Explanatory Guide to the Health Insurance Amendment (Inappropriate and Prohibited Practices and Other Measures) Act 2007

> Prepared by the Australian Government Department of Health and Ageing

August 2007

TABLE OF CONTENTS

Glossary of t	erms and acronyms used	3
Introduction		4
Chapter 1:	Overview of legislative amendments	6
A. "Requ B. Peopl C. Permi D. Prohib E. Exam	Terminology and concepts used in new provisions	8 9 10 11
Chapter 3:	Prohibitions on asking for, or accepting, prohibited benefits	13
Chapter 4:	Prohibitions on offering or providing a prohibited benefit	15
Chapter 5:	Prohibitions on making threats	17
A. Offend a three B. Penalis	Other offences ces applying to anyone who offers or provides a benefit or make at cies for people who aid or abet the contravention of a civil penal cies for people who aid or abet the contravention of a civil penal cies for people who aid or abet the contravention of a civil penal cies for people who aid or abet the contravention of a civil penal cied geographical application. Penalties and referral to MPRC cing the new civil penalty provisions cyling the new civil penalty provisions cyling the Crown ayment of medicare benefits cal of practitioners who have breached the new penalty and cyline provisions to the MPRC	ces 19 alty 20 22 23 24 25
B. APP of C. Remo D. Varyin subse E. Occup F. Displa G. Definit	Other amendments	26 27 27 27 28 28

GLOSSARY OF TERMS AND ACRONYMS USED

ACC approved collection centre

APA approved pathology authority

APL accredited pathology laboratory

APP approved pathology practitioner

DI diagnostic imaging

HIA Health Insurance Act 1973

MPRC Medicare Participation Review Committee

the Amendment Act the Health Insurance Amendment (Inappropriate and

Prohibited Practices and Other Measures) Act 2007

the Department the Australian Government Department of Health and

Ageing

the Review of enforcement and offence provisions of

the *Health Insurance Act 1973* as they relate to the provision of pathology services under Medicare

INTRODUCTION

A. Background

Reviews

In 2002, a review of Commonwealth legislation for pathology arrangements noted that the legislative arrangements for regulating pathology services needed updating and streamlining. Further work in the area of enforcement and offence provisions was recommended, particularly in relation to the bribery and prohibited practices provisions (sections 129AA and 129AAA) of the *Health Insurance Act 1973* (HIA).

In 2005, the Department of Health and Ageing (the Department) commissioned a further review, undertaken by Phillips Fox Lawyers, to look specifically at the enforcement and offence provisions of the HIA as they relate to the delivery of pathology services under Medicare (the Review).

The Review made 52 recommendations, many of which called for amendments to the enforcement and offence provisions in the HIA. A copy of the Review report is available on the Department's website.

Government response

The Government accepted most of these recommendations and is amending the HIA to reflect Government policy. The amendments clarify and strengthen the existing provisions and aim to:

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

Amendments in relation to diagnostic imaging

In addition to implementing many of the recommendations in relation to pathology-related offences, similar changes are being implemented in relation to diagnostic imaging.

Other minor amendments for pathology

Other minor, technical amendments relating to pathology will be made at the same time as the amendments detailed above. In general, these changes are meant to either clarify the policy intent of the legislation, or to enable more efficient and effective implementation of the policy intent.

Further information regarding these minor amendments is included in Chapter 8.

Consultations

There has been extensive consultation during the development of the Review, the development of the Government response, and the preparation of this legislation to implement the Government response. Consultation meetings were held in June 2006, and again in December 2006, to discuss the proposed legislative approach. Following these discussions and the consideration of written submissions provided, a number of changes were made to the Department's approach. These changes are reflected in the Health Insurance Amendment (Inappropriate and Prohibited Practices and Other Measures) Act 2007 (the Amendment Act) and are also described in more detail in this Explanatory Guide.

