

EXPOSURE DRAFT

HEALTH INSURANCE AMENDMENT (COMPLIANCE) BILL 2009

EXPLANATORY MATERIAL

(Circulated by the authority of the
Minister for Health and Ageing, the Hon Nicola Roxon MP)

Glossary

CEO	Chief Executive Officer of Medicare Australia
civil penalty	A provision enforced by civil proceedings which carries a financial penalty. The imposition of a civil penalty does not constitute a criminal conviction.
GP	general practitioner
HIA	<i>Health Insurance Act 1973</i>
health information	As defined in section 7 of the <i>Privacy Act 1988</i> .
IMCA	Increased Medicare Benefits Schedule Compliance Audits initiative
item	Section 3 of the HIA defines 'item' as 'an item in the table'. The tables are prescribed under sections 4, 4A and 4AA. Each table sets out the items of medical services, the amount of fees applicable in respect of each item (the schedule fee) and rules for interpretation of the table. The relevant current tables are set out in the Health Insurance (General Medical Services Table) Regulations, the Health Insurance (Pathology Services Table) Regulations and the Health Insurance (Diagnostic Imaging Services Table) Regulations.
MBS	Medicare Benefits Schedule. The table of medical services prescribed in the regulations is published annually as the MBS and is provided free of cost to practitioners on a CD and is available online at www.mbsonline.gov.au . Practitioners may also purchase hard copies of the MBS.
Medicare number	As defined in subsection 84(1) of the <i>National Health Act 1953</i> .
NCP	Medicare Australia's National Compliance Program
OPC	Office of the Privacy Commissioner
other person	A person who is not the practitioner or the patient who has documents relevant to substantiating a Medicare benefit amount paid in respect of a professional service.
patient	The person who received the professional service.
Penalty unit	A single penalty unit is equivalent to \$110 (<i>Crimes Act 1914</i>).
practitioner	Any medical or health practitioner who renders a professional service for which a Medicare benefit amount is paid.
PIA	Privacy Impact Assessment
professional service	A service to which an item relates, being a clinically relevant service that is rendered by or on behalf of a medical practitioner. A clinically relevant service is a service rendered by a medical or a dental practitioner or optometrist that is generally accepted as being necessary for the appropriate treatment of the patient to whom it is rendered (see section 3 of the HIA).
PSR	Professional Services Review

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Summary and financial impact

This Bill amends the *Health Insurance Act 1973* (the HIA) to enhance the compliance audit program for the Medicare scheme. It allows the Chief Executive Officer (CEO) of Medicare Australia to give a notice requiring practitioners, and other specified persons, to produce documents to substantiate a Medicare benefit paid in respect of a service. Other persons are defined as persons who have control of documents relevant to the service being audited (but who are not the practitioner or the patient) such as corporate practices and hospitals. Other persons who fail to comply with a notice to produce will be subject to a civil penalty provision.

The Bill contains an additional financial administrative penalty for practitioners who are unable to substantiate a Medicare benefit paid in respect of a service, if that amount is more than \$2,500 (or a higher amount if specified in regulations) and provides for this penalty to be reduced or increased in certain specified circumstances.

Date of effect: This Bill will apply once the provisions commence (currently expected to be 1 July 2009). These amendments are not retrospective. They apply to professional services provided after the commencement of the legislation. This means that the notice to produce documents may only be issued in respect of professional services provided within two years of the date the notice is given. The administrative penalty may only be applied to services provided after the commencement of the legislation.

Proposal announced: This Bill gives effect to two elements of the *Increased Medicare Benefits Schedule (MBS) Compliance Audits initiative* (the IMCA initiative) which was announced in the 2008-09 Budget as part of the Responsible Economic Management package.

Financial impact: The implementation of the IMCA initiative will provide savings of \$147.2 million over four years and will cost \$76.9 million to administer, leading to net savings of \$70.3 million over four years. This funding was included in Budget Paper No.2 2008-09 for the Health and Ageing portfolio.

Compliance cost impact: The compliance cost for business has been assessed as medium because of the number of businesses which may be affected (any Medicare service provided by a health practitioner may be audited).

Chapter 1

Overview

- 1.1 This chapter provides a description of the IMCA initiative.
- 1.2 It explains why these changes are necessary and provides an overview of the Bill.

Overview of the Increased MBS Compliance Audits initiative

- 1.3 The IMCA initiative was announced in the 2008-09 Budget as part of the Responsible Economic Management package.
- 1.4 The IMCA initiative enhances the compliance program for the Medicare scheme by providing a mechanism to enable the Medicare benefit amounts which are paid in respect of professional services to be substantiated.
- 1.5 The IMCA initiative has three components which are:
 - an increase in the number of compliance audits undertaken by Medicare Australia each year;
 - a requirement that practitioners produce evidence to verify their Medicare claiming when audited by Medicare Australia; and
 - a financial penalty for Medicare practitioners who make incorrect claims.

Changes which do not require legislative amendments

- 1.6 The increase in the number of compliance audits conducted by Medicare Australia each year from 500 to 2,500 did not require amendments to the HIA and took effect from 1 January 2009.
- 1.7 At the time of the Budget announcement on 8 May 2008, this corresponded to an increase in the coverage of the compliance audit program from 0.7% to almost 4% of the total number of practitioners who provide Medicare services each year.
- 1.8 In the past year the practitioner population has increased and as a result, the 2,500 audits are expected to cover around 3.2% of the current practitioner population.
- 1.9 The increase in the capacity of the compliance audit program has enabled Medicare Australia to expand the scope of the program to encompass Medicare services provided by allied health practitioners and to increase the proportion of specialist services audited annually.
- 1.10 This represents an important and timely change. Medicare compliance audits have been conducted since the program was introduced in 1984.

However, there has not been a corresponding growth in compliance activities for the Medicare scheme.

- 1.11 The expansion of the program is enabling Medicare Australia to include in the compliance audit program Medicare services provided by allied health practitioners including aboriginal health workers; audiologists; clinical psychologists; diabetes educators; dieticians; exercise physiologists; mental health nurses; occupational therapists; psychologists; social workers; and speech pathologists.
- 1.12 The expansion is also enabling Medicare Australia to conduct more compliance audits on Medicare services provided by specialists. At the same time, Medicare Australia is continuing work to develop better risk identification processes for specialties and sub-specialties.

Changes which require legislative amendments

- 1.13 Legislative amendments to the HIA are required to compel practitioners to produce evidence to verify their Medicare claiming when audited by Medicare Australia and for the introduction of financial penalties for practitioners who make incorrect Medicare claims.
- 1.14 The Bill contains provisions which give effect to these components of the IMCA initiative.
- 1.15 Broadly these provisions:
 - allow the CEO of Medicare Australia to require a practitioner or another person to produce documents in respect of specified services; and
 - provide for an administrative penalty to be imposed on a practitioner who owes a debt to the Commonwealth in certain circumstances.

Why does Medicare Australia conduct compliance audits?

- 1.16 Medicare Australia conducts compliance audits of Medicare services to confirm that a Medicare benefit amount paid in respect of a service was paid correctly.
- 1.17 The CEO of *Medicare Australia* has broad responsibilities under various parts of the *Health Insurance Act 1973* (the HIA), the *National Health Act 1953* (the NHA) and other legislation.
- 1.18 While there is no explicit power that directs the CEO to conduct audits, it is reasonable to expect that the CEO may conduct audits in order to carry out a given function, and to ensure the honest and efficient use of public money.
- 1.19 Compliance audits of Medicare services are checks conducted by administrative staff to confirm that the practitioner was eligible to provide a Medicare service, that the service was actually provided and that the

service met the requirements of the Medicare item paid in respect of the service.

