1995

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

SENATE

HEALTH AND OTHER SERVICES (COMPENSATION) BILL 1994

REVISED SUPPLEMENTARY EXPLANATORY MEMORANDUM

(Amendments to be moved on behalf of the Government)

(Circulated by the authority of the Minister for Human Services and Health the Hon. Dr Carmen Lawrence, MP)

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GOVERNMENT AMENDMENTS

HEALTH AND OTHER SERVICES (COMPENSATION) BILL 1994

GENERAL OUTLINE

These amendments relate to the *Health and Other Services (Compensation) Bill 1994.* This is the main bill in a package of four Bills which aim to prevent double dipping that currently occurs when a person receives a compensation payment to cover past medical and other care costs and does not reimburse the costs of services already received through programs subsidised by the Commonwealth. Co-incidentally, it also addresses some forms of cost transfer from insurers to Medicare and nursing home programs. These problems were identified in a public discussion paper prepared by the Review of the Relationship between Compensation and Health and Community Services Programs.

The aim of the amendments is to simplify the administrative obligations on insurers, representative organisations and others, who were consulted following the report of the Senate Community Affairs Legislation Committee into the Bills. At the same time, the amendments also retain the financial benefits to taxpayers and protect the rights of compensable people as was provided in the original bills.

The main amendments:

- create a power for the Commonwealth to create bulk payment arrangements 18 months after the legislation commences, in exchange for a waiver of most of the notice provisions of the Act and of the administration fee;

- remove the requirement to notify of a forthcoming hearing, to notify very small settlements in certain cases, and to notify settlements in schemes which prevent double-dipping under their acts;

- waive the administrative fee in certain cases where there is early payment of debts to the Commonwealth;

- remove the obligation to provide a full copy of a settlement or judgment and replace it with a requirement to provide necessary details (including any apportionment of liability between the parties) in the notice of judgment or settlement, which will have to be signed by all parties;

- deem a current notice of past benefits to be a notice of charge on the day of settlement or judgment in certain cases, to reduce delays in finalising cases;

- limit the abrogation of privilege (including legal professional privilege) to matters relating to the existence of a claim and to matters required in the notice of settlement or judgment;

- allow production of such information, for the purposes of this legislation only, where it might otherwise be prohibited by Commonwealth, State or Territory law, by contractual obligation or by a court non-disclosure order;

- remove some cases from the legislation, where double-dipping could not occur;

- define a "claim", and allow inactive claims to be removed from the system; and

- remove any obligation to pay interest on certain sums retained to meet the refund obligations under the legislation.

- allow parties to settle claims provided the compensable person has been informed that he or she may be liable to repay the Commonwealth medicare or nursing care benefits.

FINANCIAL IMPACT STATEMENT

The annual savings arising from the package of measures to prevent double dipping in health and community services programs by compensable people are estimated to be $40m. Most of the amendments have no additional cost implications, except the one dealing with apportionment of liability between the parties.

The acceptance of a statement signed by both parties of a reduction in recoverable costs because of apportionment of liability has the potential to permit collusion between parties to the financial detriment of the Commonwealth. However, the original proposal to allow the Health Insurance Commission to investigate the background to such cases required a general abrogation of legal professional privilege and was likely to have significant administrative costs associated with it. The Government has therefore decided to administratively streamline the provisions through joint certification of any claimed apportionment of liability, and to monitor the operation of the provisions, to determine whether the provisions are being used appropriately.

If individual companies or practices appear to have significantly different patterns from the norm, and to be using the provisions to avoid reimbursement, the Health Insurance Commission can use its broad fraud investigation powers to investigate such cases. Should the provision be used more broadly to significantly reduce payments to the Commonwealth, amendments to the provisions will need to be considered. Consideration of this will be part of the evaluation of the legislation, which is to occur 18 months after commencement.

NOTES ON AMENDMENTS

Amendment 1

This inserts a new definition of "bulk payment arrangement" in clause 3, and relates to the proposed new arrangements detailed in amendment 33 below.

