

EXPLANATORY STATEMENT

Select Legislative Instrument 2006 No. 72

Subject – *Medical Indemnity Act 2002*

Medical Indemnity Amendment Regulations 2006 (No. 1)

Section 79 of the *Medical Indemnity Act 2002* (the Act) provides that the Governor-General may make regulations prescribing matters required or permitted by the Act to be prescribed, or necessary or convenient to be prescribed for carrying out or giving effect to the Act. In addition, subsection 59C(1) of the Act specifically provides that regulations may exempt a person from the competitive advantage payment.

The Commonwealth has undertaken a variety of measures to make medical indemnity costs for doctors more affordable and to make the medical indemnity industry more viable in the longer term. In 2002 the Australian medical indemnity industry was in a critical condition with the largest indemnifier of self-employed doctors entering provisional liquidation. In order to ensure that patients' claims against doctors could be met, and to give medical indemnity providers a chance to return to financial viability unencumbered by past liabilities, the Government developed the incurred but not reported (IBNR) liability scheme. The IBNR scheme allowed the Commonwealth to reimburse IBNR claims against doctors where IBNR liabilities associated with these claims were unfunded at 30 June 2002.

On 7 December 2004, the Commonwealth announced a review of competitive neutrality in the medical indemnity marketplace to ensure that there is a level playing field. The Review of Competitive Neutrality in the Medical Indemnity Insurance Market, headed by Mr Graham Rogers, found that the IBNR scheme had created a competitive advantage for participating medical defence organisations (MDOs) and their associated insurers because their competitors in the medical indemnity insurance market did not have access to this source of income. Measures arising out of the review included the introduction of a competitive neutrality adjustment in order to neutralise the competitive advantage.

The *Medical Indemnity (Competitive Advantage Payment) Act 2005* (the CAP Act) introduced a competitive advantage payment in the form of an annual tax on the medical indemnity insurer, where the insurer is associated with a participating MDO. Following the enactment of the competitive advantage payment legislation, the Government considers that an alternative and more expeditious method of achieving the same policy goals may be to accept a lump sum payment as an alternative to the annual competitive advantage payment.

The Regulations create a general exemption from the competitive advantage payment for any insurer who enters into a deed of agreement with the Commonwealth and makes a lump sum payment under this deed, for the purpose of redressing their competitive

advantage. Redressing the competitive advantage via a lump- sum payment provides administrative convenience for both the insurer and the Commonwealth. A lump-sum payment is also more certain because annual payments (under the CAP Act) have the potential to increase or decrease in future years because these are calculated by reference to the net IBNR exposure which is reassessed annually by the Australian Government Actuary.

For each insurer where a competitive advantage has been established under the CAP Act the liability to redress this by means of annual payments would remain unless and until they adopt the alternative course of making a lump sum payment under a deed of agreement with the Commonwealth for this purpose. Under these circumstances the proposed Regulations would create an exemption from the need to make annual payments.

Details of the proposed Regulations are set out in the Attachment.

Consultation

In developing these Regulations consultation has been invited from the Australian Government Solicitor, the Australian Government Actuary, the Department of Treasury and the Department of Prime Minister and Cabinet, and also with persons directly affected within the industry.

The Act specifies no conditions that need to be satisfied before the power to make the Regulations may be exercised.

The Regulations are a legislative instrument for the purposes of the *Legislative Instruments Act 2003*.

The Regulations commence on the day after they are registered on the Federal Register of Legislative Instruments.

ATTACHMENT

Details of the proposed *Medical Indemnity Amendment Regulations 2006 (No. 1)*.

Regulation 1 – Name of Regulations

This regulation provides that the title of the Regulations is the *Medical Indemnity Amendment Regulations 2006 (No. 1)*.

Regulation 2 – Commencement

This Regulation provides that the Regulations commence on the day after they are registered on the Federal Register of Legislative Instruments.

Regulation 3 – Amendment of *Medical Indemnity Regulations 2003*

This regulation provides that the *Medical Indemnity Regulations 2003* is amended by Schedule 1.

Schedule 1 – Amendment

Item [1]

This item inserts new regulation 25A into new Division 3.1A of the *Medical Indemnity Regulations 2003*. This regulation specifies the conditions under which a person may be exempt from the requirement to make a competitive advantage payment under Division 2A of the *Medical Indemnity Act 2002*, and is made pursuant to subsection 59C(1) of that Act.

The regulation provides that an insurer who is otherwise liable to pay a competitive advantage payment, due to their association with a participating medical defence organisation (MDO) will be exempt from that payment where they have entered into a deed of agreement with the Commonwealth to pay a lump sum amount to redress their competitive advantage resultant from the participation of the insurer's associated MDO in the incurred but not reported (IBNR) medical indemnity scheme.

Currently the *Medical Indemnity (Competitive Advantage Payment) Regulations 2005* prescribe the percentage of 4.55% for the contribution year that starts on 1 July 2005, as provided for in subsection 6(1) of the *Medical Indemnity (Competitive Advantage Payment Act) 2005*. Under section 61 of the *Medical Indemnity Act 2002* the competitive advantage payment becomes payable on 30 April in the contribution year or such other day as specified in the Regulations. These competitive advantage payments are to be made annually until 30 April 2015.

The Regulations would give the Commonwealth capacity to accept an upfront payment as an alternative to annual payments over ten years. The existing liabilities will remain in

effect until the medical indemnity insurer has entered into and satisfied the terms of the deed (paid the agreed lump sum). It is only at this point in time that the insurer would become exempt from the existing liability.