- 1.20 There are over 5,700 individual Medicare items which are set out in tables prescribed under sections 4, 4A and 4AA of the HIA.
- 1.21 Each table sets out the items of medical services, the amount of fees applicable in respect of each item (the schedule fee) and rules for interpretation of the table.
- 1.22 The relevant tables are set out in the *Health Insurance (General Medical Services Table) Regulations*, the *Health Insurance (Pathology Services Table) Regulations* and the *Health Insurance (Diagnostic Imaging Services Table) Regulations*.
- 1.23 The table of medical services prescribed in the regulations is known as the Medicare Benefits Schedule (MBS).
- 1.24 The MBS is provided free of cost to practitioners on a CD and is available online at www.mbsonline.gov.au. Practitioners may also purchase a hard copy of the MBS.
- 1.25 A compliance audit is conducted by specially trained administrative staff that assess whether the service the practitioner provided to the patient met the requirements of the Medicare item which was paid in respect of the service.
- 1.26 This is a question of fact which does not require any clinical assessment of the service. For example if a practitioner provides a service for which a Medicare benefit is paid in respect of a Medicare item that:
- requires a particular test to be done - Medicare Australia will ask for evidence that the test was done;
 - requires a referral - Medicare Australia will ask to see the referral;
 - requires a certain amount of time to be spent with the patient, or the service to be performed at a particular time – Medicare Australia will ask for evidence that those time requirements have been met;
 - requires the patient to have a particular pre-existing condition – Medicare Australia will ask for evidence that the pre-existing condition existed.
- 1.27 A compliance audit does not assess whether the service was clinically appropriate.
- 1.28 Matters relating to the clinical relevance of Medicare services are referred to Professional Services Review (PSR) and may be reviewed by a committee of the practitioner's peers. Assessments relating to the clinical relevance of a service or whether that service was conducted in a clinically

appropriate manner can only be made by other medical (or where relevant health) practitioners.

How will this Bill change the way compliance audits are conducted?

- 1.29 The new compliance audit process will retain the voluntary aspects of the current program.
- 1.30 Under existing arrangements when Medicare Australia identifies a potential threat to the integrity of the Medicare scheme, it notifies the individual practitioner about the concern.
- 1.31 Medicare Australia gives the practitioner the details of the service(s), explains the concern being audited and asks the practitioner to supply documents or information to substantiate the service(s).
- 1.32 This will continue to occur.
- 1.33 However, if a practitioner refuses to respond or cooperate with Medicare Australia voluntarily, the Bill will give Medicare Australia the power to require the practitioner and/or other persons to produce documents or information to substantiate a Medicare benefit amount paid in respect of a professional service.
- 1.34 The Bill also provides for the Medicare benefit amount paid in respect of a service to be recovered from practitioners who cannot substantiate a Medicare benefit amount paid in respect of a service.
- 1.35 Other persons who fail to comply with a requirement to produce documents may be subject to a civil penalty.

Why are these legislative changes needed?

- 1.36 There has been little change to Medicare Australia's compliance program for the Medicare scheme in the past decade.
- 1.37 In the past ten years the Medicare scheme has undergone significant growth and expansion:
 - expenditure has more than doubled (from \$6 billion in 1997-98 to over \$13 billion in 2007-08);
 - the number of services claimed has grown from 202 million to nearly 280 million annually;
 - the number of practitioners who can provide Medicare services has increased from 44,500 to over 80,000; and
 - new groups of practitioners may now provide Medicare services.
- 1.38 Existing provisions in the HIA and other legislation which seeks to protect the integrity of the Medicare scheme largely focus on inappropriate practice (Part VAA of the HIA) or criminal activity (such as sections 128A, 128B and 129 relating to false and misleading statements).

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- 1.39 The HIA does not currently provide Medicare Australia with a general power to require practitioners to provide verifying documents during a compliance audit.
 - 1.40 While many practitioners cooperate voluntarily with requests from Medicare Australia during a compliance audit, some do not respond or refuse to cooperate with a request.
 - 1.41 Across a range of audits conducted during 2006-07, this non-response rate ranged from 4% to 70%. The average non-response rate for compliance audits of Medicare services during this period was around 20%.
 - 1.42 When a practitioner does not respond or refuses to cooperate with an audit request Medicare Australia does not have the authority to require the production of the relevant information.
 - 1.43 As a result the audit is effectively halted as no further action is able to be taken, unless Medicare Australia considers there are grounds for referral to PSR or for criminal investigation.
 - 1.44 There are several exceptions to this. The HIA currently requires some practitioners to provide specified health information, including information contained in patient medical records in response to a request from Medicare Australia.
 - 1.45 Sections 23DKA and 23DS of the HIA provide that clinical information relating to diagnostic imaging or pathology services must be produced (following a request) to a Medicare Australia employee who is a medical practitioner.
 - 1.46 Medicare Australia may also request copies of specialist referrals from a specialist or consultant physician under section 20BA of the HIA, and diagnostic imaging and pathology requests from providers of diagnostic imaging services and approved pathology practitioners under sections 23DK and 23DR of the HIA.
 - 1.47 Although the *Privacy Act 1988* allows personal information to be disclosed to bodies such as Medicare Australia where that disclosure is reasonably necessary to protect the public revenue, many practitioners remain unclear about what their obligations are.
 - 1.48 Part IID of the *Medicare Australia Act 1973* provides Medicare Australia with the power to require a person to provide information or produce documents where there are reasonable grounds for believing the information or documents may be relevant to the commission of a criminal offence or civil contravention.
 - 1.49 Part IID also gives Medicare Australia powers of search and seizure (which extend to clinical records) where criminal offences or civil contraventions are suspected.

Protection of information provided during compliance audits

- 1.50 Protections for health information which will be provided to Medicare Australia during compliance audits under the amendments contained in the Bill are contained in existing legislation.
- 1.51 Medicare Australia already manages a significant amount of health information about individuals including patients and practitioners.
- 1.52 The use of information collected for the purposes of the Medicare scheme is governed by section 130 of the HIA and by the *Privacy Act 1988*.
- 1.53 Section 130 of the HIA prohibits Medicare Australia staff from giving out personal information to any other person, except in the performance of their statutory duties and functions or where the individual has authorised the release of that information.
- 1.54 Statutory exceptions also enable information to be released in other limited circumstances (such as where there is an imminent threat to a person's life or health).
- 1.55 Penalties, including fines and imprisonment, may apply to Medicare Australia staff who breach their obligations under section 130, and other statutory sanctions may also be imposed where personal information is misused.
- 1.56 Information collected during a compliance audit will only be accessed by specially trained compliance auditors.
- 1.57 Compliance auditors will be administrative staff located at Medicare Australia's State, Territory and Central offices who will receive additional training in the use and storage of sensitive information.
- 1.58 Staff from local Medicare Australia branches will not be conducting compliance audits.
- 1.59 All documents collected during a compliance audit will be stored securely and destroyed at the completion of the compliance activity in accordance with Government record keeping laws and requirements.
- 1.60 The legislation does not contain a provision which requires either Medicare Australia or the practitioner to advise individual patients that a Medicare service they have received is being audited

Privacy Impact Assessment

- 1.61 The amendments in this Bill will have a privacy impact because they will provide Medicare Australia with authority to give a notice to produce documents to persons to substantiate a Medicare benefit paid in respect of a service and the person will be required to comply.

