

2004-2005-2006-2007

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

**HEALTH INSURANCE AMENDMENT (INAPPROPRIATE AND PROHIBITED
PRACTICES AND OTHER MEASURES) BILL 2007**

EXPLANATORY MEMORANDUM

Circulated by authority of the Minister for Health and Ageing,
the Honourable Tony Abbott MP

HEALTH INSURANCE AMENDMENT (INAPPROPRIATE AND PROHIBITED PRACTICES AND OTHER MEASURES) BILL 2007

OUTLINE

Pathology and diagnostic imaging services play a critical role in health care. They also account for a significant amount of taxpayer funded outlays from the national health care budget. In 2005-06 approximately 83 million Medicare funded pathology services were performed. During the same period, approximately 15 million Medicare funded diagnostic imaging services such as x-rays, ultrasound, computed tomography (CT) and magnetic resonance imaging (MRI) were performed. This equates to expenditure in excess of \$3.2 billion, representing approximately 30% of total Medicare outlays in 2005-06.

In 2002, a review of Commonwealth legislation for pathology arrangements was undertaken. The review noted that the legislative arrangements for regulating pathology services needed updating and streamlining. The area of offences and enforcement provisions was highlighted as one area of concern, particularly in relation to bribery and prohibited practices.

In 2005, the Department of Health and Ageing commissioned a further review, undertaken by Phillips Fox Lawyers, to specifically examine the pathology enforcement and offence provisions of the *Health Insurance Act 1973* (HIA). There was extensive consultation with Government and industry stakeholders during the development of the review.

The Phillips Fox review included 52 recommendations. It was recommended that the enforcement and offence provisions be redrafted to express more clearly the Government's intent to prevent benefits and bribes between pathology providers and requesters of services, and to extend the application of provisions to create an enforcement framework that can be more effectively applied.

The main purpose of this Bill is to amend the HIA to reflect Government policy, implement many of the recommendations in relation to pathology related offences and to also implement similar changes in relation to diagnostic imaging.

In summary, the Bill replaces existing prohibitions on the payment of benefits between providers and requesters of pathology and diagnostic imaging services with new and strengthened provisions aimed at:

- prohibiting certain practices in relation to the rendering of pathology and diagnostic imaging services, including prohibiting inducements and other relationships between requesters and providers of pathology services/diagnostic imaging services;
- preventing payments for pathology and diagnostic imaging services that do not benefit patients; and
- encouraging fair competition between pathology/diagnostic imaging providers on the basis of quality of service provided, and cost to patients.

A summary table of the prohibitions is included at Attachment A.

This Bill also makes a number of more minor, technical amendments to clarify the policy intent of the legislation and enable more efficient and effective implementation of the policy intent. The majority of these changes have been made in response to concerns raised by industry and other stakeholders regarding the current lack of clarity.

FINANCIAL IMPACT STATEMENT

The Bill will have no financial impact.

REGULATION IMPACT STATEMENT

1. PROBLEM AND BACKGROUND

The prohibition of inducements and similar activities by pathology service providers in relation to referrals for pathology services is a long-standing element of the legislative provisions relating to pathology services in the HIA. The prohibitions are contained largely in sections 129AA and 129AAA of the HIA and are intended to prevent referrers of pathology services from gaining a benefit, which could be an incentive for overservicing. Despite numerous amendments since the mid 1980s to increase the effectiveness of the provisions, their deterrent and enforcement effect has remained at lower than desirable levels.

Ongoing reports from within the pathology industry allege that the prohibited practice provisions are being circumvented by operators who are contravening the known intent of the legislation. These allegations indicate the possibility that competition between pathology providers may be skewed to favour those providers who are able to provide a benefit to pathology requesters.

Despite this, the relevant agencies (Medicare Australia and the Director of Public Prosecutions) have been unable to successfully prosecute any alleged offenders. The current sanctions are difficult to apply because it is difficult to discharge the burden of proof, to determine the preconditions for application of the relevant sanctions and to establish the facts necessary to apply the relevant sanctions. The intent of the legislation is widely recognised as not being stated clearly enough to support its effective interpretation and application.

Notably, the current rules of conduct do not apply equally to requesters and providers of these services. Consequently, even if it was clear that a referrer had knowingly entered into an arrangement with a provider that involved some form of bribery or inducement, there is no mechanism at present to apply the same penalties to the referrer as opposed to a provider who might be engaged in inappropriate activity.

A reliance on market mechanisms is insufficient in this situation. Consumers are unlikely to possess the necessary knowledge to assess appropriate use of these services and are therefore not generally equipped to identify overservicing or inappropriate ordering of services. More stringent enforcement actions are required to ensure more effective regulation of industry practices.

The prohibited practice provisions relating to diagnostic imaging services, contained in Division 3 of Part IIB of the HIA, mirror most of the prohibited practice provisions for pathology. Likewise, there are several inadequacies in the diagnostic imaging provisions and there are considerable barriers to enforcement action being taken. Given that the diagnostic imaging provisions mirror those in pathology and are intended to proscribe the same type of arrangements between requesters and providers, it is proposed that these provisions also be reviewed.

Medicare Funding

The Australian Government currently provides Medicare rebates for a wide range of pathology and diagnostic imaging services. For the period 1 July 2005 to 30 June 2006, approximately 83 million Medicare funded pathology services were performed. This equates to expenditure in excess of \$1.6 billion. During the same period, approximately 15 million Medicare funded diagnostic imaging services such as x-rays, ultrasound, CT and MRI were performed, costing approximately \$1.6 billion. The amount of inappropriate servicing prompted by providers paying inappropriate benefits to requesters cannot be quantified. However, even if inappropriate expenditure accounts for only 0.5% of all Medicare funded pathology and diagnostic imaging services, this equates to approximately \$16 million a year in inappropriate use of Medicare funding.

2. OBJECTIVES

The objectives of the proposed regulatory changes are to:

- reduce inappropriate expenditure for pathology and diagnostic imaging services provided under the Medicare Benefits Scheme (MBS); and
- ensure that competition between providers of pathology and diagnostic imaging services is based on quality of service and costs to patients and is not skewed in favour of those who provide benefits to requesters of pathology and diagnostic imaging services.

In order to achieve these objectives the Government will:

- revise the existing provisions to clarify the intent of the current prohibitions;
- extend the current provisions to include requesters of pathology and diagnostic imaging services; and
- introduce a range of penalties commensurate with the severity of the offences in respect of prohibited practices.

3. OPTIONS

Currently, the HIA contains provisions intended to prohibit inducements and similar activities by pathology and diagnostic imaging service providers. As these provisions have been identified as problematic the following options are alternate ways in which inadequacies in the existing legislation could be addressed.

Option A: Do nothing

This option would require no change to the legislative provisions. Government agencies would continue to attempt to enforce the current provisions prohibiting inducements in relation to pathology and diagnostic imaging services.

Option B: Amend the existing provisions

This option would use the existing prohibited practices legislative provisions as a basis to more clearly and explicitly set out the Government's intentions to prohibit the use of inducements to encourage pathology and diagnostic imaging services.

Option C: Repeal and replace the existing provisions

This option would involve repealing the current legislative provisions and replacing them with new provisions that more clearly and explicitly set out the Government's intentions, and extend the current prohibition parameters for inducements to encourage referrals for pathology and diagnostic imaging services.

The key changes would include:

- extending the prohibitions to include requesters of pathology and diagnostic imaging services;
- strengthening the prohibition on “arm’s length” distancing between pathology and diagnostic imaging providers and requesters through the use of family, commercial and/or corporate arrangements;
- broadening the definitions of what could be interpreted as an inducement;
- introducing mechanisms to ensure legitimate commercial transactions between pathology and diagnostic imaging providers and requesters;
- creating an expanded range of penalties that are relevant to the scale of the offence;
- incorporating Crown activities (such as those involving MBS billing by State and Territory health authorities) within the scope of the provisions where possible; and
- introducing a Ministerial exemption capacity within the legislation to enable sufficient flexibility so as to avoid unintended consequences.

The changes will include any consequential amendments to the HIA and the *Medicare Australia Act 1973* to give effect to the new requirements.

4. IMPACT ANALYSIS

The following groups are considered to be the key groups or bodies potentially affected by the options outlined above:

- Australian Government
- State and Territory Governments
- pathology service providers (Approved Pathology Practitioners, Approved Pathology Authorities, and their employers and associated medical entrepreneurs)
- diagnostic imaging service providers (including radiologists, nuclear medicine physicians, cardiologists, obstetricians and gynaecologists, vascular surgeons, and their employers and associated medical entrepreneurs)
- requesters of pathology and diagnostic imaging services (general practitioners, medical specialists, dental practitioners, physiotherapists, chiropractors, osteopaths and podiatrists, and their employers and associated medical entrepreneurs)
- consumers

Option A: Do nothing

Impact on the Australian Government

Benefits

There are no benefits arising from this option as the problem would not be addressed.

Costs

While few breaches have been recorded to date, anecdotal evidence, particularly in pathology, suggests that the existence of the prohibited practices in question is real and of concern to the industry. If no action is taken to address these concerns, the Government may be seen to be tacitly approving inappropriate activity in the pathology and diagnostic imaging sectors.

The existence of inducements to secure patient referrals, albeit by a very small number of requesters and providers, undermines the basis of agreements made as part of the Government's Memoranda of Understanding (MoU) with pathology and diagnostic imaging industry groups. The Government has committed more than \$15 billion over five years to these agreements. The inability to apply sanctions could lead to claims that the Australian Government is not applying sufficient attention to reducing inappropriate expenditure for pathology and diagnostic imaging services under the MBS.

Over-servicing can result in increased risks to patients associated with testing, increased costs to the Government via the MBS and/or an inappropriate mix of services under the capped funding arrangements. While there is no quantitative data as to the level of inappropriate servicing, even if this was as low as 0.5% of total Medicare benefits paid for pathology and diagnostic imaging services, it would equate to approximately \$16 million a year.

Lack of Government action to properly address inappropriate activities within the pathology and diagnostic imaging sectors may lead to a lack of confidence by law-abiding providers in the Government's commitment to its stated intent and a lack of willingness on their part to work with Government agencies on other initiatives.

Medicare Australia will still incur the costs of administering and enforcing the current requirements, which have been identified as being inadequate. This could lead to a waste of resources.

Impact on State and Territory Governments

This option would have no impact.

Impact on providers of pathology and diagnostic imaging services

Benefits

There are no benefits to the vast majority of providers, who comply with the legislation, as the problem would not be addressed. However, providers engaged in prohibited practices with requesters of pathology and diagnostic imaging services will continue to benefit from the difficulty of enforcing the current provisions.

Costs

Providers complying with the legislation will continue to be disadvantaged by those who may be acting inappropriately. The existence of apparently acceptable loopholes may lead to pressure on a greater number of pathology and diagnostic imaging providers to adopt prohibited practices to remain competitive within the industry.

Impact on requesters of pathology and diagnostic imaging services

Benefits

There are no benefits to requesters of pathology and diagnostic imaging services who comply with the spirit of the legislation as the problem would not be addressed.

Requesters engaged in business relationships with providers of pathology and diagnostic imaging services which constitute prohibited practices will continue to benefit from the difficulty of enforcing the current provisions.

Costs

Requesters complying with the spirit of the legislation will continue to be disadvantaged by those who may be acting inappropriately.

Impact on consumers

Benefits

There are no benefits arising from this option as the problem would not be addressed.

Costs

Inducement arrangements may lead to over-servicing and/or inappropriate testing, potentially leading to increased risks and costs to patients.

Option B: Amend the existing provisions

Impact on the Australian Government

Benefits

Varying the current provisions would help to address the problem and may have a stronger deterrent effect on those considering engaging in inducement or bribery activities.

The Government may save Medicare funds by reducing inappropriate services.

Costs

The current pathology provisions reflect a series of amendments to the original provisions over a number of years which have been made with the intention of clarifying and strengthening the intent of the original provisions. The resulting structure of the legislation has led to further difficulties in interpreting and enforcing appropriate arrangements in the pathology industry. There is no strong reason to believe that it will be possible to achieve the desired outcome with further amendments to the existing provisions.

The diagnostic imaging prohibited practice provisions have been in existence since 1991. As mentioned earlier, they largely reflect the pathology provisions that existed at the time and are intended to proscribe the same types of inappropriate activity between requesters and providers. While there is no evidence to suggest that there is widespread non-compliance with the diagnostic imaging provisions, the deficiencies identified in the pathology provisions apply equally to the diagnostic imaging provisions.

The extent of amendments required to rectify identified problems would make drafting complex and very difficult, especially if amendments must be made within the existing legislative framework. Such large-scale re-working of existing provisions is also more likely

to result in a less clear outcome and the creation of further unintended loopholes and inconsistencies.

The capacity to effectively enforce the amended requirements is dependent upon the degree of clarity in the re-worked provisions. The cost of administering and enforcing the amended requirements by Medicare Australia may be greater if there are unintended loopholes in the re-worked provisions.

Impact on State and Territory Governments

As for option A.

Impact on pathology and diagnostic imaging service providers

Benefits

This option would help to address the problem.

There would be clearer guidance for pathology and diagnostic imaging service providers on the extent of the intended prohibition of inducements and bribery practices, including the nature of the inducements and the means by which such inducements might be offered.

Costs

The poor track record of the existing provisions suggests that it is unlikely that such an amendment process would result in significant changes to their effectiveness.

Impact on requesters of pathology and diagnostic imaging services

As for option A.

Impact on consumers

Benefits

Amending the current provisions may help to reduce inducement activities and provide the legal framework to prevent over-servicing and inappropriate testing. As a consequence, the cost to consumers associated with over-servicing and inappropriate testing may be reduced.

Costs

Although amending the provisions may help to reduce costs to consumers associated with over-servicing and inappropriate services may be reduced, the risk of loopholes allowing some inappropriate practices will continue.

Option C: Repeal and replace the existing provisions

Impact on the Australian Government

Benefits

Reviewing and replacing the current provisions signals to the pathology and diagnostic imaging sectors a renewed commitment by the Government regarding its intent to prevent the misuse of pathology and diagnostic imaging services funded under Medicare.

