

EXPLANATORY STATEMENT

Select Legislative Instrument 2009 No. 225

Health Insurance Act 1973

Health Insurance Amendment Regulations 2009 (No. 2)

Subsection 133(1) of the *Health Insurance Act 1973* ('the Act') provides that the Governor-General may make regulations, not inconsistent with the Act, prescribing all 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 regulations is to amend the *Health Insurance Regulations 1975* to set out a method for determining the amount that is to be the market value of property, goods or services; and a method of working out whether the amount of a payment or of consideration for property, goods or services is substantially different from the market value of the property, goods or services.

Part IIBA of the Act contains provisions that are directed at preventing requesters of pathology services and diagnostic imaging services from (either directly or indirectly) asking for or accepting, or being offered or provided, any benefits (other than permitted benefits) in order to induce the requesters to request the services from providers of those services.

Section 23DZZIF of the Act describes when a benefit asked for or accepted by, or offered or provided to, a person ('the beneficiary') who is, or is connected to, a requester is a permitted benefit.

Subsection 23DZZIF(5) sets out the circumstances where a benefit that consists of a payment (whether or not made to the beneficiary) for property, goods or service that are not shared between the beneficiary and another person is a permitted benefit. Relevantly, paragraph (b) provides that the amount of the benefit must not be substantially different from the market value of the property, goods or services.

Subsection 23DZZIF(6) sets out the circumstances where a benefit that consists of the provision of property, goods or services to the beneficiary is a permitted benefit. Relevantly, paragraph (b) provides that the benefit must be provided for consideration that is not substantially different from the market value of the property, goods or services.

Subsection 23DZZIF(9) provides that, for the purposes of paragraphs 23DZZIF(5)(b) and 23DZZIF(6)(b), the regulations may prescribe a method of working out whether the amount of a payment or of consideration is substantially different from the market value, or an amount determined by a method prescribed in the regulations to be the market value, of a specified class of property, goods or services.

Details of the Regulations are set out in the Attachment.

Initial consultation was carried out with peak pathology and diagnostic imaging bodies, requester groups and the Australian Property Institute in the early development of the Regulations. Follow-up detailed consultations were conducted with Legal Services Branch, pathology providers and requester groups, along with Medicare Australia in the finalisation of the Regulations.

The Act specifies no conditions that need to be satisfied before the power to make the Regulations may be exercised.

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

The Regulations commence on the day after they are registered.

ATTACHMENT**DETAILS OF THE *HEALTH INSURANCE AMENDMENT REGULATIONS 2009*
(No. 2)****1 Name of Regulations**

This regulation provides that the Regulations are the *Health Insurance Amendment Regulations 2009 (No. 2)*.

2 Commencement

This regulation provides that the Regulations commence on the day after they are registered.

3 Amendment of *Health Insurance Regulations 1975*

This regulation provides that Schedule 1 amends the *Health Insurance Regulations 1975*.

Schedule 1 Amendments**Item 1**

This item inserts new regulations 20CA and 20CB.

Regulation 20CA – Method for determining substantial difference from market value

Sub-regulation 20CA(1) provides that sub-regulation 20CA(2) prescribes the method for determining whether the amount of a payment or of consideration for property, goods or services is substantially different from the market value of the property, goods or services.

Sub-regulation 20CA(2) provides that the amount of the payment or consideration is substantially different from the market value, which is determined in accordance with regulation 20CB, if the difference between the market value and the payment or consideration is more than 20% of the market value.

Example 1:

Payment: \$1000

Market Value: \$850

Difference between market value and payment = \$150.

20% of the market value = \$170.

In this example, the amount of the payment is not substantially different from the market value because the difference between the market value and the payment is not more than 20% of the market value.

Example 2:

Payment: \$600
 Market Value: \$700

Difference between market value and payment = \$100
 20% of the market value = \$140

In this example, the amount of the payment is not substantially different from the market value because the difference between the market value and the payment is not more than 20% of the market value.

Example 3:

Payment: \$550
 Market Value: \$300

Difference between market value and payment = \$250
 20% of the market value = \$60

In this example, the amount of the payment is substantially different from the market value because the difference between the market value and the payment is more than 20% of the market value.

Regulation 20CB – Method for determining market value

Sub-regulation 20CB(1) specifies that, for subsection 23DZZIF(9) of the Act, the amount determined by what a willing purchaser will have to pay, at the time mentioned in sub-regulation (2), to a vendor who was willing, but not anxious to sell, being the method, is the market value of property, goods or services.

Sub-regulation 20CB(2) specifies the time at which the amount referred to in subregulation 20CB(1) is to be assessed for the purposes of ascertaining the market value.

Sub-regulation 20CB(2) provides that the time is:

- for an offence or a contravention of asking for a benefit that is not a permitted benefit – when the person asked for the benefit; or
- for an offence or a contravention of accepting a benefit that is not a permitted benefit – when the person accepted the benefit; or
- for an offence or a contravention of offering a benefit that is not a permitted benefit – when the person offered the benefit; or
- for an offence or a contravention of providing a benefit that is not a permitted benefit – when the person provided the benefit.

The method set out in regulation 20CB is intended to reflect the common law meaning of market value as found in the High Court decision of *Spencer v The Commonwealth of Australia* (1907) 5 CLR 418.

The following may be relevant to the application of the method in regulation 20CB:

- the amount or price is the best price that may reasonably be obtained for the property, goods or services, if sold in the ‘general market’. In considering what is the ‘general market’:
 - if there is no general market, for example in the case of shares in a private company, such a market is to be assumed;
 - all possible purchasers are to be taken into account;
 - where the vendor knows that the potential purchaser values the property, goods or services in a special way, this usually means that the property, goods or services will sell and the market value will be at the higher end of the usual market value range.
- the transaction should be at arm’s length and should take place in an environment where the purchaser and vendor each act knowledgeably (including in regard to current market conditions), prudently and without compulsion; and

Where the property is either land or some interest in land such as a lease, evidence of market value may be obtained from the following:

- a report by a registered valuer that identifies the particular land or interest in land;
- a valuation required by a financial institution for financial purposes, noting that such valuations may be conservative and may indicate that the property has a higher unencumbered value;
- a valuation by a registered real estate valuer being a comprehensive valuation of the property at the date of transaction indicating an inspection of the property had been undertaken; or
- other offers to purchase or lease.

Where the property is not an interest in land or where the benefit is a good or a service, evidence of market value may be obtained from the following:

- a report by a registered valuer that identifies the particular property, good or service;
- any valuation of the particular property, good or service for insurance purposes; or
- other offers to purchase.

Where the benefit being examined is the purchase of shares, units or options evidence of market value might be obtained from a review of the latest balance sheet and supporting notes of the particular entity in which the interest is being or may be purchased.