Amendment 2

This inserts a definition of "claim" in clause 3. It states that a claim must be in writing. This was to clarify questions raised by some insurers and representative organisations about whether they needed to notify the Health Insurance Commission where they had only received a telephone inquiry about possible compensation.

Amendment 3

This inserts a definition of "small amount" in clause 3. This relates to amendments 8, 13 and 33 (particularly new subclause 32F) in this Bill and related amendments in the *Health and Other Services (Compensation) Care Charges Bill 1994*, where notice provisions will not apply to very small settlements in certain circumstances.

Amendment 4

This inserts two new sub-clauses in clause 3.

Subclause 3(9) clarifies the "date of injury" in disease cases, by making it the day medical treatment is first sought for the disease.

Subclause 3(10) tells how to determine the "period of a bulk payment arrangement".

Amendment 5

Clause 4, sub-clause(2) is amended to provide an additional exclusion category from the forms of personal injury compensation covered by the legislation, for fatal injury cases, which involve no medical or nursing-home costs.

Amendment 6

This amendment adds two notes after the heading of Part 2, Division 1, which draw attention to other relevant legislation, which might affect the operation of this Division. These are the related bill the *Health and Other Services (Compensation) Care Charges Bill 1994*, and the Social Security Act, through the operation of clause 27 of this Bill.

Amendment 7

This is a minor consequential amendment arising from the addition of subclauses 8(6) and 8(9) detailed in amendment 8 below.

Amendment 8

This adds four new sub-clauses to clause 8, which relates to cases involving payment of Medicare benefits for medical services.

The new subclause 8(6) provides that, subject to the next two amending subclauses 8(7) and 8(8), and clause 32E set out in amendment 33 below, the other provisions of clause 8 do not apply to final settlements or judgments made, during the currency of a bulk payment arrangement which has been complied with by the notifiable person.

The new subclause 8(7) prevents the operation of subclause 8(6), where the settlement or judgment in the bulk payment period is not a final one, and another settlement or judgment in the claim occurs after the arrangement terminates. This is designed to stop any attempt to avoid payment of a debt to the Commonwealth under this legislation, by splitting payments of claims, where a bulk payment exists for some of the payments but not the final one.

The new subclause 8(8) ensures the continued validity of a payment under a notice of charge, which might otherwise be affected by subclause 8(6). This could occur, for example, where a notice of charge is issued and paid by a compensation payer, in relation to Medicare or nursing home benefits received by a claimant prior to the commencement of a reimbursement arrangement. A compensation payer who is later covered by a bulk payment arrangement would at that point be excused under subclause 8(6) from making an individual repayment to the Commonwealth, if such a case were finalised in the bulk payment period. This provision ensures this earlier repayment remains valid.

The new sub-clause 8(9) provides that the other provisions of clause 8 do not apply in the case of a judgment or settlement for a small amount, where this amount satisfies the whole claim and where the settlement or judgment takes place before the expiration of the period for notification of a claim. "Small amount" is defined in a new clause 32F set out in amendment 33 below.

Amendment 9

This amendment adds two notes after the heading of Part 2, Division 2, which draw attention to other relevant legislation which might affect the operation of this Division - these are the related bill the *Health and Other Services (Compensation) Care Charges Bill 1994*, and the Social Security Act, through the operation of clause 27 of this Bill.

Amendment 10

This is a minor consequential amendment to subclause 10(1) arising from the addition of subclauses 10(2A), 10(5) and 10(8) detailed in amendments 12 and 13 below.

Amendment 11

This is a minor consequential amendment to subclause 10(2) arising from the addition of subclause 10(2A) detailed in amendment 12 below.

Amendment 12

The amendment inserts a new subclause 10(2A), which relates to judgments which fix an amount for past nursing home care, which is less than the amount which a person might otherwise owe to the Commonwealth. In such cases, this clause provides only the lower amount is repayable to the Commonwealth. This mirrors existing clause 8(3) which relates to past medical care costs.

Amendment 13

This adds four new sub-clauses to clause 10, which relates to cases involving payment of nursing home benefits.

The new subclause 10(5) provides that, subject to the next two amending subclauses 10(6) and 10(7), and clause 32E set out in amendment 33 below, the other provisions of clause 10 do not apply to final settlements or judgments made, during the currency of a bulk payment arrangement which has been complied with by the notifiable person.

