

EXPOSURE DRAFT

EXPLANATORY STATEMENT

Medical Indemnity (Prudential Supervision and Product Standards) Act 2003

Medical Indemnity (Prudential Supervision and Product Standards) Regulations 2020

Section 33 of the *Medical Indemnity (Prudential Supervision and Product Standards) Act 2003* (the Act) provides that the Governor-General may make regulations prescribing matters required or permitted by the Act to be prescribed, or necessary or convenient to be prescribed for carrying out or giving effect to the Act.

The purpose of the *Medical Indemnity (Prudential Supervision and Product Standards) Regulations 2020* (the Regulations) is to remake and improve the *Medical Indemnity (Prudential Supervision and Product Standards) Regulations 2003* (the 2003 Regulations) prior to their sunseting. The *Legislation Act 2003* provides that all legislative instruments, other than exempt instruments, are automatically repealed according to the progressive timetable set out in section 50 of that Act. Legislative instruments generally cease to have effect after a specific date unless further legislative action is taken to extend their operation, such as remaking the instrument.

The 2003 Regulations were reviewed as part of the February 2018 *Thematic Review of Commonwealth Medical and Midwife Indemnity Legislation* (the Thematic Review) prepared for the Department of Health. The sunseting date for the *Medical Indemnity (Prudential Supervision and Product Standards) Regulations 2003* was adjusted to allow for the thematic review to be undertaken and then deferred so that amendments to the Act could be legislated and is now 1 October 2021.

The Thematic Review reviewed 17 legislative instruments, including the 2003 Regulations, which collectively support the Indemnity Insurance Fund. The Indemnity Insurance Fund comprises seven related schemes that are collectively designed to promote stability of the medical indemnity insurance industry and support the availability of affordable indemnity insurance for medical practitioners and eligible midwives.

The Thematic Review involved consultation with regulatory and other bodies managing or overseeing medical indemnity arrangements, relevant Departments and Government Agencies, the Law Council of Australia, medical indemnity insurers, and peak bodies representing insurers, medical practitioners and midwives. It also involved a review of recent relevant reports including those of the Australian National Audit Office and the Department of Human Services and a review of submissions made by stakeholders over the past three years.¹

The Thematic Review found that the 2003 Regulations are still required in order to describe the types of insurance to which the Act does not apply.

The Thematic Review also found that the provisions in the 2003 Regulations relating to transitional arrangements for compliance with minimum capital requirements have

¹ See pages 15-16 of the Thematic Review.

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been exhausted and are no longer required.² The provisions stopped being operable from July 2008. APRA's guidelines made under subsection 13(9) of the Act, were revoked in 2012. Consistent with the findings of the Thematic Review, the Regulations remake the 2003 Regulations without the redundant provisions and with drafting improvements.

The Thematic Review also suggested that the 2003 Regulations are required in order to provide for the circumstances in which an insurer must offer run-off cover and to cap the amount of the premium payable for run-off cover.³ The 2003 Regulations required an insurer to offer run-off cover where a medical practitioner has ceased medical practice aged less than 65 years (regulation 8), and cap the amount of the associated premiums (regulation 9). However, the Medical and Midwife Indemnity Legislation Amendment Bill 2019, which was introduced into the Parliament on 18 September 2019, will enable medical practitioners who retire permanently from private medical practice to access the Run-off Cover Schemes regardless of the age at which they retire. As such, equivalent provisions to regulations 8 and 9 of the 2003 Regulations are no longer required.

Furthermore, a specific exemption from the application of the Act which related to the coverage of a health care professional who performed services as a contractor to the then MIA Group Limited or certain related entities (see paragraph 4(1)(j) of the 2003 Regulations), has not been replicated in the Regulations on the basis that it is now obsolete.

Details of the Regulations are set out in Attachment A.

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

The Regulations commence on 1 July 2020.

Regulation Impact Statement

OBPR have certified the Thematic Review as a RIS like process. The Thematic Review can be accessed at:

http://www.health.gov.au/internet/main/publishing.nsf/content/medical_Indemnity_First_Principles_Review

² See page 79 of the Thematic Review.

³ See page 79 of the Thematic Review.

Details of the Medical Indemnity (Prudential Supervision and Product Standards) Regulations 2020

Part 1 – Preliminary

Section 1 – Name

This section provides that the name of the Regulations is the *Medical Indemnity (Prudential Supervision and Product Standards) Regulations 2020* (the Regulations).

Section 2 – Commencement

This section provides that the Regulations commence on 1 July 2020.

Section 3 – Authority

The section provides that the Regulations are made under the *Medical Indemnity (Prudential Supervision and Product Standards) Act 2003* (the Act).

Section 4 – Schedules

The section provides that each instrument that is specified in a Schedule to this instrument is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to this instrument has effect according to its terms.

Section 5 – Definitions

This section provides that in the Regulations, Act means the *Medical Indemnity (Prudential Supervision and Product Standards) Act 2003*. It also notes that a number of expressions used in the Regulations are defined in the Act including the expressions ‘arrangement’, ‘health care’, ‘health care incident’, ‘health care professional’, and ‘provide medical indemnity cover’.

Part 2 – Arrangements to which the Act does not apply

Section 6 – Kinds of arrangements to which the Act does not apply

Part 2 of the Regulations sets out kinds of arrangements to which the Act does not apply.

The Act provides that medical indemnity insurance is only to be provided by general insurers and only under contracts of insurance.

The kinds of arrangements covered by the sections of this Part are prescribed for the purposes of paragraph 8(2)(e) of the Act. This means that the Act does not apply to an arrangement of a kind prescribed by this Part.

The Regulations address the following issues by exempting specified arrangements from the application of the Act, allowing health care service providers and health care

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professionals to access cover that may otherwise have been unavailable or unaffordable.

