

EXPLANATORY STATEMENT

Select Legislative Instrument No. 195, 2014

Health Insurance Act 1973

Health Insurance Legislation Amendment (Optometric Services and Other Measures) Regulation 2014

Subsection 133(1) of the *Health Insurance Act 1973* (the Act) provides that the Governor-General may make regulations, not inconsistent with the Act, prescribing all matters required or permitted by the Act to be prescribed, or necessary or convenient to be prescribed for carrying out or giving effect to the Act.

Part II of the Act provides for the payment of Medicare benefits for professional services rendered to eligible persons. Section 9 of the Act provides that Medicare benefits be calculated by reference to the fees for medical services set out in prescribed tables.

Subsections 4(1) and 4AA(1) of the Act provides that the regulations may prescribe a table of medical and diagnostic imaging services which set out items of medical and diagnostic imaging services, the fees applicable for each item, and rules for interpreting the table. The *Health Insurance (General Medical Services Table) Regulation 2014* (GMST) and the *Health Insurance (Diagnostic Imaging Services Table) Regulation 2014* (DIST) currently prescribe such tables. The *Health Insurance Regulations 1975* (HI Regulations) prescribe other 'matters' which the Governor-General may make regulations for in accordance with subsection 133(1) of the Act.

The *Health Insurance Legislation Amendment (Optometric Services and Other Measures) Regulation 2014* (the Regulation) will amend the GMST, DIST and HI Regulations to implement 2014-15 Budget measures and otherwise ensure that the medical and diagnostic services funded through the Medicare Benefits Schedule (MBS) continue to be up-to-date, representative of best practice medical practice, and reflective of government commitments.

Part 1

Part 1 of the Regulation implements the 2014-15 Budget measures – '*Medicare Benefits Schedule - Reduced optometry rebates and removal of charging cap*' and '*Medicare Benefits Schedule - Comprehensive eye examinations*' which are to take effect on 1 January 2015

Part 1 of the Regulation includes the following changes to the GMST that will take effect on 1 January 2015:

- the MBS fees for optometry services will be reduced by 5.88 per cent, reducing the MBS rebate for these services by 5 per cent;
- subclause 2.28.4(2) of Schedule 1 will be repealed to remove the charging cap that currently applies to optometrists accessing the Medicare Benefits Schedule, enabling them to set their own fees in a similar manner to other health providers;
- the period between claiming Medicare rebateable comprehensive eye examinations will be extended from two years to three years for asymptomatic people aged under 65 years; and

- the period between claiming Medicare rebateable comprehensive eye examination will be reduced from two years to one year for asymptomatic patients aged 65 years and over.

Part 2

Part 2 of the Regulation amends the DIST to clarify the restrictions applied to cone beam computed tomography items 57362 and 57363. These items were inserted in the DIST on 1 November 2014, along with clause 2.2.6 which sets out the restrictions to be applied to these items.

The Regulation amends clause 2.2.6 of the DIST to ensure unnecessary inclusions in paragraph (b) and (c) of clause 2.2.6 will be deleted. The reasons being that;

- the requirement in paragraph (b) is already covered by section 16EA of the Act which requires equipment for Medicare rebated diagnostic imaging services to be provided by practices which are accredited under a diagnostic imaging accreditation scheme; and
- the requirement in paragraph (c) is already covered by regulation 10(1)(c) which restricts requests for certain diagnostic imaging services to dental specialists.

As a consequence of removing paragraph (c) from clause 2.2.6; the definition of ‘dental specialists’ will also be removed from Part 3 of Schedule 1 of the DIST.

Part 2 of the Regulation also amends the HI Regulations to clarify that items 57362 and 57363 can also be requested by prosthodontists, and oral medicine specialist or oral pathology specialists, by inserting these items in 10(1)(b) and (d) of the HI Regulations.

Consultation

The Department of Health has consulted with the Department of Human Services and Optometry Australia.

Details of the regulation are set out in the Attachment.

The Act specifies no conditions which need to be met before the power to make the regulation may be exercised.

The regulation is a legislative instrument for the purposes of the *Legislative Instruments Act 2003*.

Part 1 of the Regulation commences on 1 January 2015.

Part 2 of the Regulation commences on the day after registration on the Federal Register of Legislative Instruments.

Authority: Subsection 133(1) of the
Health Insurance Act 1973

Details of the Health Insurance Legislation Amendment (Optometric Services and Other Measures) Regulation 2014

Section 1 – Name

This section provides for the regulation to be referred to as the *Health Insurance Legislation Amendment (Optometric Services and Other Measures) Regulation 2014*.

Section 2 – Commencement

This section provides for Part 1 of the regulation to commence on 1 January 2015 and Sections 1 to 4 and Part 2 of the regulation to commence on the day after registration of the instrument on the Federal Register of Legislative Instruments.

Section 3 – Authority

This section provides that the regulation is made under the *Health Insurance Act 1973*.

Section 4 – Schedules

This section provides that each instrument specified in a Schedule to the instrument is amended or repealed as set out in the applicable items in the Schedule concerned.

Schedule 1 – Amendments

Part 1 – Optometric services

Health Insurance (General Medical Service Table) Regulation 2014

Item [1] – Subclause 1.2.3(1) of Schedule 1

This item omits item 10900, which will be repealed under Item 8 of the regulation, from subclause 1.2.3(1) of Schedule 1 and substitutes it with item 10905.