IMPORTANT NOTE

Please note that this Explanatory Guide is intended to provide a general overview of the amendments to the HIA only. The Guide has no legislative effect, and is not intended to be used as legal advice or as formal guidelines for interpreting the Amendment Act. It is important that stakeholders read this Explanatory Guide in conjunction with the Amendment Act, and the Explanatory Memorandum to the Amendment Act.

CHAPTER 1: OVERVIEW OF LEGISLATIVE AMENDMENTS

A. New Part

Currently, section 129AA of the HIA sets out offences in relation to the offering or accepting of inducements (including the making of threats) in order to encourage the rendering of pathology services. Section 129AA is supplemented by section 129AAA, which describes prohibited practices in relation to the rendering of pathology services.

Similar provisions are included in section 23DZG in relation to prohibited diagnostic imaging services.

In both cases, the general intent of the provisions is to prevent the paying of inducements and the making of threats in order to encourage the rendering of either a pathology service or a diagnostic imaging service.

The Amendment Act repeals these sections and replaces them with a new Part. The new Part details the new prohibitions relating to benefits and threats for both pathology services and diagnostic imaging services.

B. Objectives of the new provisions

The objectives of the new provisions are to:

- prevent providers of pathology services and diagnostic imaging services from offering or providing (either directly or indirectly) any benefits or threats (either directly or indirectly) to requesters of those services in order to induce the requesters to request services from the providers. Conversely, the provisions are also intended to prevent requesters from asking for, or accepting, any benefits or making any threats;
- address the limitations of the existing provisions, as highlighted in the Review; 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.

It is not intended to make competition on the basis of quality, or on the basis of cost to patients, unlawful. Nor is it intended that the provisions make it unlawful for:

- any person to publicise the availability of pathology or diagnostic imaging services, whether such publicity is by general publication or by direct communication with practitioners and/or medical entrepreneurs; or
- persons who render pathology or diagnostic imaging services (or persons connected with such persons) to:
 - offer quality of service and/or cost advantages for patients in return for direction of referrals; or
 - provide information and/or make representations to practitioners or medical entrepreneurs about the medical advantages, quality and/or cost advantages for patients of the services offered.

CHAPTER 2: TERMINOLOGY AND CONCEPTS USED IN NEW PROVISIONS

A. "Requesters" and "providers"

As described below most of the new offences will apply to "requesters" and "providers" of pathology services or diagnostic imaging services. For the purposes of the new provisions:

- A requester of a pathology service means:
 - o a 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:
 - o a medical practitioner;
 - a dental practitioner, a chiropractor, a physiotherapist, a podiatrist or an osteopath (in relation to certain types of services prescribed in Regulations);
 - a person who employs, or engages under a contract for services, one of the people mentioned above; or
 - a person who exercises control or direction over one of the people mentioned above (in his or her professional capacity).
- A provider of a pathology service or a diagnostic imaging service means:
 - o 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 detailed 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;
 - o an approved pathology practitioner (APP); or
 - o an approved pathology authority (APA).

These definitions are intended to be broad and to capture any person who is either requesting pathology or diagnostic imaging services, or providing such services, regardless of whether they are doing so directly or through an employee or other agent.

B. People "connected" to a requester or a provider

The Review suggested that any offences be extended to persons who have a "relevant connection" with requesters and providers.

This ensures that a requester or a provider cannot avoid the offence provisions simply because a third person such as a relative of the requester or the provider is offering or accepting a prohibited benefit.

The Amendment Act therefore defines those people who are assumed to be "connected" to a requester or a provider. If a prohibited benefit is offered, asked for, provided or accepted, or a threat is made, by a person connected to a provider or a requester then the requester or the provider (as the case may be) may still be breaching the legislation, regardless of the fact that they may not have directly provided or received the prohibited benefit or made the threat.