Section 7 – Dental care provided by certain surgeons

This section replicates the effect of paragraphs 4(1)(a) and (b) of the 2003 Regulations. It covers oral and maxillo-facial surgeons registered as dental practitioners in relation to arrangements solely in relation to dental care.

Oral and maxillo-facial surgeons are registered as both medical and dental practitioners under the relevant State and Territory legislation. As such, subsection 21(1) of the Act would render professional indemnity insurance contracts written to cover these practitioners as 'regulated insurance contracts,' with the result that the minimum product standards at Part 3 of the Act would apply to such arrangements. This would be so even if the indemnity cover were only in respect of dental procedures. This outcome would not match the policy intent for Part 3 of the Act, which is aimed at ensuring minimum product standards apply only to contracts of medical indemnity insurance for doctors in respect of health care incidents arising from practice as medical practitioners, not as dental practitioners.

Section 8 – Training institutions

This section replicates the effect of paragraphs 4(1)(c) and (d) of the 2003 Regulations. This section covers certain arrangements, as set out below, under which the training institution provides medical indemnity cover for a covered person.

It also covers arrangements under which a person provides medical indemnity cover for a covered person through the interposed entity of the training institution (subsection 8(3)).

Cover for trainers and trainees for incidents during training

The arrangements covered by subsection 8(1) include an arrangement which provides medical indemnity cover to a health care professional of a training institution (including a student, volunteer or staff member, whether a contractor or employee) engaged in training activity associated with a training institution through an insurance contract between the insurer and the institution.

Cover for staff and students for incidents during provision of health care

The arrangements covered by subsection 8(2) include an arrangement which provides medical indemnity cover to a health care professional of a training institution (including a volunteer, contractor or employee) providing health care services to the public through an insurance contract between the insurer and the institution.

Section 9 – Health care professionals who need not be registered

This section replicates the effect of paragraph 4(1)(e) of the 2003 Regulations. It covers an arrangement under which medical indemnity cover is provided to a health care professional whose profession is not required to be licensed or registered in any State or Territory.

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Section 10 – Cover through government

This section replicates the effect of paragraph 4(1)(f) of the 2003 Regulations. It covers an arrangement under which medical indemnity cover is provided to a health care professional who is the subject of an indemnity described under paragraph 8(2)(a) of the Act, by the Commonwealth, State or Territory or a public authority of the Commonwealth or the public authority of a State or Territory.

Section 11 – Voluntary organisations

This section replicates the effect of paragraph 4(1)(g) of the 2003 Regulations. It covers an arrangement under which a person provides medical indemnity cover to a volunteer organisation, in relation only to gratuitous health care.

Section 12 – Employment-related arrangements giving indemnities provided by general insurers or Lloyd's underwriters

This section replicates the effect of paragraphs 4(1)(h) and (i) of the 2003 Regulations. It covers an arrangement as a result of an agreement or understanding between a health care professional and their employer which provides an indemnity to certain beneficiaries in relation to claims for health care incidents. It covers arrangements that are provided by a general insurer or a Lloyd's underwriter.

The beneficiary of the indemnity may be the health care professional, the health care professional's employer or if the health care professional's employer is a wholly-owned subsidiary (within the meaning of section 9 of the *Corporations Act 2001*) of another entity, the other entity. This provides for bodies corporate to be wholly-owned subsidiaries of other bodies corporate.

Section 13 – Indemnities under public liability policies for health care provided by health care professionals to certain employees

This section replicates the effect of paragraphs 4(1)(k) and (l) of the 2003 Regulations. It covers arrangements under which a health care professional benefits from an indemnity under a public liability insurance policy in relation to health care provided to the person's employees.

It also covers arrangements under which a person by whom a health care professional is employed or contracted to provide health care to the person's employee's benefits from an indemnity under a public liability insurance policy in relation to health care provided to the person's employees.

Section 14 – Arrangements involving excesses under insurance contracts for medical indemnity cover

This section replicates the intended effect of paragraph 4(1)(m) of the 2003 Regulations. It covers an arrangement under which a person, who is not an insured under a contract of insurance, provides medical indemnity cover to a health care professional by bearing any excess or deductible that applies under the insurance policy.

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It corrects a typographical error in paragraph 4(1)(m) of the 2003 Regulations, which refer to an arrangement under which a ‘person who is not an insurer (sic)’, instead of ‘a person who is not an insured’.

Excesses are common to the insurance arrangements of those employing health care professionals. Before paragraph 4(1)(m) was made, it was an offence under the Act for a third party, such as an employer, to agree to meet an excess unless the third party was an authorised insurer. This prevented third parties from partially self-insuring through an excess. Since the excess forms part of the cost of insurance, the absence of an excess will raise the cost of insurance.

Section 15 – Research

This section replicates the effect of paragraph 4(1)(n) of the 2003 Regulations. It covers an arrangement under which a person provides medical indemnity cover for the conduct of health care-related research, including cover provided to students at a training institution.

Prior to the making of paragraph 4(1)(n) of the 2003 Regulations, as part of its application to the insurance of health care services, the Act applied to the insurance of health care-related research. This reduced the already limited global market for the insurance of health care-related research to APRA-authorised insurers. The continued application of the Act to the insurance of health care-related research could have been detrimental to the conduct of medical research in Australia.

Section 16 – Contracts of reinsurance

This section replicates the effect of subsection 4(2) of the 2003 Regulations. This section covers contracts of insurance in so far as they are contracts of reinsurance.

The Act is not intended to apply to reinsurance arrangements. However, it may be argued that the Act potentially extends to such arrangements. To put the matter beyond doubt, it is necessary to prescribe such arrangements as exempt from the application of the Act.

Schedule 1 – Repeals

Schedule 1 to the Regulations repeals the 2003 Regulations.