

Factsheet - A guide to pathology collection leasing

In this factsheet, we look at pathology collection centre leasing and compliance with the *Health Insurance Act 1973*. This is important information both for pathology providers, and their landlords.

Part IIBA of the *Health Insurance Act 1973* (“Act”) prohibits asking for, accepting, offering and providing various forms of ‘benefit’ in connection with the provision of pathology services.

A key area in which benefits are prone to arise – whether advertently or inadvertently – is in the context of collection centre leases, where a pathology provider leases (or sublets or licences) space from a ‘requester’ of services. In essence, the rationale for this regulatory approach is that benefits and inducements can lead to an increased cost of services for consumers and the Government.

Benefits can also create actual and perceived conflicts of interest. Where a medical or other healthcare practitioner recommends pathology services to a patient, this should be based on the patient’s clinical needs – not commercial arrangements between the practitioner and the pathology service provider.

What is the key terminology used in the Act?

The following is an overview of some important terminology.

Benefit includes:

- money, property or services or any other benefit asked for, accepted, offered or provided in any form; and
- an actual or a potential benefit. (Act s 23DZZID)

Market value

- The market value of property, goods or services is the amount that a willing purchaser would have had to pay to a vendor who was willing, but not anxious, to sell: Health Insurance Regulations 2018 (“Regs”) s 77.
- General legal notions about ‘market value’ otherwise apply, connoting an arms-length transaction with each party acting knowledgeably and prudently. In a leasing context, market rent assumes payment of rent by a willing tenant in order to secure a lease from a willing, but not anxious, landlord.
- A payment or consideration given for property, goods or service will be deemed ‘substantially different’ from its market value if the difference is more than 20% of the market value. (Regs s 76)

Permitted benefits are defined in a way intended to allow reasonable commercial leasing and business practices. For example:

- The provision of ‘property, goods or services’ can be permissible if provided for ‘consideration that is not substantially different from the market value of the property, goods or services’. (Act s 23DZZIF(6))
- Conversely, a payment for the use of occupation of premises for a pathology service can be a permissible benefit if it is ‘not substantially different from the market value of the property, goods or services’, or it is proportionate (if the premises are shared with others). (Act s 23DZZIF (4),(5))

A **prohibited benefit** is one that:

- 'would be reasonably likely to induce a requester to request any of those kinds of services from a provider'; or
- 'is related to the business of rendering pathology services or diagnostic imaging services, as the case requires',

and is not a permitted benefit. (Act ss 23DZZIK(1), 23DZZIL(1))

A **provider** of pathology services includes: '(a) a person who renders that kind of service; (b) a person who carries on a business of rendering that kind of service; [or] (c) a person who employs, or engages under a contract for services, a person specified in paragraph (a) or (b) ...'. (Act s 23DZZIE(3))

A **requester** of pathology services is a person entitled to request pathology services, such as 'a practitioner [defined in section 3(1) as 'a medical practitioner or a dental practitioner'], a participating midwife or a participating nurse practitioner'. (Act s 23DZZIE(1))

What is prohibited, and what is permitted?

A person who is a requester of pathology services will contravene section 23DZZIK(1) of the Act if that person 'asks for' or 'accepts' a benefit from a second person who is (or is connected to) a provider of those kinds of services, and the benefit:

- 'would be reasonably likely to induce a requester to request any of those kinds of services from a provider'; or
- 'is related to the business of rendering pathology services or diagnostic imaging services, as the case requires',

and is not a permitted benefit.

Conversely, under section 23DZZIL(1) of the Act, a provider must not offer or provide a benefit of the above kind to a requester (or person connected to a requester) of those kinds of services.

- **requesters:** the requester or a person connected to the requester



a provider or a person connected to a provider

- **providers:** the provider or a person connected to the provider



a requester or a person connected to a requester

Source: Department of Health, 'The Red Book: Guidance on Laws Relating to Pathology and Diagnostic Imaging – Prohibited Practices'

The Minister for Health periodically determines what will be permitted benefits for pathology services under the Act: See the [Health Insurance \(Permitted benefits – pathology services\) Determination 2018](#).

Rent and other payments under pathology collection centre leases

Whilst a collection centre typically occupies only a small area (usually less than 50 square metres, and often no more than a single room), in the past, these premises could attract rent at thousands of dollars per square metre – significantly above market compared with other commercial uses.

Now, care must be taken when setting rent and other charges payable under a collection centre lease, to avoid the flow of benefits that would be prohibited under the Act. In summary:

- Leases between pathology requesters and providers must not contain a rent that is 'substantially different' from market value. In other words, rent must not be more than 20 per cent above market value. (Regs s 76)
- A benefit (i.e. rent in this case) is not a permitted benefit if it 'is related to the number, kind or value of requests for pathology services ... made by the requester'; or 'consists of the provision of staff or equipment at premises of the beneficiary for the purpose of providing pathology services ...'. (Act s 23DZZIF (7),(8))
- The definition of permitted benefits (mentioned earlier) is capable of applying to outgoings and shared lease costs. For example, if a pathology provider uses, say, 30 per cent of the water and electricity consumed by all the occupants of a building, and is liable under their lease for 30 per cent of the service charges, this is permitted. If, however, the same provider had been charged, say, 100 per cent, that arrangement would be a prohibited benefit. (Act s 23DZZIF (4))

Regulation and enforcement

Since 1 July 2018, it has been a requirement that all new pathology leases and subleases, as well as renewals, are submitted through Health Professional Online Services ("HPOS"), along with an Application for new, renewal or cancellation of an Approved Collection Centre form HW035, available here. Landlords and tenants whose leasing arrangements appear out of step with the market may be issued requests for information.

Civil penalties for breaches of the prohibited benefit provisions discussed in this factsheet can be up to \$126,000 for individuals or \$1.26m for a company. In addition, there are criminal offence provisions punishable by imprisonment.

A breach of the Act and Regs can also result in referral to the Medicare Participation Review Committee; and ultimately, exclusion from receiving Medicare benefits.

Finally, it should be noted that practices which breach the Act and Regs may (among other things) also breach the Competition and Consumer Act 2010, and the Medical Board of Australia Good medical practice: A code of conduct for doctors in Australia.

Property and leasing contract

If you seek assistance or guidance with pathology centre leasing, David McMullen would be pleased to hear from you.



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