



# **Medical Indemnity Amendment Act 2003**

**No. 121, 2003**

**An Act to amend the *Medical Indemnity Act 2002*,  
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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# Medical Indemnity Amendment Act 2003

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## **An Act to amend the *Medical Indemnity Act 2002*, and for related purposes**

[Assented to 5 December 2003]

The Parliament of Australia enacts:

### **1 Short title**

This Act may be cited as the *Medical Indemnity Amendment Act 2003*.

### **2 Commencement**

- (1) Each provision of this Act specified in column 1 of the table commences, or is taken to have commenced, in accordance with

column 2 of the table. Any other statement in column 2 has effect according to its terms.

<b>Commencement information</b>		
<b>Column 1</b>	<b>Column 2</b>	<b>Column 3</b>
<b>Provision(s)</b>	<b>Commencement</b>	<b>Date/Details</b>
1. Sections 1 to 3 and anything in this Act not elsewhere covered by this table	The day on which this Act receives the Royal Assent.	5 December 2003
2. Schedule 1, items 1 and 2	At the same time as the <i>Medical Indemnity (IBNR Indemnity) Contribution Amendment Act 2003</i> commences.	1 July 2003
3. Schedule 1, item 3	The day on which this Act receives the Royal Assent.	5 December 2003
4. Schedule 1, item 4	At the same time as the <i>Medical Indemnity (IBNR Indemnity) Contribution Amendment Act 2003</i> commences.	1 July 2003
5. Schedule 1, items 5 to 8	The day on which this Act receives the Royal Assent.	5 December 2003
6. Schedule 1, items 9 to 11	At the same time as the <i>Medical Indemnity (IBNR Indemnity) Contribution Amendment Act 2003</i> commences.	1 July 2003
7. Schedule 1, items 12 and 13	The day on which this Act receives the Royal Assent.	5 December 2003
8. Schedule 1, items 14 to 17	At the same time as the <i>Medical Indemnity (IBNR Indemnity) Contribution Amendment Act 2003</i> commences.	1 July 2003
9. Schedule 1, item 18	The day on which this Act receives the Royal Assent.	5 December 2003
10. Schedule 1, items 19 and 20	At the same time as the <i>Medical Indemnity (IBNR Indemnity) Contribution Amendment Act 2003</i> commences.	1 July 2003
11. Schedule 1, items 21 to 26	The day on which this Act receives the Royal Assent.	5 December 2003
12. Schedule 2	The day on which this Act receives the Royal Assent.	5 December 2003

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Note: This table relates only to the provisions of this Act as originally passed by the Parliament and assented to. It will not be expanded to deal with provisions inserted in this Act after assent.

- (2) Column 3 of the table contains additional information that is not part of this Act. Information in this column may be added to or edited in any published version of this Act.

### **3 Schedule(s)**

Each Act that is specified in a Schedule to this Act is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to this Act has effect according to its terms.

## Schedule 1—Medical indemnity contribution

### Part 1—Amendments

#### *Medical Indemnity Act 2002*

##### **1 Paragraph 52(2)(a)**

Repeal the paragraph, substitute:

- (a) the person dies in or before that contribution year; or

##### **2 Paragraph 52(2)(e)**

Omit “by the person; or”, substitute:

by the person and that lump sum has not later been:

- (i) refunded under section 67; or
- (ii) repaid to the person in accordance with an authorisation under section 33 of the *Financial Management and Accountability Act 1997*; or

##### **3 After subsection 52(4)**

Insert:

- (4A) Regulations made for the purposes of subsection (4) may provide that a person is exempt from IBNR indemnity contribution in circumstances that are similar to those specified in subsection (2).

##### **4 Paragraph 59(2)(b)**

Omit “by the person.”, substitute:

by the person and that lump sum has not later been:

- (i) refunded under section 67; or
- (ii) repaid to the person in accordance with an authorisation under section 33 of the *Financial Management and Accountability Act 1997*.

##### **5 After subsection 59(3)**

Insert:

- (3A) Regulations made for the purposes of subsection (3) may provide that a person is exempt from enhanced UMP indemnity



contribution in circumstances that are similar to those specified in subsection (2).

**6 Section 61**

After “a medical indemnity contribution”, insert “that a person is liable to pay”.

**7 Section 61 (paragraph (b) in the cell at table item 1, column headed “becomes due and payable on...”)**

Repeal the paragraph, substitute:

(b) such later day as is specified in the regulations as the payment day for the contribution year either generally for all people or for the class of people that includes the person, as the case may be.

**8 Subsection 62(1)**

Before “under this section”, insert “for the person”.

**9 Subsection 62(3)**

Omit “if the HIC:”, substitute “(the *current application*) if:”.

**10 Paragraph 62(3)(a)**

Before “is satisfied”, insert “the HIC”.

**11 Paragraph 62(3)(b)**

Repeal the paragraph, substitute:

- (b) at the time the HIC approves the current application, either:
  - (i) the HIC has not approved an application by the person to defer the payment day for that kind of medical indemnity contribution for an earlier contribution year under this section; or
  - (ii) each application by the person to defer the payment day for that kind of medical indemnity contribution for an earlier contribution year under this section that has been approved by the HIC has subsequently been revoked or

is in respect of a contribution from which the person is exempt.

**12 Subsection 62(4)**

After “the contribution”, insert “that the person is liable to pay”.

**13 Subsection 62(4) (paragraph (b) in the cell at table item 1, column headed “becomes due and payable on...”)**

Repeal the paragraph, substitute:

- (b) such later day as is specified in the regulations either generally for all people or for the class of people that includes the person, as the case may be.

**14 Paragraph 62(5)(c)**

Omit “subsection (7)”, substitute “whichever of subsections (7) and (8) applies”.

**15 Subsection 62(7)**

Repeal the subsection, substitute:

(7) If:

- (a) the contribution is IBNR indemnity contribution; and
- (b) before the deferred payment day worked out under subsection (4), either:
  - (i) the person dies; or
  - (ii) the person becomes exempt because of turning a particular age;

the contribution becomes due and payable immediately after the person dies or turns that age.

(8) If:

- (a) the contribution is enhanced UMP indemnity contribution; and
- (b) the person dies before the deferred payment day worked out under subsection (4);

the contribution becomes due and payable immediately after the person dies.

**16 Paragraph 63(1)(b)**

Omit “\$1,000 or more”, substitute “more than \$1,000”.

**17 Subsection 64(1)**

Repeal the subsection (not including the heading or the note), substitute:

- (1) A person who is liable to pay:
- (a) IBNR indemnity contribution for a contribution year (the *current contribution year*) that starts on or after 1 July 2005; or
  - (b) enhanced UMP indemnity contribution for a contribution year (the *current contribution year*) that starts on or after 1 July 2003;
- may elect to pay the lump sum worked out under subsection (4).

**18 Subsection 64(5) (definition of *deferred contribution liability*)**

After “day”, insert “for the person”.

**19 Subsection 67(1)**

After “unless”, insert “the amount has been previously repaid to the person in accordance with an authorisation under section 33 of the *Financial Management and Accountability Act 1997* or”.

