

Independent Hospital Pricing Authority

Cost-Shifting and Cross-Border Dispute Resolution Framework

Version 3.3 June 2019



IHPA

Cost-Shifting and Cross-Border Dispute Resolution Framework – Version 3.3 June 2019

© Independent Hospital Pricing Authority 2019

This publication is available for your use under a Creative Commons BY Attribution 3.0 Australia licence, with the exception of the Independent Hospital Pricing Authority logo, photographs, images, signatures and where otherwise stated. The full licence terms are available from the Creative Commons website.



Use of Independent Hospital Pricing Authority material under a Creative Commons BY Attribution 3.0 Australia licence requires you to attribute the work (but not in any way that suggests that the Independent Hospital Pricing Authority endorses you or your use of the work).

Independent Hospital Pricing Authority material used 'as supplied'.

Provided you have not modified or transformed Independent Hospital Pricing Authority material in any way including, for example, by changing Independent Hospital Pricing Authority text – then the Independent Hospital Pricing Authority prefers the following attribution:

Source: The Independent Hospital Pricing Authority

Table of contents

Acronyms and abbreviations	3
Definitions	4
1. Executive summary	6
1.1 Background.....	6
1.2 Purpose.....	6
1.3 Review	6
2. Dispute resolution principles.....	7
3. Cost-shifting dispute resolution.....	8
3.1 Scope.....	8
3.2 Timeframes	8
3.3 Submissions.....	9
3.4 Process	9
4. Cross-border dispute resolution	15
4.1 Scope.....	15
4.2 Cross-border activity	15
4.3 Timeframes	16
4.4 Process	17
5. Complaint and enquiry process	23
5.1 Internal review.....	23
5.2 External review options.....	23
6. Maintenance of records.....	24
Appendix A: Cost-shifting: Guidance on evidence	26
Appendix B: Cross-border: Guidance on evidence.....	28
Appendix C: Extracts from the Act	30
Appendix D: Extracts from the NHRA.....	33

Acronyms and abbreviations

ABF	Activity Based Funding
CEO	Chief Executive Officer
IHPA	Independent Hospital Pricing Authority
NEP	National Efficient Price
NHRA	National Health Reform Agreement
the Act	<i>National Health Reform Act 2011</i>

Definitions

Activity based funding	<p>Refers to an activity comprising in-scope public hospital services which will be funded by the Australian Government in the manner described at Clause A32(c) of the National Health Reform Agreement (NHRA).</p> <p>An activity based funding (ABF) activity may take the form of a separation, presentation or service event.</p>
Cost-shifting dispute	<p>Defined by section 138(1) of the <i>National Health Reform Act 2011</i> (the Act) as one that arises if:</p> <ol style="list-style-type: none"> a) a health minister believes that costs to his or her jurisdiction (the 'first jurisdiction') in relation to health care services are attributable to one or more changes that have been made to the policies, programs or practices of another jurisdiction (the 'second jurisdiction'); and b) within 2 months after being requested to do so, the second jurisdiction has not reimbursed those costs.
Cross-border dispute	<p>Defined by section 138(2) of the Act as on that arises if:</p> <ol style="list-style-type: none"> a) a state / territory health minister believes that: <ol style="list-style-type: none"> i. costs to his or her jurisdiction (the 'first jurisdiction') in relation to health care services are attributable to the provision of public hospital services to residents of another jurisdiction (the second jurisdiction); and ii. an intergovernmental agreement, or an agreement between states or states and territories, provides for those costs to be reimbursed, wholly or partly, by the second jurisdiction; and b) after being requested to do so, the second jurisdiction has not reimbursed those costs: <ol style="list-style-type: none"> i. within 2 months after the jurisdictions agree on the number of health care services involved; or ii. within 6 months after the last of those services was provided.
Cross-border agreement / arrangement	<p>Details the agreed scope, prices, methodology for charging and processes for estimating and acquitting activity for the relevant jurisdictions.</p>

Health care services	<p>Services provided by public hospitals. From 1 July 2013, the scope of public hospital services eligible for Commonwealth funding are:</p> <ul style="list-style-type: none">• All admitted programs, including hospital in home programs. Forensic mental health inpatient services are included;• All emergency department services; and• Non-admitted services that meet the criteria for inclusion on the IHPA General List.
Pricing Authority	<p>The governing body of IHPA established under the <i>National Health Reform Act 2011</i> (the Act).</p>
Provider jurisdiction	<p>The jurisdiction providing services in their own state/territory for a resident of another jurisdiction.</p>
Resident jurisdiction	<p>The jurisdiction which has responsibility for the provision of public hospital services to those residents receiving services in another state/territory.</p>

1. Executive summary

1.1 Background

The Independent Hospital Pricing Authority (IHPA) played a pivotal role in the national introduction of Activity Based Funding (ABF) and other functions as outlined in the National Health Reform Agreement (NHRA) and the *National Health Reform Act 2011* (the Act). IHPA was set up to deliver fair funding for hospitals across the country through the setting of the national efficient price (NEP) for public hospital services, whilst taking into account factors such as safety and quality and the cost of services in regional hospitals.

Since 1 July 2012, the Commonwealth, and state and territory funding contributions flow to the Local Hospital Networks through the National Health Funding Pool. With respect to cross-border arrangements, funding contributions by the resident jurisdiction are made to the provider jurisdiction through the National Health Funding Pool either on a regular basis throughout the year or on an ad-hoc basis reflecting actual activity (Clause A90, NHRA).

This Framework was developed by IHPA in consultation with the Dispute Resolution Framework Development working group, which included members from jurisdictions. The Framework was endorsed by IHPA's Jurisdictional Advisory Committee. IHPA will administer this Framework according to the requirements outlined in the Act and the NHRA.

This Framework is supported by other internal IHPA frameworks, policies and procedures, such as the *Data Access and Release Policy*, *Management of Confidential Jurisdictional Information Protocol*, *Data Governance Policy*, and *Disclosure of Interests Policy*.

1.2 Purpose

This Framework outlines the processes to investigate cross-border and cost-shifting disputes following a request by a health minister to ensure the timely, equitable and transparent management of these disputes.

1.3 Review

The Pricing Authority (IHPA Board) and Chief Executive Officer (CEO) of IHPA will review IHPA's Dispute Resolution Framework, including associated documentation, annually or as required.