The new subclause 10(6) prevents the operation of subclause 10(5), where the settlement or judgment in the bulk payment period is not a final one, and another settlement or judgment in the claim occurs after the arrangement terminates. This is designed to stop any attempt to avoid payment of a debt to the Commonwealth under this legislation, by splitting payments of claims, where a bulk payment exists for some of the payments but not the final one.

The new subclause 10(7) ensures the continued validity of a payment under a notice of charge, which might otherwise be affected by subclause 10(5). This could occur, for example, where a notice of charge is issued and paid by a compensation payer, in relation to Medicare or nursing home benefits received by a claimant prior to the commencement of a reimbursement arrangement. A compensation payer who is later covered by a bulk payment arrangement would at that point be excused under subclause 10(5) from making an individual repayment to the Commonwealth, if such a case were finalised in the bulk payment period. This provision ensures this earlier repayment remains valid.

The new sub-clause(8) provides that the other provisions of clause 10 do not apply in the case of a judgment or settlement for a small amount, where this amount satisfies the whole claim and where the settlement or judgment takes place before the expiration of the period for notification of a claim. "Small amount" is defined in a new clause 32F set out in amendment 33 below.

Amendment 14

This amendment adds a note after the heading of Part 3 Division I (which relates to notices about compensation claims), referring to the new Division 3 added by amendment 33 below. This new Division relates to bulk payment arrangements. The note is a reminder that generally the notice obligations imposed by Division I do not apply where a bulk payment arrangement is current.

Amendment 15

This is a minor consequential amendment to subclause 12(1), arising from the addition of subclause 12(8A) detailed in amendment 16 below.

Amendment 16

Two new sub-clauses are added to clause 12, to cover notice provisions for inactive claims that exist at the time of commencement of the new legislation.

Subclause 12(8A) means no notice is required of existing claims where the compensation claimant has taken no active steps to pursue the claim within the 5 years prior to commencement of the legislation, and in the first 12 months of its operation.

Subclause 12(8B) requires that if case covered by subclause 12(8A) later becomes active, the person required to give notice of the claim has 28 days from its reactivation to notify the Health Insurance Commission of the claim.

Amendment 17

This amendment deletes the requirement to notify the Health Insurance Commission of any forthcoming hearing. This was originally intended to provide an automatic administrative trigger for the Health Insurance Commission to forward a notice to the claimant under clause 17, in preparation for settlement. However, it was considered by insurers and representative organisations to be too onerous an obligation, because of the probability of multiple hearing dates applying in any one case eg through adjournments.

The removal of clause 15 means that the issue of a notice of past benefits under clause 21 (a current one of which is required under clause 22 prior to any settlement taking place) will no longer be automatically triggered at this point. The parties (and their lawyers) will therefore be required to obtain this notice themselves in most cases, by a request to the Health Insurance Commission, when settlement appears likely within the next 3 months.

Amendment 18

This inserts a new clause 16A, which allows an insurer or representative organisation to notify the Health Insurance Commission that a claim is unlikely to become active again, after a long period of inactivity.

This is a complementary provision to those in clause 16, which apply when a claimant discontinues a case, or where a case fails before a court or compensation authority. It allows the Health Insurance Commission to finalise these cases, and to archive the data in the normal manner.

Amendment 19

This removes the provision in subclause 18(3) which requires that a claimant must lodge a written request before an extension to submit a statement of past benefits can be granted.

It adds a new subclause 18(3A), however, which provides that the period for submitting the statement cannot be extended if a judgment or settlement had already been made and the Managing Director of the Commission had not given, during the 3 months preceding the judgment or settlement, a notice of past benefits under clause 21.

Amendment 20

Four new subclauses are added to clause 21, allowing a notice of past benefits to be deemed to be a notice of charge in certain circumstances. This will minimise the administrative steps required by the Health Insurance Commission and insurers and representative organisations, and lead to faster finalisations.

