

**Thematic Review of Commonwealth  
Medical and Midwife Indemnity Legislation**

**Prepared for the Department of Health**

**February 2018**

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## Executive Summary

### Short Title

Thematic Review of medical indemnity and midwife indemnity legislation.

### Scope of Thematic Review

This Thematic Review examined 17 legislative instruments as described in the table below.

These instruments were selected to be reviewed together because, collectively, the legislation supports the Indemnity Insurance Fund (IIF), which comprises seven related schemes:

- the Premium Support Scheme (PSS) (incorporating the grandfathered Medical Indemnity Subsidy Scheme)
- the High Cost Claims Scheme (HCCS)
- the Exceptional Claims Scheme (ECS)
- the Run-Off Cover Scheme (ROCS)
- the IBNR (incurred but not reported) Indemnity Scheme
- the Midwife Professional Indemnity (Commonwealth Contribution) Scheme, and
- the Midwife Professional Indemnity Run-off Cover Scheme.

Collectively, these schemes are designed to promote stability of the medical indemnity insurance industry and support the availability of affordable indemnity insurance for medical practitioners and eligible midwives. To this end, the legislation implements a variety of measures including premium subsidies and government assistance to insurers, medical practitioners and midwives. The schemes are discussed in more detail in Chapter 1.

The following table sets out each of the legislative instruments (and the relevant enabling legislation) reviewed as part of this Thematic Review.

Act	Instrument
<b>Medical Indemnity Act 2002</b>	<i>Medical Indemnity (IBNR Claims) Protocol 2006</i>
	<i>Medical Indemnity (Unfunded IBNR factor - United Medical Protection Limited) Determination 2003</i>
	<i>Medical Indemnity (Non-participating MDOs) Determination 2003</i>
	<i>Medical Indemnity (UMP support payment exemption) Regulations 2006</i>
	<i>Premium Support Scheme 2004</i>
	<i>Premium Support (Medical Indemnity Provider) Scheme 2006</i>
	<i>Medical Indemnity (Run-off Cover Claims and Administration) Protocol 2006</i>
	<i>Medical Indemnity (Run-off Cover Claims and Administration) Protocol 2006 (No.2)</i>
	<i>Medical Indemnity Regulations 2003</i>
<b>Medical Indemnity (Prudential)</b>	<i>Medical Indemnity (Prudential Supervision and Product Standards</i>

Act	Instrument
<b>Supervision and Product Standards) Act 2003</b>	- <i>Notice of Provision of Run-off Cover) Determination 2007</i>
	<i>Medical Indemnity (Prudential Supervision and Product Standards - Terms and Conditions for Run-off Cover) Determination 2004</i>
	<i>Medical Indemnity (Prudential Supervision and Product Standards) Regulations 2003</i>
<b>Medical Indemnity (Run-off Cover Support Payment) Act 2004</b>	<i>Medical Indemnity (Run-off Cover Support Payment) Regulations 2008</i>
<b>Medical Indemnity (UMP Support Payment) Act 2002</b>	<i>Medical Indemnity (UMP Support Payment) Regulations 2004</i>
<b>Medical indemnity (Competitive Advantage Payment) Act 2005</b>	<i>Medical Indemnity (Competitive Advantage Payment) Regulations 2005</i>
<b>Midwife Professional Indemnity (Commonwealth Contribution) Scheme Act 2010</b>	<i>Midwife Professional Indemnity (Commonwealth Contribution) Scheme Rules 2010</i>
<b>Midwife Professional Indemnity (Run-off Cover Support Payment) Acts 2010</b>	<i>Midwife Professional Indemnity (Run-off Cover Support Payment) Rules 2010</i>
<b>Medical Indemnity Agreement (Financial Assistance—Binding Commonwealth Obligations) Act 2002</b>	<i>No instruments</i>

The above instruments were due to sunset at different dates (between 2016 and 2020). With the exception of the rules made under the midwife professional indemnity legislation, the Attorney General approved the alignment of all sunset dates to 1 October 2019, so that a Thematic Review could be undertaken in the interim. As the *Midwife Professional Indemnity (Commonwealth Contribution) Scheme Rules 2010* and the *Midwife Professional Indemnity (Run-off Cover Support Payment) Rules 2010* are due to sunset on 1 October 2020 (and are closely related to the medical Indemnity legislation), these instruments have been included in this Thematic Review.

## Details of the Thematic Review

The Thematic Review has involved review of the legislation (including its regulatory impact) and consultation with stakeholders (discussed further in Chapter 2). The Review has focused on identifying opportunities to:

- consolidate instruments wherever possible
- remove redundant or inoperable legislation
- ensure the instruments are consistent with the broader legal and policy context and with the clearer laws principles, and
- simplify the legislation wherever possible.

## Recent reviews and related processes

In parallel with the Thematic Review, the Department of Health (the Department) is undertaking a First Principles Review of the same legislation, as recommended by the Australian National Audit Office (ANAO) and announced by Government as part of the 2016-17 Mid-Year Economic and Fiscal Outlook (MYEFO).

Subject to the agreement of Government, it is proposed that the legislative changes recommended in each review will be implemented as a package.

## Summary of key findings of the Thematic Review

Question	Finding
Do the objectives of the legislation remain relevant?	<p>Yes. The legislation achieves the current policy objectives of Government by enabling the payment of subsidies and reimbursements and recovering certain costs from industry via certain levies.</p> <p>Separate matters for consideration by Government are:</p> <ul style="list-style-type: none"> <li>• whether Government intervention continues to be necessary in order to support the stability of the medical indemnity insurance industry and the availability of affordable indemnity insurance for medical practitioners and midwives, and</li> <li>• whether the way that government is subsidising/reimbursing is the most effective and efficient use of limited resources or whether alternative approaches are appropriate for achieving Government's objectives.</li> </ul> <p>These matters are being considered through the First Principles Review.</p>
Should any of the Instruments (or enabling Acts) be repealed or allowed to sunset?	<p>The following Acts and instruments (or provisions within) are no longer operable and can be repealed:</p> <ul style="list-style-type: none"> <li>• <i>Medical Indemnity (UMP Support Payment) Act 2002</i></li> <li>• <i>Medical Indemnity (UMP Support Payment) Regulations 2004</i></li> <li>• <i>Medical Indemnity (UMP support payment exemption) Regulations 2006</i></li> <li>• <i>Medical Indemnity (Competitive Advantage Payment) Act 2005</i></li> <li>• <i>Medical Indemnity (Competitive Advantage Payment) Regulations 2005</i></li> <li>• Division 1 and Division 2A of Part 3 of the <i>Medical Indemnity Act 2002</i> (and related amendments)</li> <li>• Division 3.1 and 3.1A of Part 3 of the <i>Medical Indemnity Regulations 2003</i></li> <li>• <i>Medical Indemnity (Run-off Cover Claims and Administration) Protocol 2006</i></li> <li>• <i>Premium Support (Medical Indemnity Provider) Scheme 2006</i></li> </ul> <p>It is proposed that the following instruments be repealed and remade in one consolidated instrument under the <i>Medical Indemnity Act 2002</i>:</p> <ul style="list-style-type: none"> <li>• <i>Premium Support Scheme 2004</i></li> <li>• <i>Medical Indemnity (Run-off Cover Claims and Administration) Protocol 2006 (No.2)</i></li> <li>• <i>Medical Indemnity (IBNR Claims) Protocol 2006</i></li> </ul>

Question	Finding
	<p>It is proposed that the following instruments be repealed and remade (with minor consequential amendments if required):</p> <ul style="list-style-type: none"> <li>• <i>Medical Indemnity Regulations 2003</i></li> <li>• <i>Medical Indemnity (Prudential Supervision and Product Standards - Notice of Provision of Run-off Cover) Determination 2007</i></li> <li>• <i>Midwife Professional Indemnity (Commonwealth Contribution) Scheme Rules 2010</i></li> <li>• <i>Midwife Professional Indemnity (Run-off Cover Support Payment) Rules 2010</i></li> <li>• <i>Medical Indemnity (Run-off Cover Support Payment) Regulations 2008</i></li> <li>• <i>Medical Indemnity (Prudential Supervision and Product Standards) Regulations 2003</i> (these changes may be progressed within a separate legislation package administered by the Treasury).</li> </ul> <p>It is proposed that the following instruments be repealed, but only after amendments have been made to the enabling Acts:</p> <ul style="list-style-type: none"> <li>• <i>Medical Indemnity (Unfunded IBNR factor – United Medical Protection Limited) Determination 2003</i>. The <i>Medical Indemnity Act 2002</i> would require amendment first, noting that the Act currently prevents repeal of the instrument</li> <li>• <i>Medical Indemnity (Prudential Supervision and Product Standards - Terms and Conditions for Run-off Cover) Determination 2004</i>. The <i>Medical Indemnity (Prudential Supervision and Product Standards) Act 2003</i> would first require amendment to incorporate the few matters currently in the Determination.</li> <li>• <i>Medical Indemnity (Non-participating MDOs) Determination 2003</i>. The <i>Medical Indemnity Act 2002</i> would first require amendment to refer to Avant as the only participating MDO.</li> </ul>
<p>What is the regulatory impact of the instruments? Is there opportunity for deregulation?</p>	<p>Many of the instruments are declaratory only and as such there is no opportunity for deregulation, or to reduce compliance costs. However, for the more substantive instruments, it is proposed that:</p> <ul style="list-style-type: none"> <li>• all redundant provisions be repealed (to clarify the legislation and reduce costs to insurers, medical practitioners and eligible midwives having to navigate complex legislation), and</li> <li>• wherever possible instruments that require information to be reported to Government be amended to minimise the information reported to that which is absolutely necessary to enable Government to effectively and efficiently manage the relevant scheme.</li> </ul> <p>As part of the First Principles Review, Government is separately considering other changes that may be desirable to improve the operation of the schemes.</p>
<p>Are the instruments consistent with broader legal and policy context?</p>	<p>Yes. In summary:</p> <ul style="list-style-type: none"> <li>• the legislation does not engage any of the human rights and freedoms recognised in the seven core international human rights treaties which Australia has ratified</li> <li>• none of the instruments pose any international or constitutional law issues</li> </ul>

Question	Finding
	<ul style="list-style-type: none"> <li>to the extent that criminal offences are created in the legislation, these are consistent with the <i>Attorney Generals' Guide to Framing Commonwealth Offences</i> and the penalties attached to such offences have been benchmarked against like offences in other Commonwealth laws and found to be appropriate</li> <li>in relation to administrative law, two instruments create review rights to the Administrative Appeals Tribunal (AAT). To date, no applications have been made for review of decisions made under these instruments. The legislation does not exclude the jurisdictions of the Federal Court under the <i>Administrative Decisions Judicial Review Act 1997</i>, and</li> <li>in relation to privacy law, a number of the instruments require submission of information (by insurers or practitioners) to the Department of Human Services (DHS). Some of the information provided to DHS, the Department and other government agencies is personal and/or confidential information protected under the <i>Privacy Act 1988</i> and the Australian Privacy Principles (APP). While the instruments do not expressly refer to the <i>Privacy Act 1988</i> or the APP, government departments and agencies are subject to such legislation and, therefore, deal with all information in accordance with relevant requirements.</li> </ul>
<p>Do the instruments comply with the clearer laws principles? What can be done to make it simpler, clearer or easier to read?</p>	<p>The clearer laws principles require that, amongst other things, the laws are no more complex than necessary to give effect to the policy, and that people affected by the laws can understand the laws and how they apply to them. While each of the individual instruments is reasonably clear, the fact that there are 17 separate instruments dealing with essentially one subject matter (subsidies and payments relating to medical indemnity for medical practitioners and eligible midwives) has the effect of making the law difficult to navigate. This adversely impacts those in government administering the law, and stakeholders. A key recommendation of this Thematic Review is that the opportunity be taken to repeal all redundant instruments/provisions and to consolidate the instruments such that they are clearer and more user-friendly.</p>
<p>What was the advice of stakeholders in relation to the instruments.</p>	<p>Most stakeholders did not make comments on individual instruments but expressed support for repealing redundant legislation, consolidating instruments and any other measures designed to support ease of use for stakeholders.</p> <p>Through the submissions on the Thematic Review a number of stakeholders also raised broader matters of policy, and suggested a number of changes to the schemes. These broader policy issues and stakeholder suggestions will be examined as part of the First Principles Review which is occurring in parallel with this Thematic Review.</p>

## Chapter 1 - Context

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### What is medical indemnity insurance?

Under national registration arrangements, all registered health professionals must be covered by indemnity insurance. Privately practising health practitioners must purchase their own indemnity insurance. Medical services provided under the public health system are covered by State and Territory professional indemnity arrangements as part of their employment arrangements.

Medical indemnity insurers provide insurance to health practitioners and medical practitioners to pay the cost of claims for medical malpractice proceedings. Insurers also provide a wide range of services including advice on medico legal proceedings, training, disciplinary proceedings and best practice communication and record keeping.

When a medical practitioner applies for insurance and, where applicable, membership with an insurer, the insurer determines a premium based on a range of potential risk factors, such as the location at which the medical practitioner is practising and the medical practitioner's speciality, claiming history, and private income. The insurer charges the medical practitioner an insurance premium and may also charge a separate membership fee.

When a medical practitioner becomes aware of an adverse event, or when a claim is made against a medical practitioner (usually by a patient or a person acting on behalf of a patient) the medical practitioner notifies his/her insurer. The insurer advises and defends the medical practitioner throughout the legal process until the claim is finalised.

As the insurer is responsible for the costs of all claims against their members (some of which may be subsidised by the Commonwealth), the value and frequency of claims directly impacts on the amount of premium that insurers charge to members as well as the costs to the Commonwealth.

Similar arrangements apply to midwives.

### What prompted the Commonwealth Government's involvement in medical indemnity insurance?

In May 2002, the largest medical defence organisation (MDO) in Australia, United Medical Protection (UMP), was placed into provisional liquidation, which resulted in a potential lack of insurance cover for many medical practitioners. There was insufficient capacity in the rest of the medical indemnity market to accept UMP members, in the event that UMP could not continue to operate.

At the same time, medical practitioners were experiencing significant increases in premiums and fees from MDOs/insurers. In extreme cases, medical practitioners were paying over a

third of their incomes for indemnity cover, while others considered leaving the profession or ceasing high-risk procedures like obstetrics.

In response to this crisis, the Australian Government's medical indemnity insurance package was announced by the Prime Minister on 23 October 2002. The reform package included a variety of measures including premium subsidies, government assistance to MDOs/insurers and medical practitioners for high-cost claims and placing the industry within a new regulatory framework.

Since 2002, there have been some changes to the schemes (including the introduction of two schemes to support midwives) but the broad objectives of the schemes remain - to promote stability of the medical indemnity insurance industry and support the availability of affordable indemnity insurance for medical practitioners and eligible midwives.

### How do each of the schemes within the IIF support privately practising medical practitioners and eligible midwives?

The schemes within the IIF are:

- **Premium Support Scheme (PSS)** – subsidises 60% of indemnity insurance costs for participating medical practitioners whose premiums exceed 7.5% of their income from private practice. PSS also subsidises 75% of the difference between the higher premiums for rural procedural GPs and premiums for non-procedural GPs. Universal cover arrangements, enabling all medical practitioners to access indemnity insurance, are also currently encompassed under the PSS.
- **High Cost Claims Scheme (HCCS)** – reimburses medical indemnity insurers 50% of the eligible insurance payout over \$300,000 up to the limit of the practitioner's cover, for claims notified on or after 1 January 2004. From 1 July 2018 the threshold increases from \$300,000 to \$500,000.
- **Exceptional Claims Scheme (ECS)** – reimburses medical indemnity insurers for 100% of the cost of private practice claims that are above the limit of their medical indemnity insurance contract limit, typically \$20 million.
- **Run-Off Cover Scheme (ROCS)** – reimburses medical indemnity insurers for 100% of the cost of eligible claims for medical practitioners who have ceased private practice because of retirement, disability, maternity leave, death, or if they stop working as a medical practitioner in Australia. The ongoing costs of the scheme are met by the ROCS support payment, a levy on the premium income of medical indemnity insurers.
- **Incurred But Not Reported (IBNR) Scheme** – reimburses the participating medical indemnity insurer for 100% of claims made against medical practitioners arising from incidents that took place on or before 30 June 2002, provided they held incident-occurring based cover with a participating MDO. The IBNR Scheme was established to support the former UMP (now Avant Mutual Group Limited (Avant)) to continue to

provide medical indemnity insurance after it was placed into provisional liquidation in 2002. In practice, Avant is the only participating organisation.