The annual review will be undertaken in consultation with jurisdictions to ensure the Framework remains current to support IHPA's cross-border and cost-shifting dispute resolution role. This annual review will consider, within the bounds of the prescribed legislative requirements, the manageability of the framework for all parties involved.

The Framework was last reviewed in June 2019.

2. Dispute resolution principles

IHPA's dispute resolution principles are outlined in Table 1, along with the key mechanisms by which IHPA meets these principles.

Table 1. Dispute resolution principles and mechanisms

No.	Dispute resolution principles	Dispute resolution mechanisms
1	Clear sense of purpose and role	IHPA's role and mandate with regards to dispute resolution is defined in the Act and NHRA. This Framework guides the timely, equitable and transparent processes to investigate both cross-border and cost-shifting disputes following a request by a health minister.
2	Transparent communication	Promote transparency through clear dispute resolution principles, processes and communication with those parties involved in the dispute.
3	Promote ethical, fairness and responsible decision making	Actively promote ethical and responsible decision making (code of conduct, conflict of interest management). Focus on promoting improved efficiency and access to public hospital services and minimising susceptibility to gaming. Focus on fairness in decision making and good outcomes for resolution based on legislative and other requirements, including the Act and the NHRA. IHPA staff, contractors and Pricing Authority Members are bound by the <i>Disclosure of Interests Policy</i> .
4	Investigations are undertaken in an effective and efficient manner	Dispute investigations undertaken in accordance with the dispute resolution processes. IHPA procedure manuals and templates to guide the efficient dispute resolution process.
5	Make timely, balanced and evidenced based assessments / recommendations	Dispute resolution assessments and recommendations to be made on a timely basis. Where disputes are complex, an 'evidence based' balance of factors will be taken into account in making assessments / recommendations.
6	Recognise and manage quality and risk in the investigation process	Establish a sound system within IHPA of risk management and quality oversight (<i>Risk Management Framework, Data Quality Assurance Framework, etc.</i>).

3. Cost-shifting dispute resolution

3.1 Scope

IHPA's role in investigating and making assessments on cost-shifting disputes is limited to those disputes which:

- are in relation to 'costs' attributable to one or more changes that have been made to the policies, programs or practices of another jurisdiction (as opposed to dispute resolution with respect to provision of services); and
- have arisen on or after the date by which IHPA commenced operation (15 December 2011).

Section 139 of the Act outlines IHPA's responsibility in assessing cost-shifting disputes. Clauses A99 to A101 of the NHRA provide further details with regard to cost-shifting and the dispute resolution process. An extract of the relevant sections of the Act and the NHRA are at Appendices C and D respectively.

3.2 Timeframes

There is no time limit for IHPA to investigate a cost-shifting dispute. However, section 139(3) of the Act states that jurisdictions should ensure compliance with any relevant interjurisdictional agreements that stipulate timeframes by which to bring disputes to IHPA.

In addition, where a jurisdiction has known about the circumstances giving rise to a cost-shifting dispute, and has delayed taking steps to resolve that dispute with the second jurisdiction for an extended period, this may amount to failing to make reasonable efforts to resolve the dispute¹ Where a jurisdiction diligently pursued the complaint with the second jurisdiction, and then delayed referring the dispute to IHPA, such a delay at that stage of the process is less likely to amount to a failure to make 'reasonable efforts to resolve the dispute'.

Neither the Act nor the NHRA prescribes timeframes by which IHPA must conduct investigations or prepare the draft and final assessment. However, subject to adequate evidence to support IHPA in undertaking a timely investigation, the draft assessment will be provided to each jurisdictional health ministers party to the dispute within six months of receiving a request for assessment.

¹ Section 138(3)(b) of the Act

3.3 Submissions

A health minister may request an assessment of cost-shifting disputes by IHPA. There may be circumstances where changes in one jurisdiction have a cost effect on multiple other jurisdictions. Those jurisdictions may jointly request an assessment of the cost-shifting dispute by IHPA.

In this instance, IHPA will ensure that the requirements of Section 139 of the Act are met for all requesting jurisdictions. In particular:

- IHPA must be satisfied that each of the requesting jurisdictions has complied with relevant requirements and made other reasonable efforts to resolve the dispute (Section 139(3) of the Act);
- the draft assessment will be provided by IHPA to the health minister of each jurisdiction in dispute (Section 139(5) of the Act); and
- the final assessment will be provided by IHPA to the health minister of each jurisdiction in dispute (Section 139(6) of the Act).

3.4 Process

The key stages in the cost-shifting dispute resolution process are outlined in Table 2.

Table 2. Overview of cost-shifting dispute resolution processes

<p>Stage 1: Request for assessment</p>	<p>(1a) Jurisdictions undertake reasonable efforts to resolve dispute (1b) The first jurisdiction provides IHPA with a written request for assessment</p>
<p>Stage 2: Initial assessment</p>	<p>(2a) IHPA undertakes an initial assessment of the dispute (2b) IHPA provides written notification of the request for assessment to the second jurisdiction (as soon as practicable) (2c) The second jurisdiction makes a written submission to IHPA about the dispute within 60 days (2d) IHPA provides a copy of any written response received from the second jurisdiction</p>
<p>Stage 3: Investigation</p>	<p>(3a) IHPA undertakes investigation of the dispute (3b) IHPA requests additional information to assist the investigation (as required)</p>
<p>Stage 4: Draft assessment</p>	<p>(4a) IHPA drafts the assessment and provides to the disputing jurisdictional health ministers for review (4b) The jurisdictional health ministers provide IHPA with written comments within 30 days (4c) IHPA reviews the written comments from the jurisdictions with regards to the draft assessment (4d) IHPA clarifies the written comments with jurisdictions (if required)</p>

<p>Stage 5: Final assessment</p>	<p>(5a) IHPA determines the final assessment and provides to the disputing jurisdictional health ministers</p> <p>(5b) IHPA publishes the final assessment on the website if the investigation determines cost shifting has occurred</p>
---	--

Further details on each stage are provided below.

Stage 1: Request for assessment

(1a) Jurisdictions undertake reasonable efforts to resolve dispute

As part of the request for assessment process, the first jurisdiction must include a statement detailing the 'reasonable efforts ' they have taken to resolve the dispute with the second jurisdiction, or the reasons why no such steps were taken.