**20 At the end of subsection 67(3)**

Add “unless the amount has been previously repaid to the person in accordance with an authorisation under section 33 of the *Financial Management and Accountability Act 1997*”.

**21 Section 72**

Repeal the section, substitute:

**72 HIC must be notified of a change in circumstances etc.**

- (1) A person who:
- (a) is exempt from a medical indemnity contribution; and
  - (b) ceases to be exempt from the contribution because:
    - (i) the person’s circumstances change before the start of, or during, a contribution year; or

**Schedule 1** Medical indemnity contribution  
**Part 1** Amendments

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(ii) the person fails to satisfy a condition on which the exemption from the contribution depends;  
must notify the HIC of that change in circumstances or that failure, as the case may be.

Note: Failure to notify is an offence (see section 74).

- (2) The notification must:
- (a) be in writing; and
  - (b) set out details of the change in circumstances or failure of which the person is required to notify the HIC under subsection (1); and
  - (c) be given to the HIC within 28 days after the day on which the person becomes aware of the change in circumstances or failure, as the case may be.

**22 Subsection 74(1)**

Omit “change in circumstances”, substitute “matter”.

**23 Subsection 74(2)**

Omit “those circumstances”, substitute “that matter”.

## **Part 2—Transitional provisions etc.**

### **24 Saving existing regulations**

Regulations in force immediately before the commencement of this item for the purposes of:

- (a) paragraph (b) of table item 1 of section 61 of the *Medical Indemnity Act 2002*; or
- (b) paragraph (b) of table item 1 of subsection 62(4) of the *Medical Indemnity Act 2002*;

have effect after that commencement as if they were made for the purposes of that paragraph of that Act as substituted by item 7 or 13 of this Schedule, as the case requires.

### **25 Transitional—deferral of payment day for IBNR indemnity contribution**

- (1) This item applies to an application under section 62 of the *Medical Indemnity Act 2002* to defer the payment day for IBNR indemnity contribution for the contribution year that started on 1 July 2003 that:
  - (a) was purportedly made before the commencement of this item; and
  - (b) would have been valid but for the amendment made by item 1 of Schedule 1 to the *Medical Indemnity (IBNR Indemnity) Contribution Amendment Act 2003*.

Note: The application will not in fact be valid because the imposition day has been changed retrospectively by item 1 of Schedule 1 to the *Medical Indemnity (IBNR Indemnity) Contribution Amendment Act 2003* and one of the results of this is that the applicant will not have been entitled to make the application as the applicant will not have been, at that time, liable to pay an IBNR indemnity contribution.

- (2) An application that this item applies to has effect, and may be dealt with by the HIC, after the commencement of this item as though it were a valid application.
- (3) A purported approval under section 62 of the *Medical Indemnity Act 2002* before the commencement of this item of an application to which this item applies has effect, and may be dealt with by the HIC, after the commencement of this item as though it were a valid approval if, but for the amendment made by item 1 of Schedule 1 to the *Medical*

**Schedule 1** Medical indemnity contribution  
**Part 2** Transitional provisions etc.

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*Indemnity (IBNR Indemnity) Contribution Amendment Act 2003*, the approval would have been valid.

Note: The approval will not in fact be valid because the application for the approval was not in fact valid (see the note to subitem (1)).

- (4) As soon as practicable after the commencement of this item, the HIC must give an applicant whose approval has effect under subitem (3) as though it were valid a written notice that:
- (a) states that the application has been approved; and
  - (b) specifies the deferred payment day worked out under subsection 62(4) of the *Medical Indemnity Act 2002* as amended by this Schedule; and
  - (c) states the effect of subsection 62(7) of the *Medical Indemnity Act 2002* as inserted by item 15 of this Schedule.

## **26 Transitional regulations**

The Governor-General may make regulations prescribing matters of a transitional nature (including prescribing any saving or application provisions) arising out of the amendments made by this Schedule or the *Medical Indemnity (IBNR Indemnity) Contribution Amendment Act 2003*.

## **Schedule 2—Exceptional claims indemnity scheme**

### *Medical Indemnity Act 2002*

#### **1 After paragraph 3(2)(a)**

Insert:

- (aa) meeting the amounts by which settlements and awards exceed insurance contract limits, if those contract limits meet the Commonwealth's threshold requirements; and

#### **2 Subsection 4(1)**

Insert:

*exceptional claims indemnity* means an exceptional claims indemnity paid or payable under Division 2A of Part 2.

Note: Amounts payable under the Exceptional Claims Protocol are not covered by this definition.

#### **3 Subsection 4(1)**

Insert:

*Exceptional Claims Protocol* means the protocol (as amended and in force from time to time) determined by the Minister under section 34X.

#### **4 Subsection 4(1)**

Insert:

*high cost claim indemnity* means a high cost claim indemnity paid or payable under Division 2 of Part 2.

#### **5 Subsection 4(1)**

Insert:

*IBNR indemnity* means an IBNR indemnity paid or payable under Division 1 of Part 2.

#### **6 Subsection 4(1) (definition of *indemnity scheme payment*)**

Repeal the definition, substitute:

*indemnity scheme payment* means:

- (a) an IBNR indemnity; or
- (b) a high cost claim indemnity; or
- (c) an exceptional claims indemnity.

**7 Subsection 4(1) (after paragraph (a) of the definition of *late payment penalty*)**

Insert:

- (aa) in relation to a debt owed under section 34T—means a penalty payable under section 34W; and

**8 Subsection 4(1)**

Insert:

*legal practitioner* means a person who is enrolled as a barrister, a solicitor, a barrister and solicitor, or a legal practitioner, of:

- (a) a federal court; or
- (b) a court of a State or Territory.

**9 Subsection 4(1)**

Insert:

*medical indemnity cover*: a contract of insurance provides medical indemnity cover for a person if:

- (a) the person is specified or referred to in the contract, whether by name or otherwise, as a person to whom the insurance cover provided by the contract extends; and
- (b) the insurance cover indemnifies the person (subject to the terms and conditions of the contract) in relation to claims that may be made against the person in relation to incidents that occur or occurred in the course of, or in connection with, the practice by the person of a medical profession.

Note: A single contract of insurance may provide medical indemnity cover for more than one person.

**10 Subsection 4(1) (definition of *payment*)**

After “has”, insert “(other than in Division 2A of Part 2)”.

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### **11 Subsection 4(1)**

Insert:

*qualifying claim certificate* means a certificate issued by the HIC under section 34E.

### **12 Subsection 4(1)**

Insert:

*subject to appeal*: a judgment or order is *subject to appeal* until:

- (a) any applicable time limits for lodging an appeal (however described) against the judgment or order have expired; and
- (b) if there is such an appeal against the judgment or order—the appeal (and any subsequent appeals) have been finally disposed of.

### **13 Subsections 4(3) and (4)**

After “this Act”, insert “(other than Division 2A of Part 2)”.

### **14 Subsection 30(2) (note)**

Repeal the note.

### **15 Subsection 30(4)**

Repeal the subsection.