- **Midwife Professional Indemnity (Commonwealth Contribution) Scheme** – under Level 1 of this Scheme, the Commonwealth reimburses the insurer for 80% of the cost of a claim that exceeds the \$100,000 threshold up to \$2 million. Under Level 2 of this Scheme, the Commonwealth reimburses the insurer for 100% of the cost of the claim above the \$2 million threshold.
- **Midwife Professional Indemnity Run-off Cover Scheme (Midwife ROCS)** – provides secure ongoing insurance for eligible midwives who have ceased private practice because of retirement, disability, maternity leave, death or other reasons, with 100% of the cost of claims reimbursed by the Commonwealth.

### What legislation supports the schemes?

The schemes are supported by 8 Acts and 17 instruments. In summary, the instruments are designed to achieve the following purpose:

Act	Instrument	Purpose
<b>Medical Indemnity Act 2002</b>	<i>Medical Indemnity (Unfunded IBNR factor - United Medical Protection Limited) Determination 2003</i>	Establishes that the unfunded IBNR factor for Avant is 1 (meaning that the Government reimburses the full costs of IBNR claims incurred by Avant).
	<i>Premium Support (Medical Indemnity Provider) Scheme 2006</i>	The Premium Support Scheme (PSS) assists eligible medical practitioners with the cost of their insurance premiums.  Sets out details regarding the PSS contract, the eligibility of medical practitioners and the amount of subsidies.
	<i>Premium Support Scheme 2004</i>	Establishes the PSS for payment of subsidies to medical indemnity insurers and MDOs on behalf of medical practitioners. The instrument also: <ul style="list-style-type: none"> <li>• provides for the Commonwealth to enter into contracts with medical indemnity insurers for the purposes of the PSS</li> <li>• describes:               <ul style="list-style-type: none"> <li>– eligibility requirements for subsidy to be paid to contracted insurers on behalf of medical practitioners</li> <li>– the method by which the amount of subsidy is calculated</li> <li>– the circumstances in which advance subsidy is payable</li> </ul> </li> <li>• the conditions that must be met by contracted insurers for subsidy to be payable</li> <li>• provides for the payment of an</li> </ul>

Act	Instrument	Purpose
		<p>administration fee to compliant contracted insurers, and</p> <ul style="list-style-type: none"> <li>provides for review of decisions made under PSS and for other administrative matters.</li> </ul>
	<p><i>Medical Indemnity (Run-off Cover Claims and Administration) Protocol 2006</i></p>	<p>Enables the payment of implementation costs incurred prior to 1 July 2006, and compliance costs (for the period 1 July 2004 to 1 July 2005) to medical indemnity insurers.</p> <p>Includes provisions about application for payment, payment dates and recovery of overpayment.</p>
	<p><i>Medical Indemnity (Run-off Cover Claims and Administration) Protocol 2006 (No.2)</i></p>	<p>Enables the payment of claims handling fees to medical indemnity providers for managing an eligible run-off claim. Also enables the payment of ongoing administration costs to medical indemnity insurers that meet certain conditions and incur certain costs in respect of administering run-off insurance.</p> <p>Provides for payment of a fixed amount to Avant for a specified period (1 January 2007 to 30 June 2009).</p> <p>Sets out when a claims handling fee (or payments on account of legal, administrative or other costs) are payable and the amount.</p> <p>Includes provisions about making an application for payment to the Chief Executive Medicare, payment date and recovery of overpayment.</p>
	<p><i>Medical Indemnity (IBNR Claims) Protocol 2006</i></p>	<p>Establishes when claims handling fees are payable to an MDO, and the amount that is payable in different circumstances.</p> <p>Describes how an application for payment may be made, the payment date, and the process for recovery of overpayments.</p>
	<p><i>Medical Indemnity (Non-participating MDOs) Determination 2003</i></p>	<p>Provides that four MDOs are non-participating MDOs in relation to the IBNR scheme (the effect being that only Avant is the only participating MDO).</p>
	<p><i>Medical Indemnity (UMP support payment exemption) Regulations 2006</i></p>	<p>Exempts certain members (medical practitioners) from paying the UMP support payment for specified contribution years.</p>

Act	Instrument	Purpose
	<i>Medical Indemnity Regulations 2003</i>	Provides further detail: <ul style="list-style-type: none"> <li>• prescribing a late penalty payment rate where an MDO or insurer owes money to the Commonwealth relating to the IBNR Scheme</li> <li>• setting the high cost claims threshold for the HCCS</li> <li>• describing the circumstances in which a claim will be a qualifying claim for the purposes of the ECS</li> <li>• prescribing the various classes of persons against whom a claim may be made, for the purposes of the ROCS; prescribing a penalty interest rate for late repayment (to the Commonwealth) of any overpayments paid in relation to the ROCS; and describing matters that may be included in the ROCS Claims and Administration Protocol</li> <li>• describing circumstances in which prescribed persons are exempt from paying the UMP support payment or the competitive advantage payment, and</li> <li>• for administrative matters such as when and how various payments may be made the Commonwealth.</li> </ul>
<b>Medical Indemnity (Prudential Supervision and Product Standards) Act 2003</b>	<i>Medical Indemnity (Prudential Supervision and Product Standards - Notice of Provision of Run-off Cover) Determination 2007</i>	Specifies additional information that must be provided to the Chief Executive Medicare to support the ROCS, including: <ul style="list-style-type: none"> <li>• general information about the practitioner</li> <li>• information about the history of medical indemnity cover provided to the practitioner</li> <li>• the reason that the practitioner is eligible for ROCS</li> <li>• the level of ROCS cover being provided, and</li> <li>• information regarding premiums paid by the practitioner.</li> </ul>
	<i>Medical Indemnity (Prudential Supervision and Product Standards - Terms and Conditions for Run-off Cover) Determination 2004</i>	States that the terms and conditions for the run-off cover must be the terms and conditions on which the last medical indemnity cover was provided to the practitioner (where those terms and conditions are relevant for the provision of run-off cover).
	<i>Medical Indemnity (Prudential Supervision and Product Standards) Regulations 2003</i>	Describes the types of insurance to which the PSPS Act does not apply. Sets out certain transitional arrangements that were applicable until 30 June 2008.  Describes the circumstances in which an insurer must make a compulsory offer of run-off cover,

Act	Instrument	Purpose
		and states that if an offer of run-off cover is made to a retiring practitioner, then in order to be a complying offer, the premium payable by the practitioner for the cover must not exceed the cost to the insurer of providing the cover without returning a profit to anyone for the provision of that cover.
<b>Medical Indemnity (Run-off Cover Support Payment) Act 2004</b>	Medical Indemnity (Run-off Cover Support Payment) Regulations 2008	<p>Specifies that:</p> <ul style="list-style-type: none"> <li>the amount of ROCS support payment is 5% of the insurer's premium income for contribution years beginning on or after 1 July 2008, and</li> <li>for the purpose of working out the insurer's premium income for a contribution year, the income is to be reduced by any amount of refund payable by a medical indemnity insurer to a medical practitioner in respect of an overpayment of a premium for medical indemnity cover.</li> </ul> <p>Includes some transitional arrangements relating to the transition from the 2004 Regulations to the 2008 Regulations (in respect of the 2008 contribution year).</p>
<b>Medical Indemnity (UMP Support Payment) Act 2002</b>	<i>Medical Indemnity (UMP Support Payment) Regulations 2004</i>	<p>Establishes the financial year starting on 1 July 2006 as the last contribution year for UMP/Avant. Also establishes that:</p> <ul style="list-style-type: none"> <li>the imposition day (for the tax to recoup some of the IBNR costs) for the contribution year starting on 1 July 2003 is 1 May 2004, and</li> <li>the imposition day for contribution years starting on or after 1 July 2004 is 1 November.</li> </ul>
<b>Medical indemnity (Competitive Advantage Payment) Act 2005</b>	<i>Medical Indemnity (Competitive Advantage Payment) Regulations 2005</i>	Specifies the applicable percentage as 4.55% (to determine the amount of competitive advantage payment imposed on Avant/UMP) for the contribution year that starts on 1 July 2005.
<b>Midwife Professional Indemnity (Commonwealth Contribution) Scheme Act 2010</b>	<i>Midwife Professional Indemnity (Commonwealth Contribution) Scheme Rules 2010</i>	Gives the meaning of eligible insurer and eligible midwife. Specifies the interest rate payable if the eligible insurer does not pay back an amount overpaid to the insurer (i.e. late payment of overpayment rate is 0.03% per day).

Act	Instrument	Purpose
<b>Midwife Professional Indemnity (Run-off Cover Support Payment) Act 2010</b>	<i>Midwife Professional Indemnity (Run-off Cover Support Payment) Rules 2010</i>	Establishes a lower percentage of the insurer's premium income which is imposed as a tax in a particular contribution year. The Act specifies a rate of 15% or such lower percentage specified in the rules. The rules specify a lower percentage, being 10%.
<b>Medical Indemnity Agreement (Financial Assistance— Binding Commonwealth Obligations) Act 2002</b>	No instruments	Provides for Commonwealth obligations to provide financial assistance under indemnity agreements relating to Australasian Medical Insurance Limited and UMP.

## Chapter 2 – The purpose and scope of the Thematic Review

### Scope of the Review

The above instruments were all due to sunset at different dates (between 2016 and 2020). In 2016, the Attorney General approved the alignment of all sunset dates to 1 October 2019, so that a Thematic Review could be undertaken in the interim (noting that the two midwife professional indemnity related instruments will sunset on 1 October 2020).

Consistent with the requirements for thematic reviews detailed in the Attorney General's *Guide to Managing Sunsetting of Legislative Instruments*, this Thematic Review has involved consideration of each of the following matters for each instrument detailed in the table above:

- the objectives and purpose of the instrument
- whether the instrument is still required
- the regulatory impact of each instrument and any opportunities to reduce compliance costs (noting that this review has focused on administrative changes that are consistent with current policy whereas the First Principles Review focuses more on fundamental policy questions and opportunities for broader reform)
- whether the instrument is consistent with the broader legal and policy context (including in relation to human rights, international law, administrative laws, criminal law, constitutional law, privacy law and the deregulation agenda) and if not, any necessary changes
- whether the law complies with the clearer laws principles and any changes required to make the instrument simpler, clearer or easier to read, and
- the outcomes of consultation on each of the instruments.

### Inputs to the Review

The Thematic Review involved:

- a review of recent relevant reports including those of the ANAO and DHS
- review of submissions made by stakeholders over the past 3 years
- consultation with:
  - regulatory and other bodies managing or overseeing medical indemnity arrangements in Australia including the Australian Health Practitioner Regulation Agency and the Financial Ombudsman Service
  - relevant Departments including DHS, the Treasury, the Australian Institute of Health and Welfare and the Australian Government Actuary
  - the Law Council of Australia
  - medical indemnity insurers specifically MIGA, MDA National, MIPS, Avant, Guild Group and Berkshire Hathaway Specialty Insurance, and
  - peak bodies representing insurers, medical practitioners and midwives including the Australian Medical Association, Royal Australian College of General Practitioners,

Rural Doctors Association of Australia, the Australian College of Rural and Remote Medicine, Australian College of Midwives and the Insurance Council of Australia.

## Related reviews and processes

In 2016, the ANAO conducted a performance audit of the IIF. In its report, "*The Management, Administration and Monitoring of the Indemnity Insurance Fund*", the ANAO noted the significant improvement in the financial strength and stability of the medical indemnity insurance market since the first of the IIF schemes were introduced in 2002 and recommended that the Department conduct a First Principles Review of the IIF and related schemes.

In response to the ANAO recommendation, in the 2016-17 MYEFO, the Government announced that the Department will conduct a First Principles Review of the IIF and each of the schemes that comprise the IIF. The terms of reference for the First Principles Review are to:

- examine to what degree, in the current environment, Commonwealth intervention has been successful in providing:
  - stability of the medical indemnity insurance industry
  - availability of affordable indemnity insurance for medical practitioners and midwives and by extension, the affordability of healthcare for patients
  - viability for professions, and patients, where claims have a 'long-tail' or high costs
- assess whether the schemes that comprise the IIF continue to be fit for purpose for all parties, and where improvements might be made, and
- consider the appropriate level of Commonwealth support needed to continue stability, affordability and accessibility of professional indemnity insurance for medical practitioners and eligible midwives.

The First Principles Review is being conducted in parallel with the Thematic Review. Subject to the agreement of Government, it is proposed that the legislative changes recommended in each review will be implemented as a package.

## Chapter 3 – Findings of the Thematic Review

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### Do the objectives of the legislation remain relevant?

Overall, the legislation continues to enable Government to:

- subsidise 60% of indemnity insurance costs for medical practitioners whose premiums exceed 7.5% of their income from private practice (via the PSS)
- reimburse medical indemnity insurers 50% of the insurance payout over \$300,000 (for claims notified until 30 June 2018) or \$500,000 (for claims notified from 1 July 2018) and up to the limit of the practitioner's cover (via the HCCS)
- reimburse medical indemnity insurers for 100% of the cost of private practice claims that are above the limit of their medical indemnity insurance contract limit, typically \$20 million (via the ECS)
- reimburse medical indemnity insurers for 100% of the cost of claims for medical practitioners who have ceased private practice and charge a levy on the premium income of medical indemnity insurers (via the ROCS)
- reimburse UMP/Avant for 100% of claims made against medical practitioners arising from incidents that took place on or before 30 June 2002 (the Incurred-But-Not-Reported Scheme)
- reimburse insurers (of midwives) for 80% of claims that exceeds the \$100,000 threshold up to \$2 million and 100% of the cost of the claim above the \$2 million threshold (Midwife Professional Indemnity (Commonwealth Contribution) Scheme), and
- provide secure ongoing insurance for eligible midwives who have ceased private practice with 100% of the cost of claims reimbursed by the Commonwealth (Midwife Professional Indemnity Run-off Cover Scheme).

The legislation achieves the current policy objectives of Government by enabling the payment of subsidies and reimbursements (described above) and recovering certain costs from industry via certain levies.

Separate matters for consideration by Government are:

- to what degree, in the current environment, Commonwealth intervention has been successful in providing stability of the medical indemnity insurance industry and the availability of affordable indemnity insurance for medical practitioners and eligible midwives
- whether the way that government is subsidising/reimbursing is the most effective and efficient use of limited resources or whether alternative approaches are appropriate for achieving Government's objectives, and
- whether there are improvements that could be made to the schemes.

These matters are being considered through the First Principles Review.

## Should any of the instruments be repealed or allowed to sunset?

It is recommended that the following actions be taken in relation to each of the instruments. The reasoning supporting each of these recommendations is included in the fit-for-purpose tests for each instrument, at Attachment A.

Instrument	Recommendation
<i>Medical Indemnity (IBNR Claims) Protocol 2006</i>	<p>Repeal the <i>Medical Indemnity (IBNR Claims) Protocol 2006</i>.</p> <p>Remake the instrument, without substantive change, as part of a consolidated instrument made under the <i>Medical Indemnity Act 2002</i>.</p>
<i>Medical Indemnity (Unfunded IBNR factor - United Medical Protection Limited) Determination 2003</i>	<p>Repeal the <i>Medical Indemnity (Unfunded IBNR factor – United Medical Protection Limited) Determination 2003</i>, after the <i>Medical Indemnity Act 2002</i> is amended, noting that the Act currently prevents repeal of the instrument.</p> <p>Amend section 21 of the <i>Medical Indemnity Act 2002</i> to expressly state that the unfunded IBNR factor is 1.</p> <p>Repeal section 22 and amend section 23 of the <i>Medical Indemnity Act 2002</i> (noting consequential amendments such as a change to the definition of <i>unfunded IBNR factor</i> in section 4).</p>
<i>Medical Indemnity (Non-participating MDOs) Determination 2003</i>	<p>Amend section 11 of the <i>Medical Indemnity Act 2002</i> to refer to UMP/Avant as the only participating MDO.</p> <p>Delete sections 12 and 13 of the <i>Medical Indemnity Act 2002</i>.</p> <p>Repeal the <i>Medical Indemnity (Non-participating MDOs) Determination 2003</i>.</p>
<i>Medical Indemnity (Competitive Advantage Payment) Regulations 2005</i>	<p>Repeal the <i>Medical Indemnity (Competitive Advantage Payment) Act 2005</i>.</p> <p>Repeal the <i>Medical Indemnity (Competitive Advantage Payment) Regulations 2005</i>.</p> <p>Amend the <i>Medical Indemnity Act 2002</i> to repeal Division 2A of Part 3 (and related provisions).</p> <p>Amend the <i>Medical Indemnity Regulations 2003</i> to repeal Division 3.1A of Part 3 (and related provisions).</p>
<i>Medical Indemnity (UMP Support Payment) Regulations 2004</i>	<p>Repeal the <i>Medical Indemnity (UMP Support Payment) Act 2002</i>.</p> <p>Repeal the <i>Medical Indemnity (UMP Support Payment) Regulations 2004</i>.</p>