Some examples of 'reasonable efforts' include:

- notifying the other party of the issues in dispute and offering to discuss with them, with a view to resolving the dispute;
- providing relevant information and documents to the other party to enable them to understand the issues involved and how the dispute might be resolved;
- considering possible resolution through alternative dispute resolution processes; and
- attempting to negotiate with the other party with a view to resolving some or all of the issues in dispute.

While IHPA does not mandate particular action, it supports parties in deciding what steps are most appropriate in their circumstances.

(1b) The first jurisdiction provides IHPA with a request for assessment

After at least two months have elapsed where the second jurisdiction has failed to reimburse the first jurisdiction its costs, the jurisdictional health minister may refer the dispute to IHPA.

The request must be in writing and at a minimum include the following information in support of the request:

- copies of any intergovernmental agreements, or arrangements between the Commonwealth, states and territories;
- relevant information, data and documents to enable IHPA to understand the issues involved; and
- statement detailing the 'reasonable efforts' taken to resolve the dispute with the second jurisdiction, including steps in accordance with any applicable agreements, or the reasons why no such steps were taken.

IHPA has developed guidance at [Appendix A](#) to assist jurisdictions prepare a written submission to request an assessment by IHPA.

The first jurisdiction may provide a copy of its written submission to the second jurisdiction at the same time that it sends its request and written submission to IHPA. The Act, however, does not require the first jurisdiction to take this step.

A written submission does not necessarily mean that the dispute will be investigated by IHPA (see Stage 2).

Stage 2: Initial assessment

(2a) IHPA undertakes an initial assessment of the dispute

IHPA assesses whether the jurisdictions have met the following conditions:

- a health minister believes that costs to his or her jurisdiction in relation to health care services are attributable to one or more changes that have been made to the policies, programs or practices of another jurisdiction; and
- within 2 months after being requested to do so, the second jurisdiction has not reimbursed those costs; and
- jurisdictions have complied with any relevant requirements set out in intergovernmental agreements, or agreements between the Commonwealth, states and territories; and
- jurisdictions have made reasonable efforts to resolve the dispute.

IHPA will only investigate a dispute where the first jurisdiction outlines in the request for assessment how each of these conditions have been met and IHPA is satisfied that this information is sufficient. If IHPA is not satisfied that these conditions have been met, the request for assessment will be referred back to the health minister of the first jurisdiction:

- explaining that insufficient information has been provided to enable IHPA to determine whether it will investigate the dispute; and
- seeking additional information to enable IHPA to make this decision.

(2b) IHPA provides written notification of the request for assessment to the second jurisdiction (as soon as practicable)

Once IHPA starts to investigate the dispute, IHPA must give the health minister of the second jurisdiction (in writing):

- notice of the request, including copy of submission; and
- an invitation to make a written submission about the dispute within 60 days of receiving the invitation.

(2c) The second jurisdiction makes a written submission to IHPA about the dispute within 60 days

IHPA generally expects jurisdictions to provide requested information within the timeframes.

If the second jurisdiction declines the invitation to provide a written submission this must be advised in writing.

Alternatively, if the second jurisdiction is unable to provide a written submission within 60 days, they may seek an extension to make a submission. Extensions are considered by IHPA as a matter of discretion. The period of any extension will be as short as is reasonably appropriate in the circumstances.

A request for an extension should be made in writing and include reasons for seeking such an extension. IHPA will consult with the health minister of the other affected jurisdiction (including in relation to the proposed length of extension) when deciding on the request for extension. In making its decision on the request for an extension, IHPA will have regard to:

- the reasons given by the second jurisdiction, including whether the extension is requested because of circumstances outside of their control (for example, delays in obtaining information from third parties needed to prepare the submission);
- the level of detail provided to enable IHPA to understand the basis of the request;
- the terms of the submission received from the first jurisdiction;
- what is fair and reasonable to both parties in the circumstances of the particular case; and
- any other matters IHPA considers relevant.

Where IHPA decides to grant an extension of time, a copy of the letter advising the second jurisdiction of the extended timeframes to provide a written submission will be provided to the first jurisdiction.

If IHPA does not receive a written submission, a request for extension, or a letter advising the second jurisdiction will not be providing a response within 60 days, it will continue to exercise its functions under Part 4.3 of the Act.

(2d) IHPA provides a copy of any written response received from the second jurisdiction to the first jurisdiction

If IHPA receives a written submission from the second jurisdiction about the dispute within 60 days after receiving the invitation, IHPA will provide a copy of the response to the first jurisdiction (Clause A100, NHRA).

Stage 3: Investigation

(3a) IHPA undertakes investigation of the dispute

In undertaking the investigation, IHPA will assess the submissions received from the jurisdictions (in accordance with Clause A101, NHRA).

(3b) IHPA requests additional information to assist the investigation (as required)

Where required and appropriate, IHPA will:

- request additional evidence from jurisdictions (e.g. data, information, agreements, etc.) to clarify conflicting views, facts and other ambiguities in the investigation process;
- consult further with affected jurisdictions where required (in accordance with Clause A101, NHRA); and

- seek expert input/advice.

To support the timeliness of the investigation, jurisdictions should provide additional information within 30 days of receiving the written request.

In the course of IHPA consulting with the jurisdictions, requesting additional information and seeking any expert advice/input, IHPA may come into possession of information that adversely impacts upon a position or submission taken by a jurisdiction (the affected jurisdiction). In order to ensure fairness to all jurisdictions, such information will be provided by IHPA to the affected jurisdiction so that the affected jurisdiction has the opportunity to consider and respond to the matter within a reasonable timeframe.

Stage 4: Draft assessment

(4a) IHPA drafts the assessment and provides to the disputing jurisdictional health ministers for review

Following the investigation, IHPA will:

- prepare a draft assessment and obtain endorsement by the Pricing Authority;
- provide the draft assessment to the disputing jurisdictional health ministers; and
- invite the health ministers to give IHPA written comments on the draft assessment within 30 days of receiving them.

The draft assessment will include:

- a summary of the cost-shifting dispute between the jurisdictions, including the position of each jurisdiction with regard to the dispute;
- an overview of the evidence assessed in undertaking the investigation;
- limitations to the scope of the investigation;
- IHPA's assessment of the dispute (i.e. whether the costs of the first jurisdiction in relation to health care services are attributable to one or more changes that have been made to the policies, programs or practices of the second jurisdiction); and
- reasons supporting the assessment.