### **16 After Division 2 of Part 2**

Insert:

## **Division 2A—Exceptional claims indemnity scheme**

### **Subdivision A—Introduction**

#### **34A Guide to the exceptional claims indemnity provisions**

- (1) This Division provides that an exceptional claims indemnity may be paid in relation to a liability of a person if:
  - (a) the liability relates to a claim against the person in relation to an incident that occurs in the course of, or in connection with, the practice by the person of a medical profession,

**Schedule 2** Exceptional claims indemnity scheme

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- being a claim that has been certified as a qualifying claim;  
and
- (b) the liability exceeds the amount payable under an insurance contract that has a contract limit satisfying the relevant threshold.
- (2) This Division also provides for the determination of an Exceptional Claims Protocol that can deal with other matters relating to claims that have been certified as qualifying claims.
- (3) The following table tells you where to find the provisions dealing with various issues:

<b>Where to find the provisions on various issues</b>		
<b>Item</b>	<b>Issue</b>	<b>Provisions</b>
1	certification of claims that qualify for exceptional claims indemnity (including the threshold requirement for the insurance contract)	sections 34E to 34K
2	when is an exceptional claims indemnity payable in respect of a liability?	sections 34L and 34M
3	some liabilities are only partly covered	sections 34N and 34O
4	how much exceptional claims indemnity is payable?	section 34P
5	how must an exceptional claims indemnity be applied?	section 34Q
6	who is liable to repay an overpayment of exceptional claims indemnity?	section 34R
7	what if a payment is received that would have reduced the amount of an insurance payment?	sections 34S to 34W
8	the Exceptional Claims Protocol, and what it can deal with	sections 34X and 34Y
9	modifications and exclusions by regulations	section 34Z
10	how does a person apply for an exceptional claims indemnity?	section 37A

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<b>Where to find the provisions on various issues</b>		
<b>Item</b>	<b>Issue</b>	<b>Provisions</b>
11	when will an exceptional claims indemnity be paid?	section 37B
12	what information has to be provided to the HIC about exceptional claims matters?	section 38
13	what records must be kept in relation to exceptional claims matters?	section 39
14	how are overpayments of exceptional claims indemnity recovered?	sections 41 and 42

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### **34B Definitions**

In this Division:

***practitioner's contract limit***, in relation to a person for whom a contract of insurance provides medical indemnity cover, means the maximum amount payable, in aggregate, by the insurer under the contract in relation to claims against the person.

Note 1: If the contract provides medical indemnity cover for more than one person, there must be a separate contract limit for each of those persons.

Note 2: For how this definition applies if the contract provides for deductibles, see section 34C.

Note 3: For how this definition interacts with the high cost claim indemnity scheme, see section 34D.

***qualifying liability***, in relation to a claim, has the meaning given by section 34M.

***termination date*** means the date, if any, set by regulations under section 34G.

### **34C Treatment of deductibles**

- (1) This section applies if, under a contract of insurance that provides medical indemnity cover for a person (the ***practitioner***), the insurer is entitled to count an amount (the ***deductible amount***):

- (a) incurred by the insurer in relation to a claim against the practitioner; or
  - (b) paid or payable by the practitioner or another person in relation to a claim against the practitioner;
- towards the maximum amount payable, in aggregate, under the contract in relation to claims against the practitioner, even though the insurer has not paid, and is not liable to pay, the amount under the contract.
- (2) For the purpose of the definition of *practitioner's contract limit* in section 34B, the maximum amount payable, in aggregate, under the contract in relation to claims against the practitioner is as stated in the contract, even though the insurer (because of the deductible amount) may not actually be liable to pay the whole of that maximum amount.
  - (3) For the purpose of the references in paragraphs 34L(1)(e) and (f) to an amount that an insurer has paid or is liable to pay under a contract of insurance, the deductible amount is to be counted as if it were an amount that the insurer has paid or is liable to pay under the contract.
  - (4) However, for the purpose of the reference in paragraph 34L(1)(e) to an amount that an insurer would have been liable to pay under a contract of insurance, the deductible amount is not to be counted as if it were an amount that the insurer would have been liable to pay under the contract.

#### **34D Interaction with high cost claim indemnity scheme**

For the purposes of the definition of *practitioner's contract limit* in section 34B, and of paragraphs 34L(1)(e) and (f), an amount that an insurer has paid or is liable to pay, or would have been liable to pay, under a contract of insurance is not to be reduced on account of a high cost claim indemnity paid or payable, or that would have been payable, to the insurer.

## **Subdivision B—Certification of qualifying claims**

### **34E When may the HIC certify a claim as a qualifying claim?**

*Criteria for certification*

- (1) The HIC may issue a certificate stating that a claim is a qualifying claim if the HIC is satisfied that:
  - (a) the claim is a claim for compensation or damages that is or was made by a person against another person (the ***practitioner***); and
  - (b) the claim relates to:
    - (i) an incident that occurs or occurred; or
    - (ii) a series of related incidents that occur or occurred; in the course of, or in connection with, the practice by the practitioner of a medical profession; and
  - (c) either:
    - (i) the incident occurs or occurred; or
    - (ii) one or more of the incidents in the series occurs or occurred; in Australia or an external Territory; and
  - (d) the incident did not occur, or the incidents did not all occur, in the course of the provision of treatment to a public patient in a public hospital; and
  - (e) there is a contract of insurance in relation to which the following requirements are satisfied:
    - (i) the contract provides medical indemnity cover for the practitioner in relation to the claim, or would, but for the practitioner's contract limit, provide such cover for the practitioner in relation to the claim;
    - (ii) the practitioner's contract limit equals or exceeds the relevant threshold (see section 34F);
    - (iii) the insurer is a general insurer, within the meaning of the *Insurance Act 1973*;
    - (iv) the insurer entered into the contract in the ordinary course of the insurer's business; and
  - (f) the insurer was first notified of the claim, or of facts that might give rise to the claim, on or after 1 January 2003; and

- (g) if a termination date for the exceptional claims indemnity scheme is set (see section 34G), the incident, or one or more of the incidents, to which the claim relates occurred before the termination date; and
- (h) the claim is not a claim of a class specified in regulations made for the purposes of this paragraph; and
- (i) the contract of insurance is not a contract of a class specified in regulations made for the purposes of this paragraph; and
- (j) a person has applied for the certificate in accordance with section 34H.

Note 1: Paragraph (d)—for what happens if some, but not all, of the incidents in a series occur in the course of the provision of treatment to a public patient in a public hospital, see section 34N.

Note 2: Paragraph (g)—for what happens if some, but not all, of the incidents in a series occur after the termination date, see section 34O.

*When a certificate is in force*

- (2) The certificate comes into force when it is issued and remains in force until it is revoked.

*Matters to be identified or specified in certificate*

- (3) The certificate must:
  - (a) identify:
    - (i) the practitioner; and
    - (ii) the claim; and
    - (iii) the contract of insurance in relation to which paragraph (1)(e) is satisfied; and
  - (b) specify the relevant threshold.

The certificate may also contain other material.

*AAT review of decision to refuse*

- (4) An application may be made to the Administrative Appeals Tribunal for review of a decision of the HIC to refuse to issue a qualifying claim certificate.