Instrument	Recommendation
<i>Medical Indemnity (UMP support payment exemption) Regulations 2006</i>	<p>Repeal Division 1 of Part 3 the <i>Medical Indemnity Act 2002</i> (noting other consequential amendments).</p> <p>Repeal the <i>Medical Indemnity (UMP support payment exemption) Regulations 2006</i>.</p>
<i>Premium Support Scheme 2004</i>	<p>Repeal the <i>Premium Support Scheme 2004</i>.</p> <p>Remake the instrument as part of a consolidated instrument made under the <i>Medical Indemnity Act 2002</i>.</p>
<i>Premium Support (Medical Indemnity Provider) Scheme 2006</i>	<p>Repeal the <i>Premium Support (Medical Indemnity Provider) Scheme 2006</i>.</p>
<i>Medical Indemnity (Run-off Cover Support Payment) Regulations 2008</i>	<p>Repeal the <i>Medical Indemnity (Run-off Cover Support Payment) Regulations 2008</i>.</p> <p>Remake the instrument with changes to remove:</p> <ul style="list-style-type: none"> <li>– Regulations 3 and 4</li> <li>– the definition of Avant in Regulation 5</li> <li>– the note under Regulation 6 (consequential to the repeal of Regulation 4).</li> </ul>
<i>Medical Indemnity (Run-off Cover Claims and Administration) Protocol 2006</i>	<p>Repeal the <i>Medical Indemnity (Run-off Cover Claims and Administration) Protocol 2006</i>.</p>
<i>Medical Indemnity (Run-off Cover Claims and Administration) Protocol 2006 (No.2)</i>	<p>Repeal the <i>Medical Indemnity (Run-off Cover Claims and Administration) Protocol 2006 (No. 2)</i>.</p> <p>Remake Parts 1-4 of the instrument as part of a consolidated instrument made under the <i>Medical Indemnity Act 2002</i>, and with minor amendments to the calculation of ongoing administration costs in section 7.</p> <p>Amend to allow compliance costs for Run-off Cover Claims to be paid to new insurers providing medical indemnity insurance.</p>
<i>Medical Indemnity Regulations 2003</i>	<p>Repeal the <i>Medical Indemnity Regulations 2003</i>.</p> <p>Remake the instrument as the <i>Medical Indemnity Regulations 2018</i>. In the remade instrument:</p> <ul style="list-style-type: none"> <li>• do not include existing regulations 14 and 27 (not in use/operable)</li> <li>• do not include existing Divisions 3.1 and 3.1A and regulation 26 (relating to the UMP support payment and the competitive advantage payment), and</li> <li>• include matters currently in other stand-alone instruments that could be prescribed in the one set of Regulations made under the <i>Medical Indemnity Act 2002</i>.</li> </ul>

Instrument	Recommendation
<p><i>Medical Indemnity (Prudential Supervision and Product Standards - Notice of Provision of Run-off Cover) Determination 2007</i></p>	<p>Repeal the <i>Medical Indemnity (Prudential Supervision and Product Standards - Notice of Provision of Run-off Cover) Determination 2007</i>.</p> <p>Remake the instrument as the <i>Medical Indemnity (Prudential Supervision and Product Standards - Notice of Provision of Run-off Cover) Determination 2018</i>.</p> <p>In remaking the instrument, remove requirements for insurers to provide information that is not necessary for the effective and efficient management of the ROCS scheme (discussed above) and remove redundant references to UMP support payments.</p>
<p><i>Medical Indemnity (Prudential Supervision and Product Standards - Terms and Conditions for Run-off Cover) Determination 2004</i></p>	<p>Repeal the <i>Medical Indemnity (Prudential Supervision and Product Standards - Terms and Conditions for Run-off Cover) Determination 2004</i>.</p> <p>Amend subsection 26A(4) of the <i>Medical Indemnity (Prudential Supervision and Product Standards) Act 2003</i> to incorporate the two conditions currently in the Determination (removing the need for the Determination).</p>
<p><i>Medical Indemnity (Prudential Supervision and Product Standards) Regulations 2003</i></p>	<p>Subject to the agreement of the Treasurer:</p> <p>Repeal the <i>Medical Indemnity (Prudential Supervision and Product Standards) Regulations 2003</i>.</p> <p>Remake the instrument as the <i>Medical Indemnity (Prudential Supervision and Product Standards) Regulations 2018</i>.</p> <p>In remaking the instrument, remove Part 2 and Schedules 1 and 2 (relating to expired transitional arrangements).</p>
<p><i>Midwife Professional Indemnity (Commonwealth Contribution) Scheme Rules 2010</i></p>	<p>Repeal the <i>Midwife Professional Indemnity (Commonwealth Contribution) Scheme Rules 2010</i>.</p> <p>Remake the instrument, without substantive change, as the <i>Midwife Professional Indemnity (Commonwealth Contribution) Scheme 2018</i>.</p>
<p><i>Midwife Professional Indemnity (Run-off Cover Support Payment) Rules 2010</i></p>	<p>Repeal the <i>Midwife Professional Indemnity (Run-off Cover Support Payment) Rules 2010</i>.</p> <p>Remake the instrument, without substantive change, as the <i>Midwife Professional Indemnity (Run-off Cover Support Payment) Rules 2018</i>.</p>

## What is the regulatory impact of the instruments? Is there opportunity for deregulation?

Many of the instruments are declaratory only and as such there is no opportunity for deregulation or to reduce compliance costs. This includes the following instruments:

- *Medical Indemnity (Unfunded IBNR factor - United Medical Protection Limited) Determination 2003*
- *Medical Indemnity (Non-participating MDOs) Determination 2003*
- *Midwife Professional Indemnity (Commonwealth Contribution) Scheme Rules 2010*, and
- *Midwife Professional Indemnity (Run-off Cover Support Payment) Rules 2010*.

However, for the more substantive instruments, it is proposed that:

- all redundant provisions be repealed (to clarify the legislation and reduce costs to insurers and practitioners having to navigate complex legislation), and
- wherever possible, instruments that require information to be reported to Government be amended to minimise the information reported to that which is absolutely necessary to enable Government to effectively and efficiently manage the relevant schemes.

Any changes that have policy or financial implications have not been addressed through this Thematic Review but will instead be dealt with as part of the First Principles Review.

## Are the instruments consistent with the broader legal and policy context?

In summary:

- **Human rights** - The instruments do not engage any of the human rights and freedoms recognised in the seven core international human rights treaties which Australia has ratified. However, the overarching purpose of the medical indemnity and midwife indemnity legislation is to enable payments to be made to insurers on behalf of medical practitioners and eligible midwives such that persons who make legitimate claims against medical practitioners or eligible midwives are able to be compensated for any loss they have suffered. This supports Article 12(2)(d) of the International Covenant on Economic, Social and Cultural Rights such that it creates “conditions which would assure to all medical service and medical attention in the event of sickness”.
- **International law** – None of the instruments intersect with any international agreements or arrangement and nor do they relate to any matters of security, trade or investment.
- **Constitutional law** - No constitutional law issues have been raised in any litigation or by state or territory governments.
- **Criminal offences** – The *Medical Indemnity Act 2002* creates a number of offences relating to matters such as: failure to give certain information to the Chief Executive

Medicare, failure to notify the Chief Executive Medicare of certain matters and failure to keep certain records relating to the schemes. These offences are consistent with the *Attorney Generals' Guide to Framing Commonwealth Offences* and the penalty units attached to each offence have been benchmarked against like offences in other Commonwealth laws and found to be appropriate. While the enabling Acts create offences, no offences are created through the various instruments. To date the Commonwealth has not prosecuted an offence under *the Medical Indemnity Act 2002*.

- **Administrative law** – Certain decisions made in relation to the PSS scheme (under two instruments) are reviewable decisions. To date, no applications have been made for review by the AAT.
- **Privacy Law** – A number of the instruments require submission of information (by insurers or practitioners) to DHS or the Department. It is likely that information provided to these government agencies is personal and/or confidential information protected under the *Privacy Act 1988* and the Australian Privacy Principles (APP). While the instruments do not expressly refer to the legislation or the APP, all government departments are subject to such legislation and deal with all information in accordance with relevant requirements.

### Do the instruments comply with the clearer laws principles? What can be done to make them simpler, clearer or easier to read?

The clearer laws policy requires that, amongst other things, the laws are no more complex than necessary to give effect to the policy, and that people affected by the laws can understand the laws and how they apply to them. While each of the individual instruments is reasonably clear, the fact that there are 17 separate instruments dealing with essentially one subject matter (subsidies and payments relating to medical indemnity for medical practitioners and midwives) has the effect of making the law difficult to navigate. This adversely impacts those in government administering the law and stakeholders. A key recommendation of this Thematic Review is that the opportunity be taken to repeal all redundant instruments and provisions and to consolidate and rename the instruments such that they are clearer and more user-friendly.

### What has been the stakeholder response to the Thematic Review?

Most stakeholders did not make comments on individual instruments but expressed support for repealing redundant legislation, consolidating instruments and any other measures designed to support ease of use for stakeholders. The comments from stakeholders suggest that the complexity of the legislation is challenging for some stakeholders to fully understand and stakeholders have requested greater clarity regarding some aspects of the legislation.

Through the submissions on the Thematic Review a number of stakeholders also raised broader matters of policy and suggested a number of changes to the schemes. These broader policy issues and stakeholder suggestions will be examined as part of the First Principles Review which is occurring in parallel with this Thematic Review.

## Chapter 4 – Proposed approach to implementing the findings of this Thematic Review

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Should Government agree the recommendations from this Thematic Review, it is proposed that:

- drafting instructions be prepared in early 2018 to give effect to the recommended changes. This would include amendments to Acts (to be included in an amending Bill), the preparation of repeal instruments and the drafting of new legislative instruments. While not all changes to the delegated legislation depend on changes to the enabling Acts, it is proposed that the changes to the enabling Acts occur before any changes to the delegated legislation are made, and
- the changes arising from the Thematic Review progress as part of a wider package of reforms that also includes changes recommended by the First Principles Review. Subject to the timing and outcomes of that Review (and Government agreement), it is anticipated that legislation giving effect to the recommendations from both reviews could be introduced into Parliament during 2018. Changes to instruments could then be made in early 2019. Stakeholders would have significant lead time before the changes take effect (noting that any changes arising from the First Principles Review may be subject to longer transition periods). This timeframe also enables the necessary changes to be made to instruments before they sunset on 1 October 2019.

## Attachment A – Fit for purpose tests

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### Medical Indemnity (IBNR Claims) Protocol 2006 (F2006L03940)

#### 1. Objective of the instrument

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##### What is the objective and purpose of the instrument?

The *Medical Indemnity (IBNR Claims) Protocol 2006* (IBNR Claims Protocol) is made under the *Medical Indemnity Act 2002* (MI Act).

The IBNR Indemnity Scheme was established on 1 January 2003 to enable the Commonwealth to make payments relating to IBNR claims made against members of UMP/Avant arising from incidents occurring prior to June 2002.

Section 27A of the MI Act enables the Minister, by legislative instrument, to determine an IBNR Claims Protocol for: making payments to MDOs (and insurers) of claims handling fees; and making payments on account of legal, administrative or other costs incurred by MDOs and insurers in respect of claims relating to incidents covered by the IBNR Indemnity Scheme.

To this end, the IBNR Claims Protocol describes:

- when a claims handling fee is payable to an MDO in respect of an IBNR claim
- the amount of claim handling fee that is payable in different circumstances
- how an application for payment may be made to Medicare
- the date by which payment will be made by Medicare, and
- the process for recovery of overpayments.

##### Is the instrument still required?

Yes, the provisions contained in the instrument are still necessary but as detailed below this instrument could be combined with others.

While IBNR claims continue to be made, an important aspect of the scheme is enabling claims handling fees to be paid. The IBNR Claims Protocol describes the processes relating to claims handling fees.

An instrument is the best way to achieve these objectives in the future because:

- the process details are not appropriate for inclusion in primary legislation and are most appropriately included in delegated legislation
- while some of the details could be included in non-legislative guidance documents this would not provide legal certainty to MDOs UMP/Avant making applications for claims handling fees. Further, because the Commonwealth is expending money (through the payment of claims handling fees) it is appropriate that there be a degree of transparency

surrounding the circumstances in which such fees are paid and the process for claiming such fees (as the IBNR Claims Protocol provides).

If the instrument was allowed to lapse, claims handling fees could no longer be paid to the MDO (UMP/Avant).

## 2. Regulatory impact

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### Does the instrument impose significant compliance costs on business, community organisations and individuals?

This instrument imposes some compliance costs on UMP/Avant making applications for claims handling fees. However, the application requirements are minimal. The small compliance costs are justified by the benefit received by UMP/Avant (over \$5.4 million since 2003).

### If so, how could compliance costs be reduced?

No submissions were made by Avant suggesting changes to reduce compliance costs.

The Department of Human Services (DHS) will be undertaking a review of all forms to ensure that only relevant information is requested and to improve clarity.

## 3. Identified administrative issues

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Nil.

## 4. Broader legal and policy context

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Assessment of impact on the following legal and policy issues:

Issue	Impact	Assessment
Human rights particularly the rights and freedoms recognised or declared by the seven core international conventions	No	The instrument does not engage any of the human rights and freedoms recognised in the seven core international human rights treaties which Australia has ratified. However, the overarching purpose of the medical indemnity legislation is to enable payments to be made to insurers and medical practitioners such that persons who make legitimate claims against medical practitioners are able to be compensated for any loss they have suffered. This supports Article 12(2)(d) of the <i>International Covenant on Economic, Social and Cultural Rights</i> such that it creates “conditions which would assure to all medical

Issue	Impact	Assessment
		service and medical attention in the event of sickness”.
International law particularly security, trade, investment, fisheries, maritime, aviation and space law.	No	The instrument does not raise any international law issues.
Constitutional law particularly where constitutional issues have been raised in litigation or by state and territory governments.	No	No constitutional law issues have been raised in any litigation or by state or territory governments.
Criminal law particularly to ensure compliance with the Guide to Framing Commonwealth Offences.	No	No criminal offences are created, or referenced, by the instrument.
Administrative law particularly merits or judicial review, administrative decision making processes and alternative dispute resolution.	No	This instrument does not create any reviewable decisions.
Privacy law particularly compliance with the Australian Privacy Principles (APP).	No	The IBNR Claims Protocol describes a process by which applications are made to Medicare by UMP/Avant for a claims handling fee. As part of the application process, it is likely that UMP/Avant will provide information to Medicare that is personal and/or confidential information protected under the <i>Privacy Act 1988</i> and the APP. While the Protocol does not expressly refer to the legislation or the APP, Medicare is subject to such legislation and deals with all information in accordance with relevant requirements.
Deregulation particularly the Government’s commitment to reducing regulatory burdens.	No	See comments below.

## 5. Clearer laws

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### Does the instrument comply with clearer laws principles?

Yes, this instrument complies with the clearer laws principles. The instrument:

- is no more complex than is necessary to give effect to policy, and
- is readily understandable, such that the one organisation to whom the law applies (UMP/Avant) can readily understand the requirements in relation to applications for claims handling fees.

### What can be done to make the instrument simpler, clearer or easier to read?

While the provisions included in the IBNR Claims Protocol are necessary to enable the payment of claims handling fees, it would be desirable to consolidate these provisions in a single instrument made under the *Medical Indemnity Act 2002*. This would:

- ease administration
- enable affected parties to view all relevant provisions in fewer locations, and
- ensure that all relevant provisions relation to the IBNR Indemnity Scheme are in one or two instruments (noting that some matters must be included in the Regulations, whereas others may be included in a legislative instrument made by the Minister).

### Does the instrument meet OPC drafting and publishing standards?

Yes, the instrument meets current drafting and publishing standards.

## 6. Consultation

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No stakeholder comments were made on this instrument. However, stakeholders acknowledged the value of repealing unnecessary legislation or consolidating instruments where possible.

## 7. Outcome

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### Recommendation

- Repeal the *Medical Indemnity (IBNR Claims) Protocol 2006*.
- Remake the content of the instrument, without substantive change, as part of a consolidated instrument made under the *Medical Indemnity Act 2002*.

## **Medical Indemnity (Unfunded IBNR Factor – United Medical Protection Limited) Determination 2003 (F2006B00118)**

### **1. Objective of the instrument**

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#### **What is the objective and purpose of the instrument?**

The *Medical Indemnity (Unfunded IBNR factor – United Medical Protection Limited) Determination 2003* is made under the *Medical Indemnity Act 2002* (MI Act).

Subsection 22(1) of the MI Act provides that a participating MDO's unfunded IBNR factor is 0 (if there is no determination in force) or the factor determined by the Minister, by legislative instrument, for the participating MDO.

The *Medical Indemnity (Unfunded IBNR factor – United Medical Protection Limited) Determination 2003* states that the unfunded IBNR factor for UMP/Avant (the only participating MDO) is 1.

The effect of this is that, under the IBNR Indemnity Scheme (that was established on 1 January 2003 to enable UMP/Avant members to be reimbursed for claims made against them arising from incidents prior to June 2002) the Commonwealth will reimburse the full cost of claims (e.g. 100% - reflecting an unfunded IBNR factor of 1).