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- 1.62 This may involve the disclosure of information from a patient medical record to Medicare Australia.
- 1.63 A Privacy Impact Assessment (PIA) is being prepared on the IMCA initiative and is currently being updated to reflect stakeholder comments. This document is likely to be released for stakeholder consideration shortly.
- 1.64 A PIA is a detailed analysis of the information flows and potential privacy risks and impacts of a project.
- 1.65 The purpose of conducting a PIA is to add value to projects that handle personal information by mitigating privacy risks and impacts, ensuring compliance with legal obligations and building best privacy practice into a project
- 1.66 The Office of the Privacy Commissioner (OPC) has been consulted throughout the development of the IMCA initiative. The OPC has also provided comments on the PIA.
- 1.67 The PIA is an iterative document which will continue to be updated regularly to reflect privacy issues.
- 1.68 The PIA considers the privacy issues raised by this Bill and discusses how these are being addressed.
- 1.69 Key issues include:
- the collection of information – what kind of information is required, under what circumstances and whether it is possible to use de-identified information;
 - use of information collected during a compliance audit;
 - reporting requirements – whether Medicare Australia should be required to provide information in their Annual Report on how often information from patient medical records is provided during a compliance audit;
 - review mechanisms to ensure that the benefits of requiring information to be provided to substantiate a Medicare benefit paid in respect of a service continue to outweigh the privacy impacts; and
 - patient notification – whether patients should be notified individually when information from their medical record is provided to Medicare Australia during a compliance audit.
- 1.70 A full discussion of the privacy issues relating to this Bill is contained in the Privacy Impact Assessment.

Stakeholder consultation

- 1.71 The Department of Health and Ageing and Medicare Australia have consulted with stakeholders on the design of the IMCA initiative, including legislative amendments.
- 1.72 Two information sheets have been issued to stakeholders (17 October 2008 and 24 February 2009).
- 1.73 The Department and Medicare Australia have also met with and/or received written submissions from a range of stakeholders including:
- Allied Health Professions Australia
 - Australian General Practice Network
 - Australasian College of Dermatologists
 - Australian Association of Pathology Practices
 - Australian Medical Association
 - Australian Orthopaedic Association
 - Australian Privacy Foundation
 - Australian Society of Anaesthetists
 - AVANT
 - Consumer's Health Forum of Australia
 - National Association of Obstetricians and Gynaecologists
 - Occupational Therapists Australia
 - Optometrists Association of Australia
 - Royal Australian and New Zealand College of Obstetrics and Gynaecologists
 - Royal Australian and New Zealand College of Ophthalmologists
 - Royal Australian and New Zealand College of Psychiatrists
 - Royal Australian College of General Practitioners
 - Royal Australian College of Pathologists
 - Royal Australian College of Physicians - Australasian Chapter of Sexual Health Medicine
 - Royal Australian College of Physicians - Australian Faculty of Rehabilitation Medicine
 - Royal Australian College of Physicians – Paediatrics and Child Health Division
 - Royal College of Surgeons
 - Rural Doctors Association of Australia
 - Western Australian Health Consumers Council

Summary of new law

- 1.74 This legislation enhances the current voluntary compliance model for the Medicare scheme.
- 1.75 The Bill will amend the HIA to enable the CEO of Medicare Australia to give a written notice requiring the production of documents to a

practitioner to substantiate whether a Medicare benefit amount paid in respect of a professional service should have been paid. A practitioner is the person who rendered the professional service (or on whose behalf the service was rendered).

- 1.76 The Bill will also enable the CEO of Medicare Australia to give a written notice requiring the production of documents to another person who has custody, control or possession of the documents, to substantiate whether a Medicare benefit amount paid in respect of a professional service should have been paid.
- 1.77 The Bill prevents a notice to produce from being given to the patient (the person to whom the professional service was rendered) or the person who incurred the medical expense in relation to the professional service.
- 1.78 The notice will only be able to be given when the CEO has a reasonable concern that the Medicare benefit amount paid in respect of one or more professional services may exceed the amount that should have been paid.
- 1.79 A practitioner (or another person who has control of the documents) is not excused from producing documents on the basis that the documents may incriminate them or expose them to a penalty. This abrogates the common law privilege against self-incrimination but is necessary to ensure that the compliance measures contained in this Bill are able to operate effectively.
- 1.80 The Bill provides protection for practitioners by providing that the documents and information about particular services provided in response to a notice cannot be used as the basis for a referral to PSR or for other criminal and civil proceedings except for those relating to offences under the HIA or the *Criminal Code Act 1995* which relate to false and misleading statements made in respect of Medicare services.
- 1.81 At present if Medicare Australia identifies that a Medicare benefit paid in respect of a professional service should not have been paid because of a false or misleading statement made by, or on behalf of, the practitioner, the practitioner who rendered the service is required to repay the relevant amount (see section 129AC(1) of the HIA).
- 1.82 In these circumstances the practitioner is required to repay the amount as a debt to the Commonwealth because their actions caused an incorrect payment to be made in respect of the service. This will continue to occur under the new legislation.
- 1.83 The Bill provides that a practitioner who cannot substantiate the amount paid in respect of the service may also be liable for a financial administrative penalty. A base penalty amount of 20% will be applied to debts in excess of \$2,500 or a higher amount if specified in regulations.
- 1.84 The Bill allows the base penalty amount of 20% to be reduced and increased in specified circumstances.

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- 1.85 The legislation will apply to all practitioners who render Medicare services and to other specified persons (who are not the practitioner or the patient) who control or have custody of documents relevant to a professional service.
- 1.86 This Bill will apply prospectively. That is, the new provisions will only apply to professional services rendered once those provisions commence (currently expected to be 1 July 2009).
- 1.87 This means that the Medicare Australia CEO will not be able to issue a notice to produce documents or apply an administrative penalty to a debt amount in relation to any professional service that was rendered prior to the legislation commencing, even where a reasonable concern is identified.

Chapter 2

Notice to produce documents

- 2.1 This chapter provides an outline of the provisions which require a person to produce information to substantiate a Medicare benefit amount paid in respect of a professional service.

Notice to produce documents

- 2.2 The discussion in paragraphs 2.3 to 2.37 relates to new section @129AAD of the Bill.
- 2.3 The Bill will amend the HIA to allow the CEO of Medicare Australia to give a written notice requiring a practitioner or another person to produce documents to substantiate a Medicare benefit amount paid in respect of a service.

When can a notice to produce documents be given?

- 2.4 The written notice to produce may only be given if the Medicare Australia CEO has a reasonable concern that an amount paid in respect of one or more professional services may have exceeded the Medicare benefit amount (if any) that should have been paid.
- 2.5 Medicare Australia uses a range of sophisticated data analysis techniques, as well as information provided by members of the public, to identify threats to the integrity of the Medicare scheme.
- 2.6 Services and practitioners are selected for compliance activities because a risk analysis has indicated that a Medicare benefit amount may not have been payable for a professional service. Generally the risks relate to:
- whether the practitioner was eligible to provide the Medicare service;
 - whether the patient was eligible to receive the Medicare service;
 - whether the service was actually provided;
 - whether the service met the requirements set out in the Medicare item descriptor; and
 - whether the service was clinically relevant.
- 2.7 Depending on which risk is identified, the matter may be referred for an administrative compliance audit, peer review or criminal investigation.
- 2.8 Sometimes individuals question the value of compliance audits because the Medicare benefit amount for each service being audited is a relatively small amount of money (less than \$100).

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- 2.9 However with around 80,000 practitioners providing Medicare services, small amounts of money which are paid out to individual practitioners when they should not have been paid can quickly add up to large amounts of taxpayer's money.
- 2.10 In addition, if individuals receive a Medicare benefit amount that is not payable for a professional service over repeated instances the behaviour can become habitual and the system can lose its integrity. This can have an ongoing and increasing negative compliance impact on the entire practitioner community.