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

*HIC to give applicant copy of certificate*

- (5) If the HIC decides to issue a qualifying claim certificate, the HIC must, within 28 days of making its decision, give the applicant a copy of the certificate. However, a failure to comply does not affect the validity of the decision.

**34F What is the relevant threshold?**

*The relevant threshold*

- (1) For the purposes of subparagraph 34E(1)(e)(ii), the **relevant threshold** is:
  - (a) if the insurer was first notified of the claim, or of facts that might give rise to the claim, on or after 1 January 2003 and before 1 July 2003—\$15 million; or
  - (b) if the insurer is or was first notified of the claim, or of facts that might give rise to the claim, on or after 1 July 2003—\$20 million, or such other amount as is specified in the regulations as the threshold.

*Threshold specified in regulations only applies to contracts entered into after the regulations take effect*

- (2) A regulation specifying an amount as the threshold (or changing the amount previously so specified) only applies in relation to contracts of insurance entered into after the regulation takes effect.

*When regulations reducing the threshold take effect*

- (3) A regulation reducing the threshold (which could be the threshold originally applicable under subsection (1), or that threshold as already changed by regulations) takes effect on the date specified in the regulations, which must be the date on which the regulations are notified in the *Gazette* or a later day.

*When regulations increasing the threshold take effect*

- (4) A regulation increasing the threshold (which could be the threshold originally applicable under subsection (1), or that threshold as already changed by regulations), takes effect on the date specified in the regulations, which must be at least 3 calendar months after the date on which the regulations are notified in the *Gazette*.

### **34G Setting a termination date**

- (1) The regulations may set a termination date for the exceptional claims indemnity scheme.

Note: The scheme does not cover incidents that occur after the termination date (see paragraph 34E(1)(g) and section 34O).

- (2) The termination date cannot be earlier than 1 January 2006, and cannot be before the date on which the regulations are notified in the *Gazette*.

### **34H Application for a qualifying claim certificate**

- (1) An application for the issue of a qualifying claim certificate in relation to a claim may be made by the person against whom the claim is or was made, or by a person acting on that person's behalf.
- (2) The application must:
  - (a) be made in writing using a form approved by the HIC; and
  - (b) be accompanied by the documents and other information required by the form approved by the HIC.

### **34I Time by which an application must be decided**

- (1) Subject to subsection (2), the HIC is to decide an application for the issue of a qualifying claim certificate on or before the 21st day after the day on which the application is received by the HIC.
- (2) If the HIC requests a person to give information under section 38 in relation to the application, the HIC does not have to decide the application until the 21st day after the day on which the person gives the information to the HIC.

### **34J Obligation to notify the HIC if information is incorrect or incomplete**

- (1) If:
  - (a) a qualifying claim certificate is in force in relation to a claim; and
  - (b) a person becomes aware that the information provided to the HIC in connection with the application for the certificate was



incorrect or incomplete, or is no longer correct or complete;  
and

- (c) the person is:
- (i) the person who applied for the certificate; or
  - (ii) another person who has applied for a payment of exceptional claims indemnity, or for a payment under the Exceptional Claims Protocol, in relation to the claim;

the person must notify the HIC of the respect in which the information was incorrect or incomplete, or is no longer correct or complete.

Note: Failure to notify is an offence (see section 46).

- (2) The notification must:
- (a) be made in writing; and
  - (b) be given to the HIC within 28 days after the person becomes aware as mentioned in subsection (1).

### **34K Revocation and variation of qualifying claim certificates**

#### *Revocation*

- (1) The HIC may revoke a qualifying claim certificate if the HIC is no longer satisfied as mentioned in subsection 34E(1) in relation to the claim.
- (2) To avoid doubt, in considering whether it is still satisfied as mentioned in subsection 34E(1) in relation to the claim, the HIC may have regard to matters that have occurred since the decision to issue the qualifying claim certificate was made, including for example:
  - (a) the making of regulations for the purpose of paragraph 34E(1)(h) or (i); or
  - (b) changes to the terms and conditions of the contract of insurance identified in the certificate.

#### *Variation*

- (3) If the HIC is satisfied that a matter is not correctly identified or specified in a qualifying claim certificate, the HIC may vary the certificate so that it correctly identifies or specifies the matter.

*Effect of revocation*

- (4) If:
- (a) the HIC revokes a qualifying claim certificate; and
  - (b) an amount of exceptional claims indemnity has already been paid in relation to the claim;
- the amount is an amount overpaid to which section 41 applies.

*Effect of variation*

- (5) If:
- (a) the HIC varies a qualifying claim certificate; and
  - (b) an amount of exceptional claims indemnity has already been paid in relation to the claim, and that amount exceeds the amount that would have been paid if the amount of indemnity had been determined having regard to the certificate as varied;
- the amount of the excess is an amount overpaid to which section 41 applies.

*AAT review of decision to revoke or vary*

- (6) An application may be made to the Administrative Appeals Tribunal for review of a decision of the HIC to revoke or vary a qualifying claim certificate.

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

*HIC to give applicant copy of varied certificate*

- (7) If the HIC decides to vary a qualifying claim certificate, the HIC must, within 28 days of making its decision, give the applicant a copy of the varied certificate. However, a failure to comply does not affect the validity of the decision.

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## Subdivision C—Exceptional claims indemnity

### 34L When is an exceptional claims indemnity payable?

*Criteria for payment of indemnity*

- (1) The HIC may decide that an exceptional claims indemnity is payable in relation to a liability of a person (the *practitioner*) if:
  - (a) a claim for compensation or damages (the *current claim*) is, or was, made against the practitioner by another person; and
  - (b) a qualifying claim certificate is in force in relation to the current claim; and
  - (c) the liability is a qualifying liability of the practitioner in relation to the current claim (see section 34M); and
  - (d) because of the practitioner's contract limit in relation to the contract of insurance identified in the qualifying claim certificate, the contract does not cover, or does not fully cover, the liability; and
  - (e) the amount that, if the practitioner's contract limit had been high enough to cover the whole of the liability, the insurer would (subject to the other terms and conditions of the contract) have been liable to pay under the contract of insurance in relation to the liability exceeds the actual amount (if any) that the insurer has paid or is liable to pay under the contract in relation to the liability; and
  - (f) the aggregate of:
    - (i) the amount (if any) the insurer has paid, or is liable to pay, in relation to the liability under the contract of insurance; and
    - (ii) the other amounts (if any) already paid by the insurer under the contract in relation to the current claim; and
    - (iii) the amounts (if any) already paid by the insurer under the contract in relation to other claims against the practitioner;
 equals or exceeds the relevant threshold identified in the qualifying claim certificate; and
  - (g) a person has applied for the indemnity in accordance with section 37A.

Note 1: For how paragraphs (e) and (f) apply if there are deductibles, see section 34C.

- Note 2: For how paragraphs (e) and (f) interact with the high cost claim indemnity scheme, see section 34D.
- Note 3: For the purpose of subparagraphs (f)(i) and (ii), payments and liabilities to pay must meet the ordinary course of business requirement set out in subsection (3).
- Note 4: For how paragraphs (e) and (f) apply if the insurer is an externally-administered body corporate, see subsection (4).
- Note 5: For how paragraphs (e) and (f) apply if the claim relates to a series of incidents some, but not all, of which occurred in the course of the provision of treatment to a public patient in a public hospital, see section 34N.
- Note 6: For how paragraphs (e) and (f) apply if the claim relates to a series of incidents some, but not all, of which occurred after the termination date, see section 34O.