The draft assessment to the disputing jurisdictional health ministers will include a copy of any submissions received by IHPA.

(4b) The jurisdictional health ministers provide IHPA with written comments within 30 days

Health ministers should aim to provide IHPA with their written comments within 30 days. Where they are unable to do so, they may seek an extension.

Extensions are granted by IHPA as a matter of discretion, following consultation with the health minister of the other affected jurisdiction (including the proposed length of any extension). In this instance, the extension will be granted to both jurisdictions.

(4c) IHPA reviews the written comments from the jurisdictions with regard to the draft assessment

IHPA will review the comments received by health ministers with regard to the draft assessment.

(4d) IHPA clarifies the written comments with jurisdictions (if required)

Where there are comments that require explanation or clarification, IHPA will request clarification in writing from health ministers. To support the timeliness of the final assessment, this response will be requested to be provided within 30 days of receiving the request for clarification.

Stage 5: Final assessment**(5a) IHPA determines the final assessment and provides to the disputing jurisdictional health ministers**

IHPA will develop a final assessment, obtain endorsement from the Pricing Authority and provide it to the disputing jurisdictional health ministers.

(5b) IHPA publishes the final assessment on the website if the investigation determines cost-shifting has occurred

If the assessment confirms cost-shifting has occurred (costs to the first jurisdiction in relation to health care services are attributable to one or more changes that have been made to the policies, programs or practices of the second jurisdiction), the final assessment will be published on IHPA's website.

4. Cross-border dispute resolution

4.1 Scope

IHPA's role to investigate and make recommendations on cross-border disputes is limited to those disputes which:

- are in relation to reimbursement of 'costs' attributable to the provision of public hospital services to residents of another jurisdiction (as opposed to dispute resolution with respect to provision of services); and
- have arisen on or after the date by which IHPA commenced operation (15 December 2011).

As outlined in Clause B3(k) of the NHRA, IHPA will make recommendations on disputes where jurisdictions are unable to agree on the reconciliation and reimbursement of costs and either party seeks a determination from IHPA. As outlined in stage 2(a), IHPA must investigate the dispute if it is satisfied that the jurisdictions have satisfied certain conditions.

Although capital is not explicitly priced by IHPA, cross-border dispute resolution can include disputes in relation to the resident jurisdiction's contribution to capital funding relating to health service infrastructure (Clause A95, NHRA).

Section 140 of the Act outlines IHPA's responsibility in assessing cross-border disputes.

4.2 Cross-border activity

Clauses A88 to A97 of the NHRA provide further details with regard to cross-border arrangements and the dispute resolution process. As outlined in clause A88 of the NHRA, the Commonwealth, states and territories have agreed that the treatment of cross-border hospital activities will be governed by the following principles:

- the state/territory where a patient would normally reside should meet the cost of services (exclusive of the Commonwealth contribution discussed below) where its resident receives hospital treatment in another jurisdiction;
- payment flows (both Commonwealth and state/territory) associated with cross-border services should be administratively simple, and where possible consistent with the broader arrangements of the NHRA;
- the cross-border payment arrangements should not result in any adverse GST distribution effects;
- states/territories recognise their commitment under the Medicare principles which require medical treatment to be prioritised on the basis of clinical need;

- both states/territories should have the opportunity to engage in the setting of cross-border activity estimates and variations, in the context that this would not involve shifting of risk; and
- there should be transparency of cross-border flows.

Cross-border arrangements are to be developed between jurisdictions that experience significant cross-border flows and where one of the parties requests an agreement be in place (Clause A91, NHRA). These will set out estimated activity levels providing the capacity for both parties to contribute to planning of cross-border activity (Clause A92, NHRA).

An extract of the relevant sections of the Act and the NHRA are at Appendices C and D respectively.

4.3 Timeframes

There is no time limit for IHPA to investigate a cross-border dispute. However, section 140(3) of the Act states that jurisdictions should ensure compliance with any relevant intergovernmental or interjurisdictional agreements that stipulate timeframes by which to bring a dispute to IHPA.

In addition, where a jurisdiction has known about the circumstances giving rise to a cross-border dispute and has delayed taking steps to resolve that dispute with the second jurisdiction for an extended period, this may amount to failing to make reasonable efforts to resolve the dispute.² Where a jurisdiction diligently pursued the complaint with the second jurisdiction and delayed referring the dispute to IHPA, this is less likely to amount to a failure to make 'reasonable efforts' to resolve the dispute.

Neither the Act nor the NHRA prescribe timeframes by which IHPA must conduct investigations or prepare the draft and final recommendations. However, subject to adequate evidence to support IHPA in undertaking a timely investigation, the draft recommendation will be provided to each jurisdictional health ministers party to the dispute within six months of receiving a request.

² Section 140(3)(b) of the Act

4.4 Process

The key stages in the cross-border dispute resolution process are outlined in Table 3.

Table 3. Overview of cross-border dispute resolution processes

<p>Stage 1: Request for recommendations</p>	<p>(1a) Jurisdictions undertake reasonable efforts to resolve dispute (1b) The first jurisdiction provides IHPA with a written request for recommendations</p>
<p>Stage 2: Initial assessment</p>	<p>(2a) IHPA undertakes an initial assessment of the dispute (2b) IHPA provides a written notification of the request for recommendations to the second jurisdiction (as soon as practicable) (2c) The second jurisdiction makes a written submission to IHPA about the dispute within 60 days (2d) IHPA provides a copy of any written response received from the second jurisdiction to the first jurisdiction</p>
<p>Stage 3: Investigation</p>	<p>(3a) IHPA undertakes investigation of the dispute (3b) IHPA requests additional information to assist the investigation (as required)</p>
<p>Stage 4: Draft recommendations</p>	<p>(4a) IHPA drafts the recommendations and provides to the disputing jurisdictional health ministers for review (4b) The jurisdictional health ministers provide IHPA with written comments within 30 days (4c) IHPA reviews the written comments from the jurisdictions with regards to the draft recommendations (4d) IHPA clarifies the written comments with jurisdictions (if required)</p>
<p>Stage 5: Final recommendations</p>	<p>5a) IHPA determines the final recommendation and provides to the disputing jurisdictional health ministers</p>
<p>Stage 6: Ongoing monitoring</p>	<p>(6a) Jurisdictions implement recommendations (6b) IHPA monitors jurisdictions compliance with recommendations (6c) IHPA provides advice to the Commonwealth to adjust funding (if required)</p>

Further details on each stage are provided below.