The Amendment Act defines a person as being "connected" to a requester or a provider if the person has one of the personal or business relationships with the requester or the provider as set out in the Amendment Act. For example, a person (the "first person") is connected to another person if:

- the first person is a relative of the other person. This is broadly defined to capture spouses, parents, lineal descendents, step-children etc; 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; 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; or
- the first person is a body corporate and the other person is a body corporate that is related to that body corporate. The question of whether a body corporate is related to another body corporate is determined in the same manner as in the *Corporations Act 2001*; 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; or
- the first person is a trustee and the other person, or a relative of the other person, is a beneficiary under that trust; 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; or
- the first person is a member of a partnership and a relative of the other person is also a member of that partnership; or
- the first person employs or engages the other person; or
- the other person employs or engages the first person.

C. Permitted benefits

The new provisions are aimed at preventing the payment of 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. The Amendment Act therefore describes what is, and is not, a permitted benefit. In summary, 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:
- 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;
- 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;
 - If a pathology provider leases premises, they must establish an approved collection centre (ACC) or an accredited pathology laboratory (APL) within 60 days of entering into the lease, or render professional services in the relevant part of the premises. If this does not occur, then the lease payments will not be permitted benefits.
- a payment for property, goods or services that are not shared between the requester and the provider, where the amount of the payment is not substantially different from the market value of the property, goods or services:
 - 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 (refer to further discussion on this issue below).
 - 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 ACC or an APL within 60 days of entering into the lease, or render professional services in the premises. If this does not occur, the payments will not be permitted benefits.

- the provision of property, goods or services where the benefit provided for consideration is not substantially different from the market value of the property, goods or services. 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.

In addition to the list of permitted benefits contained in the Amendment Act, the legislation includes a power for the Minister to make a Determination that a certain type of benefit is a permitted benefit. For example, a Determination may be made detailing reasonable limits for benefits such as education or consumables. Stakeholders are invited to make submissions on what benefits should or should not be included in a Determination.

D. Prohibited benefits

Any benefit that is not on the list of permitted benefits contained in the Amendment Act, or has not been included in a Determination made by the Minister, is a prohibited benefit.

In addition, even if a benefit is included in the list of permitted benefits, it will not be permitted if the benefit is related to the number, kind or value of requests for pathology services or diagnostic imaging services made by the requester. In other words, any benefit that is linked to the number or type of requests made is prohibited.

The Amendment Act also contains a general prohibition on the stationing of staff and equipment at a requester's premises for the purposes of providing pathology or diagnostic imaging services. Payments may, however, be made for shared property, goods or services provided that the amount of the benefit is proportionate to the other person's share of the cost of the property, goods or services.

E. Examples of permitted and prohibited benefits

Some examples of permitted and prohibited benefits are as follows:

- If a requester owns (or owns shares in) a pathology or diagnostic imaging service, then they can share in the legitimate profits of that business.
 However, the dividends must be proportionate to their share of ownership in the business. It is prohibited for them to receive payments based directly on the number, type or value 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, and only
 make payments to cover their legitimate share of the total costs. A
 provider may not station staff or equipment at a requester's premises.

- A provider may lease premises from a requester, provided that the amount
 of rent paid aligns with the market value of those premises. It would not
 be permitted for the amount of rent paid to be linked in any way to the
 number, type or value of the services requested.
- If the spouse of a requester (or another person with a 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 pathology or diagnostic imaging requests made by the requester.
- In some circumstances, salaried medical practitioners in public hospitals receive a portion of the income the hospital receives from services provided for private patients, including pathology and diagnostic imaging services. These payments would be permitted, provided that the amount paid to the medical practitioner is not related to the number, type or value of services that the medical practitioner requests.

F. Calculation of value

As noted above, it is proposed that 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. An issue that has been raised with the Department, and is therefore likely to be covered by such Regulations, is the valuation of leases and the treatment of existing leases.

An approach being considered by the Department is that the market value for property means a value that is within 10% of the average of two valuations obtained from a person who is:

- not connected to a requester or a provider of pathology or diagnostic imaging services. The terms "connected", "requester" and "provider" are all defined in the Amendment Act; and
- registered, accredited, certified or otherwise recognised as a valuer under any relevant State or Territory legislation or recognised as a valuer by the Australian Property Institute.