*Who the indemnity is payable to*

- (2) The indemnity is to be paid to the person who applies for it.

Note: For who can apply, see section 37A.

*Ordinary course of business test for insurance payments*

- (3) An amount that an insurer has paid, or is liable to pay, under a contract of insurance does not count for the purpose of subparagraph (1)(f)(i) or (ii) unless it is an amount that the insurer paid, or is liable to pay, in the ordinary course of the insurer's business.

*What if the insurer is an externally-administered body corporate?*

- (4) If an insurer is an externally-administered body corporate:
- (a) a reference in paragraphs (1)(e) and (f) to an amount that the insurer is liable to pay under a contract of insurance is a reference to an amount that the insurer is liable to pay under the contract and that is a provable amount; and
  - (b) a reference in subsection (3) to an amount that an insurer is liable to pay in the ordinary course of the insurer's business is a reference to an amount that the insurer is liable to pay, and would be able to pay in the ordinary course of the insurer's business if it were not an externally-administered body corporate.

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*AAT review of decision to refuse, or to pay a particular amount of indemnity*

- (5) An application may be made to the Administrative Appeals Tribunal for review of a decision of the HIC to refuse an application for exceptional claims indemnity, or a decision of the HIC to pay a particular amount of exceptional claims indemnity.

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

### **34M Qualifying liabilities**

- (1) A person (the *practitioner*) has a *qualifying liability* in relation to a claim made against the person if:
- (a) one of the following applies:
    - (i) the liability is under a judgment or order of a court in relation to the claim, being a judgment or order that is not stayed and is not subject to appeal;
    - (ii) the liability is under a settlement of the claim that takes the form of a written agreement between the parties to the claim;
    - (iii) the liability is some other kind of liability of the practitioner (for example, a liability to legal costs) that relates to the claim; and
  - (b) the defence of the claim against the practitioner was conducted appropriately (see subsection (2)) up to the time when:
    - (i) if the liability is under a judgment or order of a court—the date on which the judgment or order became a judgment or order that is not stayed and is not subject to appeal; or
    - (ii) if the liability is under a settlement of the claim—the date on which the settlement agreement was entered into; or
    - (iii) if the liability is some other kind of liability—the date on which the liability was incurred; and
  - (c) if the liability is under a settlement of the claim, or is under a consent order made by a court—a legal practitioner has given a statutory declaration certifying that the amount of the liability is reasonable.

- (2) For the purposes of paragraph (1)(b), the defence of the claim is *conducted appropriately* if, and only if:
- (a) to the extent it is conducted on the practitioner's behalf by an insurer, or by a legal practitioner engaged by the insurer—the defence is conducted to a standard that is consistent with the insurer's usual standard for the conduct of the defence of claims; and
  - (b) to the extent it is conducted by the practitioner, or by a legal practitioner engaged by the practitioner—the defence is conducted prudently.

- (3) In this section:

*defence of the claim* includes any settlement negotiations on behalf of the practitioner.

**34N Treatment of a claim that partly relates to a public patient in a public hospital**

If:

- (a) a claim against a person relates to a series of incidents; and
- (b) some, but not all, of the incidents occurred in the course of the provision of treatment to a public patient in a public hospital;

then, for the purposes of applying paragraph 34L(1)(e) and subparagraphs 34L(1)(f)(i) and (ii) in relation to the claim, an amount that an insurer has paid or is liable to pay, or would have been liable to pay, in relation to the claim, is to be reduced by the extent (if any) to which the amount relates or would relate to, or is or would be reasonably attributable to, the incident or incidents that occurred in the course of the provision of treatment to a public patient in a public hospital.

**34O Treatment of a claim that relates to a series of incidents some of which occurred after the termination date**

If:

- (a) a claim against a person relates to a series of incidents; and
- (b) some, but not all, of the incidents occurred after the termination date;

then, for the purposes of applying paragraph 34L(1)(e) and subparagraphs 34L(1)(f)(i) and (ii) in relation to the claim, an amount that an insurer has paid or is liable to pay, or would have been liable to pay, in relation to the claim, is to be reduced by the extent (if any) to which the amount relates or would relate to, or is or would be reasonably attributable to, the incident or incidents that occurred after the termination date.

### **34P The amount of exceptional claims indemnity that is payable**

The amount of exceptional claims indemnity that is payable in relation to a particular qualifying liability is the amount of the excess referred to in paragraph 34L(1)(e).

Note: It is only liabilities that exceed the practitioner's contract limit that will be covered by an exceptional claims indemnity (even if the relevant threshold is less than that limit).

### **34Q How exceptional claims indemnity is to be applied**

- (1) This section applies if an exceptional claims indemnity is paid to a person (the **recipient**) in relation to a liability of a person (the **practitioner**).

Note: The recipient will either be the practitioner himself or herself, or a person acting on behalf of the practitioner.

*HIC to give recipient of payment a notice identifying the liability to be discharged*

- (2) The HIC must give the recipient a written notice (the **payment notice**) identifying the liability in relation to which the indemnity is paid, and advising the recipient how this section requires the indemnity to be dealt with.

*Recipient's obligation if the amount of the indemnity equals or is less than the liability*

- (3) If the amount of the indemnity equals or is less than the undischarged amount of the liability identified in the payment notice, the recipient must apply the whole of the indemnity towards the discharge of the liability.

*Recipient's obligation if the amount of the indemnity exceeds the liability*

- (4) If the amount of the indemnity is greater than the undischarged amount of the liability identified in the payment notice, the recipient must:
- (a) apply so much of the indemnity as equals the undischarged amount of the liability towards the discharge of the liability; and
  - (b) if the recipient is not the practitioner—deal with the balance of the indemnity in accordance with the directions of the practitioner.

*Time by which recipient must comply with obligation*

- (5) The recipient must comply with whichever of subsections (3) and (4) applies:
- (a) by the time specified in a written direction (whether contained in the payment notice or otherwise) given to the recipient by the HIC; or
  - (b) if no such direction is given to the recipient—as soon as practicable after the indemnity is received by the recipient.
- To avoid doubt, the HIC may vary a direction under paragraph (a) to specify a different time.

*Debt to Commonwealth if recipient does not comply with obligation on time*

- (6) If the recipient does not comply with whichever of subsections (3) and (4) applies by the time required by subsection (5), the amount of the indemnity is a debt due to the Commonwealth.
- (7) The debt may be recovered:
- (a) by action by the HIC against the recipient in a court of competent jurisdiction; or
  - (b) under section 42.
- (8) If the amount of the indemnity is recoverable, or has been recovered, as mentioned in subsection (7), no amount is recoverable under section 34T or section 41 in relation to the same payment of exceptional claims indemnity.