#### **Is the instrument still required?**

The substance contained in the instrument is still necessary. However, changes to the MI Act would enable this instrument to sunset without requiring it to be remade.

Section 22 of the MI Act expressly provides that the Minister may not vary or revoke a determination made under paragraph 22(1)(b) (namely *the Medical Indemnity (Unfunded IBNR factor – United Medical Protection Limited) Determination 2003*).

While IBNR claims continue to be made, the legislation needs to describe the amount of the IBNR indemnity that will be paid by the Commonwealth. Section 21 of the MI Act describes the amount of the IBNR indemnity, but it relies on a calculation that requires identification of the unfunded IBNR factor (which is described in the *Medical Indemnity (Unfunded IBNR factor – United Medical Protection Limited) Determination 2003*).

This factor could continue to be described in an instrument, or the Act could be amended such that the IBNR factor appears in the MI Act. This would be possible because it is not likely that the factor will change in the few remaining years of the IBNR Indemnity Scheme.

Without the instrument (or an amendment to the Act), the IBNR factor will be 0 (as stated by the MI Act) and as such, no claims would be able to be paid for IBNR liabilities.

If the instrument was allowed to lapse without changes to the MI Act, UMP/Avant could not be reimbursed for IBNR claims.

The legislation could be improved, to make it no more complex than necessary to achieve its objective, by amending section 21 of the MI Act to expressly state that the unfunded IBNR factor is 1. This would enable the repeal of sections 22 and 23 of the Act, along with the repeal of the *Medical Indemnity (Unfunded IBNR factor – United Medical Protection Limited) Determination 2003*.

## 2. Regulatory impact

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### Does the instrument impose significant compliance costs on business, community organisations and individuals?

No. This instrument does not impose significant compliance costs on business, community organisations and individuals.

### If so, how could compliance costs be reduced?

Not applicable.

## 3. Identified administrative issues

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Nil.

## 4. Broader legal and policy context

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Issue	Impact	Assessment
Human rights particularly the rights and freedoms recognised or declared by the seven core international conventions	No	The instrument does not engage any of the human rights and freedoms recognised in the seven core international human rights treaties which Australia has ratified. However, the overarching purpose of the medical indemnity legislation is to enable payments to be made to insurers and medical practitioners such that persons who make legitimate claims against medical practitioners are able to be compensated for any loss they have suffered. This supports Article 12(2)(d) of the International Covenant on Economic, Social and Cultural Rights such that it creates “conditions which would assure to all medical service and medical

Issue	Impact	Assessment
		attention in the event of sickness”.
International law particularly security, trade, investment, fisheries, maritime, aviation and space law.	No	The instrument does not raise any international law issues.
Constitutional law particularly where constitutional issues have been raised in litigation or by state and territory governments.	No	No constitutional law issues have been raised in any litigation or by state or territory governments.
Criminal law particularly to ensure compliance with the Guide to Framing Commonwealth Offences.	No	No criminal offences are created, or referenced, by the instrument.
Administrative law particularly merits or judicial review, administrative decision making processes and alternative dispute resolution.	No	The instrument does not create any reviewable decisions.
Privacy law particularly compliance with the Australian Privacy Principles (APP).	No	The instrument does not require the provision of information to the Department or any other person such that the requirements of the <i>Privacy Act 1988</i> and the APP would be triggered.
Deregulation particularly the Government’s commitment to reducing regulatory burdens.	No	Not relevant because the instrument is declaratory only.

## 5. Clearer laws

### Does the instrument comply with clearer laws principles?

Yes, this instrument complies with the clearer laws principles.

### What can be done to make the instrument simpler, clearer or easier to read?

While the provision included in the determination is necessary to enable the payment of IBNR claims, it would be desirable to amend section 21 (and related provisions) of the MI Act such that there is no longer any need for the relevant IBNR factor to be included in a Determination (and the Determination would also be repealed as a consequence of the Act amendments).

This would have no practical impact but would remove the need for a separate Determination and would make the means for calculating the IBNR indemnity clear on the face of the law.

It would also enable the repeal of a number of provisions in the Act that relate to the process for making the Determination.

### **Does the instrument meet OPC drafting and publishing?**

Yes, the instrument meets current drafting and publishing standards.

## **6. Consultation**

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No stakeholder comments were made on this instrument. However, stakeholders acknowledged the value of repealing unnecessary legislation or consolidating instruments where possible.

## **7. Outcome**

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### **Recommendation**

- Amend section 21 of the *Medical Indemnity Act 2002* to expressly state that the unfunded IBNR factor is 1.
- Repeal section 22 and amend section 23 of the *Medical Indemnity Act 2002* (noting consequential amendments such as a change to the definition of *unfunded IBNR factor* in section 4).
- Repeal the *Medical Indemnity (Unfunded IBNR factor – United Medical Protection Limited) Determination 2003*.

## Medical Indemnity (Non-participating MDOs) Determination 2003 (F2009B00209)

### 1. Objective of the instrument

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#### What is the objective and purpose of the instrument?

The *Medical Indemnity (Non-participating MDOs) Determination 2003* is made under the *Medical Indemnity Act 2002* (MI Act).

The MI Act describes the IBNR (incurred but not reported) Indemnity Scheme (established on 1 January 2003) that enables payments to be made to participating MDOs. The only participating MDO is UMP/Avant and the scheme enables Commonwealth payments to be made in relation to IBNR claims arising from incidents prior to June 2002.

Section 11 of the MI Act provides that an MDO is a participating MDO unless the MDO was not in existence on 30 June 2002 or the Minister determines under section 12 that the MDO is not a participating MDO.

Section 12 of the MI Act enables the Minister to determine, by legislative instrument, that an MDO is not a participating MDO. Sections 12 and 13 describe the matters that must be taken into account by the Minister (and the process that must be followed) before determining that an MDO is not a participating MDO.

The *Medical Indemnity (Non-participating MDOs) Determination 2003* provides that four MDOs are not participating MDOs. The effect of this is that the only participating MDO, in the IBNR Indemnity Scheme, is UMP/Avant.

#### Is the instrument still required?

While the legislation continues to enable payments to be made under the IBNR Indemnity Scheme, there continues to be a need to define who is the participating MDO. However, the MI Act could be amended such that section 11 defines a participating MDO to be UMP/Avant. This would mean that section 12 and 13 could be deleted from the MI Act and there would no longer be a need for this instrument.

### 2. Regulatory impact

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#### Does the instrument impose significant compliance costs on business, community organisations and individuals?

Yes.

#### If so, how could compliance costs be reduced?

Not applicable.

### 3. Identified administrative issues

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Nil.

### 4. Broader legal and policy context

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Assessment of impact on the following legal and policy issues:

Issue	Impact	Assessment
Human rights particularly the rights and freedoms recognised or declared by the seven core international conventions	No	The instrument does not engage any of the human rights and freedoms recognised in the seven core international human rights treaties which Australia has ratified. However, the overarching purpose of the medical indemnity legislation is to enable payments to be made to insurers and medical practitioners such that persons who make legitimate claims against medical practitioners are able to be compensated for any loss they have suffered. This supports Article 12(2)(d) of the <i>International Covenant on Economic, Social and Cultural Rights</i> such that it creates “conditions which would assure to all medical service and medical attention in the event of sickness”.
International law particularly security, trade, investment, fisheries, maritime, aviation and space law.	No	The instrument does not raise any international law issues.
Constitutional law particularly where constitutional issues have been raised in litigation or by state and territory governments.	No	No constitutional law issues have been raised in any litigation or by state or territory governments.
Criminal law particularly to ensure compliance with the Guide to Framing Commonwealth Offences.	No	No criminal offences are created, or referenced, by the instrument.
Administrative law particularly merits or judicial review, administrative decision making processes and alternative dispute resolution.	No	The instrument does not create any reviewable decisions.
Privacy law particularly compliance with the Australian Privacy Principles	No	The instrument does not require the provision of information to the Department

Issue	Impact	Assessment
(APP).		or any other person such that the requirements of the <i>Privacy Act 1988</i> and the APP would be triggered.
Deregulation particularly the Government's commitment to reducing regulatory burdens.	No	Not relevant because the instrument is declaratory only.

## 5. Clearer laws

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### Does the instrument comply with clearer laws principles?

Yes, the law is declaratory only and stakeholders can readily identify that the MDOs listed in Schedule 1 to the *Medical Indemnity (Non-participating MDOs) Determination 2003* are non-participating MDOs for the purposes of the IBNR Indemnity Scheme.

### What can be done to make the instrument simpler, clearer or easier to read?

While the provision included in the determination is necessary to enable the participation of UMP/Avant in the IBNR Indemnity Scheme, it would be desirable to amend section 11 of the MI Act to refer to UMP/Avant as the only participating MDO. Sections 12 and 13 of the MI Act (which allow the Minister to determine that an MDO is not a participating MDO) could then be repealed. There would no longer be any need for the Determination (and the Determination would also be repealed as a consequence of the MI Act amendments).

### Does the instrument meet OPC drafting and publishing standards?

Yes, the instrument meets current drafting and publishing standards.

## 6. Consultation

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No stakeholder comments were made on this instrument. However, stakeholders acknowledged the value of repealing unnecessary legislation or consolidating instruments where possible.

## 7. Outcome

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### Recommendation

- Amend section 11 of the MI Act to refer to UMP/Avant as the only participating MDO.
- Delete sections 12 and 13 of the MI Act.
- Repeal the *Medical Indemnity (Non-participating MDOs) Determination 2003*.

## Medical Indemnity (Competitive Advantage Payment) Regulations 2005 (F2005L04110)

### 1. Objective of the instrument

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#### What is the objective and purpose of the instrument?

The *Medical Indemnity (Competitive Advantage Payment) Regulations 2005* (MI (CAP) Regulations) are made under the *Medical Indemnity (Competitive Advantage Payment) Act 2005* (MI (CAP) Act).

The MI (CAP) Act imposes an annual tax on MDOs participating in the IBNR Indemnity Scheme. The only MDO participating in the scheme is UMP/Avant and, as such, the MI (CAP) Act imposes a tax on UMP/Avant to neutralise any competitive advantage they have as a result of participating in the IBNR Indemnity Scheme.

The MI (CAP) Act enables regulations to be made:

- declaring that a financial year specified in regulations is the last contribution year, and
- describing relevant matters for the purposes of setting the amount of the competitive advantage payment. The MI (CAP) Act establishes a formula for determining the amount of the payment and enables regulations to prescribe the applicable percentage for inclusion in the formula.

The MI (CAP) Regulations set the applicable percentage (relevant to the formula for working out the competitive advantage payment amount) at 4.55%.

The MI (CAP) Act and the MI (CAP) Regulations, operate in conjunction with the *Medical Indemnity Act 2002* and the *Medical Indemnity Regulations 2003*.

Section 59B of the *Medical Indemnity Act 2002* provides that a medical indemnity insurer is liable to pay a competitive advantage payment amount for a financial year if the financial year is a contribution year and the person is not exempt from the payment under section 59C.

Section 59C further provides that the regulations may provide that a person is exempt from the competitive advantage payment in the circumstances specified in the regulations.

Section 25A of the *Medical Indemnity Regulations 2003* provides that, for section 59C of the *Medical Indemnity Act 2002*, a person is exempt from the competitive advantage payment if:

- the insurer has entered into a deed of agreement with the Commonwealth to pay, as a lump sum, an amount to the Commonwealth to redress the competitive advantage received by the insurer, or a participating MDO of the insurer, through participation in the IBNR Indemnity Scheme, and

- the insurer has paid to the Commonwealth the amount in accordance with the deed of agreement.

In April 2006 UMP/Avant (the only MDO insurer subject to the competitive advantage payment) entered such a deed with the Commonwealth. As a result, UMP was no longer liable to pay the competitive advantage payment.

This makes both the MI (CAP) Act and the MI (CAP) Regulations redundant.

**Is the instrument still required?**

No. Both the MI (CAP) Act and the MI (CAP) Regulations require repeal.

Amendments also need to be made to:

- the *Medical Indemnity Act 2002* to repeal Division 2A of Part 3 (and related provisions). These provisions establish the competitive advantage payment scheme, and
- the *Medical Indemnity Regulations 2003* to repeal Division 3.1A of Part 3 (and related provisions). These provisions exempt UMP/Avant from liability for the competitive advantage payment on the basis that they entered into a deed with the Commonwealth and fulfilled their payment obligations.

**2. Regulatory impact**

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**Does the instrument impose significant compliance costs on business, community organisations and individuals?**

This instrument is no longer operable and as such does not impose any compliance costs on business, community organisations or individuals.

**If so, how could compliance costs be reduced?**

Not applicable (repeal of instrument recommended).

**3. Identified administrative issues**

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Nil.

**4. Broader legal and policy context**

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Assessment of impact on the following legal and policy issues:

Issue	Impact	Assessment
Human rights particularly the rights and freedoms recognised or declared by the	No	N/A

Issue	Impact	Assessment
seven core international conventions		
International law particularly security, trade, investment, fisheries, maritime, aviation and space law.	No	N/A
Constitutional law particularly where constitutional issues have been raised in litigation or by state and territory governments.	No	N/A
Criminal law particularly to ensure compliance with the Guide to Framing Commonwealth Offences.	No	N/A
Administrative law particularly merits or judicial review, administrative decision making processes and alternative dispute resolution.	No	N/A
Privacy law particularly compliance with the Australian Privacy Principles (APP).	No	N/A
Deregulation particularly the Government's commitment to reducing regulatory burdens.	No	N/A

## 5. Clearer laws

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### Does the instrument comply with clearer laws principles?

Not applicable (instrument recommended for repeal).

### What can be done to make the instrument simpler, clearer or easier to read?

Not applicable.

### Does the instrument meet OPC drafting and publishing standards?

Not applicable.

## 6. Consultation

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No stakeholder comments were made on this instrument. However, stakeholders acknowledged the value of repealing unnecessary legislation or consolidating instruments where possible.

## 7. Outcome

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### Recommendation

- Repeal the *Medical Indemnity (Competitive Advantage Payment) Act 2005*.
- Repeal the *Medical Indemnity (Competitive Advantage Payment) Regulations 2005*.
- Amend the *Medical Indemnity Act 2002* to repeal Division 2A of Part 3 (and related provisions).
- Amend the *Medical Indemnity Regulations 2003* to repeal Division 3.1A of Part 3 (and related provisions).

## Medical Indemnity (UMP Support Payment) Regulations 2004 (F2005C00874)

### 1. Objective of the instrument

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#### What is the objective and purpose of the instrument?

The *Medical Indemnity (UMP Support Payment) Regulations 2004* (MI (UMPSP) Regulations) are made under the *Medical Indemnity (UMP Support Payment) Act 2002* (MI (UMPSP) Act).

The MI (UMPSP) Act imposes a tax on members and former members of certain medical defence organisations (MDOs) to recoup some of the costs associated with the IBNR scheme.

UMP/Avant is the only MDO participating in the IBNR and, as such, the tax imposed via the MI (UMPSP) Act is applicable only to UMP/Avant.

The MI (UMPSP) Regulations provide that:

- the imposition day (for the tax to recoup some of the IBNR costs) for the contribution year starting on 1 July 2003 is 1 May 2004
- the imposition day for contribution years starting on or after 1 July 2004 is 1 November, and
- the financial year starting on 1 July 2006 is the last contribution year for UMP/Avant. In April 2006, UMP/Avant reached agreement with the Commonwealth to make a once off payment in lieu of annual payments over 10 years. In doing so, UMP/Avant fulfilled its payment obligations in full, and therefore the regulations were made relieving UMP/Avant of its liability to pay further UMP support payments under the MI (UMPSP) Act.

#### Is the instrument still required?

Neither the MI (UMPSP) Act or the MI (UMPSP) Regulations are required.

Rather than allowing the MI (UMPSP) Regulations to sunset, the regulations should be repealed at the same time as the MI (UMPSP) Act is repealed (in advance of the proposed sunset date of 1 October 2019).

However, if the MI (UMPSP) Act is not repealed, the regulations should remain (i.e. not be allowed to sunset) in order to ensure that UMP/Avant does not become liable for further UMP payments. This is because the effect of the regulations is to declare a final contribution year (2006) (refer regulation 5). Without the regulations, UMP/Avant could continue to be liable to make the support payment by 1 May in each contribution year (see sections 5 and 6 of the MI (UMPSP) Act and regulation 5).

## 2. Regulatory impact

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### Does the instrument impose significant compliance costs on business, community organisations and individuals?

This instrument is declaratory only and prevents further UMP support payments. As such it does not impose any compliance costs on business, community organisations or individuals.

However, if the MI (UMPSP) Regulations were to be repealed (without the enabling MI (UMPSP) Act also being repealed), the effect would be to reactivate the requirement for UMP/Avant to make support payments (imposing a direct cost on UMP/Avant). This would result in the imposition of compliance costs.