The introduction of a range of penalties from civil to criminal, depending on the severity of the offence, will make it more likely that Medicare Australia and the Director of Public Prosecutions will be able to pursue breaches more effectively, thus creating a greater deterrent effect than produced by the current legislation.

The revised and clarified prohibition framework may result in better adherence to the legislative intent and a lesser need for enforcement activities.

While Medicare Australia will still incur the cost of administering and enforcing the new requirements, it may cost less than administering the existing or amended provisions as it will be easier to enforce compliance.

The provision of a Ministerial power to make determinations on exemptions allows some flexibility for the Government to minimise unintended effects and respond to valid industry concerns about counter-productive consequences of particular prohibitions.

Costs

Medicare Australia will still have the costs of administering and enforcing the amended requirements. However, with less likelihood of loopholes, these costs are likely to be less than with option B.

The Department of Health and Ageing would incur costs associated with educating practitioners and other Government agencies to ensure that the amendments are well understood.

Impact on State and Territory Governments

Benefits

The law would apply equally to State and Territory Governments as for other providers of pathology and diagnostic imaging services.

Costs

State and Territory Government agencies gaining access to MBS funding will need to examine their existing processes and make sure that they are not in breach of the HIA prohibition provisions. Where breaches are discovered and the relevant agencies wish to continue to have access to Medicare funding, changes to existing arrangements may be required.

Impact on pathology and diagnostic imaging service providers

Benefits

Repealing and replacing the existing provisions will create clearer and more comprehensive guidance for providers on the extent of the intended prohibition of inducements, including the nature of the inducements and the means by which such inducements might be offered.

The parameters of the offence provisions will be widened to incorporate any type of “arms-length” arrangements that may be used to circumvent the intent of the legislation. This will mean that providers complying with the spirit of the current legislation can have confidence that inappropriate behaviour is more likely to be addressed.

Amending the current provisions would make the law apply equally to all providers of pathology and diagnostic imaging services, including public providers.

The introduction of a range of penalties from civil to criminal, depending on the severity of the offence, may have a stronger deterrent effect on those considering engaging in inducement or bribery activities. It may also mean that a greater number of offenders are prosecuted and potentially penalised.

The provision of an avenue for the granting of exemptions to the provisions through a legislative instrument allows providers to state their claim for exemption of specific practices and the Government to consider the validity of those claims.

For diagnostic imaging providers, there will be a public record of decisions about whether there has been a breach of the provisions, rather than such decisions being confidential under the Medicare Participation Review Committee process.

Costs

There may be increased compliance costs where it is necessary for providers to offer evidence to Medicare Australia (and/or the courts) of the commercial appropriateness of transactions between providers and requesters (such as rental payments or the provision of statistics). However, these costs would be minimal.

In addition, the inclusion of referrers in the enforcement and offence provisions will require pathology and diagnostic imaging providers to give due consideration to the nature of their dealings with referrers, including the full extent of primary and secondary connections through personal and/or corporate dealings.

Impact on requesters of pathology and diagnostic imaging services

Benefits

The amended provisions would extend prohibition parameters to include requesters of pathology and diagnostic imaging services as well as providers. Requesters complying with the spirit of the current legislation will be assured that their colleagues who may be acting inappropriately would be more likely to face prosecution.

For diagnostic imaging requesters, there will be a public record of decisions about whether there has been a breach of the provisions, rather than such decisions being confidential under the Medicare Participation Review Committee process.

Costs

The proposal, extending the full range of prohibition parameters to include requesters of pathology and diagnostic imaging services, will require requesters to be fully informed about the risks that are associated with entering into any form of commercial or other benefit-accruing arrangement with providers or persons/entities with business or family connections with those providers.

For the first time, penalties ranging from civil to criminal, depending on the severity of the breach, will apply to requesters and/or their associates.

Impact on consumers

Benefits

This option will provide the legal framework to prevent over-servicing and inappropriate testing. As a consequence, consumers will not incur costs associated with these practices.

Costs

There are no costs to consumers under this option.

SUMMARY OF IMPACT OF REGULATORY CHANGES

Stakeholder	Option A: Do nothing	Option B: Amend the existing provisions	Option C: Repeal and replace the existing provisions
Australian Government	<p>Benefits No benefits as problem not addressed</p> <p>Costs</p> <ul style="list-style-type: none"> - Government seen to be approving inappropriate activity - Undermines basis of agreements made between Government and industry - MBS funding of approximately \$16 million a year expended on inappropriate servicing - Government seen to not apply attention to reduce inappropriate MBS expenditure - Lack of confidence in Government results in industry not willing to work collaboratively with Government agencies on other initiatives - Government resources wasted on inadequate administrative and enforcement requirements 	<p>Benefits</p> <ul style="list-style-type: none"> - Would help to address the problem - May have a stronger deterrent effect on those considering engaging in prohibited practices - Government may save Medicare funds <p>Costs</p> <ul style="list-style-type: none"> - The extent of amendments required would make drafting more complex and more likely to result in a less clear outcome, unintended loopholes and inconsistencies - Cost of administering and enforcing by Medicare Australia may be greater 	<p>Benefits</p> <ul style="list-style-type: none"> - Signals Government's commitment to preventing misuse of Medicare funding - Range of penalties will make it more likely that enforcement will be more effective - May result in better adherence and less need for enforcement - Lower costs in administration and enforcement - Ministerial power for exemptions allows flexibility for Government to minimise unintended consequences <p>Costs</p> <ul style="list-style-type: none"> - Medicare Australia will still have costs in administration and enforcement, albeit lower than costs associated with current provisions - Department of Health and Ageing will incur costs associated with communicating the amendments to those affected
State and territory Governments	No impact	As for Option A	<p>Benefits</p> <ul style="list-style-type: none"> - Law would apply equally to State and Territory Governments as for

Stakeholder	Option A: Do nothing	Option B: Amend the existing provisions	Option C: Repeal and replace the existing provisions
			<p>other providers of services</p> <p>Costs</p> <ul style="list-style-type: none"> - State and Territory Governments accessing MBS funding may need to change existing arrangements
Providers of pathology and diagnostic imaging services	<p>Benefits</p> <ul style="list-style-type: none"> - No benefits to those who comply with current legislation as problem not addressed - Non-compliant providers will benefit from enforcement difficulties <p>Costs</p> <ul style="list-style-type: none"> - Compliant providers disadvantaged - Loopholes may lead to pressure on providers to adopt prohibited practices to remain competitive 	<p>Benefits</p> <ul style="list-style-type: none"> - May help to address problems - Clearer guidance for providers on extent of the intended prohibitions <p>Costs</p> <ul style="list-style-type: none"> - Poor track record of existing provisions makes it unlikely that amendments would result in significant change 	<p>Benefits</p> <ul style="list-style-type: none"> - Will create clearer and comprehensive guidance on the extent of intended prohibitions - Providers complying with spirit of current legislation will be confident that competitors' inappropriate behaviour is more likely to be addressed - Law would apply equally to all providers, including public providers - Introduction of a range of penalties may have a stronger deterrent effect - Provision for Minister to make exemptions allows avenue for industry to state claims for exemption for specific practices - For diagnostic imaging, there will be a public record of those in breach of the provisions <p>Costs</p> <ul style="list-style-type: none"> - There may be increased compliance costs where it is necessary for providers to prove validity of commercial transactions - Compliance costs will

Stakeholder	Option A: Do nothing	Option B: Amend the existing provisions	Option C: Repeal and replace the existing provisions
			<p>apply equally to all providers, including those who are not offering inducements</p> <ul style="list-style-type: none"> - Inclusion of requesters in the provisions will require providers to give due consideration to commercial transactions with requesters
Requesters of pathology and diagnostic imaging services	Impact on requesters same as impact on providers	As for Option A	<p>Benefits</p> <ul style="list-style-type: none"> - Those complying with spirit of current provisions will be assured that colleagues acting inappropriately will be more likely to face prosecution - For diagnostic imaging, there will be a public record of those in breach of the provisions <p>Costs</p> <ul style="list-style-type: none"> - Requesters will need to be fully informed about the risks associated with entering into prohibited commercial transactions with providers - For the first time, penalties will also apply to requesters and their associates
Consumers	<p>Benefits</p> <ul style="list-style-type: none"> - No benefits as problem not addressed <p>Costs</p> <ul style="list-style-type: none"> - May lead to inappropriate testing - May lead to increased costs 	<p>Benefits</p> <ul style="list-style-type: none"> - Costs associated with over-servicing and inappropriate testing may be reduced <p>Costs</p> <ul style="list-style-type: none"> - Amendments unlikely to result in significant change and some inappropriate practices may continue 	<p>Benefits</p> <ul style="list-style-type: none"> - Will provide the legal framework to prevent costs associated with over-servicing and inappropriate testing <p>Costs</p> <p>None</p>

5. CONSULTATION

The review of the pathology enforcement and offence provisions included preparation and dissemination of an Issues and Options Paper in January 2005. The paper was distributed for comment to:

- relevant Government agencies
- pathology providers
- pathology professional and industry peak organisations
- State and Territory Governments and medical registration authorities
- peak consumer groups.

The consultants also conducted a number of face-to-face meetings with interested parties.

Twenty-seven submissions were received and analysed as part of the preparation of the final report of the review. The final report was made available publicly by the Minister for Health and Ageing in September 2005.

Meetings regarding the report, its recommendations and proposed timetable were held with key stakeholders, including:

- relevant Government agencies—Department of Prime Minister and Cabinet, Attorney General's Department, Director of Public Prosecutions, Department of Finance and Administration, Medicare Australia, and Professional Services Review
- State and Territory health authorities
- peak professional and industry groups, including the Australian Medical Association, Royal College of Pathologist of Australasia (RCPA), Royal Australian College of General Practitioners, National Coalition of Public Pathology (NCOPP) and the Australian Association of Pathology Practices (AAPP)
- relevant consultative forums including the Pathology Consultative Committee and the National Pathology Accreditation Advisory Council
- other private pathology providers with a particular interest in the issues.

The final report was distributed to a wide range of diagnostic imaging stakeholders in December 2005 and commensurate changes in diagnostic imaging were foreshadowed. These stakeholders included:

- professional organisations and peak industry groups for diagnostic imaging service provider groups, including
 - Royal Australian and New Zealand College of Radiologists (RANZCR)
 - Australian Diagnostic Imaging Association (ADIA)
 - Royal Australian and New Zealand College of Obstetricians and Gynaecologists
 - National Association of Specialist Obstetricians and Gynaecologists
 - Royal Australian College of General Practitioners
 - Australian College of Rural and Remote Medicine
 - Cardiac Society of Australia and New Zealand
 - Australian and New Zealand Association of Physicians in Nuclear Medicine
 - Australian and New Zealand Society of Vascular Surgery
 - Australian Institute of Radiography
 - Australian Sonographers Association
 - Australasian Society for Ultrasound in Medicine

- Professional and peak industry groups for requesters of diagnostic imaging services.

Industry briefing sessions were held for requesters and providers of diagnostic imaging services in Melbourne and Sydney in February 2006. Comments in writing were sought from those who attended the briefing sessions.

Information from these sessions was made available to stakeholders who were unable to attend a briefing session. These stakeholders were also invited to provide written comments.

Written comments were provided by eight stakeholders, including RANZCR, ADIA, the Royal Australian and New Zealand College of Ophthalmologists, the Australian Physiotherapy Association and the Australian Dental Association. The remaining submissions were received from individual practitioners.

The majority of diagnostic imaging peak industry or professional groups who provided written submissions to the Department supported the proposal, either without qualification or on an in-principle basis pending further consultations on the detail of the legislative provisions.

Arguments from diagnostic imaging stakeholders who opposed the legislation centred on whether there was a need to make amendments to the diagnostic imaging provisions. Some felt that diagnostic imaging should have its own full review, like that undertaken in respect of pathology.

Follow-up consultations were held with ADIA and RANZCR in response to issues raised by stakeholders during the industry briefing sessions. Separate discussions were held with a representative from the Cardiac Imaging MoU Management Committee.

ADIA sought assurances that proposed amendments would apply equally to all providers and requesters, including the public sector and non-specialist radiology practices.

The Government response to the Phillips Fox review, which supports the majority of the recommendations, was issued in May 2006. All of the recommendations contained in the review have been the subject of public consultation.

Further consultation sessions with key Government agencies and major pathology and diagnostic imaging stakeholders were undertaken in June 2006 to inform stakeholders of the proposed framework and timing of the legislation, as well as ensuring that the drafting instructions contain all relevant material and the policy direction is properly applied.

In general, there was broad support for the proposed framework of the legislation. All stakeholders expressed a desire to work collaboratively with the Government during the drafting process to ensure that inappropriate practices are explicitly prohibited and that the legislation does not produce any unintended consequences for appropriate practices.

In December 2006, the Department disseminated an Exposure Draft of the Bill to peak industry bodies and targeted Commonwealth and State Government agencies to further assist in ensuring there are no unintended consequences arising from the drafting process.

The peak pathology bodies (RCPA, NCOPP and AAPP) submitted a joint response to the Exposure Draft. While the pathology industry's submission indicated strong support for the

proposed changes, they recommended further amendments aimed at more clearly stating the Government's intent to prevent inappropriate and anti-competitive referral practices.

Likewise, the peak diagnostic imaging bodies (ADIA and RANZCR) submitted a joint response. Although the diagnostic imaging industry clearly supports the Government prohibiting inducements to encourage requests for services, they hold the view that amendments to the current diagnostic imaging provisions may not be necessary. They are also of the view that the legislation may produce unintended consequences for diagnostic imaging providers and requesters.

While the Government recognises the differences in the pathology and diagnostic imaging industries, the existing provisions are similar (in some cases identical) and are intended to proscribe unethical referral practices that do not benefit patients. If the diagnostic imaging provisions are not amended in line with the pathology provisions, the Government may be perceived as supporting a regulatory regime that favours requesters and providers of diagnostic imaging over requesters and providers of pathology services.

Drafting of the changes to exclude arms-length inducement activities has been undertaken carefully to ensure no negative impact on consumers or those who may be assisting them to obtain the pathology and/or diagnostic imaging services to which they have been referred and/or are entitled. Wherever practical, concerns raised by stakeholders have been addressed in the drafting of the Bill.