Subclause 21(4A) allows a statement to be included on the notice of past benefits, deeming a current notice of past benefits to become a notice of charge under clause 24 at the date of settlement or judgment, for the amount listed on the notice of past benefits. Subclause 21(4B) allows a similar deeming provision, but with an automatic adjustment for the charge payable, if there is reduction in the amount of compensation payable through an apportionment of liability in a judgment or settlement. Subclause 21(4C) provides a similar mechanism for deeming where a judgement reduces the amount recoverable below that in the notice of past benefits.

Subclause 21(4D) allows a similar deeming provision to operate where the notice of charge relates to a claim involving a reimbursement arrangement. The date of the deeming depends on the date of the reimbursement arrangement. If it precedes the notice of past benefits, then the relevant date is the day the notice of past benefits is given.
Otherwise, it is the date of the reimbursement arrangement.

Amendment 21

This omits subclause 22(1) and substitutes a new subclause. The note below the subclause is retained.

The new subclause 22(1) provides that a compensation claim must not be settled unless the compensable person has been informed that he or she may be liable to repay the Commonwealth medicare or nursing care benefits, or the Managing Director of the Commission had issued a notice of past benefits.

Amendment 22

A new subclause(3)(ca) is added to clause 23, to require the inclusion of the names of all parties involved in judgments or settlements in the notice of judgment or settlement required by clause 23. This, and the new subclauses set out in amendment 22, are intended to replace the information which could have been ascertained by lodging a copy of the judgment or settlement document with the notice. Specification of the details is believed to be a more efficient and less intrusive method of obtaining the information necessary for the administration of the legislation.

Amendment 23

This amendment modifies clause 23, paragraph (3)(g), by requiring any additional items of information to be included on the notice of settlement or judgment to be prescribed in the regulations, rather than to be determined in writing by the Minister. This amendment was suggested by the Privacy Commissioner as being a preferable way to modify the range of private information which is required to be disclosed for the purposes of the legislation. It was also modified to meet the concerns of the Senate Scrutiny of Bills Committee to clearly specify and limit the application of any abrogation of privilege.

Amendment 24

The requirement to provide a copy of the judgment or settlement document with the notice of judgment or settlement(clause 23 notice), previously set out in subclause 23(4) is removed by this amendment. It is replaced by a new subclause 24 and two new subclauses 23(4A) and 23(4B).

New subclause 23(4) provides for the clause 23 notice to stipulate in percentage terms the amount by which a compensation amount has been reduced as a result of an apportionment of liability. This recognises that the settling process frequently involves a process of bargaining and compromise where no exact amount is actually agreed upon.

The new subclause 23(4A) applies to judgments, which specify an amount for past medical or nursing home costs. Where these elements are specified, they are to be included in the clause 23 notice.

Subclause 23(4B) requires that the clause 23 notice is signed by the compensable person and the insurer, representative organisation or other relevant notifiable person.

Amendments 25 and 26

These both amend subclause 23(5) to clarify the exclusion of certain limited cases from having to provide a notice of settlement or judgment. Those cases are redemptions of compensation periodic payment entitlements, where the inclusion of both past and future medical or nursing home care costs are prohibited by law.

Amendment 23 modifies paragraph (b) in subclause 23(5) to cover cases where the redemption of future nursing home, as well as future medical care costs, are prohibited.

Amendment 24 adds a new paragraph (c) to subclause 23(S). This adds an additional requirement if the lodgement of a clause 23 notice in a redemption case is to be avoided. The additional requirement is that the law prohibits the inclusion of any past medical and nursing home costs in the redemption.

Amendment 27

This removes subclause 23(6), which is no longer necessary, following amendment 21 above.

Amendment 28

Three new subclauses are added to clause 24. These relate to the automatic deeming of a notice of past benefits under clause 21 to be a notice of charge under clause 24, as set out in new subclauses 21(4A), 21(4B) and 21(4C) in amendment 19 above.

Subclause 24(6) confirms the requirements set out under amendment 19 which are to be included in the notice of past benefits issued under clause 21. It also specifies the date of settlement or judgment to be the date when a current notice of past benefits is deemed to become a notice of charge under amendment 19 above.