### If so, how could compliance costs be reduced?

Not applicable.

## 3. Identified administrative issues

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Nil.

## 4. Broader legal and policy context

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Assessment of impact on the following legal and policy issues:

Issue	Impact	Assessment
Human rights particularly the rights and freedoms recognised or declared by the seven core international conventions	No	N/A
International law particularly security, trade, investment, fisheries, maritime, aviation and space law.	No	N/A
Constitutional law particularly where constitutional issues have been raised in litigation or by state and territory governments.	No	N/A
Criminal law particularly to ensure compliance with the Guide to Framing Commonwealth Offences.	No	N/A
Administrative law particularly merits or judicial review, administrative decision making processes and alternative dispute resolution.	No	N/A

Issue	Impact	Assessment
Privacy law particularly compliance with the Australian Privacy Principles (APP).	No	N/A
Deregulation particularly the Government's commitment to reducing regulatory burdens.	No	N/A

## 5. Clearer laws

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### Does the instrument comply with clearer laws principles?

Not applicable (repeal of instrument recommended).

### What can be done to make the instrument simpler, clearer or easier to read?

Not applicable.

### Does the instrument meet OPC drafting and publishing standards?

Not applicable.

## 6. Consultation

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No stakeholder comments were made on this instrument. However, stakeholders acknowledged the value of repealing unnecessary legislation.

## 7. Outcome

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### Recommendation

- Repeal the *Medical Indemnity (UMP Support Payment) Act 2002*.
- Repeal the *Medical Indemnity (UMP Support Payment) Regulations 2004*.

Note that the MI (UMPSP) Regulations should not be repealed before the MI (UMPSP) Act is repealed.

## **Medical Indemnity (UMP Support Payment Exemption) Regulations 2006 (F2006L03295)**

### **1. Objective of the instrument**

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#### **What is the objective and purpose of the instrument?**

The *Medical Indemnity (UMP support payment exemption) Regulations 2006* (MI (UMPSPE) Regulations) are made under the *Medical Indemnity Act 2002*.

Section 52 of that Act provides that a person may be exempt from a UMP support payment in circumstances specified in regulations.

A UMP support payment is a payment made by MDOs to the Commonwealth to recoup some of the associated costs of the IBNR Indemnity Scheme. As UMP/Avant is the only MDO participating in the Scheme, it was renamed the UMP support payment.

The purpose of the MI (UMPSPE) Regulations was to exempt certain members (medical practitioners) from paying the UMP support payment.

#### **Is the instrument still required?**

No. The last UMP support payments were collected in 2007. As the support payments are no longer collected from any medical practitioners, there is no longer any need to exempt certain practitioners from the UMP support payment. As such, the regulations should be repealed.

The MI (UMPSPE) Regulations should be repealed at the same time that Division 1 of Part 3 of the *Medical Indemnity Act 2002* is repealed.

### **2. Regulatory impact**

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#### **Does the instrument impose significant compliance costs on business, community organisations and individuals?**

This instrument is no longer operable and as such does not impose any compliance costs on business, community organisations or individuals.

#### **If so, how could compliance costs be reduced?**

Not applicable.

### **3. Identified administrative issues**

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Nil.

#### 4. Broader legal and policy context

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Assessment of impact on the following legal and policy issues:

Issue	Impact	Assessment
Human rights particularly the rights and freedoms recognised or declared by the seven core international conventions	No	N/A
International law particularly security, trade, investment, fisheries, maritime, aviation and space law.	No	N/A
Constitutional law particularly where constitutional issues have been raised in litigation or by state and territory governments.	No	N/A
Criminal law particularly to ensure compliance with the Guide to Framing Commonwealth Offences.	No	N/A
Administrative law particularly merits or judicial review, administrative decision making processes and alternative dispute resolution.	No	N/A
Privacy law particularly compliance with the Australian Privacy Principles (APP).	No	N/A
Deregulation particularly the Government's commitment to reducing regulatory burdens.	No	N/A

#### 5. Clearer laws

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**Does the instrument comply with clearer laws principles?**

Not applicable (repeal of instrument recommended).

**What can be done to make the instrument simpler, clearer or easier to read?**

Not applicable.

**Does the instrument meet OPC drafting and publishing standards?**

Not applicable.

**6. Consultation**

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No stakeholder comments were made on this instrument. However, stakeholders acknowledged the value of repealing unnecessary legislation or consolidating instruments where possible.

**7. Outcome**

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**Recommendation**

- Repeal Division 1 of Part 3 the *Medical Indemnity Act 2002* (noting other consequential amendments).
- Repeal the *Medical Indemnity (UMP support payment exemption) Regulations 2006*.

While the MI (UMPSPE) Regulations could be repealed in advance of the changes to the Act, the changes should ideally be made at the same time.

## Premium Support Scheme 2004 (F2013C00503)

### 1. Objective of the instrument

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#### What is the objective and purpose of the instrument?

The Premium Support Scheme (PSS) assists eligible medical practitioners with the cost of their insurance premiums. Payments of subsidies to medical indemnity insurers are paid on behalf of medical practitioners where the medical indemnity insurer agrees to administer the scheme by entering into a PSS contract with the Commonwealth. If a medical practitioner's medical indemnity premium exceeds 7.5% of estimated private income, they will receive a subsidy towards the cost of the premium beyond that limit. Currently, the PSS subsidises 60% of the cost of the premium above the 7.5% threshold.

The *Premium Support Scheme 2004* is a legislative instrument made under subsection 43(1) of the *Medical Indemnity Act 2002*.

Subsection 43(1) of the Act provides that the Minister may, by legislative instrument, formulate one or more schemes to:

- make payments to medical practitioners or medical indemnity insurers to help medical practitioners meet the cost of purchasing medical indemnity and the cost of paying medical indemnity payments, and
- make payments to medical indemnity insurers to help the medical indemnity insurers meet the cost of administering the schemes (as described above) or complying with their obligations under section 66A of the *Medical Indemnity Act 2002* relating to UMP support payments.

The *Premium Support Scheme 2004*:

- establishes the PSS
- provides for the Commonwealth to enter into contracts with medical indemnity insurers for the purposes of the PSS
- describes:
  - eligibility requirements for subsidy to be paid to contracted insurers on behalf of medical practitioners
  - the method by which the amount of subsidy is calculated
  - the circumstances in which advance subsidy is payable
  - the conditions that must be met by contractors
- provides for the payment of an administration fee to contracted insurers, and
- provides for review of decisions made under the PSS and for other administrative matters.

### **Is the instrument still required?**

Yes, if the instrument were to sunset, this would remove the capacity for the Commonwealth to subsidise the premiums paid by medical practitioners (through payments to medical indemnity insurers), and the capacity for the Commonwealth to pay administration fees to medical indemnity insurers to compensate them for administering the scheme.

This would likely have an immediate impact in terms of increasing premiums payable by some medical practitioners. In 2015-16, 1,237 medical practitioners received a PSS subsidy.

The sunset of the instrument would result in the collapse of the PSS and would therefore have a significant impact on both medical practitioners (by removing subsidy, resulting in them paying the true cost of their premiums) and medical indemnity insurers.

## **2. Regulatory impact**

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### **Does the instrument impose significant compliance costs on business, community organisations and individuals?**

This instrument imposes some compliance costs on medical insurers and medical practitioners. Costs to medical indemnity insurers include costs related to administering the PSS on behalf of medical practitioners. Medical indemnity insurers are however compensated for performing this function via an administration fee (also provided for by the instrument).

Medical practitioners incur costs in relation to reporting certain information to their insurer in order to confirm eligibility for the PSS. For example, to be eligible for the PSS, medical practitioners must provide their medical indemnity insurers with the following information:

- estimated income for the premium period in which PSS is sought
- costs payable to other insurers for run-off cover or retroactive cover in the premium period for which PSS is sought, and
- the medical practitioner's speciality, provider number(s) and practice address.

Medical practitioners who receive the premium subsidy must also inform their insurer of their actual income via a statutory declaration no later than 12 months after the end of the premium period (in order to retain any PSS entitlements and to make any necessary adjustments to the amount of premium support to which they may be entitled).

### **If so, how could compliance costs be reduced?**

In order to efficiently and fairly administer the scheme, certain information needs to be obtained from participating insurers and medical practitioners. This information is kept to a minimum in order to enable effective administration of the scheme.

DHS is currently reviewing its guidance materials, forms and the information requirements to remove requirements for the submission of unnecessary information and to clarify requirements.

### 3. Identified administrative issues

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There are two main issues with the current instrument:

- the confusion generated by virtue of the scheme being administered by both contract and legislation (refer further discussion below), and
- the instrument does not allow for an administration fee to be calculated for new entrants to the PSS. This is because the PSS administration fee is calculated for the financial year commencing 1 July 2013 and indexed each financial year thereafter. Only insurers contracted to offer the PSS during the 2013-14 financial year can access the administration fee. This disadvantages new entrants into the market.

Both of these issues pose questions that go beyond the scope of this Thematic Review because they relate to policy issues and, if addressed, could increase costs to the Commonwealth.

These matters will therefore be considered as part of the First Principles Review, which is occurring in parallel with this Thematic Review.

### 4. Broader legal and policy context

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Assessment of impact on the following legal and policy issues:

Issue	Impact	Assessment
Human rights particularly the rights and freedoms recognised or declared by the seven core international conventions	No	The instrument does not engage any of the human rights and freedoms recognised in the seven core international human rights treaties which Australia has ratified. However, the overarching purpose of the medical indemnity legislation is to enable payments to be made to insurers and medical practitioners such that persons who make legitimate claims against medical practitioners are able to be compensated for any loss they have suffered. This supports Article 12(2)(d) of the <i>International Covenant on Economic, Social and Cultural Rights</i> such that it creates “conditions which would assure to all medical service and medical attention in the event of sickness”.
International law particularly	No	The instrument does not raise any

Issue	Impact	Assessment
security, trade, investment, fisheries, maritime, aviation and space law.		international law issues.
Constitutional law particularly where constitutional issues have been raised in litigation or by state and territory governments.	No	No constitutional law issues have been raised in any litigation or by state or territory governments.
Criminal law particularly to ensure compliance with the Guide to Framing Commonwealth Offences.	No	No criminal offences are created, or referenced, by the instrument.
Administrative law particularly merits or judicial review, administrative decision making processes and alternative dispute resolution.	No	The PSS provides for reconsideration and review by the Administrative Appeals Tribunal (AAT) of certain decisions. To date, no AAT proceedings have been initiated in relation to a PSS decision.
Privacy law particularly compliance with the Australian Privacy Principles (APP).	No	<p>The instrument requires the provision of information to the Department that includes personal and/or confidential information protected under the <i>Privacy Act 1988</i> and the APP. While the instrument does not expressly refer to the legislation or the APP, the Department is subject to such legislation and deals with all information in accordance with relevant requirements.</p> <p>Section 49 of the instrument also enables the exchange of information relating to the PSS between Medicare, the Department, APRA and contracted insurers</p>
Deregulation particularly the Government's commitment to reducing regulatory burdens.	Yes	See comments below

## 5. Clearer laws

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### Does the instrument comply with clearer laws principles?

While the instrument itself is reasonably clear as drafted, complexity is introduced by virtue of the fact that the scheme is described in, and based on, a combination of contracts and legislation.

The scheme could be simplified considerably if the contracts were no longer utilised and changes made to the instrument to reflect the obligations of medical indemnity insurers that are currently provided for in contract.

### What can be done to make the instrument simpler, clearer or easier to read?

While minor changes could be made to the instrument as part of the Thematic Review this would be unlikely to address the more significant issues surrounding the operation and administration of the PSS and the complexity and duplication created administering the scheme under contract and legislation.

It is proposed that opportunities for reform of the PSS (including to reduce regulatory burden) be considered as part of the First Principles Review.

### Does the instrument meet OPC drafting and publishing standards?

While the instrument is broadly consistent with drafting practice there is capacity to consolidate the instrument (with other instruments made under the *Medical Indemnity Act 2002*).

## 6. Consultation

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Stakeholders noted a number of substantive policy issues in relation to the PSS that will be dealt with as part of the First Principles Review.

## 7. Outcome

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### Recommendation

- Repeal the *Premium Support Scheme 2004*.
- Remake the instrument as part of a consolidated instrument made under the *Medical Indemnity Act 2002*.
- Consider changes to the PSS as part of the First Principles Review, as suggested by stakeholders (that would be reflected in a new consolidated instrument).

**Premium Support (Medical Indemnity Provider) Scheme 2006 (F2006L01959)****1. Objective of the instrument**

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**What is the objective and purpose of the instrument?**

The Premium Support Scheme (PSS) assists eligible medical practitioners with the cost of their insurance premiums. Payments of subsidies to medical indemnity insurers are paid on behalf of medical practitioners where the medical indemnity insurer agrees to administer the scheme by entering into a PSS contract. If a medical practitioner's medical indemnity premium exceeds 7.5% of estimated private income, they will receive a subsidy towards the cost of the premium beyond that limit. Currently, the PSS subsidises 60% of the cost of the premium above the 7.5% threshold.

Prior to the PSS, medical practitioners received subsidy via the *Medical Indemnity Subsidy Scheme 2003* (MISS). When the PSS was introduced (to replace the MISS), some medical practitioners who received MISS payments were no longer eligible under the PSS as their insurance provider was not a medical indemnity insurer as defined in the *Medical Indemnity Act 2002*. The Victorian Managed Insurance Authority (VMIA) was one such medical indemnity provider.

The *Premium Support (Medical Indemnity Provider) Scheme 2006* (PS (MPI) Scheme), was therefore put in place to give medical practitioners insured with VMIA access to the same subsidy as others under the PSS. The key difference is the instrument refers to “medical indemnity providers” rather than “medical indemnity insurers”.

The scheme created under the PS (MPI) Scheme mirrors the scheme created under the *Premium Support Scheme 2004*, except for where provisions are not appropriate to VMIA or their medical practitioners.

Like the *Premium Support Scheme 2004*, the PS (MPI) Scheme is a legislative instrument made under subsection 43(1) of the *Medical Indemnity Act 2002*.

**Is the instrument still required?**

This instrument is no longer required. Although the PS (MPI) Scheme was established to give medical practitioners insured with VMIA access to the same subsidy as others under the PSS, the VMIA has never entered into a PSS contract with the Commonwealth.

**2. Regulatory impact**

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**Does the instrument impose significant compliance costs on business, community organisations and individuals?**

Not applicable (repeal of instrument recommended).

**If so, how could compliance costs be reduced?**

Not applicable.

**3. Identified administrative issues**

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Nil.

**4. Broader legal and policy context**

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Assessment of impact on the following legal and policy issues:

Issue	Impact	Assessment
Human rights particularly the rights and freedoms recognised or declared by the seven core international conventions	No	The instrument does not engage any of the human rights and freedoms recognised in the seven core international human rights treaties which Australia has ratified. However, the overarching purpose of the medical indemnity legislation is to enable payments to be made to insurers and medical practitioners such that persons who make legitimate claims against medical practitioners are able to be compensated for any loss they have suffered. This supports Article 12(2)(d) of the International Covenant on Economic, Social and Cultural Rights such that it creates “conditions which would assure to all medical service and medical attention in the event of sickness”.
International law particularly security, trade, investment, fisheries, maritime, aviation and space law.	No	The instrument does not raise any international law issues.
Constitutional law particularly where constitutional issues have been raised in litigation or by state and territory governments.	No	No constitutional law issues have been raised in any litigation or by state or territory governments.
Criminal law particularly to ensure compliance with the Guide to Framing Commonwealth Offences.	No	No criminal offences are created, or referenced, by the instrument.

Issue	Impact	Assessment
Administrative law particularly merits or judicial review, administrative decision making processes and alternative dispute resolution.	No	The PS (MIP) Scheme provides for reconsideration and review by the Administrative Appeals Tribunal (AAT) of certain decisions. To date, no AAT proceedings have been initiated in relation to the PS (MIP) Scheme.
Privacy law particularly compliance with the Australian Privacy Principles (APP).	No	<p>The instrument requires the provision of information to the Department that includes personal and/or confidential information protected under the <i>Privacy Act 1988</i> and the APP. While the instrument does not expressly refer to the legislation or the APP, the Department is subject to such legislation and deals with all information in accordance with relevant requirements.</p> <p>Section 49 of the instrument also enables the exchange of information relating to the PSS between Medicare, the Department, APRA and contractors.</p>
Deregulation particularly the Government's commitment to reducing regulatory burdens.	Yes	See comments below.

## 5. Clearer laws

### Does the instrument comply with clearer laws principles?

Not applicable (repeal of instrument recommended).

### What can be done to make the instrument simpler, clearer or easier to read?

Not applicable.

### Does the instrument meet OPC drafting and publishing standards?

Not applicable.

## 6. Consultation

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No stakeholder comments were made on this instrument. However, stakeholders acknowledged the value of repealing unnecessary legislation.

