

➤ **Health Insurance (Pathology and Diagnostic Imaging) Bill**

1 December 2006

Ms Farah Reynolds
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Department of Health and Ageing
GPO Box 9848
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Dear Ms Reynolds,

Re: Health Insurance Amendment (Pathology and Diagnostic Imaging) Bill 2006

Thank you for your correspondence seeking advice from the Administrative Review Council (ARC) on a proposed amendment to the *Health Insurance Act 1973* (the Act) by the *Amendment (Pathology and Diagnostic Imaging) Bill 2006* (the Bill).

Proposed amendment

The Bill proposes an amendment to s.23DN of the Act to give a specific power to the Minister to vary or revoke accreditation of pathology laboratories in circumstances where the Minister determines that such revocation or variation is necessary to protect public health or safety.

Short response

The ARC considers that merits review should be available for decisions by the Minister under s.23DN of the Act to any revocation or variation of accreditation.

Extended response

The ARC remains guided by its 1999 publication: *What decision should be subject to merits review? (What Decisions?)*.

That publication indicates that an administrative decision that will, or is likely to, affect the interests of a person should be subject to merits review. The term 'person', in this sense, applies equally to a corporation, which may be the primary party affected by the proposed amendments.

High level policy decisions

What Decisions? identifies a number of factors that may justify excluding merits review of administrative decisions. One possible exception to the general rule relates to policy decisions of a high political content. However, the exception relates to decisions involving consideration of issues of the highest consequence to the Government.

A decision by a Minister to revoke or vary accreditation of a pathology laboratory in circumstances where the Minister determines that such revocation/variation is necessary in order to protect public health or safety does not readily fall within this exception.

Stay orders

The ARC understands that your Department is concerned that under the current regime the Administrative Appeals Tribunal ('AAT') may grant a stay order of a Minister's decision to revoke or vary the accreditation of a pathology laboratory potentially providing for the continuing operation of a pathology laboratory at risk to public health and safety.

However, the ARC does not consider this a real concern. Section 41 of the AAT Act requires the AAT in granting a stay order to take into account 'the interests of any persons who may be affected by the review.' This gives the AAT ample scope to consider all relevant factors, including the risk to the general public of allowing an unsafe service to continue in operation.

There is authority that the AAT considers three main factors when granting or not granting a stay order. These are:

- the prospects of success of the applications for review of the decisions;
- the hardship to the applicants if the stay orders are not made; and
- whether the public safety is likely to be imperilled if the stay orders are not made.¹

In considering whether to grant stay orders, the AAT has indicated the third concern (public safety) to be the most important.² The ARC believes the AAT

¹ *Re Griffiths Grif-Air Helicopters Pty Ltd and Civil Aviation Authority* (1993) 31 ALD 380 at 53.

² *AMT Helicopters Pty Ltd and Civil Aviation Safety Authority* [2006] AATA 314, Senior Member B J McCabe

will not grant a stay order of a decision under s.23DN unless it is satisfied that public health and safety would not be at risk.

Additionally, the ARC considers a report from an independent authority, such as the National Association of Testing Authorities (as referred to in correspondence to the ARC), could be made available to the AAT to assist in deciding whether to grant a stay order.

Conclusion

The ARC considers that there should be merits review available for decisions of the Minister to vary or revoke accreditation of pathology laboratories. Further, the ARC believes that there are sufficient checks and balances in place to ensure the AAT, when granting stay orders, properly considers public health and safety concerns. Therefore, the ARC does not support the proposed amendments.

Please contact the ARC Secretariat should you wish to discuss the ARC's comments.

Yours sincerely

Jillian Segal AM
President