Subclause 24(7) makes the amount on the notice of past benefits the amount of the charge, subject to subclause 24(8) and 24(9).

Subclause 24(8) relates to the amount of the deemed notice of charge in cases where the amount on the notice of past benefits is to be reduced because of apportionment of liability and subclause 24(9) where a judgment reduces the amount for past care costs, below that on the notice of past benefits.

Amendment 29

Two new subclauses are added to clause 25. These relate to the automatic deeming of a notice of past benefits under clause 21 to be a notice of charge under clause 25, as set out in new subclause 21(4D) in amendment 19 above.

Subclause 25(7) confirms that a notice of past benefits, sent out in the case of a claim involving a reimbursement arrangement, is also deemed to be a notice of charge, and subclause 25(8) confirms the date of operation of this as set out in new subclause 21(4C).

Amendment 30

This is a minor amendment to subclause 26(1) to remove a cross-reference to clause 15, which is removed by amendment 18 above.

Amendment 31

This is a minor amendment to subclause 26(2) to remove a cross-reference to clause 15, which is removed by amendment 18 above.

Amendment 32

Four new subclauses are added to clause 26. These provisions replace the previous subclause 38(3), which is removed by amendment 31. Among other things, they restrict the previously broad abrogation of privilege, which could have covered any request for information made by the Health Insurance Commission. These provisions are limited to the contents of various notices in Part 3, Division 2 of the legislation, that is: various notices of claim under clauses 11, 12 and 13; notices of failure or discontinuance under clause 16 and the details required in the clause 23 notice of judgment or settlement. The information sought in these notices would not normally be subject to legal professional privilege.

Subclause 26(3) relates to various excuses a party make seek to assert for a failure to provide certain information required under these notices. It provides that they are not "reasonable excuses" under the offence provision in subclause 26(1) for failure or refusal to provide the information. Paragraph (a) precludes a person from claiming privilege as a reasonable excuse. Paragraph (b) precludes a person from using a non-disclosure clause in a contract as a reasonable excuse, while paragraph (c) extends this to a non-disclosure order by a court. Lastly paragraph (d) does not permit a person to use a statutory prohibition under an Australian law as a reasonable excuse for not providing the information required in the notice.

Subclause 26(4) also rejects self-incrimination as a "reasonable excuse", though subclause 26(5) ensures any material provided cannot be used in criminal proceeding against the person, except for a prosecution under subclauses 26(1) and 26(2) - offences under subclause 26(2) relate to the provision of false or misleading material information.

Subclause 26(6) provides protection for a person who reveals information required by these notices, which would otherwise breach an Australian law.

Amendment 33

This amendment adds a note after the heading of Part 3 Division 2 (which relates to payments to the Commonwealth in respect of compensation amounts), referring to the new Division 3 added by amendment 30 below. This new Division relates to bulk payment arrangements. The note is a reminder that generally the payment obligations imposed by Division 2 do not apply, where a bulk payment arrangement is current.

Amendment 34

This inserts a new clause 32A, which prevents a compensation payer or insurer from being charged interest under an Australian law on that part of a judgment or settlement, which is the amount specified in a current notice of past benefits under clause 21, where it is withheld from payment to the compensable person, as required under paragraph (b), subclause 32(1).

Amendment 35

This amendment inserts a new Division 3 in Part 3. This relates to various waivers of other requirements of the Part of the legislation. It also provides a legislative framework for bulk payment agreements, where the Commonwealth and an insurer, representative organisation or other compensation payer can enter a contract, whereby a sum of money is paid and certain information provided as set out in the contract, in exchange for a waiver of the standard arrangements relating to various notices and settlements under the legislation during the currency of the agreement.

Clause 32B relates to bulk payment arrangements.