## 7. Outcome

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### Recommendation

- Repeal the *Premium Support (Medical Indemnity Provider) Scheme 2006*.

## **Medical Indemnity (Run-off Cover Support Payment) Regulations 2008 (F2008L00986)**

### **1. Objective of the instrument**

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#### **What is the objective and purpose of the instrument?**

The Run-off Cover Scheme (ROCS) was established on 1 July 2004 in response to concerns about the capacity of medical practitioners to pay for run-off cover when they no longer earn an income.

The ROCS reimburses medical indemnity insurers for 100% of the cost of claims for medical practitioners who have ceased private practice because of retirement, disability, maternity leave, death, or if they stop working as a medical practitioners in Australia. The ongoing costs of the scheme are met by the Run-off Cover support payment, a levy on the premium income of medical indemnity insurers.

The *Medical Indemnity (Run-off Cover Support Payment) Regulations 2008* (the Regulations) are made under the *Medical Indemnity (Run-off Cover Support Payment) Act 2004* (the Act).

The Act:

- imposes a tax on each medical indemnity insurer by way of a run-off cover support payment
- provides that the amount of the run-off cover support payment is 15% of the insurer's premium income for the contribution year, or such lower percentage specified in regulations for a contribution year, and
- defines premium income for the purposes of the legislation.

The Regulations provide that:

- the amount of the run-off cover support payment is 5% of the insurer's premium income for contribution years beginning on or after 1 July 2008, and
- for the purpose of working out the insurer's premium income for a contribution year, the income is to be reduced by any amount of refund payable by a medical indemnity insurer to a medical practitioner in respect of an overpayment of a premium for medical indemnity cover.

The Regulations also include some transitional arrangements relating to the transition from the 2004 Regulations to the 2008 Regulations (in respect of the 2008 contribution year).

#### **Is the instrument still required?**

Yes, the provisions contained in the instrument are still necessary (other than Regulations 3 and 4 which repeal the 2004 Regulations and provide for transitional matters and certain related definitions).

The instrument specifies the rate of the run-off cover support payment and an exclusion from the calculation of an insurer's premium income (on which the levy is based). If the Regulations were to sunset:

- the rate of the levy would default to 15% of an insurer's premium income (whereas the Regulations set the rate at 5%). This would have a significant impact on insurers, and
- overpayments of premium (that are refunded to medical practitioners) would be included in the calculation of the levy, increasing the amount of levy payable by the insurer.

Separate matters for policy consideration are whether the rate of the levy is set at the appropriate percentage. This will be further considered as part of the First Principles Review being conducted in parallel with this Thematic Review.

Section 55 of the Constitution requires that matters of taxation must be dealt with in separate Acts. As the run-off cover support payment is a tax, a separate Act is needed to impose the tax. The rate of the tax is prescribed in regulations made under the imposition Act.

If the run-off support payment is to be retained, a separate Act and Regulations must be maintained. As such, there is no opportunity for consolidating the *Medical Indemnity (Run-off Cover Support Payment) Regulations 2008* with other regulations made under the *Medical Indemnity Act 2002*.

The Regulations could, however, be remade with changes to remove provisions that have been exhausted such as Regulations 3 and 4 and the definition of Avant in Regulation 5. The note under Regulation 6 could also be removed (consequential to the removal of Regulation 4).

## 2. Regulatory impact

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### **Does the instrument impose significant compliance costs on business, community organisations and individuals?**

This instrument does not impose any compliance costs on business, community organisations and individuals. It is declaratory only.

### **If so, how could compliance costs be reduced?**

Not applicable.

## 3. Identified administrative issues

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Nil.

## 4. Broader legal and policy context

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Assessment of impact on the following legal and policy issues:

Issue	Impact	Assessment
Human rights particularly the rights and freedoms recognised or declared by the seven core international conventions	No	The instrument does not engage any of the human rights and freedoms recognised in the seven core international human rights treaties which Australia has ratified. However, the overarching purpose of the medical indemnity legislation is to enable payments to be made to insurers and medical practitioners such that persons who make legitimate claims against medical practitioners are able to be compensated for any loss they have suffered. This supports Article 12(2)(d) of the <i>International Covenant on Economic, Social and Cultural Rights</i> such that it creates “conditions which would assure to all medical service and medical attention in the event of sickness”.
International law particularly security, trade, investment, fisheries, maritime, aviation and space law.	No	The instrument does not raise any international law issues.
Constitutional law particularly where constitutional issues have been raised in litigation or by state and territory governments.	No	No constitutional law issues have been raised in any litigation or by state or territory governments.
Criminal law particularly to ensure compliance with the <i>Guide to Framing Commonwealth Offences</i> .	No	No criminal offences are created, or referenced, by the instrument.
Administrative law particularly merits or judicial review, administrative decision making processes and alternative dispute resolution.	No	The instrument does not create any reviewable decisions.
Privacy law particularly compliance with the Australian Privacy Principles (APP).	No	The instrument does not require the provision of information to the Department or any other person such that the requirements of the <i>Privacy Act 1988</i> and the APP would be triggered.
Deregulation particularly the Government’s commitment to	No	Not relevant.

Issue	Impact	Assessment
reducing regulatory burdens.		

## 5. Clearer laws

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### Does the instrument comply with clearer laws principles?

Yes. The Regulations contain only two substantive provisions, are no more complex than is necessary to give effect to policy and are readily understandable.

### What can be done to make the instrument simpler, clearer or easier to read?

Provisions that are no longer necessary could be removed (see recommendation below).

### Does the instrument meet OPC drafting and publishing standards?

Yes, the instrument meets current drafting and publishing standards.

## 6. Consultation

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No stakeholder comments were made on this instrument. However, stakeholders acknowledged the value of repealing unnecessary legislation or consolidating instruments where possible.

## 7. Outcome

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### Recommendation

- Repeal the *Medical Indemnity (Run-off Cover Support Payment) Regulations 2008*.
- Remake the instrument with changes to remove:
  - Regulations 3 and 4
  - the definition of Avant in Regulation 5
  - the note under Regulation 6 (consequential to the repeal of Regulation 4).

## Medical Indemnity (Run-off Cover Claims and Administration) Protocol 2006 (F2006L01892)

### 1. Objective of the instrument

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#### What is the objective and purpose of the instrument?

The Run-off Cover Scheme (ROCS) was established on 1 July 2004 in response to concerns about the capacity of medical practitioners to pay for run-off cover when they no longer earn an income.

The ROCS reimburses medical indemnity insurers for 100% of the cost of claims for medical practitioners who have ceased private practice because of retirement, disability, maternity leave, death, or if they stop working as a medical practitioner in Australia. The ongoing costs of the scheme are met by the ROCS support payment, a levy on the premium income of medical indemnity insurers.

The *Medical Indemnity (Run-off Cover Claims and Administration) Protocol 2006* (the Protocol) enables the payment of certain costs to medical indemnity insurers. The instrument is made under section 34ZN of the *Medical Indemnity Act 2002*.

That section provides that the Minister may, by legislative instrument, determine a protocol (the Run-off Cover Claims and Administration Protocol) for:

- making payments to MDOs and medical indemnity insurers of claim handling fees in relation to run-off claims, and
- make payments on account of legal, administrative or other costs incurred by MDOs and medical insurers in respect of:
  - run-off claims, and
  - complying with Division 2A of Part 3 of the *Medical Indemnity (Prudential Supervision and Product Standards) Act 2003* which relates to obligations of MDOs and insurers to provide run-off cover (of a certain prescribed type), to keep certain records and to notify the Chief Executive Medicare of certain matters.

The Protocol enables the payment of certain:

- implementation costs incurred prior to 1 July 2006 relating to implementation costs (of establishing run-off cover) (refer section 5 of the Protocol) and
- annual compliance costs for the period 1 July 2004 and 1 July 2005 (refer section 6 of the Protocol).

The remaining provisions in the Protocol relate to relevant definitions, how an insurer must make applications for payments in accordance with the Protocol, the payment dates and recovery of overpayments.

**Is the instrument still required?**

No. The Protocol relates only to payments for implementation and compliance costs incurred before 1 July 2006. All applications for payments relating to that period have been processed.

**How could the instrument be improved (e.g. to make it no more complex than necessary to achieve that objective)?**

Not applicable (repeal of instrument recommended).

**2. Regulatory impact**

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**Does the instrument impose significant compliance costs on business, community organisations and individuals?**

This instrument is no longer operable and as such does not impose any compliance costs on business, community organisations or individuals.

**If so, how could compliance costs be reduced?**

Not applicable.

**3. Identified administrative issues**

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Nil.

**4. Broader legal and policy context**

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Assessment of impact on the following legal and policy issues:

Issue	Impact	Assessment
Human rights particularly the rights and freedoms recognised or declared by the seven core international conventions	No	N/A
International law particularly security, trade, investment, fisheries, maritime, aviation and space law.	No	N/A
Constitutional law particularly where constitutional issues have been raised in litigation or by state and territory governments.	No	N/A
Criminal law particularly to ensure	No	N/A

Issue	Impact	Assessment
compliance with the Guide to Framing Commonwealth Offences.		
Administrative law particularly merits or judicial review, administrative decision making processes and alternative dispute resolution.	No	N/A
Privacy law particularly compliance with the Australian Privacy Principles (APP).	No	N/A
Deregulation particularly the Government's commitment to reducing regulatory burdens.	No	N/A

## 5. Clearer laws

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### Does the instrument comply with clearer laws principles?

Not applicable (repeal of instrument recommended).

### What can be done to make the instrument simpler, clearer or easier to read?

Not applicable.

### Does the instrument meet OPC drafting and publishing standards?

Not applicable.

## 6. Consultation

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No stakeholder comments were made on this instrument. However, stakeholders acknowledged the value of repealing unnecessary legislation or consolidating instruments where possible.

## 7. Outcome

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### Recommendation

- Repeal the *Medical Indemnity (Run-off Cover Claims and Administration) Protocol 2006*.

## Medical Indemnity (Run-off Cover Claims and Administration) Protocol 2006 (No. 2) (F2006L03938)

### 1. Objective of the instrument

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#### What is the objective and purpose of the instrument?

The Run-off Cover Scheme (ROCS) was established on 1 July 2004 in response to concerns about the capacity of medical practitioners to pay for run-off cover when they no longer earn an income. The ROCS reimburses medical indemnity insurers for 100% of the cost of claims for medical practitioners who have ceased private practice because of retirement, disability, maternity leave, death, or if they stop working as a medical practitioner in Australia. The ongoing costs of the scheme are met by the ROCS support payment, a levy on the premium income of medical indemnity insurers.

The *Medical Indemnity (Run-off Cover Claims and Administration) Protocol 2006 (No. 2)* (the Protocol) enables the payment of certain costs to medical indemnity insurers. The instrument is made under section 34ZN of the *Medical Indemnity Act 2002*.

That section provides that the Minister may, by legislative instrument, determine a protocol (the Run-off Cover Claims and Administration Protocol) for:

- making payments to MDOs and medical indemnity insurers of claims handling fees in relation to run-off claims, and
- make payments on account of legal, administrative or other costs incurred by MDOs and medical insurers in respect of:
  - run-off claims, and
  - complying with Division 2A of Part 3 of the *Medical Indemnity (Prudential Supervision and Product Standards) Act 2003* which relates to obligations of MDOs and insurers to provide run-off cover (of a certain prescribed type), to keep certain records and to notify the Chief Executive Medicare of certain matters.

The Protocol enables the payment of:

- a claims handling fee in respect of eligible run-off claims, to medical indemnity providers managing run-off claims
- ongoing administration costs (from 1 July 2006) to medical indemnity providers that meet certain conditions and incur certain legal, administrative or other costs in respect of administering the run-off insurance, and
- a fixed amount to Avant for a specified period (1 January 2007 to 30 June 2009).

Where a medical indemnity provider is managing an eligible run-off claim, it may apply to the Chief Executive Medicare for a claim handling fee in respect of that claim.

The Protocol describes:

- when a claims handling fee is payable and the amount of claims handling fee that is payable (Part 2 of the Protocol)
- when a payment in respect of ongoing administration is payable and the method for calculating the amount of such costs (Part 3 of the Protocol)
- applications for payment under the Protocol, payment dates and recovery of overpayments (Part 4 of the Protocol), and
- a one-off payment to Avant in respect of the period 1 January 2007 to 30 June 2009 (Part 5 of the Protocol).

### **Is the instrument still required?**

Yes, the provisions contained in the instrument are still necessary, however:

- a minor amendment could be made to the formula for calculating the amount of ongoing administration costs payable to a medical indemnity provider (to address an issue with the formula, which assumes that the provider has been claiming administration costs since 2006)
- the instrument could be consolidated with other instruments made under the *Medical Indemnity Act 2002* to reduce the number of laws on the statute book and to improve administrative efficiency for government and medical indemnity insurers, and
- provisions that have fulfilled their purpose and are no longer operable can be removed (Part 5 of the Protocol).

While ROCS claims continue to be made, the scheme enables the payment of claims handling fees and ongoing administrative costs. The Protocol enables the payment of such fees and describes the process for applications to be made and the timeframes within which payments must be made by the Chief Executive Medicare.

The Protocol could also be amended to allow compliance costs for Run-off Cover Claims to be paid to new insurers providing medical indemnity insurance.

Separate matters for policy consideration are whether:

- there continues to be a need for the Commonwealth to pay claims handling fees and administration costs in relation to the ROCS, and
- if so, whether the formulas for determining the amount of such payments (described in the Protocol) continue to be appropriate.

These matters of policy will be considered further as part of the First Principles Review being conducted in parallel with this Thematic Review.

## 2. Regulatory impact

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### Does the instrument impose significant compliance costs on business, community organisations and individuals?

This instrument imposes some compliance costs on medical indemnity insurers making applications for claims handling fees and for administration costs relating to the ROCS. However, the application requirements are minimal. The small compliance costs are justified by the benefit received by the insurers. Since 2005, 422 claims have been made totalling \$1.735 million.

### If so, how could compliance costs be reduced?

Under the ROCS, insurers are reimbursed for claims handling and administration costs, thereby off-setting the compliance costs to them.

DHS is also reviewing its guidance materials, forms and the information requirements to remove requirements for the submission of unnecessary information and to clarify requirements.

## 3. Identified administrative issues

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The formula for calculating the amount of ongoing administration costs payable to a medical indemnity provider assumes that the provider has been claiming administration costs since 2006. The effect is that the two new insurers that have entered the market since 2006 are not able to claim the payment of ongoing administration costs. This issue could be addressed through a minor amendment to the calculation in section 7 of the Protocol.

## 4. Broader legal and policy context

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Assessment of impact on the following legal and policy issues:

Issue	Impact	Assessment
Human rights particularly the rights and freedoms recognised or declared by the seven core international conventions	No	The instrument does not engage any of the human rights and freedoms recognised in the seven core international human rights treaties which Australia has ratified. However, the overarching purpose of the medical indemnity legislation is to enable payments to be made to insurers and medical practitioners such that persons who make legitimate claims against medical practitioners are able to be compensated for any loss they have suffered. This supports Article 12(2)(d) of the International Covenant on Economic,

Issue	Impact	Assessment
		Social and Cultural Rights such that it creates “conditions which would assure to all medical service and medical attention in the event of sickness”.
International law particularly security, trade, investment, fisheries, maritime, aviation and space law.	No	The instrument does not raise any international law issues.
Constitutional law particularly where constitutional issues have been raised in litigation or by state and territory governments.	No	No constitutional law issues have been raised in any litigation or by state or territory governments.
Criminal law particularly to ensure compliance with the Guide to Framing Commonwealth Offences.	No	No criminal offences are created, or referenced, by the instrument.
Administrative law particularly merits or judicial review, administrative decision making processes and alternative dispute resolution.	No	This instrument does not create any reviewable decisions.
Privacy law particularly compliance with the Australian Privacy Principles (APPs).	No	The Protocol describes a process by which applications are made to Medicare by medical indemnity insurers for a claims handling fee. As part of the application process, it is likely that UMP/Avant will provide information to Medicare that is personal and/or confidential information protected under the <i>Privacy Act 1988</i> and the Australian Privacy Principles (APP). While the Protocol does not expressly refer to the legislation or the APP, Medicare is subject to such legislation and deals with all information in accordance with relevant requirements.
Deregulation particularly the Government’s commitment to reducing regulatory burdens.	Yes	See comment below

## 5. Clearer laws

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### Does the instrument comply with clearer laws principles?

Yes, this instrument complies with the clearer laws principles. The instrument is no more complex than is necessary to give effect to the policy. However, based on stakeholder feedback, there is a degree of confusion regarding amounts that can be claimed in relation to ROCS. This will be explored as part of the First Principles Review.

### What can be done to make the instrument simpler, clearer or easier to read?

While the provisions included in the Protocol are necessary to enable the payment of claims handling fees and administration costs for ROCS, it would be desirable to consolidate these provisions into a single instrument made under the *Medical Indemnity Act 2002*.