The valuations would be made on the basis of the value of the property without adjustment to reflect any additional value that any party to the arrangement might attribute to this space because of its proximity or convenience to any source of pathology or diagnostic imaging requests.

This issue will be subject to further consideration and consultation as the Regulations are developed.

CHAPTER 3: PROHIBITIONS ON ASKING FOR, OR ACCEPTING, PROHIBITED BENEFITS

In summary, there are four different circumstances in which a requester (of either pathology or diagnostic imaging services) will contravene the legislation. Two give rise to civil penalties, and two give rise to criminal penalties.

A. Where a requester asks for, or accepts, a prohibited benefit from a provider or a person connected to a provider (civil penalty)

If a requester asks for, or accepts, a prohibited benefit from a provider or a person connected to a provider, the requester will be subject to a civil penalty (of up to \$66,000 for an individual or \$660,000 for a corporation) if either:

- the benefit would be reasonably likely to induce a requester to request services from the provider; or
- the benefit is related to the business of rendering pathology services or diagnostic imaging services, as the case requires. This could, for example, be established based on bank records and records of transfers between the pathology business and the requester.

B. Where a requester knows that a person connected to a requester asks for, or accepts, a prohibited benefit (civil penalty)

A requester will also infringe the legislation if a person connected to the requester asks for, or accepts, a prohibited benefit 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 that this has occurred and the requester has not alerted Medicare Australia within 30 days of discovering the circumstances.

This ensures 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), the requester, if they become aware that the prohibited benefit has been paid to the person, 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, or other connected person, 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.

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.

C. Where a requester asks for, or accepts, a prohibited benefit from any person with relevant intent (criminal offence)

If the requester asks for, or accepts, a prohibited benefit from any person, then the requester will be guilty of an offence (punishable by up to 5 years imprisonment) provided that either:

- the requester intends to request services from a particular provider as a result of being provided the benefit; or
- the person who provided the benefit intended that the benefit would induce the requester to request services from a particular provider, 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.

D. Where another person asks for, or accepts, a prohibited benefit intending to induce the requester to request services (criminal offence)

If a second person asks for, or accepts, a prohibited benefit from a third person then the requester will be guilty of an offence punishable by up to 5 years imprisonment if either of the following circumstances exist:

- the person asking for or accepting the prohibited benefit intends that it
 would induce the requester to request services from a particular provider,
 the requester knew this, and the requester has not, within 30 days after
 the requester first became aware of the circumstances, reported the
 benefit to the Medicare Australia CEO; or
- the requester intends to request services from a particular provider as a result of a person being provided with the non-permitted benefit.

The second and third persons may also be guilty of offences under this Part.

CHAPTER 4: PROHIBITIONS ON OFFERING OR PROVIDING A PROHIBITED BENEFIT

The offences in relation to providers mirror those for requesters. Again, there are four different circumstances in which a provider (of either pathology or diagnostic imaging services) may contravene the legislation.

A. Where a provider offers, or provides, a prohibited benefit to a requester or a person connected to a requester (civil penalty)

If a provider offers or provides a prohibited benefit to a requester, or a person connected to a requester, then the provider will be subject to a civil penalty (of up to \$66,000 for an individual or \$660,000 for a corporation) if either:

- the benefit would be reasonably likely to induce a requester to request services from the provider; or
- the benefit is related to the business of rendering pathology services or diagnostic imaging services.

B. Where a provider knows that a person connected to them offers or provides a prohibited benefit (civil penalty)

A provider will be subject to a civil penalty (of up to \$66,000 for an individual or \$660,000 for a corporation) if a person connected to the provider offers or provides a prohibited benefit and:

- the benefit:
 - would be reasonably likely to induce a requester to request services from the provider; or
 - is related to the business of rendering pathology services or diagnostic imaging services, as the case requires; and
- the provider knows that this has occurred, and the provider has not alerted Medicare Australia within 30 days of discovering the circumstances.