Subclause 32B(1) provides that 18 months after the commencement of the legislation, the Health Insurance Commission may enter a bulk payment arrangement on behalf of the Commonwealth, which specifies the amount to be paid, the information which must be provided (including the form in which it is to be provided), and the various consequences of entering and complying with the bulk payment agreement so far as the provisions of the legislation are concerned. The consequences set out in paragraph (c) of subclause 32B(1) are:

- the notifiable person is exempt from the operation of Divisions I and 2 of Part 3 to the extent set out in clauses 32C, 32D and 32 E set out below (subparagraph (i)); and

- the compensable person is exempt from various repayment obligations in clauses 8 and 10 of this bill (subparagraphs (ii) and (iii)) and clauses 6 and 8 of the *Health and Other Services (Compensation) Care Charges Bill 1994* (subparagraphs (iv) and (v)).

Subclause 32B(2) allows the Managing Director of the Health Insurance Commission to determine in writing what information must be provided and how, under a bulk payment arrangement, which subclause 32B(4) makes such determinations disallowable instruments.

Subclause 32B(3) specifies that the determination under section 32B(2) can include the full names of the parties, the date of settlement or judgment and the amount of compensation paid out.

Clause 32C sets out the general waiver provisions which will apply, where a bulk payment agreement is current and has been complied with by the insurer or representative organisation, and the limitations on those waivers. Subclause 32C(1) provides that, subject to this clause and clause 32E, requirements of notice and payment under Divisions 1 and 2 do not apply.

Subclause 32C(2) states that the waiver provisions do not apply to a settlement or judgment, which is entered into prior to the bulk payment arrangement coming into force.

Subclause 32C(3) generally excludes reimbursement arrangements from bulk payment arrangements (except where they are finalised by a settlement or judgment in the bulk payment period as set out in subclause 32D(2)).

Subclause 32C(4) sets out notice requirements relating to claims, where the need for the notices arose in a bulk payment arrangement period, but the notice period expires after the period of the agreement ends.

Clause 32D provides some extended waivers, for settlements or judgments which finalise a claim in a bulk payment period. Subclause 32D(1) waives the notice and payment requirements of Division 1 and 2 of Part 3, subject any limitations set out in this clause and clause 32E.

Subclause 32D(2) confirms that this waiver covers settlements or judgments involving cases where a reimbursement arrangement exists.

Subclause 32D(3) confirms that this waiver covers cases where an interim settlement or judgment was made prior to entering the bulk payment arrangements, and the claim is eventually finalised in the bulk payment period.

Subclause 32D(4) exempts from the above waiver those claims which purport to be finalised in a bulk payment arrangement period, but subsequently involve another payment outside the bulk payment period. This is designed to stop any attempt to avoid payment of a debt to he Commonwealth under this legislation, by splitting payments of claims, where a bulk payment exists for some of the payments but not the final one.

Subclause 32D(5) ensures the continued validity of an earlier payment under a notice of charge under either clause 24 or 25, which might otherwise be affected by subclause 32D(1). This could occur, for example, where a notice of charge is issued and paid by a compensation payer, in relation to Medicare or nursing home benefits received by a claimant prior to the commencement of a reimbursement arrangement. A compensation payer who is later covered by a bulk payment arrangement would at that point be excused under subclause 32D(I) from making an individual repayment to the Commonwealth, if such a case were finalised in the bulk payment period. This provision ensures this earlier repayment remains valid.

Clause 32E sets out the limits of the waiver provisions under a bulk payment agreement. Subclause 32E(2) continues the operation of the offence provisions in Divisions 1 and 2, where the breach occurred prior to entering the bulk payment period. Subclause 32E(3) continues the operation of time limit provisions and obligations, where action was required but was not completed before the time limit expired, prior to the bulk payment period. In this case the obligations still continue even after the bulk payment period commences.

Clause 32F waives various requirements under the legislation in the case of small amounts of compensation, where a payment in full is made prior to the expiration of the initial notice of claim period. Subclause 32F(2) provides that a "small amount" is the amount of the administrative fee which would normally have been payable, or some other prescribed amount.

Amendment 36

This amendment removes the general abrogation of privilege and the broad removal of the operation of contractual non-disclosure clauses which was in subclause 38(3), in relation to any information requested by the Health Insurance Commission under clause 36. Much more circumscribed provisions are now included in clauses 23 and 26 as modified by amendments 22 and 30 above.

Amendment 37

This is a minor amendment to subclause 38(4), arising from the removal of subclause 38(3).