Stage 1: Request for recommendations

(1a) Jurisdictions undertake reasonable efforts to resolve the dispute

As part of the submission process, the first jurisdiction must include a statement detailing the 'reasonable effort' to resolve the dispute with the second jurisdiction, or the reasons why no such steps were taken.

Some examples of 'reasonable efforts' include:

- notifying the other party of the issues in dispute and offering to discuss them with a view to resolving the dispute;
- providing relevant information and documents to the other party to enable them to understand the issues involved and how the dispute might be resolved;
- considering possible resolution through alternative dispute resolution processes; and
- attempting to negotiate with the other party with a view to resolving some or all of the issues in dispute.

(1b) The first jurisdiction provides IHPA with a written request for recommendations

Following the lapse of the relevant time period (two or six months) where the second jurisdiction has failed to reimburse the first jurisdiction, a health minister may refer the dispute to IHPA for recommendations.

The request must be in writing and the jurisdiction is encouraged at a minimum to provide the following information to support the request:

- copies of any intergovernmental agreements, or arrangements between states/territories;
- relevant information, data and documents to enable IHPA to understand the issues involved; and
- statement detailing the 'reasonable efforts' taken to resolve the dispute with the second jurisdiction, including steps in accordance with any applicable agreements, or the reasons why no such steps were taken.

IHPA has developed guidance at [Appendix B](#) to assist jurisdictions in preparing a written submission to request IHPA resolve disputes.

The first jurisdiction may provide a copy of its written submission to the second jurisdiction at the same time that it sends its request and written submission to IHPA. The Act, however, does not require the first jurisdiction to take this step.

A written submission does not necessarily mean that the dispute will be investigated by IHPA (see Section 2(a)).

Stage 2: Initial assessment

(2a) IHPA undertakes an initial assessment of the dispute

IHPA assesses whether the jurisdictions have satisfied the following conditions:

1. a jurisdictional health minister believes that costs to his or her jurisdiction in relation to health care services are attributable to the provision of public hospital services to residents of another jurisdiction (the second jurisdiction); and
2. a jurisdictional health minister believes that an intergovernmental agreement, or an agreement between states or states and territories, provides for those costs to be reimbursed, wholly or partly, by the second jurisdiction.

Note: 'intergovernmental agreement' as it appears in Section 138(2)(a)(ii) of the Act includes the NHRA. In addition, as IHPA is able to calculate funding contributions that need to be

made by a resident state following IHPA's receipt of the quarterly submissions detailing actual activity, then the NHRA itself meets the requirement set out in Section 138(2)(a)(ii) of the Act.

3. after being requested to do so, the second jurisdiction has not reimbursed those costs:
 - within 2 months after the jurisdictions agree on the number of health care services involved; or
 - within 2 months after the funding contribution assessed on an ad hoc basis in accordance with Clause A90(b) was reported; or
 - within 6 months after the last of those services was provided;
4. jurisdictions have complied with any relevant requirements set out in intergovernmental agreements, or agreements between jurisdictions; and
5. jurisdictions have made reasonable efforts to resolve the dispute.

IHPA will only investigate and make recommendations where the first jurisdiction outlines in the request how each of the above conditions have been met and IHPA is satisfied that this information is sufficient. If IHPA is not satisfied that these conditions have been met, the request for assessment will be referred back to the health minister of the first jurisdiction:

- explaining that insufficient information has been provided to enable IHPA to determine whether it will investigate the dispute; and
- seeking additional information to enable IHPA to make this decision.

(2b) IHPA provides written notification of the request for recommendation to the second jurisdiction (as soon as practicable)

Once IHPA starts to investigate the dispute and as soon as practicable after starting the investigation, IHPA must give the health minister of the second jurisdiction (in writing):

- notice of the request, including a copy of the submission; and
- an invitation to make a written submission about the dispute within 60 days of receiving the invitation.

(2c) The second jurisdiction makes a written submission to IHPA about the dispute within 60 days

IHPA generally expects jurisdictions to provide requested information within the timeframes.

Alternatively, if the second jurisdiction declines the invitation to provide a written submission, this must be advised in writing.

If the second jurisdiction is unable to provide a written submission within 60 days, they may seek an extension. Extensions will be considered at IHPA's discretion. The period of any extension will be as short as is reasonably appropriate in the circumstances.

Any request for an extension should be made in writing and include reasons for the request. IHPA will consult with the health minister of the other affected jurisdiction (including in relation to the proposed length of any extension) when deciding on the request for extension.

In making its decision on the request for an extension, IHPA will have regard to:

- the reasons given by the second jurisdiction, including whether the extension is requested because of circumstances outside of their control (for example, delays in obtaining information from third parties needed to prepare the submission);
- the level of detail provided to enable IHPA to understand the basis of the request;
- the terms of the response received from the first jurisdiction;
- what is fair and reasonable to both parties in the circumstances of the particular case; and
- any other matters IHPA considers relevant.

Where IHPA decides to grant an extension of time, a copy of the letter advising the second jurisdiction of the extended timeframes to provide a written submission will be provided to the first jurisdiction.

If IHPA does not receive a written submission, request for extension or advice from the second jurisdiction that they will not be providing a response within 60 days, IHPA will continue to exercise its functions under Part 4.3 of the Act.

(2d) IHPA provides a copy of any written response received from the second jurisdiction to the first jurisdiction

If IHPA receives a written submission from the second jurisdiction about the dispute within 60 days after receiving the invitation, IHPA will provide a copy of the response to the first jurisdiction.

Stage 3: Investigation

(3a) IHPA undertakes investigation of the dispute

In undertaking the investigation, IHPA will assess submissions received from the jurisdictions.

(3b) IHPA requests additional information to assist the investigation (as required)

Where required, IHPA will:

- request additional evidence (e.g. data, information, agreements, etc.) to clarify conflicting views, facts and other ambiguities and to support the investigation;
- consult further with affected jurisdictions where required; and
- seek expert input / advice where required.

To support the timeliness of the investigation, jurisdictions should provide additional information within 30 days of receiving the written request.

