

Australian Financial Review

March 26, 2012 Monday

Obamacare faces court hurdle

By Ben Potter, AFR correspondent Washington

In 1898, before he ascended to the Supreme Court, Louis Brandeis declared that American citizens had the right to be "left alone" by the government.

A hundred and twelve years later, Congress enacted the Patient Protection and Affordable Care Act, which compelled nearly 50 million uninsured Americans to buy insurance by 2014, or pay a penalty.

Two years later, President Barack Obama's signature reform, derisively referred to as "Obamacare" by Republicans vowing to repeal it, is up for grabs in the Supreme Court.

The nine justices will hear six hours of argument on the constitutionality of the "individual mandate" and other aspects of Obamacare over the next three days.

Then they will retire to consider a decision that is expected to be handed down in June, with potentially explosive consequences for the general election later in the year.

It is the most politically sensitive case the court has taken since it heard Al Gore's challenge to George Bush's election in 2000, and one of the biggest cases since the Brown v Board of Education desegregation case and cases on president Franklin Roosevelt's "New Deal" in 1936 and 1937.

The US devotes a larger share of its economic output to healthcare than any other comparable country - almost 18 per cent of gross domestic product, or about \$US2.5 trillion a year. Yet it achieves more uneven results - great for those with good coverage, but chancy for many and threadbare for those who fall through the cracks.

Mr Obama and congressional Democrats sought to improve coverage for the uninsured and mend some of the inefficiencies stemming from the fragmented market.

But lacking confidence in political support for a public single purchaser of medical services, such as Medicare in Australia, they opted to compel - and subsidise - the purchase of insurance.

They also expanded Medicaid, which is jointly funded by the federal government and the states, outlawed refusals of coverage for existing ailments and let children stay on their parents' policies until age 26.

Some states immediately cried foul at the Medicaid expansion, which they argued was coercive because of the risk of defunding if they did not play ball, and the individual mandate.

Obamacare's survival now depends on whether a majority of the judges believe the interstate commerce clause in the constitution is flexible enough to regulate the "inaction" of refusing to buy health insurance. If not, the survival of the rest of "Obamacare" depends on whether it is "severable" from the individual mandate.

Despite the high stakes, legal experts polled by the American Bar Association put Obamacare's chances of survival at 85 per cent.

"The justices will emphasise that the healthcare crisis requires a national solution and that the Affordable Care Act is a constitutional effort to do just this," Erwin Chemerinsky, a University of California law professor, told the ABA's Supreme Court preview.

But Ilya Shapiro, constitutional expert at the libertarian **Cato Institute**, told the preview he thought the court would narrowly throw it out.

"Upholding the mandate would fundamentally alter the relationship of the federal government to the states and the people; nobody would ever again be able to claim that the constitution limits federal power," he said.

KEY POINTS Nine judges will hear arguments on health care reforms this week. The court is expected to hand down its judgment in June. It's the most politically sensitive case since *Gore v Bush* in 2000.