In summary, providers will be 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 provider (rather than directly to the provider), the provider 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 providers are not subject to a penalty merely because a prohibited benefit has been accepted by a family member, or other connected person, without the provider's knowledge.

C. Where a provider offers or provides a prohibited benefit to any person with relevant intent (criminal offence)

If the provider offers or provides a prohibited benefit to any person, the provider will be guilty of an offence (punishable by up to 5 years imprisonment) if the provider intends that the benefit would induce a requester to request services from a particular provider.

D. Where another person offers or provides a prohibited benefit intending to induce the requester to request services (criminal offence)

If a second person offers or provides a prohibited benefit to a third person then the provider will be guilty of an offence punishable by up to 5 years imprisonment if:

- the second person intends that the benefit will induce a requester of pathology or diagnostic imaging services to request services from the provider; and
- the provider knows that this was the intent; and
- the provider has not, within 30 days after becoming aware of the circumstances, reported the benefit to the Medicare Australia CEO.

The second person will also be guilty of an offence punishable by up to 5 years imprisonment if they intend that the benefit will induce a requester of pathology or diagnostic imaging services to request services from a provider.

CHAPTER 5: PROHIBITIONS ON MAKING THREATS

The Amendment Act contains four sets of provisions relating to threats—two civil penalty provisions and two criminal offence provisions.

A. Where a provider makes a threat to a requester or a person connected to a requester (civil penalty)

A provider will be in breach of a civil penalty provision 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 or 6,000 penalty units for a corporation. Currently, this equates to \$66,000 for an individual or \$660,000 for a corporation.

B. Where a provider knows that a person connected to them has made a threat to a requester, or to a person connected to a requester (civil penalty)

If a provider knows that a person connected to them has made a threat to a requester, or a person connected to a requester, then they will be in breach of a civil penalty provision if:

- 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
- the provider has not 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 of the Amendment Act. This section 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, and the requester would be taken to have contravened the provision.

C. Where any person threatens another person intending to induce a requester to request services from a particular provider (criminal offence)

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, 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.

D. Where a provider commits an offence if they know about a threat intended to induce a requester to request services (criminal offence)

A provider commits an offence if:

- one person threatens another person intending that the threat will induce a requester to request services from the provider;
- 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; and
- the provider has not reported the threat to the Medicare Australia CEO, in writing, within 30 days after first becoming aware of the threat, and of the intention of the person making the threat.

As for each of the other criminal offences, the maximum penalty is 5 years imprisonment.

CHAPTER 6: OTHER OFFENCES

A. Offences applying to anyone who offers or provides a benefit or makes a threat

As noted in the previous Chapter, in addition to the prohibitions which apply specifically to providers and requesters, the Amendment Act contains two offences which apply to anyone regardless of whether they are a requester or a provider.

In summary:

- any person who offers or provides a prohibited benefit (that is, a benefit
 that is not a permitted benefit) to another person, intending that the benefit
 will induce a requester to request services from a particular provider, is
 guilty of an offence punishable by up to 5 years imprisonment; and
- any person who threatens another person intending that the threat will induce a requester to request services from a particular provider will be guilty of an offence punishable by up to 5 years imprisonment.

B. Penalties for people who aid or abet the contravention of the provisions

The Amendment Act also contains a new provision which 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.

For example, if the manager of a GP practice (who is not themselves a requester of services) encourages one of the GPs to accept a prohibited benefit from a provider, then the manager of the GP practice will be liable for a civil penalty because they counselled the contravention of a civil penalty provision.

The Criminal Code applies to the criminal offences created by the Amendment Act. It extends liability for ancillary offences as outlined above, and also addresses a broader range of issues relevant to criminal liability, including liability of corporate bodies such as companies.

C. Extension of liability to executive officers

During consultations on the exposure draft of the Amendment Act, stakeholders highlighted the importance of ensuring that executives are held accountable where they are in a position to influence, whether or not a breach of the legislation occurs.

