

# The Constitutional Framework of the Australian health system Reform: what's possible and realistic?

**AHHA: 10 Year Health  
Agreement Blueprint  
Roundtable  
18 September 2017**

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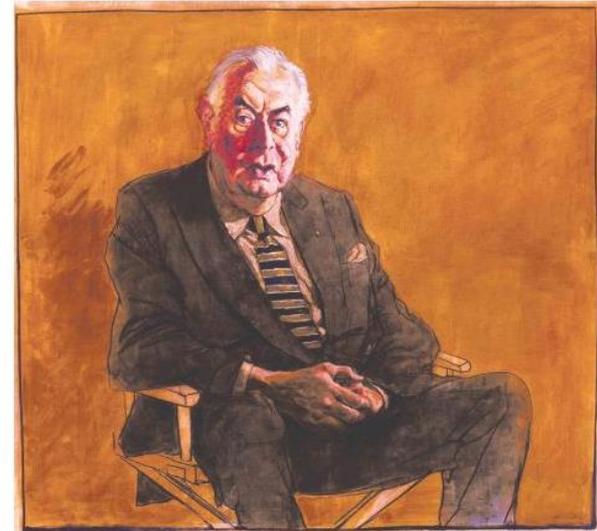


# The History

A successful referendum on 28 Sept 1946 lead to the insertion of a new clause into the Australian Constitution as follows:

**s51(xxiiiA.)** The provision of maternity allowances, widows' pensions, child endowment, unemployment, pharmaceutical, sickness and hospital benefits, medical and dental services (but not so as to authorise any form of civil conscription), benefits to students and family allowances.

## IT'S TIME, COMRADE



**On 1 July 1975 the Federal Government introduced Medibank (later Medicare) using two separate sections of the Australian Constitution:**

1. Section 96 of the Constitution for the States to run public hospitals, and
2. Section 51(xxiiiA) for medical services – to pay doctors on a FFS basis

# 60 years of High Court decisions on s51(xxiiiA)

CASE NAME	No. of Judges
British Medical Association v Commonwealth [1949] HCA 44	6
General Practitioners Society of Australia v Commonwealth [1980] HCA 30	7
Alexandra Private Geriatric Hospital Pty Ltd v Commonwealth [1987] HCA 6	5
Health Insurance Commission v Peverill [1994] HCA 8	7
Breen v Williams [1996] HCA 57*	6
Wong v Commonwealth; Selim v Lele, Tan and Rivett constituting the Professional Services Review Committee No 309 [2009] HCA 3	7
<b>TOTAL</b>	<b>38</b>

## 3 POINTS OF LAW THAT ARE NOW SETTLED

1. The relationship between a doctor and a patient is a private contract
2. The civil conscription caveat only applies to medical and dental services
3. Both legal and practical compulsion may offend the caveat

\* *Breen* considered certain aspects the contractual relationship between doctor and patient, not s51(xxiiiA) specifically

# What is the impact of these High Court decisions on Australian health reform today?

## Australian doctors can charge whatever they like.

If doctors perceive Government payments to be insufficient (whether via FFS or capitation or both) they can simply charge patients directly.

Quite apart from the likelihood of constitutional invalidity, co-payments on medical services (but not pharmaceutical services) cannot be controlled.

eHealth records have to be patient controlled and voluntary

## Australian patients can choose their doctors.

Patients cannot be required to enrol with a particular doctor without their consent.

## Section 51(xxiiiA) of the Australian Constitution

## Private health insurers cannot control doctors fees.

It is impossible to insure something that is prima facie uninsurable.

Doctors cannot be conscripted in relation to whatever comes within the scope of a professional service.

The Federal Government cannot easily take over the running of State public hospitals.

# Does the Commonwealth have Constitutional power to take over the administration of public hospitals?

- **Trade and commerce** – no intention to charge fee so not trade and commerce
- **Corporations** – No clarity as to whether public hospitals are trading corporations
- **External affairs** – Precise scope uncertain but unlikely to be used alone
- **s51(xxiiiA)** – High Court now favours expansion of federal power. Most relevant power but cannot conscript medical services
- **Quarantine** – Could support some aspects (infection control etc.) but unlikely to be used alone
- **Acquisition of property** – Commonwealth would have to compensate state governments *on just terms*. Financially unattractive for commonwealth.
- **Appropriations** – Potentially powerful in acquiring public hospitals but power to spend \$ may be limited by compulsory acquisition power
- **s96, Financial assistance** – most powerful tool. Specific purpose or tied grants allows commonwealth to indirectly regulate public hospitals

**Conclusion: the most immediate and effective solution was Rudd/Gillard solution using s96 and new national agreements, effectively maintaining the status quo.**

# How would you change the Constitution if you could and why?

- What are the odds of successfully changing the Constitution?
  - 44 referendums since Federation
  - 8 successful
  - Other factors
- Let's assume the stars aligned and we successfully removed the caveat in s51(xxiiiA) - what then?
- Australian doctors can charge whatever they like and they have a constitutional provision supporting them...so why don't we have the most expensive health system in the world?

# So what's possible and realistic?

- To what extent can we implement learnings from other countries when no other country has a similar Constitutional provision?
- We still have one of the best health systems in the world.
- The caveat in section 51(xxiiiA) does not prevent reform, but we must ensure the private contractual relationship between a doctor and a patient is not impermissibly intruded upon, or Constitutional invalidity may be the price we pay.

# Thank You & Questions

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