This would:

- ease administration
- enable affected parties to view all relevant provisions in fewer locations, and
- ensure that all relevant provisions relation to the IBNR Indemnity Scheme are in one or two instruments (noting that some matters must be included in the Regulation whereas others may be included in a legislative instrument made by the Minister).

### Does the instrument meet OPC drafting and publishing?

Yes, the instrument meets current drafting and publishing standards.

## 6. Consultation

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As noted above, stakeholders made various comments about the lack of clarity regarding administration costs that may be claimed. This will be explored further as part of the First Principles Review.

DHS is also reviewing its guidance materials and forms to improve clarity wherever possible.

## 7. Outcome

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### Recommendation

- Repeal the *Medical Indemnity (Run-off Cover Claims and Administration) Protocol 2006 (No. 2)*.
- Remake Parts 1-4 of the instrument in a consolidated instrument made under the *Medical Indemnity Act 2002*, with minor amendments to the calculation of ongoing administration costs in section 7, and to allow compliance costs for Run-off Cover Claims to be paid to new insurers providing medical indemnity insurance.

Note that following the First Principles Review, there may be minor amendments to the provisions to improve clarity.

## Medical Indemnity Regulations 2003 (F2003B00219)

### 1. Objective of the instrument

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#### What is the objective and purpose of the instrument?

The *Medical Indemnity Regulations 2003* (MI Regulations) are made under the *Medical Indemnity Act 2002* (the MI Act).

The MI Regulations provide further details regarding:

- the incurred-but-not-reported (IBNR) Indemnity Scheme – the MI Regulations prescribe a late penalty payment rate where an MDO or insurer owes money to the Commonwealth relating to the IBNR Indemnity Scheme
- the High Cost Claims Scheme (HCCS) – the MI Regulations set the high cost claims threshold for the HCCS
- the Exceptional Claims Scheme (ECS) – the MI Regulations describe the circumstances in which a claim will be a qualifying claim for the purposes of the ECS
- the Run-off Cover Support Scheme (ROCS) – the MI Act provides that a claim is an eligible claim (for the purposes of the ROCS) if, among other things, the claim is against a person who falls in a class of persons prescribed in regulations. The MI Regulations therefore prescribe the various classes of persons against whom a claim may be made, for the purposes of the ROCS. The MI Regulations also:
  - prescribe a penalty interest rate for late repayment (to the Commonwealth) of any overpayments paid in relation to the ROCS, and
  - describe matters that may be included in the ROCS (Claims and Administration) Protocol
- UMP support payments and competitive advantage payments – the MI Regulations describe circumstances in which prescribed persons are exempt from paying the UMP support payment or the competitive advantage payment, and
- administrative matters such as when, and how, various payments may be made the Commonwealth.

#### Is the instrument still required?

Yes. Provisions relating to the IBNR Indemnity Scheme, the HCCS, the ECS and the ROCS remain relevant. However, the provisions relating to the UMP support payments and competitive advantage payments are no longer needed. The Commonwealth is no longer requiring such payments to be made, and as such it is no longer necessary to prescribe classes of people who are exempt from making such payments.

While allowing the MI Regulations to sunset would have no impact in relation to UMP support payments and competitive advantage payments, it would have a significant impact on the other schemes. Specifically:

- there would be no penalty rate of interest imposed on Avant for a late IBNR indemnity payment or in relation to late repayment of overpayments under the ROCS (reducing the

incentive for payments to be made in a timely manner and impacting the efficient administration of the ROCS)

- the high cost claim threshold would revert from \$300,000 to \$2 million (as per the MI Act), putting pressure on medical indemnity premiums
- certain classes of people, against whom claims have been made, would no longer be eligible for the ROCS, and
- the circumstances in which a claim will be a qualifying claim for the purposes of the ECS would be narrowed, such that fewer claims would be eligible for payment under the ECS.

As detailed below, it is recommended that the MI Regulations be repealed and remade with redundant provisions removed.

## 2. Regulatory impact

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### Does the instrument impose significant compliance costs on business, community organisations and individuals?

No. The instrument imposes some direct costs (such as penalty interest rates on late payments to the Commonwealth) but, as identified in the Office of Best Practice Regulation (OBPR) *Guidance Note relating to the Regulatory Burden Measurement Framework*, non-compliance costs and direct financial costs are excluded from the Regulatory Burden Measurement Framework and are not required to be considered in a regulatory costing.

### If so, how could compliance costs be reduced?

Not applicable.

## 3. Identified administrative issues

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Nil.

## 4. Broader legal and policy context

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Assessment of impact on the following legal and policy issues:

Issue	Impact	Assessment
Human rights particularly the rights and freedoms recognised or declared by the seven core international conventions	No	The instrument does not engage any of the human rights and freedoms recognised in the seven core international human rights treaties which Australia has ratified. However, the overarching purpose of the medical indemnity legislation is to enable payments to be made to insurers and medical practitioners such that persons who

Issue	Impact	Assessment
		make legitimate claims against medical practitioners are able to be compensated for any loss they have suffered. This supports Article 12(2)(d) of the International Covenant on Economic, Social and Cultural Rights such that it creates “conditions which would assure to all medical service and medical attention in the event of sickness”.
International law particularly security, trade, investment, fisheries, maritime, aviation and space law.	No	The instrument does not raise any international law issues.
Constitutional law particularly where constitutional issues have been raised in litigation or by state and territory governments.	No	No constitutional law issues have been raised in any litigation or by state or territory governments.
Criminal law particularly to ensure compliance with the Guide to Framing Commonwealth Offences.	No	No criminal offences are created, or referenced, by the instrument.
Administrative law particularly merits or judicial review, administrative decision making processes and alternative dispute resolution.	No	The instrument does not create any reviewable decisions.
Privacy law particularly compliance with the Australian Privacy Principles (APP).	No	The instrument does not require the provision of any information to the Department nor does it in any other way impact on privacy law.
Deregulation particularly the Government’s commitment to reducing regulatory burdens.	No	See comments below

## 5. Clearer laws

### Does the instrument comply with clearer laws principles?

The more complex provisions in the instrument (that do not comply with the clearer laws policy) relate to the UMP support payments and competitive advantage payments. These provisions are no longer required and can be removed from any remade instrument, such that the remaining provisions would comply with the clearer laws policy.

### **What can be done to make the instrument simpler, clearer or easier to read?**

The removal of redundant provisions (which are complex and highly prescriptive) will make the instrument simpler and clearer.

Regulation 14 could be removed from the instrument. The ROCS (Claims and Administration) Protocol may provide for other matters of a kind specified in the MI Regulations (refer subsection 34ZN(4) of the MI Act). Regulation 14 of the MI Regulations largely repeats matters already provided for in section 34ZN of the MI Act. None of the matters that are specified in the ROCS (Claims and Administration) Protocol are enabled by Regulation 14. Regulation 14 can therefore be removed to provide clarity as to the relevant enabling powers.

### **Does the instrument meet OPC drafting and publishing standards?**

While the instrument is broadly consistent with OPC drafting standards, there is capacity to remove redundant provisions and consolidate provisions from other instruments into the one set of remade MI Regulations.

## **6. Consultation**

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No stakeholder comments were made on this instrument. However, stakeholders acknowledged the value of repealing unnecessary provisions and consolidating instruments where possible.

## **7. Outcome**

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### **Recommendation**

- Repeal the *Medical Indemnity Regulations 2003*.
- Remake the instrument as the *Medical Indemnity Regulations 2018*.
- In the remade instrument:
  - do not include existing regulation 14
  - do not include existing Divisions 3.1 and 3.1A and regulation 26 (relating to the UMP support payment and the competitive advantage payment)
  - do not include existing regulation 27 (no longer operable), and
  - include matters currently in other stand-alone instruments that could be prescribed in the one set of Regulations made under the MI Act.

## ***Medical Indemnity (Prudential Supervision and Product Standards – Notice of Provision of Run-off Cover) Determination 2007 (F2007L02208)***

### **1. Objective of the instrument**

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#### **What is the objective and purpose of the instrument?**

The *Medical Indemnity (Prudential Supervision and Product Standards – Notice of Provision of Run-Off Cover) Determination 2007* is made under the *Medical Indemnity (Prudential Supervision and Product Standards) Act 2003* (the PSPS Act).

The PSPS Act:

- sets certain prudential requirements for the provision of medical indemnity cover and ensures that providers of medical indemnity cover are subject to appropriate prudential supervision by the Australian Prudential Regulation Authority (APRA). The PSPS Act prohibits institutions from providing medical indemnity cover unless the institution is an authorised general insurer under the *Insurance Act 1973* (the Insurance Act), which is administered by APRA, and
- describes minimum product standards for medical indemnity contracts (noting that supervisory responsibility for this lies with the Australian Securities and Investments Commission). Minimum standards relate to matters such as minimum cover and provision of run-off cover.

Section 26D of the PSPS Act requires that insurers providing run-off cover must, within a certain period, provide the Chief Executive Medicare, with a written notice stating the name of the practitioner to whom they provided run-off cover, the date from which the cover took effect, and such other matters as determined by the Minister administering the *Medical Indemnity Act 2002*.

The *Medical Indemnity (Prudential Supervision and Product Standards - Notice of Provision of Run-off Cover) Determination 2007* sets out the additional information that must be provided to the Chief Executive Medicare pursuant to section 26D of the PSPS Act. This includes information such as:

- general information about the practitioner
- information about the history of medical indemnity cover provided to the practitioner
- the reason that the practitioner is eligible for ROCS
- the level of ROCS cover being provided, and
- information regarding premiums paid by the practitioner.

### Is the instrument still required?

Yes. The instrument is still required in order to ensure that insurers provide the Chief Executive Medicare with information that enables DHS to manage the ROCS effectively and efficiently. However, as discussed below, there is opportunity to streamline the information reporting requirements to reduce the amount of information provided and, in so doing, reduce the compliance burden on practitioners and insurers.

## 2. Regulatory impact

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### Does the instrument impose significant compliance costs on business, community organisations and individuals?

The instrument does impose some compliance burden, by requiring certain information to be notified to DHS.

### If so, how could compliance costs be reduced?

DHS is undertaking a review of its forms and information requirements. As a result of this review, it is likely that changes could be made to this instrument to:

- reduce information required to be notified, and
- clarify information requirements.

## 3. Identified administrative issues

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- Remove references to UMP support payment in section 3 (interpretation) as this is no longer payable.

## 4. Broader legal and policy context

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Assessment of impact on the following legal and policy issues:

Issue	Impact	Assessment
Human rights particularly the rights and freedoms recognised or declared by the seven core international conventions	No	The instrument does not engage any of the human rights and freedoms recognised in the seven core international human rights treaties which Australia has ratified. However, the overarching purpose of the medical indemnity legislation is to enable payments to be made to insurers and medical practitioners such that persons who make legitimate claims against medical practitioners are able to be compensated for any loss they have suffered. This supports Article 12(2)(d) of the

Issue	Impact	Assessment
		International Covenant on Economic, Social and Cultural Rights such that it creates “conditions which would assure to all medical service and medical attention in the event of sickness”.
International law particularly security, trade, investment, fisheries, maritime, aviation and space law.	No	The instrument does not raise any international law issues.
Constitutional law particularly where constitutional issues have been raised in litigation or by state and territory governments.	No	No constitutional law issues have been raised in any litigation or by state or territory governments.
Criminal law particularly to ensure compliance with the Guide to Framing Commonwealth Offences.	No	No criminal offences are created, or referenced, in the instrument.
Administrative law particularly merits or judicial review, administrative decision making processes and alternative dispute resolution.	No	The instrument does not create any reviewable decisions.
Privacy law particularly compliance with the Australian Privacy Principles (APP).	No	The instrument requires the provision of information to the Chief Executive Medicare that is personal and/or confidential information protected under the <i>Privacy Act 1988</i> and the APP. While the instrument does not expressly refer to the legislation or the APP, the Chief Executive Medicare is subject to such legislation and deals with all information in accordance with relevant requirements.
Deregulation particularly the Government’s commitment to reducing regulatory burdens.	Yes	See comments below.

## 5. Clearer laws

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### Does the instrument comply with clearer laws principles?

Partially. The instrument is simple (it is made pursuant to one provision in the enabling PSPS Act, and it only sets out matters to be included in a written notice). However, it is unnecessarily prescriptive and detailed and requires the reporting of information that is not necessary for DHS purposes. With the removal of unnecessary reporting requirements, the instrument can be simplified and better meet the clearer laws principles.

### What can be done to make the instrument simpler, clearer or easier to read?

As noted above, the instrument contains detailed information to be notified to DHS about eligible practitioners.

As part of the First Principles Review, consideration will be given to matters including who may be an eligible practitioner, along with the information required by DHS to manage the ROCS. As a result, changes may be made to reduce and/or clarify the information that is required to be notified to DHS.

### Does the instrument meet OPC drafting and publishing standards?

Yes, the instrument meets current drafting and publishing standards.

## 6. Consultation

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Stakeholders supported the opportunity to reduce red-tape, including unnecessary reporting requirements. As noted above, this will be considered as part of the First Principles Review.

## 7. Outcome

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### Recommendation

- Repeal the *Medical Indemnity (Prudential Supervision and Product Standards - Notice of Provision of Run-off Cover) Determination 2007*.
- Remake the instrument as the *Medical Indemnity (Prudential Supervision and Product Standards - Notice of Provision of Run-off Cover) Determination 2018*.
- In remaking the instrument, remove requirements for insurers to provide information that is not necessary for the effective and efficient management of the ROCS (discussed above) and remove redundant references to UMP support payments.

## ***Medical Indemnity (Prudential Supervision and Product Standards – Terms and Conditions for Run-off Cover) Determination 2004 (F2008B00062)***

### **1. Objective of the instrument**

---

#### **What is the objective and purpose of the instrument?**

The *Medical Indemnity (Prudential Supervision and Product Standards – Terms and Conditions for Run-off Cover) Determination 2004* (the Determination) is made under the *Medical Indemnity (Prudential Supervision and Product Standards) Act 2003* (the PSPS Act).

The PSPS Act:

- sets certain prudential requirements for the provision of medical indemnity cover and ensures that providers of medical indemnity cover are subject to appropriate prudential supervision by the Australian Prudential Regulation Authority (APRA). The PSPS Act prohibits institutions from providing medical indemnity cover unless the institution is an authorised general insurer under the *Insurance Act 1973* (the Insurance Act), which is administered by APRA, and
- describes minimum product standards for medical indemnity contracts (noting that supervisory responsibility for this lies with the Australian Securities and Investments Commission). Minimum standards relate to matters such as minimum cover and provision of run-off cover.

Section 26A of the PSPS Act requires medical indemnity insurers to provide run-off cover to certain medical practitioners in certain circumstances. The section also requires that the medical indemnity cover must meet certain requirements. For example, the run-off cover must cover incidents that occurred while the practitioner was registered or licensed as a medical practitioner, the insurer must provide cover until the practitioner ceases to be eligible, and no premium or other consideration is payable for the run-off cover.

Paragraph 26A(4)(d) of the PSPS Act enables the Minister to determine such other terms and conditions (if any) on which the run-off cover is provided.

Further to this provision, the Determination states that the terms and conditions for the run-off cover must be the terms and conditions on which the last medical indemnity cover was provided to the practitioner (where those terms and conditions are relevant for the provision of run-off cover).

#### **Is the instrument still required?**

While the conditions described in the instrument are still necessary to ensure that the run-off cover is provided on the same terms and conditions as the last medical indemnity cover provided to the practitioner, these conditions could be included in the PSPS Act. This would remove the need for the Determination.

## 2. Regulatory impact

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### Does the instrument impose significant compliance costs on business, community organisations and individuals?

No. This instrument does not impose significant compliance costs on business, community organisations and individuals.

### If so, how could compliance costs be reduced?

Not applicable.

## 3. Identified administrative issues

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Nil.

## 4. Broader legal and policy context

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Assessment of impact on the following legal and policy issues:

Issue	Impact	Assessment
Human rights particularly the rights and freedoms recognised or declared by the seven core international conventions	No	The instrument does not engage any of the human rights and freedoms recognised in the seven core international human rights treaties which Australia has ratified. However, the overarching purpose of the medical indemnity legislation is to enable payments to be made to insurers and medical practitioners such that persons who make legitimate claims against medical practitioners are able to be compensated for any loss they have suffered. This supports Article 12(2)(d) of the International Covenant on Economic, Social and Cultural Rights such that it creates “conditions which would assure to all medical service and medical attention in the event of sickness”.
International law particularly security, trade, investment, fisheries, maritime, aviation and space law.	No	The instrument does not raise any international law issues.
Constitutional law particularly where constitutional issues have been raised in litigation or by state	No	No constitutional law issues have been raised in any litigation or by state or territory governments.