In order to address this issue, sections have been included in the Amendment Act that apply to executive officers, such as managing directors or Chief Executive Officers, who are directly involved in, or participate in, the management of a body corporate. Such people will be accountable for the actions of the company where they are in a position to influence the company, and are aware of breaches by the company but fail to take all reasonable actions to prevent the breaches.

In summary, the executive officer of a body corporate contravenes the legislation if:

- the body corporate contravenes the legislation;
- the executive officer knew that the contravention would occur;
- the executive officer was in a position to influence the conduct of the body in relation to the contravention; and
- the executive officer failed to take all reasonable steps to prevent the contravention.

In deciding whether these circumstances exist, a Court will have regard to:

- 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 the legislation insofar 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 legislation.

The maximum penalty for a contravention is the maximum penalty that a Court could impose in respect of an individual, had the provision been breached by the body corporate. For example, if the body corporate contravened a civil penalty provision which prohibits the offering of a prohibited benefit, 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).

D. Extended geographical application

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 described in the Amendment Act, 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. During consultations on the exposure draft of the Amendment Act, a number of stakeholders noted that this would mean that the prohibitions in the Amendment Act could be avoided.

In order to ensure that the offence can be prosecuted regardless of where the prohibited benefit is paid, the Amendment Act therefore carries extended extraterritorial application. This means that the offences extend to conduct by an Australian citizen or body corporate outside Australia. Further, 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 breach of the legislation:

- 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 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.

CHAPTER 7: PENALTIES AND REFERRAL TO MPRC

A. Civil and criminal penalties

As recommended by the Review, and as noted in the previous chapters, the Amendment Act contains two types of penalty provisions:

- civil penalty provisions; and
- criminal offence provisions.

The main difference between a civil penalty provision and a criminal offence provision is that in order to be convicted of a criminal offence, a person must be found guilty beyond reasonable doubt. For a civil penalty provision, the standard of proof is the balance of probabilities. This is linked to the fact that a civil penalty provision only carries a financial penalty, not an imprisonment penalty, whereas a criminal offence can carry either imprisonment or a financial penalty, or both, as well as the stigma of a criminal conviction. The imposition of a civil penalty does not constitute a criminal conviction.

Generally speaking, a criminal penalty is imposed for serious misconduct where, for example, there is an aggravating element such as intent. Civil penalties are generally imposed for conduct which, while still serious, may not involve the same level of intent.

In general, the criminal offences apply where a person has asked for, accepted, offered or provided a benefit, or made threats, and it can be established that there is intent to induce a requester to request a pathology or diagnostic imaging service from a particular provider.

Civil penalties apply where a person has engaged in prohibited conduct but where there is no intent to induce the requesting of a pathology or a diagnostic imaging service.

The maximum civil penalty that may be imposed by a Court (in relation to a contravention of a civil penalty provision) is 600 penalty units (equivalent to \$66,000) for an individual or 6,000 penalty units (\$660,000) for a corporation.

The maximum penalty for contravention of an offence provision is 5 years imprisonment. If a person is convicted of an offence punishable by imprisonment, the Court may, if it thinks it appropriate in all the circumstances of the case, impose a pecuniary penalty (whether in place of, or in addition to, the imprisonment term). The proposed penalty of 5 years imprisonment equates to a maximum fine of \$33,000 for an individual or \$165,000 for a corporation.

It is proposed that all of the defences that are generally available for Commonwealth criminal offences would also be available in the case of the proposed new criminal offences (and also the civil penalty provisions) relating to requesters and providers.

For example, the Criminal Code contains the following defences of general application to Commonwealth offences:

- mistake or ignorance of fact—this applies to fault elements other than negligence (section 9.1);
- ignorance of subordinate legislation that was not available (section 9.3);
- duress (section 10.2);
- self-defence (section 10.4), and
- lawful authority (section 10.5)

B. Enforcing the new civil penalty provisions

The Amendment Act contains a number of provisions which enable the new provisions to be enforced.