What constitutes a reasonable concern?

- 2.11 There are a range of circumstances which might form the basis of a reasonable concern on which to conduct a compliance audit.
- 2.12 The CEO may have a reasonable concern about a professional service rendered by an individual practitioner.

Example 2.1

A medical practitioner has provided 10 services in respect of which Medicare benefit for item 31524¹ was paid. However Medicare Australia's claiming data appears to indicate that these services have been provided to male patients. As this item can only be used in respect of services provided to female patients, this could constitute a reasonable concern which may result in a compliance audit being conducted.

- 2.13 The CEO may also develop a reasonable concern about professional services provided by a particular kind of practitioner. This may occur when there is sudden, unexplained growth in the use of certain Medicare items.

Example 2.2

Expenditure on professional services for Medicare items associated with heart checks unexpectedly grew from \$500,000 in 2005 to \$10 million in 2006. Analysis of claiming data indicated that the majority of these services were being provided by practitioners employed by corporate entities who advertised free heart check services.

Medicare Australia became concerned about the risk to the Medicare scheme and conducted compliance activity focussed on practitioners who had provided significantly more of these services than their peer group. This example would also constitute a reasonable concern under this Bill.

- 2.14 The CEO may also hold a reasonable concern about a Medicare item in respect of a particular group of professional services.

¹ Item 31524 is for Breast (female), subcutaneous mastectomy (Anaes.) (Assist)

Example 2.3

Medicare Australia's National Compliance Program (NCP) identifies a number of strategic risks which are the focus of compliance activities during 2008-09. One of the risks identified in the NCP is upcoding in relation to skin lesions. Upcoding occurs when a practitioner bills for a more expensive Medicare item than the service provided to the patient.

For example MBS item 31215 is paid in respect of a service for the excision of skin lesions of up to 10mm in diameter whereas MBS item 31210 is paid in respect of a service for the excision of skin lesions of more than 10mm and up to 20mm in diameter.

The size requirement relates to the diameter of the skin lesion, not any other skin excised with the lesion. However sometimes upcoding occurs because a practitioner considers the diameter of all the skin excised rather than just the diameter of the skin lesion.

As the upcoding of these services has been publicly identified as a strategic risk to the integrity of the Medicare scheme, a reasonable concern may arise in relation to any practitioner who provides these particular Medicare services.

Who can be given a notice to produce documents?

- 2.15 Once the CEO has a reasonable concern, a written notice to produce documents relevant to ascertaining whether the amount paid in respect of the professional service should have been paid may be given to the practitioner who rendered the service.
- 2.16 If the CEO believes on reasonable grounds that another person has custody, control or possession of documents relevant to ascertaining whether the amount paid in respect of the professional service should have been paid, a notice may be given to that person.
- 2.17 This addresses an issue which was raised by a number of stakeholders during the consultations.
- 2.18 In certain situations a person who is not the practitioner may own or control documents relevant to the professional service rendered by the practitioner.
- 2.19 This mechanism will allow the CEO to deal with situations where a practitioner cannot access relevant documents because those documents are in the possession of another person who is unwilling to provide them to the practitioner.
- 2.20 This may occur where a practitioner was employed by, or had a contractual arrangement with, another person or corporate structure that possesses or

controls documents relevant to the professional service(s) identified for audit.

- 2.21 This may be relevant to many groups of practitioners who provide Medicare services, including GPs, providers of diagnostic imaging and pathology services and allied health professionals who are employed by corporate practices and specialists and providers of diagnostic imaging and pathology services who provide Medicare services in hospitals.
- 2.22 To reduce the impact on practitioners, a notice to produce documents will not have to be given to a practitioner before it is given to another person.
- 2.23 This may apply when Medicare Australia asks a practitioner to voluntarily comply with an audit request, and the practitioner indicates that they have approached another person who controls the documents and that person has refused to provide the relevant documents.

Example 2.4

Medicare Australia asks Ms S, a physiotherapist, to provide documents to substantiate Medicare benefit amounts paid in respect of 100 professional services. Ms S voluntarily indicates that her former employer, Company V, owns the relevant documents and has refused to provide her with relevant extracts.

Consequently Medicare Australia would give Company V a notice to produce documents specifying the 100 services rendered by Ms S.

- 2.24 A notice to produce documents will not be able to be given to the patient (the person to whom the professional service was rendered) or the person who incurred the medical expense in relation to the service (such as a parent or guardian).

What information will be included in a notice to produce documents?

- 2.25 The Bill provides that a notice to produce documents must include:
- the item number of each service specified in the notice;
 - the date each service was rendered;
 - the Medicare number of the patient for each service;
 - the reason(s) for the CEO's concern;
 - how the documents can be produced; and
 - the period within which, and the place at which the documents can be produced.
- 2.26 The person who is given the notice will have at least 21 days to produce a document to verify a service specified in the notice.
- 2.27 During consultation on the IMCA initiative, a number of stakeholders indicated that individual practitioners may have very different methods for

recording their services and that the notice to produce documents should provide for some flexibility in light of those differences.

- 2.28 Consequently the Bill does not require the notice to produce documents to specify the exact document(s) that the person needs to provide to substantiate the Medicare benefit amount in respect of the service. However Medicare Australia will be able to provide advice about the kinds of documents which may be relevant to the concern being audited.
- 2.29 This will give the practitioner (or another person) the opportunity to meet the requirement to produce documents in a manner which is most convenient to them.

What kind of information may be provided in response to a notice to produce documents?

- 2.30 The power to require a person to produce documents includes the power to require the production of documents containing health information about an individual.
- 2.31 Health information is defined in subsection 7 of the *Privacy Act 1988* as:
- (a) *information or an opinion about:*
 - (i) *the health or a disability (at any time) of an individual; or*
 - (ii) *an individual's expressed wishes about the future provision of health services to him or her; or*
 - (iii) *a health service provided, or to be provided, to an individual;*

that is also personal information; or
 - (b) *other personal information collected to provide, or in providing, a health service; or*
 - (c) *other personal information about an individual collected in connection with the donation, or intended donation, by the individual of his or her body parts, organs or body substances; or*
 - (d) *genetic information about an individual in a form that is, or could be, predictive of the health of the individual or a genetic relative of the individual.*
- 2.32 Consequently, practitioners will, in some circumstances, be required to produce documents, or extracts of documents, which contain clinical information about a patient to substantiate a Medicare benefit paid in respect of a professional service.
- 2.33 Clinical information will only need to be provided if that information is necessary to verify that a payment was properly made.
- 2.34 It is expected that most compliance audits will require only the production of documents such as appointment books and receipts, and that documents

containing a patient's clinical information will simply not be relevant to audits conducted in relation to many Medicare services.

Example 2.5

During 2007-08 there were 77.3 million Medicare services provided in respect of Medicare item 23². A compliance audit of this item would check that the patient was eligible to receive the service, the GP was eligible to provide the service and that the service was provided. This audit is likely to require the production of a document such as a notation in the appointment book, a receipt for payment or signature on bulk-billing form demonstrating that the patient was seen by the GP on that day.

- 2.35 It is necessary for Medicare Australia to be able to require documents which might contain clinical information because some Medicare items specify certain clinical actions which must be undertaken by the practitioner during the service for a Medicare benefit to be payable such as a blood pressure reading and a weight, height and BMI calculation item 2620 (cycle of care for diabetes). Others are only payable if a patient has a pre-existing condition such as item 2622 (for consultations with a patient with diabetes).
- 2.36 The Bill makes it clear that all practitioners (and other specified persons) must produce documents to substantiate a Medicare benefit paid in respect of a professional service when issued a notice to produce under the HIA.
- 2.37 The Bill does not introduce any additional record keeping requirements. Under existing Health Insurance (General Medical Services Table) Regulations one of the elements of a professional attendance is the recording of the clinical details of the service provided to the patient.