Issue	Impact	Assessment
and territory governments.		
Criminal law particularly to ensure compliance with the Guide to Framing Commonwealth Offences.	No	No criminal offences are created in the instrument.
Administrative law particularly merits or judicial review, administrative decision making processes and alternative dispute resolution.	No	The instrument does not create any reviewable decisions or include any discretionary decision-making powers.
Privacy law particularly compliance with the Australian Privacy Principles (APP).	No	The instrument does not require the provision of information to the Department or any other person such that the requirement of the <i>Privacy Act 1988</i> and the APP would be triggered.
Deregulation particularly the Government's commitment to reducing regulatory burdens.	No	Not relevant because the instrument is declaratory only.

## 5. Clearer laws

### Does the instrument comply with clearer laws principles?

While the instrument contains only one substantive provision, the meaning and effect of the provision is not obvious to the reader. By amending the PSPS Act to include the condition (that is currently in the Determination), this will improve readability and remove the need for the Determination.

### What can be done to make the instrument simpler, clearer or easier to read?

As noted above, with a simple amendment to the PSPS Act, the Determination may be repealed (noting that the PSPS Act will continue to enable the making of a Determination, should this be needed in the future).

### Does the instrument meet OPC drafting and publishing standards?

Yes, the instrument meets current drafting and publishing standards (noting that the readability of the substantive provision in the instrument could be improved by amending the PSPS Act to include the requirements described in the instrument).

## 6. Consultation

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No stakeholder comments were made regarding this instrument. However, stakeholders acknowledged the value of repealing unnecessary provisions and consolidating instruments where possible.

## 7. Outcome

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### Recommendation

- Repeal the *Medical Indemnity (Prudential Supervision and Product Standards - Terms and Conditions for Run-off Cover) Determination 2004*.
- Amend subsection 26A(4) of the *Medical Indemnity (Prudential Supervision and Product Standards) Act 2003* to include the conditions for run-off cover that are currently contained in the Determination.

## Medical Indemnity (Prudential Supervision and Product Standards) Regulations 2003 (F2006C00532)

### 1. Objective of the instrument

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#### What is the objective and purpose of the instrument?

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

The PPS Act:

- sets certain prudential requirements for the provision of medical indemnity cover and ensures that providers of medical indemnity cover are subject to appropriate prudential supervision by the Australian Prudential Regulation Authority (APRA). The PPS Act prohibits institutions from providing medical indemnity cover unless the institution is an authorised general insurer under the *Insurance Act 1973* (the Insurance Act), which is administered by APRA, and
- makes provision for minimum product standards for medical indemnity contracts (noting that supervisory responsibility for this lies with the Australian Securities and Investments Commission). Minimum standards relate to matters such as minimum cover and provision of run-off cover.

The PPS Regulations:

- describe the types of insurance to which the PPS Act does not apply (regulation 4)
- describe certain transitional arrangements that were applicable until 30 June 2008. The PPS Act created transitional provisions such that certain medical indemnity providers wishing to provide medical indemnity cover would have up to five years to comply with the minimum capital requirements (up to 30 June 2008). For the purposes of these transitional arrangements, the PPS Regulations:
  - set out the application form that could be used by insurers to apply for an APRA determination that the minimum capital requirements did not apply to them (regulation 5 and Schedule 1 to the PPS Regulations)
  - describe those bodies to whom the minimum capital requirements did not apply during the transition period (to 30 June 2008) (regulation 6)
  - describe the form of a funding plan that was required as part of an application for a determination by APRA that the minimum capital requirement did not apply to the applicant during the transition period (regulation 7 and Schedule 2 to the PPS Regulations)
- describe the circumstances in which an insurer must make a compulsory offer of run-off cover (i.e. when a retired practitioner has permanently ceased private practice aged less than 65 years) and requirements for any offer of run-off cover to the practitioner (regulation 8), and
- provide that if an offer of run-off cover is made to a retiring practitioner, then in order to be a complying offer (defined in the legislation), the premium payable by the

practitioner for the cover must not exceed the cost to the insurer of providing the cover without returning a profit to anyone for the provision of that cover (regulation 9).

### **Is the instrument still required?**

Yes, the instrument is still required in order to describe the types of insurance to which the PSPS Act does not apply, the circumstances in which an insurer must offer run-off cover and to cap the amount of the premium payable for run-off cover (such that it must not exceed the cost to the insurer of providing the cover without returning a profit to anyone for the provision of that cover).

The provisions relating to transitional arrangements for compliance with minimum capital requirements have been exhausted and are no longer required. The provisions stopped being operable from July 2008. APRA's guidelines made under subsection 13(9) of the PSPS Act, were revoked in 2012.

Therefore, while allowing the instrument to sunset would have no impact in relation to transitional arrangements in Part 2 of the PSPS Regulations (that finished on 30 June 2008), it would have a significant impact on:

- the prescribed insurance arrangements to which the PSPS Act currently does not apply
- the circumstances in which an insurer must make a compulsory offer of run-off cover (such that compulsory offers to the class of people currently prescribed in the PSPS regulations would no longer be required), and
- the capping of the amount of the premium payable for run-off cover.

As detailed below, it is recommended that the PSPS Regulations be repealed and remade with redundant provisions removed.

## **2. Regulatory impact**

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### **Does the instrument impose significant compliance costs on business, community organisations and individuals?**

Yes. The instrument describes the circumstances in which an insurer must make a compulsory offer of run-off cover (i.e. when a retired practitioner has permanently ceased private practice aged less than 65 years and requirements for any offer of run-off cover to the practitioner). While this imposes a compliance cost, it is necessary because it ensures that claims can still be made against the medical practitioner, and that the obligations of insurers and practitioners cannot be avoided through the retirement of the practitioner.

### **If so, how could compliance costs be reduced?**

Not applicable (compliance costs are necessary).

## **3. Identified administrative issues**

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Nil.

#### 4. Broader legal and policy context

Assessment of impact on the following legal and policy issues:

Issue	Impact	Assessment
Human rights particularly the rights and freedoms recognised or declared by the seven core international conventions	No	The instrument does not engage any of the human rights and freedoms recognised in the seven core international human rights treaties which Australia has ratified. However, the overarching purpose of the medical indemnity legislation is to enable payments to be made to insurers and medical practitioners such that persons who make legitimate claims against medical practitioners are able to be compensated for any loss they have suffered. This supports Article 12(2)(d) of the International Covenant on Economic, Social and Cultural Rights such that it creates “conditions which would assure to all medical service and medical attention in the event of sickness”.
International law particularly security, trade, investment, fisheries, maritime, aviation and space law.	No	The instrument does not raise any international law issues.
Constitutional law particularly where constitutional issues have been raised in litigation or by state and territory governments.	No	No constitutional law issues have been raised in any litigation or by state or territory governments.
Criminal law particularly to ensure compliance with the Guide to Framing Commonwealth Offences.	No	No criminal offences are created in the instrument.
Administrative law particularly merits or judicial review, administrative decision making processes and alternative dispute resolution.	No	The instrument does not create any reviewable decisions.
Privacy law particularly compliance with the Australian Privacy Principles (APP).	No	The instrument did require provision of information to the Commonwealth, but the regulations requiring such provision of information are no longer operable.

Issue	Impact	Assessment
Deregulation particularly the Government's commitment to reducing regulatory burdens.	Yes	See comments below

## 5. Clearer laws

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### Does the instrument comply with clearer laws principles?

The more complex provisions in the instrument (that do not comply with the clearer laws policy) relate to transitional arrangements. These provisions are no longer required and can be removed from any remade instrument, such that the remaining provisions would comply with the clearer laws policy.

### What can be done to make the instrument simpler, clearer or easier to read?

The removal of redundant provisions (which are complex and highly prescriptive) will make the instrument simpler and clearer.

### Does the instrument meet OPC drafting and publishing standards?

While the instrument is broadly consistent with OPC drafting standards, there is capacity to remove redundant provisions.

## 6. Consultation

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No stakeholder comments were made on this instrument. However, stakeholders acknowledged the value of repealing unnecessary provisions and consolidating instruments where possible.

## 7. Outcome

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### Recommendation

- Repeal the *Medical Indemnity (Prudential Supervision and Product Standards) Regulations 2003*.
- Remake the instrument as the *Medical Indemnity (Prudential Supervision and Product Standards) Regulations 2018*.
- In remaking the instrument, remove Part 2 and Schedules 1 and 2 (relating to expired transitional arrangements).

These changes may be progressed within a separate legislation package administered by the Treasury.

## Midwife Professional Indemnity (Commonwealth Contribution) Scheme Rules 2010 (F2017C00097)

### 1. Objective of the instrument

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#### What is the objective and purpose of the instrument?

The *Midwife Professional Indemnity (Commonwealth Contribution) Scheme Rules 2010* (the MPI Rules) are made under the *Midwife Professional Indemnity (Commonwealth Contribution) Scheme Act 2010* (MPI Act).

The MPI Act gives effect to the Government's professional indemnity scheme for eligible midwives. The scheme contributes to the availability of professional midwife services in Australia by providing Commonwealth assistance to support access by eligible midwives to professional indemnity arrangements. Under the MPI Act, the Commonwealth provides assistance by meeting:

- part of the costs of large settlements or awards paid by insurers
- the amounts by which the settlement or award exceeds insurance contract limits, and
- the amounts payable in relation to certain claims against retired midwives.

Medical Insurance Australia Pty Ltd (MIGA) is the only underwriter that provides Government-supported midwife professional indemnity cover to eligible registered midwives.

The MPI Rules establish:

- the meaning of an eligible insurer and an eligible midwife, and
- that the interest rate that is payable if the eligible insurer does not pay back an amount overpaid to the insurer by the Commonwealth is 0.03% per day.

#### Is the instrument still required?

Yes. The instrument is required to ensure definitions that are central to the scheme are in force and operating as intended, and that the interest rate payable on late overpayments (the late payment of overpayment penalty rate) is specified.

### 2. Regulatory impact

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#### Does the instrument impose significant compliance costs on business, community organisations and individuals?

This instrument does not impose significant compliance costs on business, community organisations and individuals.

**If so, how could compliance costs be reduced?**

Not applicable.

**3. Identified administrative issues**

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Nil.

**4. Broader legal and policy context**

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Assessment of impact on the following legal and policy issues:

Issue	Impact	Assessment
Human rights particularly the rights and freedoms recognised or declared by the seven core international conventions	No	The instrument does not engage any of the human rights and freedoms recognised in the seven core international human rights treaties which Australia has ratified. However, the overarching purpose of the legislation is to enable payments to be made to insurers and eligible midwives such that persons who make legitimate claims against eligible midwives are able to be compensated for any loss they have suffered. This supports Article 12(2)(d) of the <i>International Covenant on Economic, Social and Cultural Rights</i> such that it creates “conditions which would assure to all medical service and medical attention in the event of sickness”.
International law particularly security, trade, investment, fisheries, maritime, aviation and space law.	No	The instrument does not raise any international law issues.
Constitutional law particularly where constitutional issues have been raised in litigation or by state and territory governments.	No	No constitutional law issues have been raised in any litigation or by state or territory governments.
Criminal law particularly to ensure compliance with the Guide to Framing Commonwealth Offences.	No	No criminal offences are created, or referenced, in the instrument.
Administrative law particularly merits or judicial review, administrative decision making processes and alternative dispute	No	The instrument does not create any reviewable decisions.

Issue	Impact	Assessment
resolution.		
Privacy law particularly compliance with the Australian Privacy Principles (APP).	No	The instrument does not require the provision of information to the Department or any other person such that the requirements of the <i>Privacy Act 1988</i> and the APP would be triggered.
Deregulation particularly the Government's commitment to reducing regulatory burdens.	No	See comments below.

## 5. Clearer laws

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### Does the instrument comply with clearer laws principles?

Yes, the instrument complies with the clearer laws principles. The instrument is no more complex than is necessary to give effect to policy and is readily understandable.

### What can be done to make the instrument simpler, clearer or easier to read?

Not applicable.

### Does the instrument meet OPC drafting and publishing standards?

Yes, the instrument meets current drafting and publishing standards.

## 6. Consultation

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The Australian College of Midwives provided feedback regarding the eligibility requirements for midwives. The instrument clearly reflects the relevant definition of an *eligible midwife* in sections 5 and 5A, including to identify the period in which each of the definitions is relevant.

## 7. Outcome

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### Recommendation

- Repeal the *Midwife Professional Indemnity (Commonwealth Contribution) Scheme Rules 2010*.
- Remake the instrument, without substantive change, as the *Midwife Professional Indemnity (Commonwealth Contribution) Scheme 2018*.

## Midwife Professional Indemnity (Run-off Cover Support Payment) Rules 2010 (F2010L015497)

### 1. Objective of the instrument

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#### What is the objective and purpose of the instrument?

The *Midwife Professional Indemnity (Run-Off Cover Support Payment) Rules 2010* (the Rules) are made under the *Midwife Professional Indemnity (Run-off Cover Support Payment) Act 2010* (MPI ROCS Act).

The MPI ROCS Act, together with the *Midwife Professional Indemnity (Commonwealth Contribution) Scheme Act 2010* give effect to the Government's professional indemnity scheme for eligible midwives. The MPI ROCS Act:

- imposes a tax on premium payments for midwife professional indemnity by way of a run-off cover support payment
- provides that the amount of the run-off cover support payment is 15% of the insurer's premium income for the contribution year, or such lower percentage specified in rules for a contribution year, and
- defines premium income for the purposes of the legislation.

The Rules specify a lower percentage of the premium income which an eligible insurer is to pay as a tax. The MPI ROCS Act specifies a rate of 15%, whereas the rules specify a lower applicable rate of 10%.

#### Is the instrument still required?

Yes, the instrument specifies a lower applicable percentage of an insurer's premium income which an eligible insurer is to pay as a tax. If the instrument were to sunset, the applicable percentage would default from a rate of 10%, to a rate of 15% (as per the MPI ROCS Act). This would have a significant impact on insurers.

Section 55 of the Constitution requires that matters of taxation must be dealt with in separate Acts. As the Run-off Cover Support Payment is a tax, a separate Act is needed to impose the tax. The rate of the tax is prescribed in regulations made under the imposition Act. If the run-off support payment is to be retained, a separate Act and Rules must be maintained. As such, there is no opportunity to consolidate this instrument.

### 2. Regulatory impact

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#### Does the instrument impose significant compliance costs on business, community organisations and individuals?

This instrument does not impose any compliance costs on business, community organisations and individuals.

**If so, how could compliance costs be reduced?**

Not applicable.

**3. Identified Administrative Issues**

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Nil.

**4. Broader legal and policy context**

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Assessment of impact on the following legal and policy issues:

Issue	Impact	Assessment
Human rights particularly the rights and freedoms recognised or declared by the seven core international conventions	No	The instrument does not engage any of the human rights and freedoms recognised in the seven core international human rights treaties which Australia has ratified. However, the overarching purpose of the legislation is to enable payments to be made to insurers and eligible midwives such that persons who make legitimate claims against eligible midwives are able to be compensated for any loss they have suffered. This supports Article 12(2)(d) of the <i>International Covenant on Economic, Social and Cultural Rights</i> such that it creates “conditions which would assure to all medical service and medical attention in the event of sickness”.
International law particularly security, trade, investment, fisheries, maritime, aviation and space law.	No	The instrument does not raise any international law issues.
Constitutional law particularly where constitutional issues have been raised in litigation or by state and territory governments.	No	No constitutional law issues have been raised in any litigation or by state or territory governments.
Criminal law particularly to ensure compliance with the Guide to Framing Commonwealth Offences.	No	No criminal offences are created, or referenced, by the instrument.

Issue	Impact	Assessment
Administrative law particularly merits or judicial review, administrative decision making processes and alternative dispute resolution.	No	The instrument does not create any reviewable decisions.
Privacy law particularly compliance with the Australian Privacy Principles (APP).	No	The instrument does not require the provision of information to the Department or any other person such that the requirements of the <i>Privacy Act 1988</i> and the APP would be triggered.
Deregulation particularly the Government's commitment to reducing regulatory burdens.	No	Not relevant because the instrument is declaratory only.

## 5. Clearer laws

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### Does the instrument comply with clearer laws principles?

Yes. The instrument contains only one substantive provision, is no more complex than is necessary to give effect to policy, and is readily understandable.

### What can be done to make the instrument simpler, clearer or easier to read?

Not applicable.

### Does the instrument meet OPC drafting and publishing standards?

Yes, the instrument meets current drafting and publishing standards.

## 6. Consultation

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No stakeholder comments were made on this instrument. While stakeholders encouraged consolidation of instruments, this is not possible for this instrument.

## 7. Outcome

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### Recommendation

- Repeal the *Midwife Professional Indemnity (Run-off Cover Support Payment) Rules 2010*.
- Remake the instrument, without substantive change, as the *Midwife Professional Indemnity (Run-off Cover Support Payment) Rules 2018*.