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**34R Who is liable to repay an overpayment of exceptional claims indemnity?**

- (1) This section applies if, in relation to an exceptional claims indemnity that has been paid, there is an amount overpaid as described in subsection 34T(2) or 41(2).
- (2) The *liable person*, in relation to the amount overpaid, is:
  - (a) if the indemnity has not yet been dealt with in accordance with whichever of subsections 34Q(3) and (4) applies—the recipient referred to in subsection 34Q(1); or
  - (b) if the indemnity has been dealt with in accordance with whichever of those subsections applies—the practitioner referred to in subsection 34Q(1).

Note: The recipient and the practitioner will be the same person if the indemnity was paid to the practitioner.

- (3) If:
  - (a) the recipient and the practitioner referred to in subsection 34Q(1) are not the same person; and
  - (b) when the overpayment is recovered as a debt, the liable person is the recipient;

the fact that the recipient may later deal with the remainder of the indemnity in accordance with subsection 34Q(3) or (4) does not mean that the overpayment should instead have been recovered from the practitioner.

**Subdivision D—Payments that would have reduced the amount paid out under the contract of insurance**

**34S Amounts paid before payment of exceptional claims indemnity**

- (1) If:
  - (a) an amount (the *insurance payment*) has been paid under a contract of insurance that provides medical indemnity cover for a person (the *practitioner*) in relation to a liability of the practitioner; and
  - (b) another amount (not being an amount referred to in subsection (2)) has been paid to the practitioner, the insurer or another person in relation to the incident or incidents to which the liability relates; and

- (c) the other amount was not taken into account in working out the amount of the insurance payment; and
- (d) if the other amount had been taken into account in working out the amount of the insurance payment, a lesser amount would have been paid under the contract of insurance in relation to the liability;

then, for the purpose of calculating the amount of exceptional claims indemnity (if any) that is payable in relation to a liability of the practitioner, the lesser amount is taken to have been the amount of the insurance payment.

- (2) This section does not apply to any of the following:
  - (a) an amount paid to an insurer by another insurer under a right of contribution;
  - (b) a payment of high cost claim indemnity;
  - (c) an amount of a kind specified in the regulations for the purposes of this paragraph.

### **34T Amounts paid after payment of exceptional claims indemnity**

- (1) This section applies if:
  - (a) an amount (the *actual indemnity amount*) of exceptional claims indemnity has been paid in relation to a qualifying liability that relates to a claim made against a person (the *practitioner*); and
  - (b) another amount (not being an amount referred to in subsection (5)) is paid to the practitioner, an insurer or another person in relation to the incident or incidents to which the claim relates, or in relation to one or more other incidents; and
  - (c) the other amount was not taken into account in calculating the actual indemnity amount; and
  - (d) if the other amount had been so taken into account, a lesser amount (the *reduced indemnity amount*, which could be zero) of exceptional claims indemnity would have been paid in relation to the liability.
- (2) The *amount overpaid* is the amount by which the actual indemnity amount exceeds the reduced indemnity amount.

- (3) If the HIC has given the liable person (see subsection 34R(2)) a notice under subsection 34V(1) in relation to the amount overpaid, the amount is a debt owed to the Commonwealth by the liable person.

Note 1: If the indemnity is or was not dealt with in accordance with whichever of subsections 34Q(3) and (4) applies by the time required by subsection 34Q(5), the whole amount of the indemnity is a debt owed by the recipient, and no amount is recoverable under this section (see subsections 34Q(6) to (8)).

Note 2: If:

- (a) the recipient and the practitioner referred to in subsection 34Q(1) are not the same person; and
  - (b) the practitioner becomes the liable person;
- then (subject to subsection 34R(3)), the recipient ceases to be the liable person, and the amount overpaid must instead be recovered from the practitioner.

- (4) The amount overpaid may be recovered:
- (a) by action by the HIC against the liable person in a court of competent jurisdiction; or
  - (b) under section 42.
- (5) This section does not apply to any of the following:
- (a) an amount paid to an insurer by another insurer under a right of contribution;
  - (b) a payment of high cost claim indemnity;
  - (c) an amount of a kind specified in the regulations for the purposes of this paragraph.

### **34U Obligation to notify the HIC that amount has been paid**

- (1) If:
- (a) an amount of exceptional claims indemnity has been paid in relation to a qualifying liability that relates to a claim made against a person (the *practitioner*); and
  - (b) the person (the *applicant*) who applied for the exceptional claims indemnity becomes aware that another amount has been paid to the practitioner, an insurer or another person in relation to the incident or incidents to which the claim relates, or in relation to one or more other incidents; and

(c) because of the payment of the other amount, there is an amount overpaid as described in subsection 34T(2); the applicant must notify the HIC that the other amount has been paid.

Note: Failure to notify is an offence (see section 46).

- (2) The notification must:
- (a) be in writing; and
  - (b) be given to the HIC within 28 days after the applicant becomes aware that the other amount has been paid.

### **34V The HIC to notify of amount of debt due**

- (1) If:
- (a) an amount of exceptional claims indemnity has been paid in relation to a qualifying liability that relates to a claim made against a person (the *practitioner*); and
  - (b) another amount is paid to the practitioner, an insurer or another person in relation to the incident or incidents to which the claim relates, or in relation to one or more other incidents; and
  - (c) because of the payment of the other amount, there is an amount overpaid as described in subsection 34T(2);
- the HIC may give the liable person (see subsection 34R(2)) a written notice that specifies:
- (d) the amount overpaid, and that it is a debt owed to the Commonwealth under subsection 34T(3); and
  - (e) the day before which the amount must be paid to the Commonwealth; and
  - (f) the effect of section 34W.

The day specified under paragraph (e) must be at least 28 days after the day on which the notice is given.

- (2) The debt becomes due and payable on the day specified under paragraph (1)(e).

### **34W Penalty imposed if an amount is repaid late**

- (1) If:
-

- (a) a person owes a debt to the Commonwealth under subsection 34T(3); and
  - (b) the debt remains wholly or partly unpaid after it becomes due and payable;
- the person is liable to pay a late payment penalty under this section.
- (2) The late payment penalty is calculated:
    - (a) at the rate specified in the regulations for the purposes of this paragraph; and
    - (b) on the unpaid amount; and
    - (c) for the period:
      - (i) starting when the amount becomes due and payable; and
      - (ii) ending when the amount, and the penalty payable under this section in relation to the amount, have been paid in full.
  - (3) The HIC may remit the whole or a part of an amount of late payment penalty if the HIC considers that there are good reasons for doing so.
  - (4) An application may be made to the Administrative Appeals Tribunal for review of a decision of the HIC not to remit, or to remit only part of, an amount of late payment penalty.

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

- (5) If:
  - (a) the recipient and the practitioner referred to in subsection 34Q(1) are not the same person; and
  - (b) the practitioner becomes the liable person; and
  - (c) the recipient has or had a liability under this section to pay late payment penalty;the recipient's liability to the late payment penalty is not affected by the fact that the recipient is no longer the person who owes the debt to the Commonwealth under subsection 34T(3), except that the period referred to in paragraph (2)(c) ends when the practitioner becomes the liable person.