Civil penalty – failure to comply with requirements in notice

- 2.38 The discussion in paragraphs 2.39 to 2.47 relates to new section @129AAE of the Bill.
- 2.39 The Bill imposes a civil penalty when a person who is not the practitioner who rendered the service is given a notice to produce documents in respect of a service for which a Medicare benefit has been paid but does not comply.
- 2.40 The issue of practitioners being denied access to documents which substantiate a Medicare benefit paid in respect of a service was raised by a number of stakeholders during consultations.

² Level B professional attendance involving taking a selective history, examination of the patient with implementation of a management plan in relation to 1 or more problems, OR a professional attendance of less than 20 minutes duration involving components of a service to which item 36, 37, 38, 40, 43, 44, 47, 48, 50 or 51 applies.

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- 2.41 Other people who may control relevant documents in this situation may include corporatised practices and hospitals.
- 2.42 The civil penalty applies in respect of the professional service(s) specified in the notice which has been given to them under the HIA.
- 2.43 The civil penalty is 20 penalty units for an individual and 100 penalty units for a body corporate. A penalty unit is currently \$110.

Example 2.6

Medicare Australia asks Ms Z to provide documents to substantiate Medicare benefit amounts paid in respect of 50 professional services. Ms Z indicates that her former employer, Mr W, controls the relevant documents and has refused to provide her with relevant extracts.

Medicare Australia gives Mr W a notice to produce documents specifying the 50 services. Mr W responds by providing documents which substantiate 48 services. However Mr W refuses to provide documents for the remaining 2 services.

The civil penalty of 20 units for an individual is applied to the 2 services in respect of which Mr W refused to provide documents.

$$2 \text{ services} \times 20 \text{ penalty units} \times \$110 = \$4,400$$

Consequently:

- Mr W is liable for a civil penalty of 2 services x 20 penalty units x \$110 = \$4,400.
- Ms Z does not have to repay any money because 48 of the services were substantiated by the documents provided by Mr W; and the remaining 2 services could not be substantiated because Mr W refused to provide the documents.

Example 2.7

Medicare Australia asks Ms Y to provide documents to substantiate Medicare benefit amounts paid in respect of 50 professional services. Ms Y indicates that her former employer, Company B, owns the relevant documents and has refused to provide her with relevant extracts.

Medicare Australia gives Company B a notice to produce documents specifying the 50 services. Company B responds by providing documents in respect of 48 services but refuses to provide documents for the remaining 2 services.

Consequently the civil penalty of 100 units for a body corporate is applied to the 2 services in respect of which Company B refused to provide documents.

$$2 \text{ services} \times 100 \text{ penalty units} \times \$110 = \$22,000$$

Consequently:

- Company B is liable for a civil penalty of \$22,000.
 - Ms Y does not have to repay any money because 48 of the services were substantiated by the documents provided by Company B; and the remaining 2 services could not be substantiated because Company B refused to provide them.
- 2.44 It would not be appropriate to recover monies from a practitioner or impose an administrative penalty on them if they were not able to substantiate a Medicare benefit paid in respect of a service they had rendered because another person was refusing to supply the relevant documentation.
- 2.45 This penalty is also intended to discourage the practice of establishing corporate structures to avoid having to comply with a notice to produce documents.
- 2.46 This is a strict liability provision which contains a defence of intervening conduct where the other person is unable to comply with the notice because of some external factor.
- 2.47 This is intended to cover situations where the person cannot comply with the requirements of the notice to produce because documents have been destroyed in a disaster (such as fire, flood, earthquake, catastrophic IT failure).

Self-incrimination

- 2.48 The discussion in paragraphs 2.49 to 2.56 relates to new section @129AAF of the Bill.
- 2.49 The Bill provides that a person is not excused from producing the documents in response to a notice to produce on the basis that the production of the documents may tend to incriminate the person or expose them to a penalty.
- 2.50 The abrogation of the common law privilege against self-incrimination is necessary to ensure that the compliance measures contained in this Bill are able to operate effectively.
- 2.51 Expenditure on the Medicare scheme exceeded \$13 billion in 2007-08. Medicare Australia conducts compliance audits to ensure that taxpayers' money is spent appropriately. While most practitioners voluntarily comply with Medicare Australia requests for information, some practitioners do not cooperate and Medicare Australia does not presently have the power to require the production of relevant information. This Bill will address that deficiency.
- 2.52 The provisions of this Bill will, when enacted, enable the CEO of Medicare to require the production of documents to verify whether an

amount of Medicare benefit paid in respect of a professional service should have been paid. Practitioners may be liable for an administrative penalty where the amount is not substantiated by documents.

- 2.53 Compliance activities for the Medicare scheme would not be as effective, if practitioners were able to resist a notice to produce documents by claiming privilege against self-incrimination. Medicare Australia's auditing ability would be compromised.
- 2.54 The Bill contains a standard use and derivative use immunity provision to protect practitioners against inappropriate consequences of responding to notices to produce documents.
- 2.55 Documents and information obtained as a direct or indirect result of the production of documents in response to a notice to produce cannot be used as evidence against the person in any criminal proceedings other than for offences under the HIA or the *Criminal Code* concerning false or misleading information or documents or in any civil proceedings other than those arising under Part VIA (which deals with civil penalties) or Part VII of the HIA.
- 2.56 Neither the documents nor the information derived from them may be used to refer the practitioner to PSR.

Medicare Australia CEO may deal with documents etc. produced

- 2.57 The discussion in paragraph 2.58 relates to new section @129AAG of the Bill.
- 2.58 The CEO of Medicare Australia may inspect, make a copy of or take an extract from a document and retain the document, extract or copy for a reasonable period in order to ascertain whether the information contained in documents substantiates an amount paid under the HIA in respect of a professional service.

Chapter 3

Failure to produce documents

3.1 This chapter describes what actions may be taken if the CEO of Medicare Australia gives a notice to produce documents to:

- a practitioner and they do not comply with the notice; or
- a practitioner and they comply with the notice but the documents do not substantiate the payment made in respect of the service; or
- another person in respect of services provided by a rendering practitioner and the other person complies but the documents do not substantiate the payment made in respect of the service.

Failure to produce document

3.2 The discussion in paragraphs 3.3 to 3.10 relates to item 4 of the Bill which inserts eight new subsections after existing subsection 129AC(1) in the HIA.

3.3 If a practitioner is given a notice to produce documents which specifies one or more services and does not comply with the notice in relation to each of the specified services, the Medicare benefit amount paid in respect of each of the services is recoverable as a debt due to the Commonwealth from the practitioner (or their estate where applicable), whether or not the amount was paid to the person.

Example 3.1

Dr C receives a notice to produce documents under the new legislation which specifies 20 services.

Dr C complies with the notice by providing documents which substantiate 12 services. However the doctor does not provide any documents in relations to the other 8 services. This means that Dr C has not substantiated the Medicare benefit paid in respect of these 8 services.

Consequently Dr C would be required to repay the Medicare benefit amounts in relation to the 8 services as a debt due to the Commonwealth.

3.4 If a practitioner complies with a notice to produce a document in respect of a professional service but the information in the document does not substantiate the Medicare benefit amount paid in respect of the service, the

amount which cannot be substantiated is recoverable as a debt due to the Commonwealth from the practitioner (or their estate).