Stage 4: Draft recommendations

(4a) IHPA drafts the recommendation and provides to the disputing jurisdictional health ministers for review

Following the investigation, IHPA will:

- prepare draft recommendations and obtain endorsement from the Pricing Authority;
- provide the draft recommendations to the disputing jurisdictional health ministers; and
- invite the health ministers to give IHPA written comments on the draft recommendations within 30 days of receiving them.

The draft recommendations will include:

- a summary of the cross-border dispute between the jurisdictions, including the position of each jurisdiction with regard to the dispute;
- an overview of the evidence assessed in undertaking the investigation;
- limitations to the scope of the investigation;
- IHPA's recommendations (i.e. costs to a jurisdiction are attributable to the provision of public hospital services to residents of another jurisdiction); and
- reasons supporting the recommendations.

The draft recommendations sent to the jurisdictional health ministers will include a copy of any submissions received by IHPA and will be in accordance with IHPA's Management of Confidential Jurisdictional Information Protocol.

(4b) The jurisdictional health ministers provide IHPA with written comments within 30 days

health ministers should aim to provide IHPA with their written comments within 30 days. Where they are unable to do so, they may seek an extension.

Extensions are considered by IHPA as a matter of discretion, following consultation with the health minister of the other affected jurisdiction (including the proposed length of any extension). In this instance this extension will be granted to both jurisdictions.

(4c) IHPA reviews the written comments by the jurisdictions with regard to the draft recommendation

IHPA will review the comments received by jurisdictional health ministers with regard to the draft recommendation, in particular to ensure that the comments provided do not challenge the factual accuracy of the evidence assessed in undertaking the investigation and the reasons supporting the cross-border dispute recommendation.

(4d) IHPA clarifies the written comments with jurisdictions (if required)

Where there are comments that require explanation or clarification, IHPA will request this in writing from jurisdictional health ministers. To support the timeliness of the final recommendation, this response will be requested to be provided within 30 days of receiving the request for clarification.

Stage 5: Final recommendations**(5a) IHPA determines the final recommendations and provides to the disputing jurisdictional health ministers**

IHPA will prepare the final recommendations, obtain endorsement from the Pricing Authority and provide it to the disputing jurisdictional health ministers.

A copy will also be provided to the Administrator of the National Health Funding Pool for information only.

Stage 6: Implementation of recommendations**(6a) Jurisdictions implement recommendations**

As outlined in Clause A96 of the NHRA, the Commonwealth, states and territories agree that they will:

- accept and implement any recommendations made by IHPA in relation to cross-border disputes under Clause B3(k) of the NHRA; and
- provide additional funding to the other party in a dispute if this is required.

(6b) IHPA monitors compliance with recommendations

Two months after IHPA has advised disputing jurisdictions of the final recommendations, it will request an update on implementation of these recommendations. A response by the jurisdictions will be requested within 30 days.

(6c) IHPA provides advice to the Commonwealth to adjust funding (if required)

Three months after IHPA has made recommendations and any element of the recommendations have not been complied with, IHPA may at the request of the first jurisdiction advise the Commonwealth Treasurer of any adjustments to Commonwealth payments to the National Health Funding Pool required to give effect to the recommendations.³

As outlined in the Clause A97 of the NHRA, the states and territories agree to fund from their own resources any reduction in Commonwealth payments to Local Hospital Networks.

³ Section 141 of the Act

5. Complaint and enquiry process

5.1 Internal review

Should an affected jurisdiction wish to raise a complaint or enquire about IHPA's legislative functions under Part 4.3 of the Act, including how these functions are performed, the following process should be followed:

- jurisdictions to raise the complaint or enquiry in writing to the attention of the IHPA CEO and Pricing Authority Chair;
- IHPA will acknowledge the complaint or enquiry in writing;
- if an investigation is required by IHPA with regard to the performance of its legislative functions, this will be planned and aim to resolve factual issues and consider options for resolution;
- if the jurisdiction is not satisfied with the response, external review may be sought (see Section 5.2); and
- any systemic issues that arise as a result of the complaint or enquiry will be considered by IHPA.

5.2 External review options

The external review options which may be available to affected jurisdictions are summarised below.

Commonwealth Ombudsman

The performance of functions by IHPA under Part 4.3 of the Act and actions reasonably incidental to the performance of such functions could be subject to an investigation by the Ombudsman under the *Ombudsman Act 1976*, should a review be requested by an affected jurisdiction.

Judicial review

Judicial review options may be available under the *Administrative Decisions (Judicial Review) Act 1977* or under common law.

6. Maintenance of records

As an independent Commonwealth statutory authority, IHPA has an obligation to maintain good records of its business activities for legal purposes. Records are vital assets that support IHPA's operations through enabling access to required information and preserving corporate memory. They also enable IHPA to meet its accountability and compliance requirements.

Paper, electronic and other records created by IHPA which relate to IHPA's dispute resolution functions under Part 4.3 of the Act must be complete and accurate to the extent necessary to:

- enable current and future IHPA staff to take appropriate action, and make well-founded decisions in their day to day operations;
- enable an authorised person to examine the conduct of IHPA business;
- protect the financial, legal and other rights of IHPA; and
- protect third parties affected by IHPA's actions and decisions.

Where cost-shifting and cross-border disputes are reported to IHPA, requests, submissions, assessments and recommendations by IHPA will be retained on file. Tracking databases of requests, decisions and outcomes will be used for the efficient management of requests.

All of IHPA's records relating to its dispute resolution functions (including records received from other sources such as the affected jurisdictions):

- comply with the regulatory and accountability environment in which IHPA operates, including the *Archives Act 1983*, *Freedom of Information Act 1982*, *Privacy Act 1988* and the *Evidence Act 1995*;
- are adequate for the purposes for which the records are kept;
- include all activities and transactions that may require documentation;
- accurately reflect an activity or transaction;
- are credible, so that it is possible to prove that the records are what they purport to be, that their creators did in fact create them and the date on which a record was created;
- are maintained in a manner that prevents unauthorised access, alteration or removal; and
- are retained for the appropriate period of time in accordance with relevant records disposal authorities.

Members of the public have a right under the *Freedom of Information Act 1982* and the *Archives Act 1983* to access records that IHPA creates in the course of carrying out its functions. Failure to maintain or locate reliable records may lead to legal action.