6. CONCLUSION AND PREFERRED OPTION

The inadequacies of the existing pathology and diagnostic imaging prohibited practice provisions and the potential for inappropriate Medicare billing to continue without penalty are not addressed by Option A. While there are potential savings to the Government in not amending the current legislation, competition will remain skewed in favour of those who are engaging in unethical conduct.

Maintaining the status quo (Option A) offers no deterrent to those pathology and diagnostic imaging providers currently making inappropriate payments to secure referral streams from requesters of services. It is possible under this option that a greater number of pathology and diagnostic imaging providers may feel pressured to make inappropriate payments in order to remain competitive.

Consequently, it is possible that the Government will incur additional costs under Option A due to a potential increase in the number of inappropriate Medicare funded pathology and diagnostic imaging services. With Medicare expenditure on pathology and diagnostic imaging services running at \$3.2 billion a year, if just 0.5% of Medicare expenditure was as a consequence of inappropriate payments this would equate to approximately \$16 million of Medicare funding a year.

Given the considerable barriers to enforcing the current requirements, Option A is not a viable option.

Option B would help to address the inadequacies of the existing legislation and may act as a deterrent for those providers considering engaging in prohibited practices. The Government may save Medicare funds by reducing inappropriate service.

However, the current provisions reflect a series of amendments which have been made with the intention of clarifying and strengthening the intent of the original provisions. The resulting structure of the amended provisions has led to further difficulties in interpreting and enforcing appropriate arrangements in the pathology and diagnostic imaging industries. The poor track record of the existing provisions suggests that such an amendment process would be unlikely to result in significant changes to their effectiveness.

Option C is the preferred option because it reduces the potential for any ambiguity or inconsistency which might arise from amending the existing requirements. Replacing the current requirements with new and updated provisions sends a stronger message to the industry regarding the Government's expectations in relation to inappropriate payments.

Option C delivers significant benefits to the Government and to those requesters and providers of pathology and diagnostic imaging services who are currently being disadvantaged by the existing regulatory framework. This option would ensure a level playing field for the conduct of pathology and diagnostic imaging business, allow the Government to proactively contain Medicare expenditure on appropriate and relevant pathology and diagnostic imaging services, and impose sanctions on those requesters and providers who operate outside the law.

The current provisions do not apply equally to requesters and providers and there may be some costs arising from the implementation of Option C, albeit minimal. Similarly, there may be some costs to State and Territory Governments arising from the implementation of this option as the current provisions are not binding on the Crown. However, an assessment of the current administration of Medicare funds by the States and Territories has indicated that their existing practices are not likely to be inconsistent with the regulatory changes proposed.

7. IMPLEMENTATION AND REVIEW

Introduction of changes on 1 March 2008 will allow familiarisation and smooth transition. This is in addition to the previous period of approximately 2 years during which the Government has clearly stated its intention to act on many of the recommendations of the Phillips Fox review.

It will be necessary for the Government to ensure that all pathology and diagnostic imaging providers and referring practitioners (and their associates) are aware of the proposed changes in order to avoid inadvertent breaches. The Department of Health and Ageing will work with key industry, professional, consumer and Government stakeholders to develop effective strategies for ensuring that the changes are well understood.

HEALTH INSURANCE AMENDMENT (INAPPROPRIATE AND PROHIBITED PRACTICES AND OTHER MEASURES) BILL 2007

NOTES ON CLAUSES

Clause 1—Short title

This clause provides that the Act may be cited as the *Health Insurance Amendment (Inappropriate and Prohibited Practices and Other Measures) Act 2007*.

Clause 2—Commencement

This clause provides that sections 1 to 3 and Schedule 2 of the Bill commence on the day that the Bill receives Royal Assent. Schedule 1 commences on 1 March 2008.

Schedule 1 contains the major changes to the HIA and in particular includes new offences relating to prohibited benefits flowing between requesters and providers of pathology services. The purpose of setting the commencement date at 1 March 2008 is as follows:

- to provide certainty for providers and requesters about when the new offence provisions will take effect;
- to enable requesters and providers of pathology and diagnostic imaging services to make any adjustments to their business practices to ensure that they are not in contravention of the new legislation; and
- to ensure that there are at least six months between passage of the legislation and date of effect (as is consistent with Commonwealth Government criminal law policy in circumstances where new criminal offences are being created).

Clause 3—Schedule(s)

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

SCHEDULE 1—MAIN AMENDMENTS

In accordance with section 2, each of the amendments detailed in Schedule 1 commence on 1 March 2008.

Health Insurance Act 1973

Items 1 to 3

These items amend subsection 3(1) of the HIA by inserting new definitions for the terms “civil penalty provision”, “pecuniary penalty order” and “penalty unit”. These terms are used in subsequent provisions.

Item 4

This item amends subsection 3(1) of the HIA by repealing the definition of “prohibited diagnostic imaging practice”. This term is no longer used because the existing prohibited diagnostic imaging practices have been replaced with new provisions which apply to both diagnostic imaging and pathology services—see item 34.

Item 5

Paragraph 16A(5AA)(c) of the HIA currently provides that one of the circumstances in which a medicare benefit may be payable is if the pathology specimen was collected from the person by certain people detailed in the paragraph. In particular subparagraph 16A(5AA)(c)(iii) provides that a medicare benefit is payable where a specimen is collected by an employee of the treating practitioner on behalf of the treating practitioner.

Since the time that this provision was drafted, the nature of medical practice has changed and in many cases practitioners now engage contract staff to take samples rather than employees. This item therefore amends subparagraph 16A(5AA)(c)(iii) to clarify that a medicare benefit will potentially be payable if the pathology specimen was collected from the person:

- by the person himself or herself; or
- by the treating practitioner; or
- on behalf of the treating practitioner by either an employee of the treating practitioner, or a person engaged directly or indirectly under a contract for services with the treating practitioner; or
- if the treating practitioner is employed, or engaged under a contract for services, by a medical entrepreneur—on behalf of the treating practitioner, by another employee of that medical entrepreneur, or by a person engaged under a contract for services by that medical entrepreneur.

Item 6

This item replaces the wording of existing subsection 16A(5A) of the HIA. The existing wording currently provides that a medicare benefit is not payable in respect of a pathology service that has been rendered by or on behalf of an approved pathology practitioner if the request for the service was because of:

- any consideration given, or promise made, by the approved pathology practitioner (or the proprietor of the laboratory in which the service was rendered) to:
 - the treating practitioner; or
 - the requesting practitioner; or
 - an employee of the treating practitioner or requesting practitioner; or
 - a medical entrepreneur; or
- any agreement, arrangement or understanding between the approved pathology practitioner (or the proprietor of the laboratory in which the service was rendered) and:
 - the treating practitioner; or
 - the requesting practitioner; or
 - an employee of the treating practitioner or requesting practitioner; or
 - a medical entrepreneur.

The purpose of this subsection is to prevent the payment of medicare benefits where there are inappropriate agreements or benefits flowing between requesters and providers. This item therefore updates this existing section so that it better reflects the new prohibited practices, and enables non-payment of medicare benefits where a person has committed an offence under the HIA or breached a civil penalty provision.

In summary, a medicare benefit is not payable in respect of a pathology service that has been rendered by or on behalf of an approved pathology practitioner if:

- the request for the service was made:

- to the approved pathology practitioner by the treating practitioner (the requesting practitioner); or
- by another approved pathology practitioner (the requesting practitioner) to whom the treating practitioner made the request; and
- the request for the service was made as a result of:
 - conduct in respect of which the approved pathology practitioner or the requesting practitioner has been convicted of an offence under Division 3 of Part IIBA of the HIA; or
 - conduct in respect of which the approved pathology practitioner or the requesting practitioner has been ordered to pay a pecuniary penalty under Part VIA of the HIA.

Items 7 and 8

These items make consequential changes to section 19B of the HIA to reflect changes to section numbering that have resulted from other amendments. These changes do not alter the substance of section 19B which prevents the payment of medicare benefits in respect of services rendered by disqualified practitioners.

Item 9

This item amends paragraph (b) of the definition of “disqualified practitioner” in subsection 19D(11) of the HIA to reflect a reference to an amended provision under the Medicare Participation Review Committee Arrangements in Part VB resulting from the amalgamation of the pathology and diagnostic imaging prohibited practice provisions.

Section 19D deals with offences for practitioners disqualified from medicare benefits. The changes are consequential only and have no impact on the substantive operation of the section.

Item 10

Section 23DA is the interpretation section for Part IIA (special provisions relating to pathology) of the HIA. This is the section that contains relevant definitions for the Part. This item inserts a new definition into subsection 23DA(1). The item provides that “relevant civil contravention” has the same meaning as in subsection 124B(1) of the HIA.

Item 11

This item amends the definition of “relevant person” within subsection 23DA(1) of the HIA by adding two new categories of person to the definition:

- a person against whom a pecuniary penalty order has been made in respect of a relevant civil contravention; or
- a person who the Minister has reasonable grounds to believe may have committed a relevant civil contravention.

This change reflects the introduction of civil penalty provisions for prohibited pathology practices.

Item 12

Subsection 23DA(3) of the HIA defines a “prescribed person” and paragraph 23DA(3)(b) provides that a person is a “prescribed person” if the Minister has reasonable grounds to believe that they may have committed a relevant offence in relation to which a determination has not been made by a Medicare Participation Review Committee under subsection 124F(2) of the HIA whether to apply sanctions to the person.

This item amends paragraph 23DA(3)(b) by replacing the reference to a relevant offence with a reference to an offence or relevant civil contravention to cater for the introduction of civil penalties for persons engaged in prohibited pathology practices.

Item 13

Paragraph 23DA(4)(a) provides that a reference in Part IIA of the HIA to disqualification (in relation to a prescribed person) is a reference to a determination made by a Medicare Participation Review Committee. This item updates the paragraph references to reflect amendments to the Medicare Participation Review Committee provisions of the HIA resulting from the amalgamation of the pathology and diagnostic imaging prohibited practice provisions.

Items 14 and 15

Currently, where an applicant has applied to the Minister for approval as an approved pathology practitioner, subsection 23DC(5) of the HIA provides that the Minister must be satisfied that the applicant is a “fit and proper person” to be an approved pathology practitioner.

In determining whether a person is a “fit and proper person” to be an approved pathology practitioner, paragraph 23DC(6)(a) requires the Minister to consider the applicant’s “formal qualifications and experience”. However, paragraph 23DC(6)(a) does not currently identify the types of qualifications and experience that would be considered to be appropriate.

Item 14 amends subsection 23DC(5) to add that in addition to requiring that the Minister be satisfied that the person is a “fit and proper person”, the Minister must also be satisfied that the person has formal qualifications and experience determined to be appropriate for the person under subsection (6A).

Item 15 then inserts a new subsection 23DC(6A) which provides that the Minister may, by legislative instrument, determine the formal qualifications and experience that are appropriate for a specified class of persons.

Item 16

This item repeals subsection 23DC(17) of the HIA. This subsection clarifies that for the purposes of subsection 23DC(1) a medical practitioner includes a person who, immediately before 1 August 1977, was carrying on the business of rendering certain pathology services at the request of medical practitioners. This savings provision is no longer needed as non-medical practitioners from before 1 August 1977 have ceased operating. Only medical practitioners with suitable qualifications and experience should be able to be approved pathology practitioners.

Item 17

This item repeals subsection 23DN(3) of the HIA. It has been replaced by new subsection 23DN(6A), introduced and discussed at items 18 to 21.

Item 18

Item 18 inserts a new subsection 23DN(6A) into the HIA which provides that the Minister must, in exercising the Minister’s powers under section 23DN at a particular time, apply the principles determined under section 23DNA that are in force at that time. The principles applied under section 23DNA are principles relating to the granting, revocation or variation

of accreditation of pathology laboratories. Item 21 describes the changes that are made to the Minister's powers to issue principles.

Item 19

This item amends subsection 23DNA(1) of the HIA by clarifying that the principles determined by the Minister in relation to accreditation of pathology laboratories are legislative instruments.

Item 20

This item amends subsection 23DNA(1) of the HIA by omitting the cross-reference to subsection 23DN(1) and replacing it with a cross-reference to section 23DN. The heading to section 23DNA is also altered so that it reads "Determination of principles for accreditation as pathology laboratory or revocation or variation of accreditation". This reflects the changes made to subsection 23DNA(2) as described in item 21.

Item 21

This item repeals subsection 23DNA(2) of the HIA and replaces it with a new subsection 23DNA(2) which provides that without limiting the generality of subsection (1), the principles may provide for:

- the allocation of different categories of accreditation as a pathology laboratory to different premises in accordance with the criteria set out in the principles. This reflects the existing wording of subsection (2); and
- the circumstances in which an approval may be varied or revoked in order to prevent harm to the health or safety of the public or a section of the public. This enables the Minister to make principles prescribing the grounds on which accreditation as pathology laboratory will be varied or revoked. This could include, for example, failure to achieve accreditation from an independent authority such as the National Association of Testing Authorities.

Item 22

This is a consequential amendment because of the changes made to subsection 23DNA(2) of the HIA under item 21.

Items 23 and 24

Section 23DNA of the HIA provides that the Minister may determine principles that are to be applied for accreditation as a pathology laboratory, and that such principles can detail criteria for the allocation of different categories of accreditation.

Currently paragraph 23DNA(3)(c) provides that the criteria may relate to the extent to which the pathology services performed on the premises are to be performed under the direction, control or supervision of a pathologist, scientist, senior scientist, medical practitioner or any other person having specified qualifications or skills.

Subsections 23DNA(4) and (5) then define the words pathologist, scientist and senior scientist for the purposes of the section. However, over time, these definitions have become outdated.

In order to address this problem, item 23 amends paragraph 23DNA(3)(c) by removing the references to pathologist, scientist, senior scientist and medical practitioner. Instead, the new paragraph will simply provide that the criteria may relate to the extent to which the pathology

services performed on the premises are to be performed under the direction, control or supervision of a person having specified qualifications or skills.

Item 24 then repeals subsections 23DNA(4) and (5) as they are no longer needed.