- 3.5 The amount which is not substantiated may be the whole amount or it may be the difference between the amount paid and the Medicare service which has been substantiated by the documents provided by the person.

Example 3.2

Dr D receives a notice to produce documents under the new legislation which specifies 20 Medicare item 17615 services³.

This item requires an anaesthetist to conduct a pre-anaesthesia consultation with a patient. One of the requirements is that the duration of the consult be more than 15 minutes and less than 30 minutes.

Dr D complies with the notice by providing documents in relation to all 20 services. The documents substantiate 11 of the services. However the other documents indicate that 9 of the services did not last for more than 15 minutes.

This means that the service Dr D provided in each of these 9 instances corresponded to an item 17610⁴.

The Medicare benefit for item 17615 is \$59.30 and for item 17610 is \$29.80 so there is a difference of \$29.50 for each service which has not been substantiated.

$$(\$59.30 - \$29.80) \times 9 \text{ services} = \$265.50$$

Consequently \$265.50 is recoverable as a debt due to the Commonwealth from Dr D.

- 3.6 The amount is recoverable from the practitioner whether or not they received the Medicare benefit amount because it is their actions which caused an incorrect Medicare amount to be paid.
- 3.7 In some cases a notice to produce documents may be given to a person who is not the rendering practitioner.
- 3.8 If the other person provides relevant documents but those documents do not substantiate the Medicare benefit paid in respect of the service(s), the Medicare benefit amount which is not substantiated is recoverable as a debt due to the Commonwealth from the practitioner who rendered the service (or their estate).

³ Pre-anaesthesia consultation (of more than 15 minutes but not more than 30 minutes duration).

⁴ Pre-anaesthesia consultation (of not more than 15 minutes duration).

Example 3.3

Dr E receives a letter from Medicare Australia informing him about concerns in relation to 20 Medicare services in respect of Medicare item 17615.

This item requires an anaesthetist to conduct a pre-anaesthesia consultation with a patient. One of the requirements is that the duration of the consult be more than 15 minutes and less than 30 minutes.

Dr E voluntarily provides documents which substantiate 11 of the services. However he indicates that documents in relation to 9 of the services are held by a former employer, Company Q. Dr E encloses a letter from the Company indicating that it will only provide the documents in response to a notice to produce documents issued under the new legislation.

Medicare Australia gives Company Q a notice to produce documents specifying the 9 services.

The Company responds by providing the relevant documents. However the documents do not substantiate the Medicare benefit paid in respect of item 17615 as they indicate that each of these services did not last for more than 15 minutes.

This means that the service Dr E provided in each of these 9 instances corresponded to an item 17610.

The Medicare benefit for item 17615 is \$59.30 and for item 17610 is \$29.80 so there is a difference of \$29.50 for each service which has not been substantiated.

$$(\$59.30 - \$29.80) \times 9 \text{ services} = \$265.50$$

Consequently \$265.50 is recoverable as a debt due to the Commonwealth from Dr E.

- 3.9 If the practitioner satisfies the Medicare Australia CEO that they cannot comply with a notice to produce documents or cannot substantiate the Medicare benefit amount paid due to circumstances beyond their control, no recovery will take place.
- 3.10 This is intended to provide practitioners with appropriate protection where, for example, documents have been destroyed during a disaster, or some other circumstance not caused by the person (fire, flood, earthquake, catastrophic IT failure).

Example 3.4

Dr G receives a letter from Medicare Australia informing him about concerns in relation to 20 Medicare services in respect of Medicare item 17615.

Dr G voluntarily provides documents which substantiate 11 of the services. However he does not provide any documents in relation to 9 of the services and does not offer any explanation.

Consequently Medicare Australia gives Dr G a notice to produce documents specifying the 9 services.

Dr G indicates that he cannot comply with the notice to produce in respect of the 9 services. He explains that the 9 services were provided at his previous practice location and during the move to his new location, his vehicle containing a computer hard drive with 1000 patient records was stolen. The documents relate to patients with surnames A to D. Dr G provides a copy of the police report of the incident.

The Medicare Australia CEO notes that Dr G has been able to substantiate 11 of the services and that the 9 services relate to patients with surnames A to D. The CEO is satisfied that Dr G's failure to comply in respect of the 9 services is due to circumstances beyond his control.

Consequently Dr G receives written confirmation from Medicare Australia that he has complied with the notice to produce and that no further action will be taken in respect of the 9 services.

Example 3.5

Dr H receives a letter from Medicare Australia informing him about concerns in relation to 20 Medicare services in respect of Medicare item 17615. Dr H does not respond to that letter.

Consequently Medicare Australia gives Dr H a notice to produce documents specifying the 20 services.

Dr H indicates that he cannot comply with the notice to produce in respect of the 20 services because of circumstances beyond his control but he does not provide any further explanation.

The Medicare Australia compliance officer seeks clarification from the doctor about his situation. Dr H explains that his practice manager has recently resigned and that he thinks the documents have been filed but does not know where.

The compliance officer responds by indicating that this explanation is not sufficient to justify Dr H's non compliance.

Dr H indicates that he does not intend to provide any further documents and by the end of the 21 day period, no further documents have been provided.

Consequently the Medicare benefit amount paid in respect of the 20 services is recoverable as a debt due to the Commonwealth from Dr H

because he has not substantiated the Medicare benefit amounts paid in respect of these services.

Interest

- 3.11 The existing provision in the HIA for liability for interest on amounts (subsection 129AC(1)) is extended to the new provisions in section 129AC in this Bill.

Set off of debt owed

- 3.12 The discussion in paragraphs 3.13 to 3.15 relates to item 7 of the Bill which repeals existing subsection 129AC(4) of the HIA.
- 3.13 This item inserts a new subsection 129AC(4) which allows the practitioner and Medicare Australia to agree to an arrangement whereby a debt may be recovered from future payments that Medicare Australia may make to that person. The amendment is a technical one, and the basic effect of the provision remains unchanged.
- 3.14 This facility is only available to practitioners who bulk-bill and both parties must agree on the arrangement. The ability to enter such an agreement is already within the existing legislation but is further clarified through the new subsection 129AC (4).
- 3.15 Existing set-off agreements which are in place prior to this legislation taking effect, remain unchanged. However, the new legislation does not prevent a practitioner from withdrawing from the agreement.

Chapter 4

Administrative penalty

- 4.1 This chapter describes how the administrative penalty provisions apply to both the existing legislation and new legislation.
- 4.2 It includes liability for the administrative penalty and calculation of the penalty. This chapter also describes circumstances under which the base penalty amount may be reduced and increased.

Liability for administrative penalty

- 4.3 The discussion in paragraphs 4.4 to 4.10 relates to new section @129AEA of the Bill.
- 4.4 Under subsection 129AC(1) of the HIA, medicare benefits can be recovered from a practitioner if an incorrect payment was made (whether to the practitioner or any other person) due to a false or misleading statement made by, or on behalf of, the practitioner. This will remain unchanged.
- 4.5 The Bill applies an administrative penalty to debts of more than \$2,500, or a higher amount if set out in the regulations, for which the practitioner is liable, if:
 - a practitioner receives a debt notice under existing section 129AC(1); or
 - a practitioner is given a notice to produce documents specifying one or more services and they do not comply in respect of some of the services specified in the notice; or
 - a practitioner is given a notice to produce documents specifying one or more services and complies but the documents do not substantiate one or more of the services specified in the notice; or
 - another person is given a notice to produce documents specifying one or more services and complies but the documents do not substantiate one or more of the services specified in the notice.
- 4.6 The practitioner is also liable for the administrative penalty if the Medicare benefit amounts not substantiated were rendered by another person on their behalf.
- 4.7 The \$2,500 threshold is based on an analysis of Medicare Australia data which indicates that this is the point at which mistaken claims may become routine, or reflective of poor administration or decision making.