## Subdivision E—The Exceptional Claims Protocol

### 34X Minister may determine a protocol dealing with various matters

- (1) The Minister may, by writing, determine a protocol (the *Exceptional Claims Protocol*) for making payments to insurers of claim handling fees, and payments on account of legal, administrative or other costs incurred by insurers (whether on their own behalf or otherwise), in respect of claims in relation to which qualifying claim certificates have been issued.
- (2) Without limiting subsection (1), the Exceptional Claims Protocol may:
  - (a) make provision for:
    - (i) the conditions that must be satisfied for an amount to be payable to an insurer; and
    - (ii) the amount that is payable; and
    - (iii) the conditions that must be complied with by an insurer to which an amount is paid; and
    - (iv) other matters related to the making of payments, and the recovery of overpayments; and
  - (b) provide that this Division applies with specified modifications in relation to a liability that relates to costs in relation to which an amount has been paid under the Protocol.
- (3) Paragraph (2)(b) does not allow the Protocol to modify a provision that creates an offence, or that imposes an obligation which, if contravened, constitutes an offence.
- (4) The Exceptional Claims Protocol may also provide for other matters of a kind specified in regulations made for the purposes of this subsection.
- (5) The instrument determining the Exceptional Claims Protocol, and any instruments amending or revoking the Protocol, are disallowable instruments for the purposes of section 46A of the *Acts Interpretation Act 1901*.

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**34Y The HIC may request information**

- (1) If the HIC believes that a person is capable of giving information that is relevant to determining:
- (a) whether an insurer is entitled to a payment under the Exceptional Claims Protocol; or
  - (b) the amount that is payable to an insurer under the Exceptional Claims Protocol;
- the HIC may request the person to give the HIC the information.

Note: Failure to comply with the request is an offence (see section 45).

- (2) Without limiting subsection (1), any of the following persons may be requested to give information under that subsection:
- (a) an MDO;
  - (b) an insurer;
  - (c) a member, or former member of an MDO;
  - (d) a person who practises, or used to practise, a medical profession;
  - (e) a person who is acting, or has acted, on behalf of a person covered by paragraph (d);
  - (f) a legal personal representative of a person covered by paragraph (c), (d) or (e).
- (3) Without limiting subsection (1), if the information sought by the HIC is information relating to a matter in relation to which a person is required by section 39 to keep a record, the HIC may request the person to give the information by giving the HIC the record, or a copy of the record.
- (4) The request:
- (a) must be made in writing; and
  - (b) must state what information must be given to the HIC; and
  - (c) may require the information to be verified by statutory declaration; and
  - (d) must specify a day on or before which the information must be given; and
  - (e) must contain a statement to the effect that a failure to comply with the request is an offence.

The day specified under paragraph (d) must be at least 28 days after the day on which the request was made.

## Subdivision F—Miscellaneous

### 34Z Modifications and exclusions

- (1) The regulations may provide that this Division applies with specified modifications in relation to:
  - (a) a specified class of claims; or
  - (b) a specified class of contracts of insurance; or
  - (c) a specified class of situations in which a liability is, whether wholly or partly, covered by more than one contract of insurance.

Note: For the capacity for regulations to exclude classes of claims and classes of contracts of insurance, see paragraphs 34E(1)(h) and (i).

- (2) The regulations may provide that this Division does not apply, or applies with specified modifications, in relation to a specified class of liabilities or payments.
- (3) Without limiting subsection (2), the regulations may specify modifications regarding how this Division applies in relation to a liability under an order of a court requiring an amount to be paid pending the outcome of an appeal, including modifications:
  - (a) to count the liability as a qualifying liability (even though subparagraph 34M(1)(a)(i) may not be satisfied in relation to the order); and
  - (b) to deal with what happens if, as a result of the appeal or another appeal, the amount paid later becomes wholly or partly repayable; and
  - (c) to deal with what happens if the amount paid is later applied towards a liability that is confirmed as a result of the appeal or another appeal.
- (4) This section does not allow the regulations to modify a provision that creates an offence, or that imposes an obligation which, if contravened, constitutes an offence.

### 17 Subsection 35(1)

Omit “and high cost claim indemnity scheme”, substitute “, the high cost claim indemnity scheme and the exceptional claims indemnity scheme”.



**18 Subsection 35(2) (table)**

Repeal the table, substitute:

<b>Where to find the provisions on various issues</b>		
<b>Item</b>	<b>Issue</b>	<b>Provisions</b>
1	how do people apply for the indemnities?	sections 36 and 37A
2	when will the indemnities be paid?	sections 37 and 37B
3	what information has to be provided to the HIC about indemnity matters?	section 38
4	what records must be kept?	sections 39 and 40
5	how are overpayments of the indemnities, and indemnity repayments, recovered?	sections 41 and 42

**19 Subsection 36(1)**

Omit “an indemnity scheme payment”, substitute “an IBNR indemnity or a high cost claim indemnity”.

Note: The heading to section 36 is altered by omitting “**indemnity scheme payment**” and substituting “**IBNR indemnity or high cost claim indemnity**”.

**20 Subsection 37(1)**

Omit “an indemnity scheme payment”, substitute “an IBNR indemnity or a high cost claim indemnity”.

Note: The heading to section 37 is altered by omitting “**indemnity scheme payment**” and substituting “**IBNR indemnity or high cost claim indemnity**”.

**21 Subsection 37(1)**

Omit “the payment”, substitute “the indemnity”.

**22 Paragraph 37(2)(a)**

Omit “an indemnity scheme payment”, substitute “an IBNR indemnity or a high cost claim indemnity”.

**23 Paragraph 37(2)(c)**

Omit “the payment”, substitute “the indemnity”.

**24 Paragraph 37(2)(d)**

Omit “an indemnity scheme payment”, substitute “an IBNR indemnity or a high cost claim indemnity”.

**25 Subsection 37(2)**

Omit “the indemnity scheme payment”, substitute “the IBNR indemnity or the high cost claim indemnity”.

**26 After section 37**

Insert in Subdivision B of Division 3 of Part 2:

**37A Application for exceptional claims indemnity**

- (1) An application for an exceptional claims indemnity in relation to a qualifying liability that relates to a claim may be made by the person against whom the claim is or was made, or by a person acting on that person’s behalf.
- (2) The application must:
  - (a) be made in writing using a form approved by the HIC; and
  - (b) be accompanied by the documents and other information required by the form approved by the HIC.
- (3) Subject to subsections (4) and (5), the application cannot be made more than 28 days after:
  - (a) if the liability is under a judgment or order of a court—the date on which the judgment or order became or becomes a judgment or order that is not stayed and is not subject to appeal; or
  - (b) if the liability is under a settlement of the claim—the date on which the settlement agreement was entered into; or
  - (c) if the liability is some other kind of liability—the date on which the liability was incurred.
- (4) If the date that would otherwise be applicable under subsection (3) is before the commencement of Division 2A, the application can be made after that date but cannot be made more than 28 days after the commencement of that Division.
- (5) The HIC may accept a late application if the HIC considers that there are good reasons for doing so.

- (6) An application may be made to the Administrative Appeals Tribunal for review of a decision of the HIC not to accept a late application.