Item 24 also repeals subsection 23DNA(6) which is no longer required due to the amendment made to subsection 23DNA(1) by item 19.

Item 25

Subsection 23DNBA(1) of the HIA currently provides that “The Minister may grant an approval to an approved pathology authority for an eligible collection centre conducted (or to be conducted) on premises of which the authority is the owner, lessee or sub-lessee”.

This item repeals this subsection and replaces it with a new one which also enables the Minister to grant an approval where the approved pathology authority is otherwise entitled to occupy the premises (for example, otherwise has legal authority to occupy the premises).

This addresses the concern raised by approved pathology authorities that not all eligible collection centres are on premises that are owned or leased by the approved pathology authority.

Item 26

Section 23DNK of the HIA currently provides that the approved pathology authority operating an approved collection centre must:

- ensure that at all times there is on display in a prominent place at the centre a notice that lets the public know that the centre is approved; and
- ensure that the notice is clearly visible from outside the centre when the centre is closed.

This provision leads to practical difficulties for centres that are, for example, part of larger shopping complexes. In this case, while the sign may be visible when the shopping centre is open (because it will be on the window of the collection centre) it will not be able to be seen when the shopping complex is shut. It is not the policy intent that a sign would also have to be on the outside of the shopping complex.

This item therefore repeals subsections 23DNK(1) and (2) and replaces them with a new subsection 23DNK(1) which provides that the approved pathology authority operating an approved collection centre must ensure that at all times there is on display in a prominent place at the centre a notice that lets the public know that the centre is approved. The penalty for non-compliance with this provision is 10 penalty units which equates to \$1,100 for an individual and \$5,500 for a corporation.

Item 27

This item repeals subsections 23DO(2A) and (2B) of the HIA. These subsections relate to subsections 23DNA(4) and (5), and as these subsections are repealed by item 24, subsections 23DO(2A) and (2B) are no longer necessary.

Item 28

Subsection 23DO(3) of the HIA cross-references subsection 23DO(2B). As subsection 23DO(2B) is repealed by item 27, this item removes the reference to this subsection within subsection 23DO(3).

Item 29

This item amends paragraph 23DO(5)(c) of the HIA by deleting the reference to subsection 23DO(2B) which has been repealed by item 27.

Item 30

Subsection 23DP(3) of the HIA currently provides that an approved pathology practitioner or an approved pathology authority shall not provide (whether directly or indirectly) to a practitioner a pathology request form that is not in accordance with the approved form.

This item removes the reference to an approved form and replaces it with a requirement that the request form must be in accordance with regulations made for the purposes of this subsection.

This provides greater flexibility by enabling regulations to detail the essential components of an approved form rather than having to precisely prescribe the form that must be used.

Item 31

This item amends paragraphs 23DZC(1)(c) and (1A)(c) of the HIA to change section cross-referencing within the paragraphs (to reflect other changes that have been made to section 124F of the HIA). Section 23DZC deals with revocation of remote area exemptions in relation to diagnostic imaging services.

Item 32

This item repeals Division 3 of Part IIB of the HIA. This Division currently deals with prohibited diagnostic imaging services. The new prohibitions in relation to diagnostic imaging services will be contained in the new Part IIBA (Prohibited practices in relation to pathology services and diagnostic imaging services).

Item 33

Section 23DZK of the HIA provides that the Minister must keep a Diagnostic Imaging Register. Currently one of the purposes for which such a register is kept is for assisting in identifying whether prohibited diagnostic imaging practices are taking place (paragraph 23DZK(2)(d)). This item amends this paragraph by replacing the reference to “prohibited diagnostic imaging practices” with a reference to “contraventions of Part IIBA in relation to diagnostic imaging”. This updates the provision to reflect the changes to the prohibitions.

Item 34

This item inserts a new part in the HIA. The new Part is entitled “Part IIBA—Prohibited practices in relation to pathology services and diagnostic imaging services”. This Part contains the new prohibitions in relation to pathology and diagnostic imaging services.

Part IIBA—Prohibited practices in relation to pathology services and diagnostic imaging services**Division 1—Preliminary****Section 23DZZIA (Objects of Part)**

This section describes the objects of the Part. The objects are:

- to prevent requesters of pathology services and diagnostic imaging services from (either directly or indirectly) accepting, or being offered or provided, any benefits (other than

permitted benefits) in order to induce the requesters to request the services from providers of those services; and

- to protect requesters of pathology services and diagnostic imaging services from (either directly or indirectly) being threatened in order to induce the requesters to request the services from providers of those services.

The section also clarifies that the Division is not intended to prohibit legitimate commercial transactions based on quality and cost of the services which providers give to requesters and to the requester's patients.

Section 23DZZIB (Simplified outline)

This section provides a summary of the Part. The section notes that the Part creates both civil penalty provisions and offences involving benefits and threats related to requests for pathology and diagnostic imaging services.

The civil penalty provisions and offences apply to benefits and threats involving the following persons):

- requesters of pathology or diagnostic imaging services;
- providers of pathology or diagnostic imaging services;
- in the case of the civil penalty provisions—persons who are connected to requesters or providers; and
- in the case of the offences—any persons, if the benefits or threats are intended to induce requesters to request pathology or diagnostic imaging services from providers.

An executive officer of a body corporate might also infringe the legislation if the body corporate commits an offence, or contravenes a civil penalty provision, under this Part.

Section 23DZZIC (Crown to be bound)

Consistent with the recommendations of the Phillips Fox review, this section ensures that all of the new prohibitions also bind the Crown.

Currently, some entities which are involved in requesting and/or providing pathology or diagnostic imaging services may be within the shield of the Crown in right of a State or Territory. For example, if a hospital is run as part of the executive government of a State, without being incorporated, the hospital may be part of the Crown in right of the State and, as such, would not be subject to offence provisions in the HIA.

Similarly, if a hospital has been incorporated but is closely connected with the Crown, then the hospital may be within the shield of the Crown and therefore not subject to HIA offence provisions.

This section indicates that the new provisions bind the Crown in all its capacities—Commonwealth, State and Territory. However, consistent with legislative convention, the new provisions do not impose offence liability (or liability for the payment of a civil penalty) on the Crown in any capacity.

However, if the Commonwealth, a State or a Territory breaches the legislation then an injunction could be sought to restrain the Crown in right of the Commonwealth, a State or a

Territory from engaging in conduct that contravenes the new Part. The matter may also be referred to a Medicare Participation Review Committee.

Section 23DZZID (Definitions)

This section sets out the definitions that are used in the new Part.

The key definitions are:

- benefit—this includes money, property or services, or any other benefit accepted, offered or provided in any form, and an actual or a potential benefit.
- connected—this has the meaning given by section 23DZZIJ.
- permitted benefit which has the meaning given by subsection 23DZZIF(1).
- provider—this has the meaning given by subsections 23DZZIE(3) and (4).
- requester—this has the meaning given by subsections 23DZZIE(1) and (2).
- relative of a person—this means:
 - (a) the spouse of the person; or
 - (b) a parent or remoter lineal ancestor of the person or of the person’s spouse; or
 - (c) a child or remoter lineal descendant of the person or of the person’s spouse; or
 - (d) a brother or sister of the person or of the person’s spouse; or
 - (e) an uncle, aunt, nephew or niece of the person or of the person’s spouse; or
 - (f) the spouse of a person specified in paragraph (b), (c), (d) or (e).

Section 23DZZIE (Meaning of *requester* and *provider*)

This section defines a “requester” and a “provider” in relation to both a kind of pathology service and a kind of diagnostic imaging service.

A requester of a pathology service means:

- a practitioner—a practitioner is defined in subsection 3(1) of the HIA as medical practitioner or dental practitioner;
- a person who employs, or engages under a contract for services, a practitioner; or
- a person who exercises control or direction over a practitioner (in his or her capacity as a practitioner).

A requester of a diagnostic imaging service means:

- a medical practitioner;
- if the service is of a kind specified in regulations made under section 16B—a dental practitioner, a chiropractor, a physiotherapist, a podiatrist or an osteopath (these practitioners can request limited ranges of diagnostic imaging services as prescribed in the regulations); or
- in any case, a person who employs, or engages under a contract for services, one of the people specified above, or a person who exercises control or direction over one of the people specified above (in his or her professional capacity).

A provider of a kind of pathology service or diagnostic imaging service means:

- a person who renders that kind of service;
- a person who carries on a business of rendering that kind of service;

- a person who employs, or engages under a contract for services, one of the people specified above;
- a person who exercises control or direction over a person who renders that kind of service or a person who carries on a business of rendering that kind of service;
- an approved pathology practitioner; or
- an approved pathology authority.

Subsection 23DZZIE(4) clarifies that a person is a provider if they render one or more different types of pathology or diagnostic imaging services.

Section 23DZZIF (Meaning of *permitted benefit*)

The new provisions are aimed at preventing the payment of inappropriate and unethical benefits in any form (including money, property or services) from a provider to a requester (either directly or indirectly).

It is not, however, intended that the legislation capture or prohibit legitimate commercial transactions. Section 23DZZIF therefore describes what is, and is not, a permitted benefit. In general terms the following benefits are permitted benefits:

- the distribution of profits or shares from the operation of a business that renders pathology or diagnostic imaging services, provided that the amount of the benefit is proportionate to the interest that the beneficiary holds in the body corporate, trust, partnership or other body that carries on the business—subsection (2);
- remuneration (whether salary, wages, commission, allowances or bonuses) provided that the amount of the remuneration is not substantially different from the usual remuneration paid to persons engaged in similar employment or under similar contract—subsection (3).
- a payment for property, goods or services that are shared where the amount of the benefit is proportionate to the person’s share of the cost of the property, goods or services—subsection (4). This subsection also provides that if a pathology provider leases premises, they must establish an approved collection centre or accredited pathology laboratory within 60 days of entering into the lease, or render professional services in the relevant part of the premises. This picks up existing provision subsection 129AAA(3A), but now allows 60 days for a collection centre or pathology laboratory to be established rather than 30 days. This period is regarded as being a reasonable time to allow the premises to be fitted out as a collection centre or pathology laboratory.
- a payment property, goods or services that are not shared between the requester and provider where the amount of the payment is not substantially different from the market value of the property, goods or services—subsection (5). It is proposed that regulations made under the HIA will prescribe a method of working out whether the amount of a payment is substantially different from the market value of a specified class of property, goods or services. The capacity to make such regulations is detailed in subsection 23DZZIF(9). This subsection also provides that if the benefit relates to a payment for the use or occupation of a space by a provider of pathology services, the provider must establish an approved collection centre or an accredited pathology laboratory within 60 days of entering into the lease or render professional services in the premises; and
- the provision of property, goods or services where the benefit is provided for consideration that is not substantially different from the market value of the property, goods or services—subsection (6). This includes ‘payments in kind’. As noted above, regulations will prescribe a method of working out whether the amount of a payment is

substantially different from the market value of a specified class of property, goods or services.

Subsection 23DZZIF(7) sets out overarching exclusions to the permitted benefits outlined above. A benefit is not a permitted benefit if:

- the benefit is related to the number, kind or value of requests for pathology services or diagnostic imaging services made by the requester. Subsection 23DZZIF(8) clarifies that a benefit is related to the number of requests for pathology or diagnostic imaging services made by a requester if the provision of the benefit is dependent on the requester requesting all, or a proportion of, the requests for one or more kinds of services that the requester makes from a particular provider; or
- the benefit consists of the provision of staff or equipment at premises of the beneficiary for the purposes of providing pathology or diagnostic imaging services. Such a benefit is prohibited regardless of whether: the staff are stationed at the premises full-time or part-time, or simply visiting; or the equipment is brought to the premises from time to time.

Some examples of permitted and prohibited benefits are as follows:

- if a requester owns a pathology service (or owns shares in a pathology service), then they can share in the legitimate profits of that business (in proportion to their share of ownership). However, it is prohibited for them to receive payments based directly on the number of requests that they make to the business;
- requesters and providers may share rented premises provided that they each pay the appropriate rent based on the space used by them. A provider may not, however, station staff or equipment at a requester's premises;
- if the spouse of a requester (or a person with a relevant connection to the requester) works for a provider then the provider may pay the person a salary, provided that:
 - the salary is reasonable, that is, similar to that paid to others carrying out similar work; and
 - no element of the salary is linked to the number of pathology requests made by the requester; and
- if a requester and a provider share premises and the premises are owned by the requester, then the provider may make payments to the requester to cover the provider's legitimate share of the total costs. The payments can not be greater than the value of the provider's proportionate share of the costs and can not be linked to the requesting of services.

Section 23DZZIG (Ministerial determinations of permitted benefits)

Section 23DZZIG will provide a power for the Minister to make a determination that a certain type of benefit is a permitted benefit. It is proposed that the Minister could do this on either his or her own volition, or on request from a provider or requester.

For example, it is intended that determinations will be made in respect of benefits such as gifts, education, hospitality and consumables, and that reasonable limits will be prescribed for such benefits.

The Minister would make separate determinations for pathology and diagnostic imaging as the types of benefits to be exempted are likely to be different in those industries.

The list of benefits will be developed in association with pathology and diagnostic imaging stakeholders.

Section 23DZZIH (Establishing whether an executive officer took reasonable steps to prevent commission of offence or contravention of civil penalty)

This section provides that for the purposes of sections 23DZZIN and 23DZZIT (dealing with the accountability of executive officers when a body corporate breaches the prohibited practice provisions), a court is to have regard to the following conduct in determining whether an executive officer of a body corporate failed to take all reasonable steps to prevent the body corporate committing the offence or the contravening a civil penalty provision:

- what action (if any) the officer took towards ensuring that the body’s employees, agents and contractors have a reasonable knowledge and understanding of the requirements to comply with the new Part IIBA and the regulations, in so far as those requirements affect the employees, agents or contractors concerned; and
- what action (if any) the officer took when he or she became aware that the body was committing an offence against, or otherwise contravening, Part IIBA.

Subsection (2) clarifies that this section does not in any way limit the generality of section 23DZZIN or 23DZZIT.