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- 4.8 In 2007-08, only 36% of practitioners who were required to repay monies to Medicare Australia had repayments of more than \$2,500.
 - 4.9 The regulation making power will allow the threshold to be adjusted in the future to make sure that practitioners are not disadvantaged by incremental increases in the value of Medicare benefit amounts paid in respect of professional services.
 - 4.10 The Bill provides that if a practitioner is given a notice of liability to pay an administrative penalty and does not pay the penalty by the date set out in the notice, the amount set out is recoverable as a debt due to the Commonwealth from the practitioner (or their estate).

Amount of administrative penalty

- 4.11 The discussion in paragraphs 4.12 to 4.24 relates to new section @129AEB of the Bill.
- 4.12 The administrative penalty is calculated on a professional service by professional service basis.
- 4.13 It applies when a practitioner is unable to substantiate a Medicare benefit amount paid in respect of a service.

Example 4.1

Medicare Australia asks Dr R to provide documents to demonstrate that she has valid referrals in respect of 24 Medicare services. Dr R provides Medicare Australia with copies of the relevant referrals. The documents that Dr R provides substantiate all the specified services.

Consequently Dr R receives a letter from Medicare Australia confirming that she has substantiated the Medicare benefit amounts paid in respect of the 24 services and that the audit is completed.

- 4.14 This means that when more than one service is identified in a notice to produce documents under the new legislation or a debt notice under existing subsection 129AC(1), the administrative penalty will be calculated for the Medicare benefit amount in respect of each professional service which has not been substantiated.
- 4.15 The base penalty amount of the administrative penalty is 20% of the recoverable amount for the professional service.

Example 4.2

Medicare Australia asks Mr T to provide documents to substantiate the Medicare benefit amounts paid in respect of 40 Medicare item 82010⁵ services and 100 Medicare item 81330 services⁶.

⁵ Occupational therapy health services provided to a child, aged under 13 years (pervasive developmental disorder service).

Mr T provides Medicare Australia with documents in relation to each of the 24 services specified. The documents substantiate the 20 of the Medicare item 82010 services and 75 of the Medicare item 81330 services.

The documents do not substantiate the Medicare benefit amount paid in respect of 20 of the Medicare item 82010 services and 25 of the Medicare item 81330.

The benefit amount for Medicare item 82010 is \$69.10 and the benefit amount for Medicare item 81330 is \$48.95.

$$\$69.10 \times 20 \text{ services} + \$48.95 \times 25 \text{ services} = \$2,605.75$$

Consequently Mr T is liable to repay \$2,605.75 in respect of the services which were not substantiated.

This means that the base penalty amount of 20% is applied to each amount which was not substantiated.

$$20\% \text{ penalty} \times \$69.10 \text{ (item 82010)} \times 20 \text{ services} = \$276.40$$

$$20\% \text{ penalty} \times \$48.95 \text{ (item 81330)} \times 25 \text{ services} = \$244.75$$

Mr T's base penalty amount is $\$276.40 + \$244.75 = \$521.15$

Consequently Mr T is liable to repay \$2,605.75 in respect of the unsubstantiated services and \$521.15 penalty.

Mr T's total liability is \$3,126.90.

- 4.16 The legislation provides that the base penalty amount may be reduced in certain circumstances.
- 4.17 If a practitioner voluntarily admits that an incorrect amount has been paid in respect of a professional service prior to being contacted by Medicare Australia, there is a 100% reduction in the penalty.

Example 4.3

Dr I reads in the professional medical press that one of the compliance risks that Medicare Australia have identified which will be audited in the next six months are provision of specialist services without a valid referral.

Dr I is concerned that she has provided 24 services totalling \$3,000 without a valid referral. Dr I contacts Medicare Australia and admits this.

This means that Dr I is liable to repay the Medicare benefit amount of \$3,000. However no base penalty amount is applied to the debt.

⁶ Occupation therapy health service provided to a person who is of Aboriginal or Torres Strait Islander descent.

Consequently \$3,000 is recoverable as a debt due to the Commonwealth from Dr I.

- 4.18 If a practitioner admits that an incorrect amount has been paid in respect of the service before a notice to produce documents is issued, the penalty is reduced by 50%.

Example 4.4

Dr J receives a letter from Medicare Australia informing her about concerns in relation to 50 Medicare item 110⁷ services. The concern is that these services may have been provided without a valid referral.

The letter asks Dr J to supply documents to substantiate the Medicare amounts paid in respect of these services. The letter is not a notice to produce documents issued under the new legislation but is asking for Dr J to volunteer the information.

Dr J responds by providing documents which substantiate 20 of the services. However Dr J admits that she does not have valid referrals for 30 of the specified services.

The benefit amount for Medicare item 110 is \$104.60

$$\$104.60 \times 30 \text{ services} = \$3,138$$

Consequently Dr J is liable to repay \$3,138 in respect of the services which were not substantiated. As the debt amount is more than \$2,500, the base penalty amount of 20% applies.

$$20\% \times \$3,138 = \$627.60$$

However because Dr J volunteered the information, the base penalty amount is reduced by 50%.

$$50\% \times \$627.60 = \$313.80$$

Dr J's base penalty amount is $\$627.60 - \$313.80 = \$313.80$.

Dr J is liable to repay the \$3,138 in respect of services which were not substantiated and the \$313.80 penalty.

So the total amount Dr J is liable for is \$3,451.80.

- 4.19 If a practitioner admits that an incorrect amount has been paid in respect of the service after they have received a notice to produce but before the audit is completed, the base penalty amount is reduced by 25%.

Example 4.5

Dr K receives a letter from Medicare Australia informing her about concerns in relation to 50 Medicare item 110⁸ services. The concern is that these services may have been provided without a valid referral.

⁷ Consultant physician (other than in psychiatry), referred consultation – surgery or hospital.

The letter asks Dr K to supply documents to substantiate the Medicare amounts paid in respect of these services. The letter is not a notice to produce documents issued under the new legislation but is asking for Dr K to volunteer the information.

Dr K ignores the letter, so Medicare Australia gives the doctor a notice to produce documents specifying the 50 Medicare services they have concerns about.

Dr K responds by providing documents which substantiate 20 of the services. However Dr K admits that she does not have valid referrals for 30 of the specified services.

The benefit amount for Medicare item 110 is \$104.60

$$\$104.60 \times 30 \text{ services} = \$3,138$$

Consequently Dr K is liable to repay \$3,138 in respect of the services which were not substantiated. As the debt amount is more than \$2,500, the base penalty amount of 20% applies.

$$20\% \times \$3,138 = \$627.60$$

However because Dr K made the admission before the end of the audit, the base penalty amount is reduced by 25%.

$$25\% \times \$627.60 = \$156.90$$

Dr K's base penalty amount is $\$627.60 - \$156.90 = \$470.70$.

Dr K is liable to repay the \$3,138 in respect of services which were not substantiated and the \$470.70 penalty.

So the total amount Dr K is liable for is \$3,608.70.

- 4.20 The legislation provides that the base penalty amount may also be increased in certain circumstances.
- 4.21 If a practitioner does not produce any documents relating to any of the services specified in a notice to produce, the full amount of the services identified in the notice become repayable and the base penalty amount is increased by 25%.

Example 4.6

Dr L receives a letter from Medicare Australia informing her about concerns in relation to 50 Medicare item 110⁹ services. The concern is that these services may have been provided without a valid referral.