It is also possible that IHPA may be served with subpoenas or orders for the discovery of documents requiring the production of documents by a specified date. Both processes will require IHPA to make a full and thorough search for relevant documents, including documents held in an electronic form.

Appendix A: Cost-shifting: Guidance on evidence

To assist jurisdictions in preparing a request for cost-shifting dispute assessment, IHPA has developed guidance with regard to evidence to accompany the written submission to support the request. This guidance is outlined in the table below.

Table 1: Guidance on evidence to be included in the request for assessment guidance

Topic	Evidence
Contact details	<ul style="list-style-type: none"> • key person contact details to allow for clarification of any matters relating to the dispute.
Dispute particulars	<ul style="list-style-type: none"> • particulars of the cost-shifting dispute, including scope, key dates and any positions of the jurisdiction; • overview of any intergovernmental agreements or agreements between states/territories; • relevant background/contextual information to support IHPA in understanding the issues involved; and • details of any risks identified.
Compliance with agreement/s	<ul style="list-style-type: none"> • evidence to support compliance with relevant requirements set out in intergovernmental agreements or agreements between the Commonwealth, states/territories.
Prior efforts to resolve the dispute	<ul style="list-style-type: none"> • statement detailing what 'genuine steps' have been taken to resolve the dispute with the second jurisdiction, or the reasons why no such steps were taken. • examples of 'reasonable efforts' that parties may outline in the statement may include: <ul style="list-style-type: none"> – notifying the other party of the issues in dispute and offering to discuss them with a view to resolving the dispute – providing relevant information and documents to the other party to enable them to understand the issues involved and how the dispute might be resolved – considering possible resolution through alternative dispute resolution processes • attempting to negotiate with the other party with a view to resolving some or all of the issues in dispute

Topic	Evidence
Supporting documentation	<ul style="list-style-type: none"> • any evidence which may support IHPA in its investigation • of the dispute (e.g. data, information, agreements); and • copies of any intergovernmental agreements or agreements between the Commonwealth, states and territories.

Appendix B: Cross-border: Guidance on evidence

To assist jurisdictions in preparing a request for cross-border dispute recommendation, IHPA has developed guidance with regard to evidence to accompany the written submission to support the request.

Table 2: Guidance on evidence to be included in the request for recommendation

Topic	Evidence
Contact details	<ul style="list-style-type: none"> • key person contact details to allow for clarification of any matters relating to the dispute.
Dispute particulars	<ul style="list-style-type: none"> • particulars of the cross-border dispute, including scope, key dates and any positions of the jurisdiction; • overview of any intergovernmental agreements or agreements between states or states and territories; • relevant background/contextual information to support IHPA in understanding the issues involved, for example: <ul style="list-style-type: none"> – cost and activity data, estimates and analysis of variations – evidence of where patients reside – resident jurisdictions contribution to capital funding – patient pathways – planning for cross-border activity – cross-border payment arrangements – health service plans – precedents based on previous agreements • details of any risks identified.
Compliance with agreement/s	<ul style="list-style-type: none"> • evidence to support compliance with any relevant requirements set out in intergovernmental agreements or agreements between states or states and territories.
Prior efforts to resolve the dispute	<ul style="list-style-type: none"> • statement detailing what 'genuine steps' have been taken to resolve the dispute with the second jurisdiction, or the reasons why no such steps were taken.

Topic	Evidence
	<ul style="list-style-type: none"> • examples of ‘reasonable efforts’ that parties may outline in the statement may include: <ul style="list-style-type: none"> – notifying the other party of the issues in dispute and offering to discuss them with a view to resolving the dispute – providing relevant information and documents to the other party to enable them to understand the issues involved and how the dispute might be resolved – considering possible resolution through alternative dispute resolution processes – attempting to negotiate with the other party with a view to resolving some or all of the issues in dispute
Supporting documentation	<ul style="list-style-type: none"> • any evidence which may support IHPA in its investigation of the dispute (e.g. data, information, agreements); and • copies of any intergovernmental agreements or agreements between states or states and territories.

Appendix C: Extracts from the Act

Part 4.3 — Cost-shifting disputes and cross-border disputes

138 Cost-shifting disputes and cross-border disputes

*Meaning of **cost-shifting dispute***

- (1) A **cost-shifting dispute** arises if:
- (a) a Health Minister believes that costs to his or her jurisdiction in relation to health care services are attributable to one or more changes that have been made to the policies, programs or practices of another jurisdiction (the **second jurisdiction**); and
 - (b) within 2 months after being requested to do so, the second jurisdiction has not reimbursed those costs.

*Meaning of **cross-border dispute***

- (2) A **cross-border dispute** arises if:
- (a) a State/Territory Health Minister believes that:
 - (i) costs to his or her jurisdiction in relation to health care services are attributable to the provision of public hospital services to residents of another jurisdiction (the **second jurisdiction**); and
 - (ii) an intergovernmental agreement or an agreement between States or States and Territories provides for those costs to be reimbursed, wholly or partly, by the second jurisdiction; and
 - (b) after being requested to do so, the second jurisdiction has not reimbursed those costs:
 - (i) within 2 months after the jurisdictions agree on the number of health care services involved; or
 - (ii) within 6 months after the last of those services was provided.

139 Assessment by Pricing Authority of cost-shifting disputes

Request for assessment

- (1) A **Health Minister** may request the Pricing Authority to make an assessment about a cost-shifting dispute between his or her jurisdiction (the **first jurisdiction**) and another jurisdiction (the **second jurisdiction**).
- (2) The request must be:
- (a) in writing; and
 - (b) accompanied by a written submission in support of the request.
- (3) The Pricing Authority must investigate the dispute if it is satisfied that the jurisdictions have:
- (a) complied with any relevant requirements set out in intergovernmental agreements, or agreements between states or states and territories; and
 - (b) made other reasonable efforts to resolve the dispute.
- (4) As soon as practicable after starting to investigate the dispute, the Pricing Authority must give the Health Minister of the second jurisdiction:

- (a) the following in writing:
 - (i) notice of the request;
 - (ii) an invitation to make a written submission to the Pricing Authority about the dispute within 60 days after receiving the invitation; and
 - (b) a copy of the submission that accompanied the request.
- (5) Following the investigation, the Pricing Authority must:
- (a) prepare a draft assessment and give them to the Health Ministers; and
 - (b) invite the Health Ministers to give the Pricing Authority written comments on the draft assessment within 30 days after receiving them.