Division 2—Civil penalty provisions involving requesters, providers and connected persons

Subdivision A—Preliminary

Section 23DZZII (Simplified outline)

This section provides a summary of Division 2. In summary, the following conduct potentially gives rise to civil penalties:

- if a requester asks for or accepts a pathology or diagnostic imaging service-related benefit (other than a permitted benefit) from a provider or a person connected to a provider;
- if a provider offers or provides such a benefit to a requester or a person connected to a requester; or
- if a provider makes a pathology or diagnostic imaging service-related threat to a requester or a person connected to a requester.

If the requester or provider knows that a person connected to the requester or provider has asked for, accepted, offered or provided such a benefit (or made such a threat) then the requester or provider can avoid contravening a civil penalty provision by reporting the person to Medicare Australia. A person is connected to a requester or provider if the person has one of the personal or business relationships, set out in section 23DZZIJ, with the requester or provider.

A benefit is prohibited if it is not a “permitted benefit”.

An executive officer of a body corporate might also be in contravention of the legislation if the body corporate contravenes a civil penalty provision under this Part.

Section 23DZZIJ (Meaning of *connected*)

The new prohibitions address one of the concerns raised by the Phillips Fox review regarding the existing legislation. Recommendation 12 of the review suggests that the offences be extended to persons who have a “relevant connection” with requesters and providers. The new provisions introduce the concept of persons who are “connected to” a requester or provider. This ensures that a requester or provider cannot avoid the offence and civil penalty provisions simply because a third person such as a relative of the requester or provider is offering or accepting a prohibited benefit or making a threat.

The new provisions define those people who are “connected to” a requester or provider and then provide that if a benefit is offered, or accepted, by a person connected to a provider or a requester then the requester or provider (as the case may be) may still be breaching the legislation irrespective of whether they had directly offered or received the prohibited benefit. This applies equally to cases where threats have been made.

Section 23DZZIJ defines a person as being “connected to” a requester or provider if the person has one of the personal or business relationships with the requester or provider as set out in the section.

A person (the *first person*) is *connected* to another person if:

- the first person is a relative of the other person—paragraph (a). (A relative is defined in subsection 23DZZID(1) and broadly captures, for example, spouses, parents, lineal descendants and step-children); or
- the first person is a body corporate and the other person is a director, secretary, chief executive officer or any other executive officer of that body corporate—paragraph (b); or
- the other person is a body corporate and the first person is a director, secretary, chief executive officer or any other executive officer of that body corporate—paragraph (c) or
- the first person is a body corporate and the other person is a body corporate that is related to that body corporate—paragraph (d). The question of whether a body corporate is related to another body corporate is determined in the same manner as that question is determined for the purposes of the *Corporations Act 2001*—subsection (2); or
- the first person, or a relative of the first person, is a beneficiary under a trust and the other person is a trustee of that trust—paragraph (e); or
- the first person is a trustee of a trust and the other person, or a relative of the other person, is a beneficiary under that trust—paragraph (f); or
- the first person, or a relative of the first person, is a member of a partnership and the other person is also a member of that partnership—paragraph (g); or
- the first person is a member of a partnership and a relative of the other person is also a member of that partnership—paragraph (h); or
- the first person employs or engages the other person—paragraph (i); or
- the other person employs or engages the first person—paragraph (j).

Subsection 23DZZIJ(3) clarifies that this section does not affect the law on agency.

Subdivision B—Civil penalty provisions

Section 23DZZIK (Requester civil penalty provisions—asking for or accepting prohibited benefits)

This section describes two types of actions that are subject to civil penalties:

- where a requester asks for or accepts a prohibited benefit; and
- where a requester knows that a person connected to a requester asks for or accepts a prohibited benefit.

This section should also be read in conjunction with the new section 125C . Section 125C provides that a person must not aid, abet, counsel or procure the contravention of a civil penalty provision. Nor must they induce a contravention of, or conspire to contravene, a civil penalty provision. If a person engages in any of the activities prescribed in section 125C, that person is taken to have contravened a civil penalty provision.

Requester asks for or accepts a prohibited benefit

In summary, if a requester (of either pathology or diagnostic imaging services) asks for or accepts a benefit, then the requester will contravene section 23DZZIK if:

- the benefit has come from a provider or a person connected to a provider (section 23DZZIJ provides the meaning of “connected to”). It is important to note that in circumstances where the civil contravention is in relation to a requester merely asking for a prohibited benefit then it is not necessary to show that the benefit actually ever eventuated or was provided. It is sufficient to show that the requester asked for the prohibited benefit; and
- the benefit:
 - would be reasonably likely to induce a requester to request any of those kinds of services from the provider. It should be noted that this test is intended to apply to any requester and not just the particular requester in question. That is, it will only be necessary to demonstrate that the benefit would be reasonably likely to induce any requester to request services and not the particular requester in question. Any unique circumstances of the particular requester that might, for example, demonstrate that while others may have been induced by the benefit the particular requester was not, will not be taken into account; or
 - is related to the business of rendering pathology services or diagnostic imaging services, as the case requires. As noted in the Phillips Fox review report, it can sometimes be difficult to establish whether a benefit is reasonably likely to induce a requester to request services. Therefore, as an alternative, it may simply be established that the benefit was connected to the pathology or diagnostic services business. This could, for example, be established based on bank records and records of transfers between the pathology business and the requester; and
- the benefit is not a permitted benefit. If the benefit is not on the list of permitted benefits in section 23DZZIF (and has not been included in a determination made by the Minister) then the benefit is not permitted. In addition, if a benefit is related to the number, kind or value of requests for pathology or diagnostic imaging services made by a requester then it is automatically a benefit that is not a permitted benefit (regardless of whether it is also on the list of permitted benefits).

A contravention of this provision may give rise to a civil penalty of up to 600 penalty units for an individual and 6,000 penalty units for a corporation. Currently, this equates to \$66,000 for an individual and \$660,000 for a corporation.

Requester knows that a person connected to a requester asks for or accepts a prohibited benefit

A requester may also infringe the legislation if a person connected to the requester accepts a prohibited benefit, the requester knows that this has occurred and the requester has not alerted Medicare Australia.

The purpose of new subsections 23DZZIK(2) and (3) is to ensure that requesters are still liable for a civil penalty even if a benefit is not paid directly to them—for example, if the benefit is paid to their spouse or business partner.

However, where the benefit is paid to a person connected to the requester (rather than directly to the requester), then the requester, if they become aware that the prohibited benefit has been paid to the person who is connected to them, has an opportunity to report this to the authorities. If they do so, they will not be subject to a civil penalty.

This ensures that requesters are not subject to a penalty merely because a prohibited benefit has been accepted by a family member without the requester's knowledge. In this case, the provider who made the payment may be subject to a penalty but the requester would not be.

In terms of public policy, the new provision reflects the assumption that if a requester does not know that a benefit has been paid to a person who is connected to them, then it is highly unlikely that the payment of the benefit is influencing the requester to request services from a particular provider.

In summary, subsections 23DZZIK(2) and (3) provide that a requester of either pathology or diagnostic imaging services (the first person) may be subject to a civil penalty if:

- a person connected to the requester (the second person) asks for or accepts a benefit from either a provider or a person connected to a provider (the third person); and
- the benefit:
 - would be reasonably likely to induce the first person to request services from a third person; or
 - is related to the business of rendering pathology services or diagnostic imaging services, as the case requires; and
- the requester knows (either at the time of asking for or accepting the benefit or at any later time) that:
 - the second person asked for or accepted the benefit; and
 - the benefit was asked for, or accepted from, the third person; and
- the benefit is not a permitted benefit.

Subsection 23DZZIK(3) provides that subsection 23DZZIK(2) does not apply to a requester if the requester reports the benefit to the CEO of Medicare Australia, in writing, within 30 days after the requester first becomes aware of the asking for, or accepting of, the benefit.

Section 23DZZIL (Provider civil penalty provisions—offering or providing prohibited benefits)

This section is intended to mirror section 23DZZIK, but in relation to providers.

Where a provider offers or provides a prohibited benefit

In summary, if a provider of either pathology or diagnostic imaging services (the first person) offers or provides a benefit, then the provider will contravene section 23DZZIL(1) if:

- the benefit is offered or provided to a requester or a person connected to a requester (the second person) ; and
- the benefit:
 - would be reasonably likely to induce a requester to request any of those kinds of services from a provider; or
 - is related to the business of rendering pathology services or diagnostic imaging services, as the case requires; and
- the benefit is not a permitted benefit.

A contravention of this provision may give rise to a civil penalty of up to 600 penalty units for an individual and 6,000 penalty units for a corporation. Currently, this equates to \$66,000 for an individual and \$660,000 for a corporation.

A person will also contravene the provision if they aid, abet, counsel or procure the contravention of this provision, or they induce a contravention of, or conspire to contravene, the provision – see section 125C.

Where a provider knows that a person connected to a provider offers or provides a prohibited benefit

Subsections 23DZZIL(2) and (3) provide that a provider of either pathology or diagnostic imaging services (the first person) may be subject to a civil penalty if:

- a person connected to the provider (the second person) offers or provides a benefit to either a requester or a person connected to a requester (the third person); and
- the provider knows (at the time of the offer or provision of the benefit or at any later time) that:
 - the second person offered or provided the benefit; and
 - the offer or provision of the benefit was made to a third person; and
- the benefit:
 - would be reasonably likely to induce a requester to request services from a provider; or
 - is related to the business of rendering pathology services or diagnostic imaging services, as the case requires; and
- the benefit is not a permitted benefit;

Subsection 23DZZIL(3) provides that subsection 23DZZIL(2) will not apply if the provider reports the benefit to the Medicare Australia CEO, in writing, within 30 days of first becoming aware that the person connected to the provider offered or provided the benefit, and the offer or provision of the benefit was to a requester or a person connected to a requester.

Section 23DZZIM (Provider civil penalty provisions—making threats)

Subsection 23DZZIM(1) specifies that a provider contravenes the section if:

- the provider makes a threat to a requester or a person connected to a requester and the threat either:
 - would be reasonably likely to induce a requester to request services from the provider; or
 - is related to the business of rendering pathology or diagnostic imaging services (as the case requires).

A contravention of this provision may give rise to a civil penalty of up to 600 penalty units for an individual and 6,000 penalty units for a corporation. Currently, this equates to \$66,000 for an individual and \$660,000 for a corporation.

Subsection 23DZZIM(2) specifies that a provider also contravenes the section if:

- the provider knows that a person connected to them has made a threat to a requester or a person connected to a requester; and
- the threat is either:
 - reasonably likely to induce a requester to request services from a provider; or
 - related to the business of rendering pathology or diagnostic imaging services; and

However, subsection 23DZZIM(3) provides that subsection 23DZZIM(2) will not apply if the provider has reported the threat to the Medicare Australia CEO, in writing, within 30 days of finding out about the threat.

No equivalent provisions are included in the legislation for requesters making threats because they are captured through the operation of section 125C which provides that a person will contravene a civil penalty provision if they aid, abet, counsel or procure the contravention of the provision or they induce a contravention of, or conspire to contravene, the provision.

For example, if a requester threatened a provider by saying that they would not request services from the provider unless the provider gave them a prohibited benefit then the requester would be inducing (by threat) a contravention of the provision banning the offering or provision of prohibited benefits (section 23DZZIL) and the requester would be taken to have contravened the provision.

Section 23DZZIN (Application of this Division to an executive officer of a body corporate)

This section is intended to apply to executive officers (a term which is defined in subsection 23DZZID(1) – see below), such as managing directors or Chief Executive Officers, who are directly involved in or participate in the management of a body corporate, and who should be made accountable for the actions of the body where such officers are in a position to influence the body and are aware of breaches by the body of the HIA or regulations but fail to take all reasonable action to prevent the breaches.

Subsection 23DZZID(1) defines *executive officer* of a body corporate to mean a person, by whatever name called and whether or not a director of the body, who is concerned in, or takes part in, the management of the body.

In summary, subsection 23DZZIN(1) provides that an executive officer of a body corporate contravenes the subsection if:

- the body corporate contravenes a civil penalty provision in Division 2 (paragraph 23DZZIN(1)(a)); and
- the executive officer knew that the contravention would occur (paragraph 23DZZIN(1)(b)); and
- the executive officer was in a position to influence the conduct of the body in relation to the contravention (paragraph 23DZZIN(1)(c)); and
- the executive officer failed to take all reasonable steps to prevent the contravention (paragraph 23DZZIN(1)(d)).

In making a determination for the purposes of paragraph 23DZZIN(1)(d), a court has regard to the matters set out in section 23ZZIH. This includes:

- what action (if any) the executive officer took towards ensuring that the body's employees, agents and contractors have a reasonable knowledge and understanding of the requirements to comply with Part IIBA of the HIA and the regulations, in so far as those requirements affect the employees, agents or contractors concerned; and
- what action (if any) the officer took when he or she became aware that the body was committing an offence against, or otherwise contravening, the Part.

Subsection 23DZZIN(2) provides that the maximum civil penalty for a contravention of subsection 23DZZIN(1) is the maximum civil penalty that a Court could impose in respect of an individual for the civil penalty provision contravened by the body corporate. For example, if the body corporate contravened a civil penalty provision which prohibits the offering of a prohibited benefit (section 23DZZIL) and is subject to a penalty of 6,000 penalty units, then the maximum penalty that would apply to the executive officer would be 600 penalty units (which is the penalty for the same civil contravention when the contravention is by an individual).

The provisions relating to liability by executive officers have been based on section 54B of the *Therapeutic Goods Act 1989*.

Division 3—Offences involving requesters, providers and others

Section 23DZZIO (Simplified outline)

The section provides a simplified outline of Division 3. Division 3 applies to benefits (other than permitted benefits) and threats that are intended to induce a requester to request pathology or diagnostic imaging services from a provider.

In summary, the requester must not ask for or accept such a benefit, a person must not offer or provide such a benefit and a person must not make such a threat.

Division 3 also imposes reporting obligations on the requester or the provider if he or she knows that a person has asked for, accepted, offered or provided such a benefit or made such a threat.

An executive officer of a body corporate might also commit an offence if the body corporate commits an offence under this Part.

Section 23DZZIP (Extended geographical jurisdiction – category A)

This section provides that section 15.1 of the Criminal Code (extended geographical jurisdiction—category A) applies to offences against Division 3.