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

### **37B Payment date for exceptional claims indemnity**

#### *Time by which application must be decided*

- (1) Subject to subsections (2) and (3), the HIC is to decide an application for an exceptional claims indemnity on or before the end of the 21st day after the day on which the application is received by the HIC.
- (2) If the HIC requests a person to give information under section 38 in relation to an application for an exceptional claims indemnity, the HIC does not have to decide the application until the 21st day after the day on which the person gives the information to the HIC.
- (3) If the HIC has received, but not yet decided:
- (a) an application for the issue of a qualifying claim certificate in relation to a claim; and
  - (b) an application for an exceptional claims indemnity in relation to the same claim;
- the HIC does not have to decide the application for payment of an exceptional claims indemnity until the HIC has decided the application for the issue of a qualifying claim certificate.

#### *Time by which payment must be made*

- (4) If the HIC decides to grant an application for an exceptional claims indemnity, the HIC must pay the indemnity to the applicant as soon as practicable after making that decision.

### **27 Paragraphs 38(1)(a) and (b)**

Omit “to an MDO or insurer”.

### **28 After paragraph 38(1)(b)**

Insert:

- or (c) whether a qualifying claim certificate should be issued, varied or revoked; or

- (d) the Commonwealth's possible future liability to make indemnity scheme payments, or a particular kind of indemnity scheme payment;

**29 After paragraph 38(2)(c)**

Insert:

- (ca) a person who practises, or used to practise, a medical profession;
- (cb) a person who is acting, or has acted, on behalf of a person covered by paragraph (ca);

**30 Paragraph 38(2)(d)**

Omit "mentioned in paragraph (c)", substitute "covered by paragraph (c), (ca) or (cb)".

**31 Subsection 38(3)**

Repeal the subsection, substitute:

- (3) Without limiting subsection (1), if the information sought by the HIC is information relating to a matter in relation to which a person is required by section 39 or 40 to keep a record, the HIC may request the person to give the information by giving the HIC the record, or a copy of the record.
- (3A) Without limiting paragraph (1)(d), the HIC may request an MDO or insurer to give information under that paragraph on a periodic basis.

**32 Subsection 39(1)**

Repeal the subsection (including the subsection heading and the note), substitute:

*Records to be kept by person who applies for payment*

- (1) A person who applies for an indemnity scheme payment, or a payment under the Exceptional Claims Protocol, must keep records relevant to the following matters:
  - (a) the payability of the payment;
  - (b) the amount of the payment payable;
  - (c) any amount paid to the person that results in a person being liable to pay an amount under section 24 or 34T;

(d) any other matter determined by the HIC.

Note: Failure to keep the records is an offence (see section 47).

Note: The heading to section 39 is replaced by the heading “**Main record keeping obligations**”.

### **33 Saving provision—determinations under paragraph 39(1)(d)**

A determination in force under paragraph 39(1)(d) of the *Medical Indemnity Act 2002* as in force before the commencement of item 32 of this Schedule has effect after that commencement as if it were made under paragraph 39(1)(d) of that Act as amended by that item.

### **34 After subsection 39(1)**

Insert:

*Records to be kept by person who applies for a qualifying claim certificate*

(1A) A person who applies for the issue of a qualifying claim certificate in relation to a claim must keep records that are relevant to the following:

- (a) matters related to whether the criteria specified in subsection 34E(1) are satisfied in relation to the claim;
- (b) any other matter determined by the HIC.

Note: Failure to keep the records is an offence (see section 47).

### **35 Paragraph 39(2)(b)**

Repeal the paragraph, substitute:

- (b) whichever of the following days applies:
  - (i) if the record is required to be kept because the person applied for an IBNR indemnity or a high cost claim indemnity—the day on which this Act commenced;
  - (ii) if the record is required to be kept because the person applied for an exceptional claims indemnity or a qualifying claim certificate—the day on which Division 2A commenced;
  - (iii) if the record is required to be kept because the person applied for a payment under the Exceptional Claims Protocol—the day on which the Protocol took effect.

**36 Subsection 39(3)**

After “paragraph (1)(d)”, insert “or (1A)(b)”.

**37 Subsection 41(1)**

Omit “to an MDO or insurer”.

**38 Paragraphs 41(1)(a) and (b)**

Omit “to the MDO or insurer”.

**39 Subsection 41(3)**

Repeal the subsection, substitute:

- (3) The amount overpaid is a debt due to the Commonwealth by the liable person. For this purpose the *liable person* is:
- (a) if the indemnity scheme payment was an IBNR indemnity or a high cost claim indemnity—the MDO or insurer to which the payment was made; or
  - (b) if the indemnity scheme payment was an exceptional claims indemnity—the person who is the liable person under subsection 34R(2).

Note 1: Paragraph (b)—if the exceptional claims indemnity is or was not dealt with in accordance with whichever of subsections 34Q(3) and (4) applies by the time required by subsection 34Q(5), the whole amount of the indemnity is a debt owed by the recipient, and no amount is recoverable under this section (see subsections 34Q(6) to (8)).

Note 2: Paragraph (b)—if:

- (a) the recipient and the practitioner referred to in subsection 34Q(1) are not the same person; and
- (b) the practitioner becomes the liable person;

then (subject to subsection 34R(3)), the recipient ceases to be the liable person, and the amount overpaid must instead be recovered from the practitioner.

**40 Paragraph 41(4)(a)**

Omit “the MDO or insurer”, substitute “the liable person”.

**41 Paragraph 41(4)(b)**

Omit “an indemnity scheme payment payable to the MDO or insurer”, substitute “an IBNR indemnity or a high cost claim indemnity payable to the liable person”.

**42 Subsection 42(1)**

Omit “an MDO or insurer that”, substitute “a person (the *liable person*) who”.

**43 Subsection 42(1)**

After “subsection 24(4)”, insert “34Q(6), 34T(3)”.

**44 Subsections 42(2) and (3)**

Omit “the MDO or insurer” (wherever occurring), substitute “the liable person”.

**45 After subsection 42(3)**

Insert:

(3A) If:

- (a) the repayment or overpayment debt relates to an exceptional claims indemnity; and
  - (b) the recipient and the practitioner referred to in subsection 34Q(1) are not the same person; and
  - (c) the practitioner becomes the liable person; and
  - (d) the direction was given to the recipient;
- the direction ceases to have effect when the practitioner becomes the liable person.

**46 Subsections 42(8), (9), (10) and (11)**

Omit “the MDO or insurer” (wherever occurring), substitute “the liable person”.

**47 After paragraph 45(1)(b)**

Insert:

- (ba) subsection 34Y(1); or

**48 Subsection 46(1)**

After “section 25”, insert “, 34J or 34U”.

**49 At the end of subsection 46(3)**

Add “However, strict liability does not apply to the physical element described in paragraph 34J(1)(b) or 34U(1)(b).”.

**50 After paragraph 48(b)**

Insert:

- (ba) exceptional claims indemnities; and
- (bb) amounts payable under the Exceptional Claims Protocol; and



*[Minister's second reading speech made in—  
House of Representatives on 6 November 2003  
Senate on 26 November 2003]*

(176/03)

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