The letter asks Dr L to supply documents to substantiate the Medicare amounts paid in respect of these services. The letter is not a notice to

⁸ Consultant physician (other than in psychiatry), referred consultation – surgery or hospital.

⁹ Consultant physician (other than in psychiatry), referred consultation – surgery or hospital.

produce documents issued under the new legislation but is asking for Dr L to volunteer the information.

Dr L ignores the letter, so Medicare Australia gives the doctor a notice to produce documents specifying the 50 Medicare services they have concerns about.

Dr L ignores the notice to produce documents.

The benefit amount for Medicare item 110 is \$104.60

$$\$104.60 \times 50 \text{ services} = \$5,230$$

Consequently Dr L is liable to repay \$5,230 in respect of the services which were not substantiated.

The debt amount is more than \$2,500 so the base penalty of 20% applies.

$$20\% \times \$5,230 = \$1,046$$

However because Dr L did not provide any documents or make any admissions in relation to the specified services, the base penalty amount is increased by 25%.

$$25\% \times \$1,046 = \$261.50$$

Dr L's base penalty amount is $\$1,046 + \$261.50 = \$1,307.50$

Dr L is liable to repay the \$5,230 in respect of services which were not substantiated and the \$1,307.50 penalty.

So the total amount Dr L is liable for is \$6,537.50.

- 4.22 If a practitioner has been unable to substantiate an amount paid in respect of other services specified in a notice to produce under the new legislation or a debt notice under existing section 129AC(1) in the previous 24 months and the total they repaid was more than \$30,000, the penalty in respect of the current amount which is being recovered is increased by 50%.

Example 4.7

Dr M receives a letter from Medicare Australia informing her about concerns in relation to 50 Medicare item 110¹⁰ services. The concern is that these services may have been provided without a valid referral.

The letter asks Dr M to supply documents to substantiate the Medicare amounts paid in respect of these services. The letter is not a notice to produce documents issued under the new legislation but is asking for Dr M to volunteer the information.

¹⁰ Consultant physician (other than in psychiatry), referred consultation – surgery or hospital.

Dr M ignores the letter, so Medicare Australia gives the doctor a notice to produce documents specifying the 50 Medicare services they have concerns about.

Dr M ignores the notice to produce documents.

The benefit amount for Medicare item 110 is \$104.60

$$\$104.60 \times 50 \text{ services} = \$5,230$$

Consequently Dr M is liable to repay \$5,230 in respect of the services which were not substantiated.

The debt amount is more than \$2,500 so the base penalty of 20% applies.

$$20\% \times \$5,230 = \$1,046$$

However, in the previous 2 years Dr M has received a notice to produce documents and a debt notice under existing subsection 129AC(1) and the total amount of these combined notices is more than \$30,000.

Consequently the base penalty is increased by 50%.

$$50\% \times \$1,046 = \$523$$

Dr M's base penalty amount is $\$1,046 + \$523 = \$1,569$

Dr M is liable to repay the \$5,230 in respect of services which were not substantiated and the \$1,569 penalty.

So the total amount Dr M is liable for is \$6,799.

- 4.23 If both the 25% increase in the base penalty amount and the 50% increase in the base penalty amount apply to a debt, then the 25% increase is applied first, followed by the 50% increase.

Example 4.8

Dr O receives a letter from Medicare Australia informing her about concerns in relation to 50 Medicare item 110¹¹ services. The letter asks Dr O to supply documents to substantiate the Medicare amounts paid in respect of these services. The letter is not a notice to produce documents issued under the new legislation but is asking for Dr O to volunteer the information.

Dr O ignores the letter, so Medicare Australia gives the doctor a notice to produce documents specifying the 50 Medicare services they have concerns about. Dr O ignores the notice to produce documents.

The benefit amount for Medicare item 110 is \$104.60

$$\$104.60 \times 50 \text{ services} = \$5,230$$

¹¹ Consultant physician (other than in psychiatry), referred consultation – surgery or hospital.

Consequently Dr O is liable to repay \$5,230 in respect of the services which were not substantiated.

The debt amount is more than \$2,500 so the base penalty of 20% applies.

$$20\% \times \$5,230 = \$1,046$$

However because Dr O did not provide any documents or make any admissions in relation to any of the specified services, the base penalty amount is increased by 25%.

$$25\% \times \$1,046 = \$261.50$$

Consequently the base penalty amount is increased by \$261.50.

However in the previous 2 years Dr O has received a notice to produce under the new legislation and a debt notice under existing subsection 129AC(1) and the total amount of these combined notices was more than \$30,000.

This means the base penalty amount in respect of each of the services specified in the latest notice to produce increases by 50%.

$$50\% \times \$1,307.50 = \$653.75$$

Dr O's base penalty amount is $\$1,046 + \$261.50 + 653.75 = \$1,961.25$

The total amount Dr O is liable to repay is \$5,230 in respect of services which were not substantiated and the \$1,961.25 penalty.

So Dr O is liable for \$7,191.25.

- 4.24 Similarly if a base penalty amount is subject to both a reduction and an increase, the reduction is applied first.

Example 4.9

Dr P receives a letter from Medicare Australia informing her about concerns in relation to 50 Medicare item 110¹² services. The concern is that these services may have been provided without a valid referral.

The letter asks Dr P to supply documents to substantiate the Medicare amounts paid in respect of these services. The letter is not a notice to produce documents issued under the new legislation but is asking for Dr P to volunteer the information.

Dr P ignores the letter, so Medicare Australia gives the doctor a notice to produce documents specifying the 50 Medicare services they have concerns about.

Dr P ignores the notice to produce documents.

The benefit amount for Medicare item 110 is \$104.60

¹² Consultant physician (other than in psychiatry), referred consultation – surgery or hospital.

$$\$104.60 \times 50 \text{ services} = \$5,230$$

Consequently Dr P is liable to repay \$5,230 in respect of the services which were not substantiated.

The debt amount is more than \$2,500 so the base penalty of 20% applies.

$$20\% \times \$5,230 = \$1,046$$

However because Dr P made the admission before the end of the audit, the base penalty amount is reduced by 25%.

$$25\% \times \$1,046 = \$261.50$$

$$\$1,046 - \$261.50 = \$784.50$$

However in the previous 2 years Dr P has received a notice to produce under the new legislation and a debt notice under existing subsection 129AC(1) and the total amount of these combined notices was \$35,000.

This means the base penalty amount in respect of each of the services specified in the latest notice to produce increases by 50%.

$$50\% \times \$784.50 = \$392.25$$

Dr P's base penalty amount is $\$1,046 - \$261.50 + 392.25 = \$1,176.75$

The total amount Dr P is liable to repay is \$5,230 in respect of services which were not substantiated and \$1,176.75 in respect of the penalty.

So Dr P is liable for \$6,406.75.

Notice of administrative penalty

- 4.25 The discussion in paragraphs 4.24 to 4.27 relates to new section @129AEC of the Bill
- 4.26 The legislation provides for the Medicare Australia CEO to issue a written notice to a person who is liable for an administrative penalty.
- 4.27 The notice of administrative penalty will list:
- the administrative penalty relating to each professional service specified:
 - in the notice to produce issued under the new legislation and/or
 - in the debt notice issued under existing subsection 129AC(1);
- and the total amount of the administrative penalty.

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- 4.28 The notice of administrative penalty may also separately include the Medicare benefit amount paid in respect of a professional service which is being recovered as a debt due to the Commonwealth under section 129AC.
- 4.29 This will mean that Medicare Australia is able to provide a practitioner with one notice listing both the debt amount and the base penalty amount owed to the Commonwealth.