The draft assessment must be accompanied by a copy of any submissions received by the Pricing Authority.

Final assessment

- (6) The Pricing Authority must prepare a final assessment and give it to the Health Ministers.
- (7) If the assessment is that costs to the first jurisdiction in relation to health care services are attributable to one or more changes that have been made to the policies, programs or practices of the second jurisdiction, the Pricing Authority must publish the final assessment on the Pricing Authority's website.

140 Recommendations by Pricing Authority on cross-border disputes

Request for recommendations

- (1) A Health Minister may request the Pricing Authority to make recommendations about a cross-border dispute between his or her jurisdiction and another jurisdiction.
- (2) The request must be:
 - (a) in writing; and
 - (b) accompanied by a written submission in support of the request.
- (3) The Pricing Authority must investigate the dispute if it is satisfied that the jurisdictions have:
 - (a) complied with any relevant requirements set out in intergovernmental agreements, or agreements between States or States and Territories; and
 - (b) made other reasonable efforts to resolve the dispute.
- (4) As soon as practicable after starting to investigate the dispute, the Pricing Authority must give the Health Minister of the other jurisdiction the following in writing:
 - (a) notice of the request;
 - (b) an invitation to make a written submission to the Pricing Authority about the dispute within 60 days after receiving the invitation; and
 - (c) a copy of the submission that accompanied the request.
- (5) Following the investigation, the Pricing Authority must:
 - (a) prepare draft recommendations and give them to the Health Ministers; and
 - (b) invite the Health Ministers to give the Pricing Authority written comments on the draft recommendations within 30 days after receiving them.

Final recommendations

- (6) The Pricing Authority must prepare final recommendations and give them to the Health Ministers.

141 Advice to Commonwealth to adjust funding

The Pricing Authority may advise the Commonwealth of adjustments to the Commonwealth's funding in relation to health care services that would be necessary to give effect to final recommendations in relation to a cross-border dispute if:

- (a) 3 months have passed since the recommendations were given; and
- (b) the recommendations have not been compiled with; and
- (c) the Health Minister who requested the recommendations requests the advice to be given.

Appendix D: Extracts from the NHRA

Cross-border arrangements

- A88. The treatment of cross-border hospital activities will be governed by the following principles:
- a. the State where a patient would normally reside should meet the cost of services (exclusive of the Commonwealth contribution discussed below) where its resident receives hospital treatment in another jurisdiction;
 - b. payment flows (both Commonwealth and State) associated with cross-border services should be administratively simple, and where possible consistent with the broader arrangements of this Agreement;
 - c. the cross-border payment arrangements should not result in any adverse GST distribution effects;
 - d. States recognise their commitment under the Medicare principles which require medical treatment to be prioritised on the basis of clinical need;
 - e. both States should have the opportunity to engage in the setting of cross-border activity estimates and variations, in the context that this would not involve shifting of risk; and
 - f. there should be transparency of cross-border flows.

Funding flows

- A89. Commonwealth funding contributions will flow to the provider jurisdiction through the National Health Funding Pool. Steps will be taken to prevent Commonwealth payments made in accordance with these arrangements being subject to equalisation by the Commonwealth Grants Commission to avoid financially disadvantaging one State.
- A90. Funding contributions by the resident State will be made to the provider State through the National Health Funding Pool, either:
- a. on a regular basis throughout the year, reflecting activity estimates between the parties as scheduled through a Cross-border Agreement with subsequent reconciliation for activity; or
 - b. on an ad-hoc basis reflecting actual activity.

Agreement around activity

- A91. Cross-border Agreements will be developed between jurisdictions which experience significant cross-border flows, where one of the parties requests a Cross-border Agreement be in place.
- A92. Cross-border Agreements will set out estimated activity levels providing the capacity for both parties to contribute to planning of cross-border activity.
- A93. Cross-border Agreement disputes will be dealt with as part of the IHPA dispute resolution process.

Pricing

- A94. Prices will be set at the NEP as determined by IHPA including adjustments for any loadings for the provider Local Hospital Network, unless otherwise agreed by the parties to the Cross-border Agreement.
- A95. Capital will not be explicitly priced by IHPA, however cross-border dispute resolution can include disputes in relation to the resident State's contribution to capital funding.
- A96. The Commonwealth and States agree that they will accept and implement any recommendations made by IHPA in relation to cross-border disputes under Clause B3(k) and will provide additional funding to the other party in a dispute if this is required.
- A97. If, three months after IHPA has made a recommendation under Clause B3(k), a State has not complied with any element of the recommendation requiring it to make payments to another State, IHPA may at the request of the second State, advise the Commonwealth Treasurer of any adjustments to Commonwealth payments to the National Health Funding Pool required to give effect to the recommendation. States agree to fund from their own resources any reduction in Commonwealth payments to Local Hospital Networks.

Cost-Shifting

- A99. Jurisdictions may make submissions to IHPA requesting it advise whether a party to this Agreement has shifted costs onto another jurisdiction in a manner which is contrary to the intent of this Agreement.
- A100. IHPA will provide the other party a copy of the submission and request a responding submission to be provided within 60 days. IHPA will provide this response to the initiating jurisdiction.
- A101. IHPA will then assess the submissions, consult further with affected jurisdictions and publicly release its assessment should it consider that cost-shifting has occurred.

Independent Hospital Pricing Authority

- B3. IHPA has the following determinative functions:
- (k) resolving disputes on cross-border issues, where parties are unable to reach bilateral agreement and either party seeks a determination from IHPA.
- B10. Should IHPA, in carrying out its functions, identify significant anomalies in service provision or pricing which potentially suggest activity contrary to the intent of this Agreement, IHPA may consult with the relevant jurisdiction. If the matter is unresolved following consultation with the relevant jurisdiction, IHPA may confidentially provide information to all jurisdictions about the matter. Should a jurisdiction consider this information evidence of cost-shifting, they can make a submission to IHPA as set out in Clause A99.

Independent Hospital Pricing Authority

**Level 6, 1 Oxford Street
Sydney NSW 2000**

**Phone 02 8215 1100
Email enquiries.ihpa@ihpa.gov.au
Twitter [@IHPAnews](https://twitter.com/IHPAnews)**

www.ihpa.gov.au



IHPA