The standard geographical jurisdiction that applies to offences is that if any part of the conduct constituting an offence occurs in Australia or on an Australian aircraft or ship, the offence applies. The offence also applies if any part of the result of the conduct constituting the offence occurs in Australia or on an Australian aircraft or ship.

Generally speaking it is also a defence where the offence is committed outside Australia and there is no equivalent offence under the law of the local jurisdiction.

However, in the case of the types of offences describe in this Bill, it would theoretically be quite possible for all of the prohibited conduct to occur offshore. For example, where a requester and a provider go to a conference overseas and a prohibited benefit is provided to the requester at that conference. If the standard geographical jurisdiction applied, this conduct would not constitute an offence against the new prohibitions.

In order to ensure that the offence can be prosecuted regardless of where the prohibited benefit is paid, it is considered appropriate for the offences described in this Bill to carry extended extraterritorial application.

This section therefore makes express reference to Category A extraterritorial operation applying to the offences in the Bill. This provides for an offence to extend to conduct by an Australian citizen or body corporate outside Australia. Also, for an Australian citizen or body corporate, it is not a defence that there is no equivalent offence under the law of the local jurisdiction.

This means that the following types of conduct that may occur overseas could be in contravention of the new offences described in this Bill:

- if a provider provides funds for a bank based in Hong Kong to issue credit cards to Australian requesters, who agree to direct their requests to that provider;
- if a requesting doctor opens a bank account in Hawaii and a provider makes payments into the account, in return for the doctor directing pathology requests; and
- if cash or jewellery or any other prohibited benefit is handed to a requester by a provider in a location outside Australia, for example at an overseas conference.

Section 23DZZIQ (Requester offences—asking for or accepting prohibited benefits)

This section describes two sets of offences:

- where a requester asks for or accepts a prohibited benefit (subsections 23DZZIQ(1) and (2)); and
- where a requester knows that another person has asked for or accepted a prohibited benefit and has not reported this to the Medicare Australia CEO (subsections 23DZZIQ (4), (5) and (7)).

Requester asks for or accepts prohibited benefit

In summary, a requester of one or more kinds of pathology services or diagnostic imaging services commits an offence under subsection 23DZZIQ(1) if:

- the requester accepts a benefit from any person (noting that it is not essential that the person who asks for the benefit actually receives it in order for the offence to be established); and
- the person who provided the benefit intended that the benefit would induce the requester to request services from a particular provider (subsection 23DZZIQ(3) clarifies that this can be any provider and does not need to be the same person who provided the benefit); and
- the requester knows (either at the time of the acceptance of the benefit or at any later time) that the person who provided the benefit had that intention; and
- the benefit is not a permitted benefit.

A requester of one or more kinds of pathology services or diagnostic imaging services commits an offence under subsection 23DZZIQ(2) if:

- the requester asks for or accepts a benefit from any person (again noting that it is not essential that the person who asks for the benefit actually receives it in order for the offence to be established); and
- the requester intends to request any of those kinds of services from a particular provider as a result of being provided the benefit (again, subsection (3) clarifies that this can be any provider and does not need to be the same person who provided the benefit); and
- the benefit is not a permitted benefit.

The offence in subsection 23DZZIQ(1) and the offence in subsection 23DZZIQ(2) both attract a maximum penalty of imprisonment for 5 years.

Requester knows that another person asks for or accepts prohibited benefit

In summary, a requester of one or more kinds of pathology or diagnostic imaging services commits an offence under subsection 23DZZIQ(4) if:

- a second person accepts a benefit from a third person who intends that the benefit will induce the requester to request services from a particular provider (subsection 23DZZIQ(6) clarifies that this can be any provider and does not need to be the same person who gave the benefit); and
- the requester knows (either at the time of the acceptance of the benefit or at any later time) that (i) the second person accepted a benefit from the third person; and (ii) the third person had that intention; and
- the benefit is not a permitted benefit.

However, subsection 23DZZIQ(7) provides that the offence in subsection 23DZZIQ(4) will not apply if the requester has, within 30 days after the requester first becomes aware of the circumstances, reported the benefit to the Medicare Australia CEO, in writing. The requester (defendant) bears the evidential burden in relation to proving the matters in subsection 23DZZIQ(7).

A requester of one or more kinds of pathology or diagnostic imaging services also commits an offence under subsection 23DZZIQ(5) if:

- a second person asks for, or accepts, a benefit from a third person; and
- as a result of the second person being provided the benefit, the requester intends to request any of those kinds of services from a particular provider; and
- the benefit is not a permitted benefit.

The offence in subsection 23DZZIQ(4) and the offence in subsection 23DZZIQ(5) both attract a maximum penalty of imprisonment for 5 years.

Section 23DZZIR (General and provider offences—offering or providing prohibited benefits)

This section mirrors the offences in section 23DZZIQ for people who offer or provide prohibited benefits.

In summary, a person commits an offence under subsection 23DZZIR(1) if:

- a person (the first person) offers or provides a benefit (other than a permitted benefit) to a second person intending that the benefit will induce a requester of pathology services or diagnostic imaging services to request services from a particular provider. In this circumstance, the requester may or may not be the second person and the provider may or may not be the first person (subsection 23DZZIR(2)).

A person who is a provider will commit an offence under subsection 23DZZIR(3) if:

- a second person offers or provides a benefit to a third person intending that the benefit will induce a requester of pathology or diagnostic imaging services to request services from the provider (the requester may or may not be the person to whom the benefit is offered or provided); and
- the provider knows (either at the time of the offer or provision of the benefit or at any later time) that (i) the second person offers or provides the benefit to the third person; and (ii) the second person has that intention; and
- the benefit is not a permitted benefit.

However, subsection 23DZZIR(5) provides that the offence in subsection 23DZZIR(3) will not apply if the provider reports the benefit to the Medicare Australia CEO, in writing, within 30 days after first becoming aware that (i) the second person offered or provided the benefit to the third person and (ii) the second person intended that the benefit would induce a requester to request services from the provider. The provider (defendant) bears the evidential burden in relation to proving the matters in subsection 23DZZIR(5).

The offence in subsection 23DZZIR(1) and the offence in subsection 23DZZIR(3) both attract a maximum penalty of imprisonment for 5 years.

Section 23DZZIS (General and provider offences—making threats)

Subsection 23DZZIS(1) provides that a person commits an offence if the person threatens a second person, intending that the threat will induce a requester of pathology or diagnostic imaging services to request services from a particular provider.

In these circumstances, subsection 23DZZIS(2) clarifies that the requester may or may not be the person to whom the threat is made and the provider may or may not be the person who

makes the threat. In other words, any person can be guilty of this offence, regardless of whether or not they are a provider – any person who makes threats to any other person (intending that such a threat induces the requesting of services from a particular provider) will be guilty of an offence. Similarly if a provider makes the threat, but the threat is intended to induce the requesting of services from a different provider, then an offence will still be committed.

Under subsection 23DZZIS(3), a person who is a provider commits an offence if:

- a second person threatens a third person intending that the threat will induce a requester of one or more kinds of pathology services or diagnostic imaging services to request any of those kinds of services from the provider; and
- the provider knows (either at the time of the threat or at any later time) that the threat has been made and that the person making the threat (the second person) had that intention.

Again, the requester may or may not be the person to whom the threat is made (see subsection 23DZZIS(4)). In other words the provider will still commit the offence whether or not the threat was made to a requester or to another person (for example, a colleague or friend of a requester).

However, subsection 23DZZIS(5) provides that the offence in subsection 23DZZIS(3) will not apply if the provider has reported the threat to the CEO of Medicare Australia, in writing, within 30 days after first becoming aware that (i) the threat was made; and (ii) that the person making the threat had the intention of inducing a requester to request services from the provider. If a provider maintains that they made a report to the CEO of Medicare Australia about each of the matters mentioned above, they bear the evidential burden of proving this in Court.

As for each of the other offences, the maximum penalty for the offence in subsection 23DZZIS(1) and the offence in 23DZZIS(3) is 5 years imprisonment.

Section 23DZZIT (Application of this Division to an executive officer of a body corporate)

This is a mirror provision of section 23DZZIN, but concerns the application of the offences in Division 3 to an executive officer of a body corporate..

In summary, subsection 23DZZIT(1) provides that an executive officer of a body corporate (see the definition of *executive officer* in subsection 23DZZID(1)) commits an offence if:

- the body corporate commits an offence against Division 2 (paragraph 23DZZIT(1)(a)); and
- the executive officer knew that the offence would be committed (paragraph 23DZZIT(1)(b)); and
- the executive officer was in a position to influence the conduct of the body in relation to the commission of the offence (paragraph 23DZZIT(1)(c)); and
- the executive officer failed to take all reasonable steps to prevent the commission of the offence (paragraph 23DZZIT(1)(d)).

In making a determination for the purposes of paragraph 23DZZIT(1)(d), a court has regard to the matters set out in section 23ZZIH. This includes:

- what action (if any) the executive officer took towards ensuring that the body's employees, agents and contractors have a reasonable knowledge and understanding of the requirements to comply with Part IIBA of the HIA and the regulations, in so far as those requirements affect the employees, agents or contractors concerned; and
- what action (if any) the officer took when he or she became aware that the body was committing an offence against, or otherwise contravening, the Part.

Subsection 23DZZIT(2) provides that the maximum penalty for an offence against subsection 23DZZIT(1) is the maximum penalty that a Court could impose in respect of an individual for the offence committed by the body corporate, i.e. 5 years imprisonment in relation to each offence.

The provisions relating to liability by executive officers have been based on section 54B of the *Therapeutic Goods Act 1989*.

Section 23DZZIU (Division not limited by Division 2)

This section clarifies that, for the purposes of Division 3, a person:

- who asks for or accepts a benefit; or
- to whom a benefit is offered or provided; or
- to whom a threat is made;

may or may not be connected to the relevant requester.

The section further clarifies that a person:

- from whom a benefit is requested or accepted; or
- who offers or provides a benefit; or
- who makes a threat;

may or may not be connected to the relevant provider.

What this means is that the person requesting, accepting, offering or providing a non-permitted benefit can be someone other than the requester or provider or persons connected to the requester or provider. For example, the benefit may be paid by the provider to a friend of the requester, with the intent of that friend inducing the requester to order services from the provider.

Items 35 to 38

These items make minor technical amendments to subsections 89A(1) and 106N(1) to reflect the inclusion of the new civil penalty provisions in the HIA.

Currently, sections 89A and 106N enable the referral of certain material by the Director of Professional Services Review or a Professional Services Review Committee to the Medicare Australia CEO, being material gathered in the course of reviewing the provision of services by a person (who may be a practitioner) to determine whether that person has engaged in inappropriate practice.

Sections 89A and 106N provide that the material that may be referred to the Medicare Australia CEO is material that indicates that the person under review may have “committed an offence that is a relevant offence within the meaning of section 124B”.

These sections currently refer to section 124B, which is being amended to include a reference to *relevant civil contravention* for the purposes of the Medicare Participation Review Committee arrangements (see item 40 below).

Item 35 also includes a note which clarifies that the heading to section 89A is altered.

Items 39 to 47

These items amend section 124B, which contains the definitions and other interpretive provisions for Part VB of the HIA. This part contains the Medicare Participation Review Committee arrangements.

Item 39 amends the definition of determination within subsection 124B(1) to change section referencing that has resulted from this package of amendments. The reference to subsection 124F(2) is replaced with a reference to subsections “124F(1), (2) or (6)”. Section 124F deals with determinations made by Medicare Participation Review Committees.

Item 40 inserts a definition of ‘relevant civil contravention’ for the purpose of the Medicare Participation Review Committee arrangements. A Medicare Participation Review Committee can deal with persons who have contravened civil penalty provisions like they currently can for the offence provisions.

Item 41 amends subsection 124B(1) (paragraph (a) of the definition of *relevant offence*) to remove the reference to section 129AAA which is being repealed.

Item 42 amends the definition of *relevant offence* within subsection 124B(1) to include an offence against new Division 3 of Part IIBA. It is a consequential amendment only to cater for the new prohibited practice offences for pathology and diagnostic imaging introduced by Item 34 above.

Item 43 amends subsection 124B(1), subparagraph (c)(iiia) of the definition of *relevant offence* to cross-reference the insertion of the paragraph (ac) as described at item 42.

Items 44 to 47 amend the following provisions to reflect the inclusion of the new civil penalty provisions in the HIA: subsection 124B(3); paragraph 124B(3)(a); and paragraph 124B(3)(c).

Item 48

This item inserts a new section 124BA of the HIA.

Section 124BA (Application of Part to providers who are not practitioners)

This section provides that this Part (i.e. Part VB) applies to a provider (who is not a practitioner) of pathology or diagnostic imaging services as if a reference in Part VB to a practitioner were a reference to the provider.

The section provides that when Part VB is applied to a provider, subsections 124F(2) and 124FF(2) should apply as if the following paragraph were added at the end of the subsections:

- (g) in relation to a provider (who is not a practitioner) of one or more kinds of pathology services or diagnostic imaging services—medicare benefits are not payable, during the period specified in the determination (being a period ending no later than 5 years after the day on which the determination takes effect), in respect of kinds of

pathology services or diagnostic imaging services that are specified in the determination and rendered by or on behalf of the provider.

Item 49

This item inserts a new subsection 124D(1A) of the HIA which provides that section 124D, under which the Chairperson of a Medicare Participation Review Committee is to be notified if a practitioner convicted of relevant offence, also applies in relation to a pecuniary penalty order made against a practitioner if:

- the order was made in respect of a relevant civil contravention; and
- all the rights of the practitioner to appeal against the order (other than the right to apply for an extension of the time for instituting such an appeal) have been exhausted or have expired; and
- the order has not been wholly set aside.

Item 49 also includes a note which clarifies that the heading to section 124D is also altered.

Items 50 to 53

These items amend the following provisions to reflect the inclusion of the new civil penalty provisions in the HIA: subsection 124D(2); paragraph 124E(1)(a); and paragraph 124E(1)(b).