Firstly, amendments are made to the *Medicare Australia Act 1973* to enable Medicare Australia to investigate a possible breach of either the new offence provisions or the new civil penalty provisions.

Secondly, new provisions are included in the HIA to enable the Medicare Australia CEO to apply to the Federal Court for an order against a person who has contravened a civil penalty provision, and to enable the Court to impose appropriate orders. In summary:

- the Medicare Australia CEO has 6 years within which to apply to the Federal Court for an order that a person who has contravened a civil penalty provision pay the Commonwealth a pecuniary penalty;
- 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);
- in determining the pecuniary penalty, the Court must have regard to relevant matters, including, for example: the nature and extent of the contravention and the loss or damage suffered as a result of the contravention; the circumstances in which the contravention took place; and whether the Court has previously found the person to have engaged in any similar conduct;
- the Court must apply the rules of evidence and procedure for civil matters, and the standard of proof in civil proceedings is the balance of probabilities; and

 if an act or omission constitutes a contravention of two or more civil penalty provisions, 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.

The Amendment Act also contains certain protections for those alleged to have breached the provisions. For example:

- the Federal Court 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;
- proceedings for a pecuniary penalty order against a person for a contravention of a civil penalty provision are stayed if criminal proceedings are started against the person for an offence that is substantially the same;
- 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;
- 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, and the conduct is substantially the same.

C. Binding the Crown

Consistent with the recommendations of the Review, 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.

The policy intent is that the new provisions indicate an intention to bind the Crown in all its capacities—Commonwealth, State and Territory. However, by legislative convention, this does not indicate any intention to impose offence liability on the Crown in any capacity.

However, there will be provision for injunctive orders if necessary, and referral of providers and requesters (who work within the Commonwealth, a State or a Territory) to a Medicare Participation Review Committee (MPRC).

D. Non-payment of medicare benefits

Currently subsection 16A(5A) of the HIA provides that a medicare benefit is not payable in respect of a pathology service that has been rendered by or on behalf of an APP if the request for the service was because of:

- any consideration given, or promise made, by the APP to, for example, the treating or requesting practitioner or their employees; or
- any agreement, arrangement or understanding between the APP and the treating or requesting practitioner or their employees.

The Amendment Act amends this provision so that the general policy intent is continued in the new regulatory environment. In particular, the amended provision prevents the payment of medicare benefits where there are inappropriate agreements or benefits flowing between requesters and providers.

It also enables non-payment of medicare benefits where a person has committed an offence under the HIA, or breached a civil penalty provision.

E. Referral of practitioners who have breached the new penalty and offence provisions to the MPRC

The Amendment Act makes a number of consequential amendments to the MPRC provisions in the HIA to ensure that the Chairperson is notified if a requester or provider is convicted of one of the new offences, and also if one of the new pecuniary penalty orders is made. The MPRC may then take appropriate actions against the requester or provider, as well as against their employer, or a company of which they are an officer. These MPRC processes are largely the same as those currently occurring if a practitioner breaches one of the existing offence provisions in the HIA. The MPRC has a range of options in these circumstances, from counselling the practitioner involved to excluding him or her, and possibly also other practitioners employed by the same company, from performing services eligible for Medicare reimbursement.

CHAPTER 8: OTHER PROPOSED AMENDMENTS

A. Employees—subparagraph 16A(5AA)(c)(iii)

In summary, subparagraph 16A(5AA)(c)(iii) 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 an employee of the treating practitioner on behalf of the treating practitioner.

Since the time that this provision was drafted, the nature of the pathology industry has changed and in many cases practitioners now engage contract staff to take samples rather than employees.

The Amendment Act therefore amends paragraph 16A(5AA)(c) 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.

B. APP Qualifications—section 23DC

Currently, where an applicant has applied to the Minister for approval as an APP, 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 APP.

