims and incidents covered, by the contract being offered are reasonable and appropriate having regard to:

(i) the nature of the health care provided by the health care professional during the period or periods during which the incidents covered by the contract occurred; and

(ii) the kinds of claims and incidents that are usually covered by contracts of insurance that provide similar cover to the cover being offered; and

(iii) the kinds of exclusions that are usually provided for in contracts of insurance that provide similar cover to the cover being offered; and

(iv) any other relevant consideration; and

(e) the offer specifies the premium payable by the client for the cover being offered; and

(f) the premium payable by the client for the cover being offered is reasonable (see subsection (3)); and

(g) the other terms and conditions of the contract being offered comply with the requirements (if any) prescribed by the regulations for the purposes of this paragraph; and

(h) the offer includes a clear, concise and effective explanation of:

(i) the significant characteristics and features of the cover being offered; and

(ii) the significant rights, terms and conditions and obligations attaching to the cover being offered; and

(iii) the risks involved for the health care professional in not accepting the offer; and

(iv) the options that will be available to the health care professional if the health care professional does not accept the offer; and

(v) any other matters prescribed by the regulations.

Matters to be taken into account in determining whether premium is reasonable

(3) In deciding whether the premium payable by the client for the cover being offered is reasonable, regard is to be had to:

(a) the nature of the risks being assumed by the insurer; and

(b) the claims handling expenses, and other administrative expenses, the insurer has incurred and can reasonably be expected to incur in relation to the cover being offered; and

(c) the expenses the insurer can reasonably be expected to incur in obtaining appropriate reinsurance; and

(d) the expenses the insurer can reasonably be expected to incur in capital raising and prudential compliance that are reasonably attributable to the cover being offered; and

(e) the amount that represents a reasonable profit margin for the insurer; and

(f) the amount of any relevant taxes or statutory charges payable by the insurer; and

(g) the information provided, or not provided, to the insurer by the client in relation to matters relevant to assessing the risk being assumed by the insurer; and

(h) the guidelines (if any) issued by APRA for the purposes of this paragraph.

Definitions

(5) In this section:

current regulated contract means the regulated insurance contract referred to in paragraph 23(1)(a).

proposed regulated contract means the regulated insurance contract referred to in paragraph 22(1)(a).

25 APRA guidelines

(1) APRA may issue guidelines for determining for the purposes of section 24 whether a premium payable by an insured under a contract of insurance for particular cover is reasonable.

(2) A guideline issued under subsection (1) is a disallowable instrument for the purposes of section 46A of the *Acts Interpretation Act 1901*.

26 Federal Court may order insurer to make offer

(1) If an insurer contravenes subsection 22(1) or 23(1) by failing to make an offer, the Federal Court of Australia may, on application by the client or ASIC, grant an injunction ordering the insurer to make an offer.

(2) The Court may specify in its order:
   (a) the terms in which the offer is to be made; and
   (b) the time by which the offer must be made; and
   (c) the period for which the offer must be open for acceptance by the health care professional; and
   (d) the time from which the contract that results from the offer is to have effect if the offer is accepted.

Division 3—Intermediary's responsibilities

27 Intermediary's responsibilities

(1) A person (the ***intermediary***) commits an offence if:

(a) the intermediary provides a financial service on or after 1 July 2003; and

(b) in the course of providing that service, the intermediary:

(i) arranges, or offers to arrange, for someone to enter into or renew a regulated insurance contract; or

(ii) recommends that someone enter into or renew a regulated insurance contract; and

(c) either:

(i) the regulated insurance contract breaches, or would breach, the minimum cover rules; or

(ii) the regulated insurance contract is a new regulated insurance contract and the insurer does not make a compulsory new contract offer in relation to the regulated insurance contract.

Penalty: Imprisonment for 12 months.

(2) It does not matter whether the intermediary provides the financial service in the intermediary's own right or as a representative of another person.

(3) Subparagraph (1)(b)(ii) does not apply to a recommendation by the intermediary if the intermediary has reasonable grounds to believe that a compulsory new contract offer will be made in relation to the new regulated insurance contract before that contract is entered into or is renewed.

Note: A defendant bears an evidential burden in relation to the matter in this subsection (see subsection 13.3(3) of the *Criminal Code*).

(4) To avoid doubt, the intermediary commits the offence whether or not the insurer commits, or would commit, an offence against subsection 17(2), 18(3), 19(3) or 22(1).

Part 4—Administration

28 APRA to have general administration of Part 2

(1) Subject to subsection (2), APRA has the general administration of Part 2.

(2) The Minister may give APRA directions about the performance or exercise of its functions or powers under Part 2.

29 APRA Act secrecy provisions apply

Section 56 of the *Australian Prudential Regulation Authority Act 1998* prohibits certain disclosures of information received under this Act.

30 ASIC to have general administration of Part 3

(1) Subject to subsection (2), ASIC has the general administration of Part 3.

(2) The Minister may give ASIC directions about the performance or exercise of its functions or powers under Part 3.

Part 5—Miscellaneous

31 Anti-avoidance measures

(1) If:

(a) before 1 July 2003, a person entered into an arrangement under which the person provides medical indemnity cover for a health care professional; and

(b) the sole or dominant purpose, or a substantial purpose, of the person in entering into the arrangement at that time was to avoid having a provision or provisions of this Act apply to the arrangement;

the arrangement is to be treated, for the purposes of this Act, as if it had been entered into on or after 1 July 2003.

(2) If:

(a) an arrangement under which a person provides medical indemnity cover for a health care professional comes into effect before 1 July 2003; and

(b) the sole or dominant purpose, or a substantial purpose, of the person in having the arrangement come into effect at that time was to avoid having a provision or provisions of this Act apply to the arrangement;

the arrangement is to be treated, for the purposes of this Act, as if it had come into effect on or after 1 July 2003.

(3) If:

(a) an arrangement under which a person provides medical indemnity cover for a health care professional was renewed before 1 July 2003; and

(b) the sole or dominant purpose, or a substantial purpose, of the person in having the arrangement renewed at that time was to avoid having a provision or provisions of this Act apply to the arrangement;

the arrangement is to be treated, for the purposes of this Act, as if it had been renewed on or after 1 July 2003.

32 Act not to affect State and Territory laws

This Act is not intended to exclude or limit the concurrent operation of any law of a State or Territory.

33 Regulations

(1) The Governor-General may make regulations prescribing matters:

(a) required or permitted by this Act to be prescribed; or

(b) necessary or convenient to be prescribed for carrying out or giving effect to this Act.

(2) The regulations may prescribe penalties not exceeding a fine of 10 penalty units for offences against the regulations.

[*Minister's second reading speech made in—*
House of Representatives on 12 December 2002
Senate on 24 March 2003]

(287/02)