Section 124E essentially requires the Chairperson to establish a Medicare Participation Review Committee following receipt of a notice under section 124D that a person has been convicted of a relevant offence or subject to an order in respect of a relevant civil contravention.

Item 54

This item repeals subsection 124E(4) of the HIA. This subsection currently references subsection 23DZJ(1) which is being repealed through the amendments in this Bill.

Item 55

This item amends subsection 124E(5) of the HIA by removing the reference to 23DZJ(1) which is being repealed.

Item 56

This item amends subsections 124E(5) and 124EA(1) of the HIA to remove the cross-reference to subsection 124E(4) which is being repealed by item 54.

Section 124EA deals with the constitution of Medicare Participation Review Committees.

Item 57

This item repeals paragraphs 124EA(1)(b) and (c) of the HIA and replaces them with new paragraphs. The changes are consequential only, and reflect the repeal of subsection 124E(4) and the amalgamation of the prohibited pathology and diagnostic imaging practices provisions.

Item 58

This item amends subsection 124EB(2) of the HIA by omitting the reference to subsection (3), which is being repealed by item 60.

Item 59

This item amends subsection 124EB(2) of the HIA and provides that if a Medicare Participation Review Committee is convened in relation to an approved pathology practitioner or an approved pathology authority, then one of the persons selected by the Chairperson to sit on the Committee pursuant to paragraphs 124EA(1)(b) and (c) must be an approved pathology practitioner. If the Committee is convened in relation to a provider of a kind of diagnostic imaging service (within the meaning of section 23DZZID), then the Chairperson must appoint at least one medical practitioner experienced in the rendering of diagnostic imaging services to the Committee.

This changes the existing requirement in relation to Committees convened in relation to diagnostic imaging matters (subsection 124EB(4) – which is repealed by item 60 below) whereby all members appointed to the Committee by the Chairperson must be medical practitioners experienced in the rendering of diagnostic imaging services. This amendment has been made because of the amalgamation of the pathology and diagnostic imaging provisions.

Item 60

This item repeals subsections 124EB(3) and (4) of the HIA. These subsections refer to subsection 124E(4) which is being repealed.

Item 61

Section 124F of the HIA deals with determinations by a Medicare Participation Review Committee when a person has been convicted of a relevant offence. Item 61 amends subsection 124F(1) to reflect the inclusion of the new civil penalty provisions in the HIA.

Items 62 to 66

These items make amendments to the current provisions relating to determinations by Medicare Participation Review Committees to reflect the amalgamation of the pathology and diagnostic imaging prohibited practice provisions and the introduction of the new civil penalty provisions. They reflect existing provisions for pathology and diagnostic imaging (the diagnostic imaging provisions were contained in section 124FF discussed under items 73 to 77 below).

Under the current provisions, breaches of the diagnostic imaging provisions were decided by a Medicare Participation Review Committee, rather than through the courts like pathology breaches. Once dealt with by the courts, pathology breaches are then referred to a MPRC. Breaches for diagnostic imaging will now be dealt with by the courts first, and then referred to a Medicare Participation Review Committee.

These amendments combine pathology and diagnostic imaging breaches under the same Medicare Participation Review Committee provisions.

Item 63 adds a new paragraph to subsection 124F(2) to the HIA. The new paragraph requires that a Medicare Participation Review Committee, in making a determination, determine that:

- the practitioner is disqualified; or
- in the case of a relevant offence or a relevant civil contravention that relates to pathology services or diagnostic imaging services:
 - any other practitioner who is employed, or engaged under a contract for services, by the practitioner is taken to be disqualified while so employed or so engaged; or

- if the practitioner is an officer of a body corporate - any other practitioner who is employed, or engaged under a contract for services, by the body corporate is taken to be disqualified while so employed or so engaged and while the first-mentioned practitioner is an officer of the corporation.

These changes ensure that a Medicare Participation Review Committee can appropriately deal with the associates of practitioners who have committed relevant offences or civil contraventions.

Item 64

This item inserts a new sub-paragraph 124F(3)(a)(iii) into the HIA which provides that in making a determination under subsection 124F(2), a Medicare Participation Review Committee shall, have regard to the nature of, and the circumstances concerning the commission of, each relevant civil contravention for which a pecuniary penalty order has been made against the practitioner.

Item 65

This item inserts a new subsection 124F(4A) into the HIA after subsection 124F(4) relating to disqualification. In summary, the new subsection provides that if a Medicare Practitioner Review Committee determines that a practitioner is, or is taken to be, disqualified, it must specify in the determination whether the practitioner is fully disqualified or disqualified in respect of one or more of the following:

- the provision of specified professional services, or the provision of professional services other than specified professional services;
- the provision of professional services to a specified class of persons, or the provision of professional services to persons other than a specified class of persons;
- the provision of professional services within a specified location, or the provision of professional services otherwise than within a specified location.

Item 66

This item inserts two new subsections at the end of section 124F of the HIA.

In summary, the new subsection 124F(6) provides that if, in making a determination under subsection 124F(2) in relation to a practitioner, a Medicare Practitioner Review Committee is satisfied that the practitioner engaged in a relevant offence or a relevant civil contravention (under Division 2 or 3 of Part IIBA) and determines that pathology or diagnostic imaging services were rendered as a result of the relevant offence or civil contravention, then the Committee must, in its determination:

- identify the services; and
- if Medicare benefit has been paid, or is payable, in respect of the services—determine that:
 - if the Medicare benefit is payable to the practitioner, but has not been paid—the Medicare benefit or a specified part of it ceases to be payable; or
 - if the Medicare benefit has been paid to the practitioner, or has been paid or is payable to a person other than the practitioner—the Medicare benefit or a specified part of it be payable by the practitioner to the Commonwealth.

The item also inserts a new subsection 124F(7) into section 124F which relates to remote area exemptions. The new subsection provides that if the Medicare Practitioner Review

Committee determines that a medical practitioner, who has been granted a remote area exemption (under section 23DX or 23DXA) that is in force, has engaged in a relevant offence or a relevant civil contravention in relation to diagnostic imaging services, then the Committee must include in its determination under subsection 124F(2) an advice to the Minister as to whether the remote area exemption should be revoked. The Committee must also include its reasons for so advising. This provision is currently contained in subsection 124FF(6) (which currently concerns prohibited diagnostic imaging services).

Items 67 to 72

These items make amendments throughout section 124FE of the HIA. Section 124FE currently provides that under certain circumstances a Medicare Participation Review Committee can add parties to the proceedings in relation to prohibited diagnostic imaging services. The amendments to section 124FE ensure that the section applies to all relevant offences or relevant civil contraventions under the new Divisions 2 and 3 of Part IIBA of the HIA. In other words, the scope of this provision will expand to apply to pathology and diagnostic imaging offences and contraventions.

Items 73 to 77

Section 124FF of the HIA currently provides that a Medicare Participation Review Committee must make certain determinations in relation to whether a person engaged in a prohibited diagnostic imaging practice or caused or permitted a prohibited diagnostic imaging practice to be engaged in by another person.

The making of a determination as to whether a person engaged in a prohibited diagnostic imaging practice will now be covered by section 124F, as amended by items 63 to 66.

Under the amendments in items 73-77, section 124FF will now apply in relation to the making of a determination in respect of a person who permitted or caused another person to engage in any relevant offence or relevant civil contravention (i.e. it is no longer restricted to prohibited diagnostic imaging practices) under the new Divisions 2 and 3 of Part IIBA of the HIA.

Item 78

Section 124H(7) of the HIA defines a '*relevant determination*' for the purpose of the Minister making guidelines to be applied by a Medicare Participation Review Committee in relation to the making of such determinations.

Item 78 inserts references to subsections 124F(1) and (6) in subsection 124H(7). This amendment reflects the fact that section 124F, as amended by item 66, enables the making of a determination by a Medicare Participation Review Committee under subsection 124F(6). This amendment extends subsection 124H(7) to enable the Minister to make guidelines in relation to the making of determinations under subsection 124F(1) and 124F(6).

Item 79

Section 124J of the HIA deals with procedures relating to hearings by a Medicare Participation Review Committee.

Paragraph 124J(5A)(b) currently allows a Medicare Participation Review Committee to simultaneously hear suspected prohibited diagnostic imaging breaches (subsection 23DZJ(1)) and add third parties to proceedings.

Item 79 amends paragraph 124J(5A)(b) by replacing the reference to 23DZJ(1) with a reference to subsection 124D(2). The amendment is a consequence of combining the diagnostic imaging and pathology prohibited practice provisions, now described as a 'relevant offence or relevant civil contravention under subsection 124D(2).

Items 80 to 82

These items make amendments to various cross-references currently in section 124J of the HIA, to other subsections of the HIA, in order to reflect the changes that have been made within these other subsections as a result of the amalgamation of the pathology and diagnostic imaging prohibited practice provisions and the introduction of the new civil penalty provisions.

Items 83 and 84

Section 124T of the HIA concerns the dissolving of Medicare Participation Review Committees.

Items 83 and 84 amend paragraphs 124T(1)(a) and (b) of the HIA to ensure that section 124T applies in relation to both the conviction of a practitioner and the making of a pecuniary penalty order against a practitioner. This reflects the inclusion of the new civil penalty provisions in the HIA.

Item 85

This item inserts a new Part VIA—Civil penalties into the HIA.

Part VIA—Civil penalties

Division 1—Obtaining an order for a civil penalty

Section 125A (Federal Court may order person to pay pecuniary penalty for contravening civil penalty provision)

Section 125A addresses five issues:

- applications for orders (subsection 125A(1));
- the power of the Court to order a wrongdoer to pay a pecuniary penalty (subsection 125A(2));
- the matters that the Court must have regard to in determining the amount of a pecuniary penalty (subsection 125A(3));
- the requirement for the Court to apply civil evidence and procedure rules when hearing and determining an application for an order (subsection 125A(4)); and
- the rules that apply if there has been a contravention of more than one civil penalty provision (subsection 125A(5)).

In summary:

- within 6 years of a person (the wrongdoer) contravening a civil penalty provision, the Medicare Australia CEO may (on the Commonwealth's behalf,) apply to the Federal Court of Australia for an order that the wrongdoer pay the Commonwealth a pecuniary penalty (subsection 125A(1));
- if satisfied that the wrongdoer has contravened a civil penalty provision, the Court may order the wrongdoer to pay the pecuniary penalty that the Court determines is appropriate

(but not more than the maximum amount specified for the provision) (subsection 125A(2));

- in determining the pecuniary penalty, the Court must have regard to all relevant matters, including, for example: the nature and extent of (i) the contravention and (ii) the loss or damage suffered as a result of the contravention; the circumstances in which the contravention took place; and whether the Court has, in proceedings under the HIA, previously found the person to have engaged in any similar conduct (subsection 125A(3));
- the Court must apply the rules of evidence and procedure for civil matters when hearing and determining an application for an order and the standard of proof in civil proceedings is the balance of probabilities (subsection 125A(4)); and
- if an act or omission constitutes a contravention of 2 or more civil penalty provisions, then proceedings may be instituted in relation to any one or more of those provisions. However, the person is not liable to more than one pecuniary penalty in respect of the same act or omission (subsection 125A(5)).

Section 125B (What is a *civil penalty provision*?)

This section clarifies that a section (or subsection) is a civil penalty provision if the words “civil penalty” and one or more amounts in penalty units are set out at the foot of the section (or subsection).

Section 125C (Persons involved in contravening civil penalty provision)

Subsection 125C(1) provides that a person must not:

- aid, abet, counsel or procure a contravention of a civil penalty provision; or
- induce (by threats, promises or otherwise) a contravention of a civil penalty provision; or
- conspire to contravene a civil penalty provision.

If a person does any of these things in relation to a civil penalty provision then they are taken to have contravened the civil penalty provision (subsection 125C(2)).

For example, if a company director instructs the business manager of a company who provides pathology services to offer a prohibited benefit to a requester then the company director will also be liable for a civil penalty because they procured the contravention of a civil penalty. Similarly if the owner of a GP practice (who is not themselves a requester of services) encourages one of the GPs to accept a benefit from a provider then the owner of the GP practice will be liable for a civil penalty because they counselled the contravention of a civil penalty provision.

Section 125D (Recovery of a pecuniary penalty)

This section provides that if the Federal Court of Australia orders a person to pay a pecuniary penalty then the penalty is payable to the Commonwealth, and the Medicare Australia CEO may enforce the order as if it were a judgment of the Court.

Division 2—Civil penalty proceedings and criminal proceedings

Section 125E (Civil proceedings after criminal proceedings)

This section provides that the Federal Court of Australia must not make a pecuniary penalty order against a person for a contravention of a civil penalty provision if the person has been convicted of an offence relating to conduct that is substantially the same as the conduct relating to the contravention.

Section 125F (Criminal proceedings during civil proceedings)

This section provides that proceedings for a pecuniary penalty order against a person for a contravention of a civil penalty provision are stayed if:

- criminal proceedings are started or have already been started against the person for an offence; and
- the offence is in relation to conduct that is substantially the same as the conduct alleged to constitute the contravention.

The section further provides that the proceedings for the order may be resumed if the person is not convicted of the offence (otherwise, the proceedings for the order are dismissed).

Section 125G (Criminal proceedings after civil proceedings)

This section provides that criminal proceedings may not be started against a person for conduct that is substantially the same as conduct constituting a contravention of a civil penalty provision if a pecuniary penalty order has been made against the person in respect of that conduct.

Section 125H (Evidence given in proceedings for civil penalty not admissible in criminal proceedings)

This section provides that evidence of information given or evidence of production of documents by an individual is not admissible in criminal proceedings against the individual if:

- the individual previously gave the evidence or produced the documents in proceedings for a pecuniary penalty order against the individual for a contravention of a civil penalty provision (whether or not the order was made); and
- the conduct alleged to constitute the offence is substantially the same as the conduct that was claimed to constitute the contravention.

The section makes it clear that this does not apply to a criminal proceeding in respect of the falsity of the evidence given by the individual in the proceedings for the pecuniary penalty order.

Item 86

This section repeals subsection 129AA(1) of the HIA. This subsection is replaced by the new offence and civil penalty provisions in the new Part IIBA of the HIA.