In determining whether a person is a "fit and proper person" to be an APP, 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.

While the intent of subsection 23DC(6) is that the Minister or his delegate would refer to pathology-related qualifications and experience, the provision is not currently interpreted this way. This has resulted in an expectation by medical practitioners that they will be approved as APPs regardless of whether they have qualifications specific to pathology.

In order to address this problem, the Amendment Act amends the HIA to require not only that the Minister be satisfied that the person is a "fit and proper person" but also that the Minister be satisfied that the person has formal qualifications and experience determined to be appropriate for such a person. The Amendment Act enables the Minister to determine, by legislative instrument, the formal qualifications and experience that are appropriate for a specified class of persons.

This change is not intended to prevent APPs who are not pathologists and currently supervise M or S class laboratories from continuing to do so. The Department will be seeking advice from stakeholders on how to define pathology qualifications and experience appropriately, and whether different requirements should exist in relation to different categories of laboratory.

C. Removal of redundant subsection—23DC(17)

The Amendment Act repeals sub-section 23DC(17) as this provision is no longer needed because non-medical practitioners from before 1 August 1977 have ceased operating.

D. Varying and revoking accreditation of pathology laboratories

The Amendment Act amends subsection 23DNA(2) to provide that Principles may describe 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.

This ensures that where there is a danger to public health and safety, action can be taken to prevent a pathology laboratory from continuing to operate and potentially endangering the public.

E. Occupation of premises—subsection 23DNBA(1)

Subsection 23DNBA(1) currently provides that "The Minister may grant an approval to an APA for an eligible collection centre conducted (or to be conducted) on premises of which the authority is the owner, lessee or sublessee."

The Amendment Act repeals this subsection and replaces it with a new one which also enables the Minister to grant an approval where the APA 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 let by the APA.

F. Display of signs—section 23DNK

Section 23DNK currently provides that the APA operating an ACC 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.

The Amendment Act therefore repeals subsections 23DNK(1) and (2) and replaces them with a new subsection 23DNK(1) which provides that the APA operating an ACC 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 or \$11,000 for a corporation.

G. Definitions—section 23DNA

Section 23DNA 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, the Amendment Act amends paragraph 23DNA(3)(c) by removing the references to pathologist, scientist, senior scientist and medical practitioner.

H. Approved forms—subsection 23DP(3)

Subsection 23DP(3) of the HIA currently provides that an APP or an APA 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 the 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.

ATTACHMENT A: SUMMARY OF PROHIBITIONS

Table 1: Summary of provisions relating to asking for or accepting prohibited benefits (sections 23DZZIK and 23DZZIQ)						
Who asks for or accepts the benefit?	Requester of patho asks for, or accepts		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?	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	(a) The person providing the benefit intends that the benefit will induce the requester to request services from a particular provider AND The requester knows that the person who paid the benefit has that intention OR (b) The requester intends to request services from a particular provider as the result of being provided 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	(a) The person providing the benefit intends that the benefit will induce the requester to request services from a particular provider AND The requester knows that the person who paid the benefit has that intention OR (b) The requester intends to request services from a particular provider as the result of the person being provided the benefit		
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? Civil penalty or criminal offence?	Requester subject to civil penalty Provider may also be subject to civil penalty— refer Table 2	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 Provider may also be subject to civil penalty	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		

Table 2: Summary of provisions relating to offering or providing benefits (sections 23DZZIL and 23DZZIR)						
Who offers or provides the benefit? Type of benefit Who is the benefit offered or provided to What is the nature of the benefit?	Provider of pathologoffers or provides at Benefit is not a period A requester or a person connected to a requester. 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	benefit	A person who is connected to a provider offers or provides a benefit Benefit is not a permitted benefit A requester or a person connected to a requester 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	Any person (including a provider) offers or provides a benefit Benefit is not a permitted benefit Anyone 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)							
Who makes	Provider of pathology or DI	Person connected to provider	Any person makes a threat				
the threat?	services 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				