Item 87

This item repeals the definition of pathology service within subsection 129AA of the HIA. This is a consequential amendment flowing from the repeal of subsection 129AA(1).

Item 88

This item repeals section 129AAA of the HIA. This section currently describes the prohibited practices in relation to the rendering of pathology services. These prohibited practices are being replaced with the new prohibited practices included in new Part IIBA (Prohibited practices in relation to pathology services and diagnostic imaging services).

Item 89

This item amends subsection 129AAC(1) of the HIA by omitting the reference to “for the prosecution of the practitioner for a relevant offence” and replacing it with a reference to “against the practitioner for a relevant offence or relevant civil contravention”. This reflects the inclusion of new civil penalty provisions in the HIA. Section 129AAC deals with statements made in certain circumstances that are inadmissible in proceedings for relevant offences.

Item 90

This item amends subsection 129AAC(2) to reflect the inclusion of the new civil penalty provisions in the HIA.

Item 91

This item amends section 129AD of the HIA by updating the references to subsections to reflect the addition of subsection (6) to section 124F as described in Item 66. Section 129AD deals with recovery of amounts paid.

Items 92 to 96

Section 130 of the HIA deals with requirements for officers to observe privacy. Subsection (6) describes the circumstances in which the Secretary or the CEO of Medicare Australia may divulge certain information to certain people.

Item 93 amends subsection (6) to provide that an additional circumstance in which such information may be divulged is if a pecuniary penalty order has been made against a person in respect of a contravention of a new civil penalty provision in Division 2 of Part IIBA of the HIA.

Items 92, 95 and 96 are amended to add the contravention of a civil penalty provision as providing the Minister with the reasonable grounds to certify that information should be divulged in pursuance of subsection (6) or (7).

Item 97

This item amends subsection 130AA(1) of the HIA by omitting the reference to section 129AAA and replacing it with a reference to the new provisions in Division 2 of Part IIBA.

Medicare Australia Act 1973**Item 98**

Section 3 of the *Medicare Australia Act 1973* defines evidential material. This item amends that definition to reflect the inclusion of new civil penalty provisions in the HIA. The

reference to “relevant offence” within the definition is changed to “relevant offence or relevant civil contravention”.

Item 99

This item inserts within section 3 *Medicare Australia Act 1973* a statement that clarifies that “relevant civil contravention” has the same meaning as in subsection 124B(1) of the HIA.

Item 100

Section 3A of the *Medicare Australia Act 1973* defines relevant offences. Paragraphs (2)(a) and (2A)(a) of section 3A reference the existing pathology-related offences including section 129AAA of the HIA which is being repealed. This item amends section 3A to update the references and reflect the new offences and civil penalty provisions in Division 3 of Part IIB of the HIA.

Items 101 and 102

The items amend paragraph 8P(1)(a) and (b) of the *Medicare Australia Act 1973* so that the provision references offences and relevant civil contraventions (consistent with the introduction of new civil penalty provisions in the HIA).

Items 103 to 109

Items 103 to 109 amend provisions in Part IID of the *Medicare Australia Act 1973* to add references to civil contraventions in addition to the existing offences. Part IID sets out the investigative powers of the Chief Executive Officer of Medicare Australia

Item 103 repeals the existing heading for Division 3 of Part IID and replaces it with a new heading “Division 3—Searches in relation to possible relevant offences and relevant civil contraventions”.

Item 104 amends subsection 8U(1) of the *Medicare Australia Act 1973* to reflect the inclusion of new civil penalty provisions in the HIA. The reference to “relevant offence” (wherever occurring) is supplemented by a reference to “relevant civil contravention”.

Item 105 amends subsections 8U(4) and 8V(1) and (2) of the *Medicare Australia Act 1973* to reflect the inclusion of new civil penalty provisions in the HIA. The reference to “relevant offence” (wherever occurring) is supplemented by a reference to “relevant civil contravention”. The heading to section 8X is also altered by omitting “Offence” and substituting “Relevant offence and relevant civil contravention”.

Items 106 to 108 amend paragraph 8Y(5)(a), subparagraph 8ZI(a)(i) and subparagraph 8ZI(a)(ii) of the *Medicare Australia Act 1973* to reflect the inclusion of new civil penalty provisions in the HIA. The reference to “offence” is replaced by a reference to “relevant offence or relevant civil contravention”.

Item 109 amends paragraph 8ZI(b) of the *Medicare Australia Act 1973* to reflect the inclusion of new civil penalty provisions in the HIA. The words “offence or the other relevant offence”, are replaced with the words “relevant offence or relevant civil contravention or the other relevant offence or relevant civil contravention”.

Veterans' Entitlements Act 1986

Item 110

This item repeals the definition of approved pathology practitioner that appears in subsection 93E(9) of the *Veterans' Entitlements Act 1986* and replaces it with the following meaning:

- an approved pathology practitioner (within the meaning of the HIA); or
- an approved pathology authority (within the meaning of that Act) (other than a State, the Northern Territory or a public authority within the meaning of section 23DF of the HIA).

The amendment has been made because section 129AAA of the HIA (that is currently referred to in the definition within the *Veterans' Entitlements Act 1986*) has been repealed. The amendment to subsection 93E(9) has no substantive affect on the definition.

Item 111 (Application, saving and transitional provisions)

This item sets out the application, savings and transitional provisions relevant to the Bill. The item provides that the amendments of the HIA made by this Schedule do not apply in relation to:

- prohibited diagnostic imaging practices engaged in before the commencement of this item; or
- notices given under section 23DZH or 23DZJ that are in force immediately before the commencement of this item, that is, notices regarding prohibited diagnostic imaging practices; or
- determinations made under section 124F, 124FE or 124FF that are in force immediately before the commencement of this item (that is, determinations by a Medicare Participation Review Committee in respect of prohibited pathology and diagnostic imaging practices).

In order to avoid doubt, the item provides that the Act (as in force immediately before that commencement) continues to apply in relation to those practices, notices and determinations.

The item further provides that:

- the amendments of the HIA made by items 5 and 6 apply to pathology services rendered after the commencement of this item;
- the amendment of the HIA made by item 15 applies to undertakings given to the Minister under section 23DC of that Act after the commencement of this item;
- the amendment made by item 25 does not affect the continuity of approvals made under subsection 23DNBA(1) of the HIA that are in force immediately before the commencement of this item;
- the amendment made by item 30 applies to pathology request forms provided after the commencement of this item; and
- the amendments of the HIA made by items 41, 92 and 97 do not apply to an offence against section 129AA or 129AAA of the HIA committed before the commencement of this item.

SCHEDULE 2—AMENDMENTS RELATING TO THE FORM OF PATHOLOGY REQUESTS

In accordance with section 2 of this Bill, the items in Schedule 2 commence on the day on which the Act receives Royal Assent (by contrast, the amendments detailed in Schedule 1 take effect on 1 March 2008).

Part 1—Amendment of the *Health Insurance Act 1973*

Item 1

This item repeals subsection 16A(4) of the HIA and replaces it with a new subsection 16A(4). The only substantive change is that the new provision provides that any request to or by an approved pathology practitioner must be in accordance with the regulations (if any).

Part 2—Provisions dealing with the effect of the *Health Insurance (Pathology Services) Regulations 1989*

Item 2 (Definitions)

This item provides that, for the purposes of this Part, the word “amend” includes repeal and the term “the original Regulations” means the *Health Insurance (Pathology Services) Regulations 1989* purportedly made by Statutory Rules 1989, No. 75.

Item 3 (Effect of the original Regulations before the commencement of this Schedule)

Subitem (1) provides that, subject to subitem (2), the rights and liabilities of all persons are, declared to be, and always to have been, the same as if:

- the amendment made by item 1 of this Schedule had been in force during the period starting immediately before the time when the original Regulations purported to commence and ending on the commencement of this item; and
- Regulations had been in force during that period that were in the same terms as the original Regulations, as purportedly amended from time to time during that period.

Subitem (2) provides that this item does not affect the rights and liabilities arising between parties to a proceeding heard and finally determined by a court before the commencement of this Schedule, to the extent that those rights and liabilities arose from, or were affected by, the original Regulations (as purportedly amended).

Item 4 (Effect of the *Health Insurance (Pathology Services) Regulations 1989* on and after the commencement of this Schedule)

Subitem (1) provides that the original Regulations, as purportedly in force up to the commencement of this item, have effect on and after that commencement as if the amendment made by item 1 of this Schedule had been in force during the period starting immediately before the time when the original Regulations purported to commence and ending on the commencement of this item.

Subitem (2) provides that Regulations made under section 133 of the HIA may deal with matters of a transitional, application or saving nature relating to the fact that the original Regulations (as purportedly in force as mentioned in subitem (1)) are taken to have effect as provided in subitem (1).

Attachment A—Summary of new offence and civil penalty provisions

Table 1: Summary of provisions relating to asking for or accepting prohibited benefits (sections 23DZZIK and 23DZZIQ of the Bill)				
Who accepts the benefit?	Requester of pathology or DI services asks for, or accepts, a benefit		A person who is connected to a requester asks for or accepts a benefit	Another person asks for or accepts a benefit
Type of benefit	Benefit is not a permitted benefit		Benefit is not a permitted benefit	Benefit is not a permitted benefit
Who is the benefit from?	Benefit is from a provider or a person connected to a provider	Benefit is from anyone	Benefit is from a provider or a person connected to a provider	Benefit is from anyone
What is the nature of the benefit?	<p>The benefit:</p> <p>(a) would be reasonably likely to induce the requester to request services from the provider</p> <p>OR</p> <p>(b) is related to the business of rendering pathology or DI services</p>	<p>(a) The person providing the benefit intends that the benefit will induce the requester to request services from a particular provider;</p> <p>AND</p> <p>The requester knows that the person who paid the benefit has that intention.</p> <p>OR</p> <p>(b) The requester intends to request services from a particular provider as the result of being provided the benefit</p>	<p>The benefit:</p> <p>(a) would be reasonably likely to induce the requester to request services from the provider</p> <p>OR</p> <p>(b) is related to the business of rendering pathology or DI services</p>	<p>(a) The person providing the benefit intends that the benefit will induce the requester to request services from a particular provider</p> <p>AND</p> <p>The requester knows that the person who paid the benefit has that intention</p> <p>OR</p> <p>(b) The requester intends to request services from a particular provider as the result of the person being provided the benefit</p>
What knowledge is required?	N/A	Refer above	Requester knows that the person asked for, or accepted, the benefit, that the person is connected to them and that the benefit came from or was sought from a provider or a person connected to the provider	Refer above
Who is potentially liable?	Requester subject to civil penalty	Requester commits a criminal offence	Requester subject to civil penalty unless requester reported benefit to the Medicare Australia CEO within 30 days after the requester becomes aware of the benefit	Requester commits a criminal offence unless requester reported benefit to the Medicare Australia CEO within 30 days after the requester becomes aware of the payment
Civil penalty or criminal offence?	Provider may also be subject to civil penalty – refer Table 2		Provider may also be subject to civil penalty	

**Table 2:
Summary of provisions relating to offering or providing benefits
(sections 23DZZIL and 23DZZIR of the Bill)**

Who offers or provides the benefit?	Provider of pathology or DI services offers or provides a benefit		A person who is connected to a provider offers or provides a benefit	Any person (including a provider) offers or provides a benefit
Type of benefit	Benefit is not a permitted benefit		Benefit is not a permitted benefit	Benefit is not a permitted benefit
Who is the benefit offered or provided to	A requester or a person connected to a requester	Anyone	A requester or a person connected to a requester	Anyone
What is the nature of the benefit?	The benefit: (a) would be reasonably likely to induce the requester to request services from the provider OR (b) is related to the business of rendering pathology or DI services	The person providing the benefit intends that the benefit will induce the requester to request services from a particular provider	The benefit: (a) would be reasonably likely to induce the requester to request services from the provider OR (b) is related to the business of rendering pathology or DI services	The person providing the benefit intends that the benefit will induce a requester to request services from a particular provider
What knowledge is required?	N/A	The provider knows that the person who paid the benefit has that intention	Provider knows that: (a) the person connected to the provider offered or provided the benefit; and (b) that the person who offered or provided the benefit is connected to them; and (c) the person to whom the benefit was offered is a requester or is connected to a requester	Refer below
Who is potentially liable? Civil penalty or criminal offence?	Provider subject to civil penalty Requester may also be subject to civil penalty – refer Table 1	Provider commits a criminal offence	Provider subject to a civil penalty unless provider has reported benefit to the Medicare Australia CEO within 30 days after the provider becomes aware of the benefit Requester may also be subject to civil penalty – refer Table 1	The person who offered or provided the benefit commits a criminal offence AND If the provider knew that the person who offered or provided the benefit had the intention to induce, then the provider also commits a criminal offence unless provider has reported the benefit to the Medicare Australia CEO within 30 days after the provider becomes aware of the payment

**Table 3:
Summary of provisions relating to making threats
(sections 23DZZIM and 23DZZIS of the Bill)**

Who makes the threat?	Provider of pathology or DI services makes a threat	Person connected to provider	Any person makes a threat
Who is the threat made to?	A requester or a person connected to a requester	A requester or a person connected to a requester	Anyone
What is the nature of the threat?	The threat: (a) would be reasonably likely to induce the requester to request services from the provider OR (b) is related to the business of rendering pathology or DI services	The threat is: (a) reasonably likely to induce the requester to request services from the provider OR (b) related to the business of rendering pathology or DI services	The person making the threat intends that the threat will induce a requester to request services from a particular provider
What knowledge is required?	N/A	Provider knows that: (a) the person who made the threat is connected to the provider; and (b) the person to whom the threat was made is a requester or is connected to a requester	Refer below
Who is potentially liable? Civil penalty or criminal offence?	Provider subject to civil penalty	Provider subject to civil penalty unless provider has reported threat to the Medicare Australia CEO within 30 days after the provider becomes aware of the threat	The person who made the threat is guilty of a criminal offence AND The provider is guilty of a criminal offence if the provider: (a) knows that the person made the threat; (b) knows that the person who made the threat had the intention of inducing a requester to request services from the provider (c) has not reported the threat to the Medicare Australia CEO in writing within 30 days after the provider becomes aware of the threat