Item [2] – Clause 2.28.1 of Schedule 1 (heading)

Item 2 repeals the heading of Clause 2.28.1 of Schedule 1 and replaces it with a new heading to remove reference to item 10900.

Item [3] – Subclause 2.28.1(1) of Schedule 1

This item repeals subclause 2.28.1(1) of Schedule 1 which relates to the application of item 10900.

Item [4] – Subclause 2.28.4(2) of Schedule 1

Item 4 repeals subclause 2.28.4(2) of Schedule 1 to remove the charging cap that currently applies to optometrists.

Item [5] – After clause 2.28.5 of Schedule 1

Item 5 inserts a new subclause **2.28.6 Meaning of *old item 10900*** in the items in Group A10. The meaning of ***old item 10900*** is defined as “item 10900 of the table as it was in force at any time before its repeal by Part 1 of Schedule 1 to the *Health Insurance Legislation Amendment (Optometric Services and Other Measures) Regulation 2014*.”

This ensures that although item 10900 will be repealed on 1 January 2015, the limitations on claiming within relevant timeframes will continue to apply where necessary to other items within Group A10 that currently make reference to item 10900.

Item [6] – Schedule 1 (item 10900)

Item 6 repeals item 10900 from Schedule 1

Item [7] – Schedule 1 (cell at item 10905, column headed “Fee (\$)”)

Item 7 repeals the fee for item 10905 and substitute the new fee of \$66.80.

Item [8] – Schedule 1 (items 10907 to 10914)

Item 8 repeals items 10907 to 10914 and substitutes new items 10907 to 10914.

Item 8 effectively splits item 10900 into two items (10910 and 10911) to better articulate the clinical conditions to which the service applies.

New items 10907, 10910 and 10911 extend the period between claiming eye examinations from 24 months to 36 months for asymptomatic people aged under 65 years, and reduce the period from 24 months to 12 months for asymptomatic patients aged 65 years and over.

New item 10907 applies to a comprehensive optometric assessment, being the first in a course of attention, if, within the previous 36 months for a patient who is less than 65 years of age, or within the previous 12 months for a patient who is at least 65 years of age, the patient has attended another optometrist for an attendance to which items 10907, 10910, 10911, 10912, 10913, 10914, 10915 or old item 10900 applied.

New item 10910 applies to a comprehensive optometric assessment, being the first in a course of attention, if the patient is less than 65 years of age and has not within the previous 36 months received a service to which item 10907, 10910, 10912, 10913, 10914, 10915 or old item 10900 applied.

New item 10911 applies to a comprehensive optometric assessment, being the first in a course of attention, if the patient is more than 65 years of age and has not within the previous 12 months received a service to which item 10907, 10910, 10911, 10912, 10913, 10914, 10915 or old item 10900 applied.

New items 10912, 10913 and 10914 apply to comprehensive optometric reassessments, being the first in a course of attention, where clinical indications such as a significant change of visual function, new signs or symptoms unrelated to an earlier course of attention, or a progressive disorder (excluding presbyopia), require a comprehensive reassessment, within

36 months for people aged under 65 years or within 12 months for patients aged 65 years and over, of an initial consultation to which item 10907, 10910, 10911, 10912, 10913, 10914, 10915 or old item 10900 applied.

Item 8 also repeals the fees for items 10907 to 10914 and substitutes new fees.

Item [9] – Schedule 1 (cell at item 10915, column headed “Fee (\$)”)

Item 9 repeals the fee for item 10915 and substitutes the new fee of \$66.80.

Item [10] – Schedule 1 (cell at items 10916 and 10918, column headed “Fee (\$)”)

Item 10 repeals the fees for items 10916 and 10918 and substitutes new fees.

Item [11] – Schedule 1 (items 10921 to 10929)

Item 11 repeals items 10921 to 10929 and substitutes new items 10921 to 10929.

New items 10921 to 10929 remove item 10900 from the item descriptors and substitute it with “old item 10900” (as defined in new subclause 2.28.6) and new items 10910, 10911.

Item 11 also repeals the fees for items 10921 to 10929 and substitutes new fees.

Item [12] – Schedule 1 (cell at item 10930, column headed “Fee (\$)”)

Item 12 repeals the fee for item 10930 and substitutes the new fee of \$165.80.

Item [13] – Schedule 1 (cell at item 10931, column headed “Fee (\$)”)

Item 13 repeals the fee for item 10931 and substitutes the new fee of \$23.30.

Item [14] – Schedule 1 (cell at item 10932, column headed “Fee (\$)”)

Item 14 repeals the fee for items 10932 and substitutes the new fee of \$11.60.

Item [15] – Schedule 1 (cell at item 10933, column headed “Fee (\$)”)

Item 15 repeals the fee for item 10933 and substitutes the new fee of \$7.70.

Item [16] – Schedule 1 (cell at item 10940, column headed “Fee (\$)”)

Item 16 repeals the fee for item 10940 and substitutes the new fee of \$63.75.

Item [17] – Schedule 1 (cell at item 10941, column headed “Fee (\$)”)

Item 17 repeals the fee for item 10941 and substitutes the new fee of \$38.45.

Item [18] – Schedule 1 (cell at item 10942 and 10943, column headed “Fee (\$)”)

Item 12 repeals the fees for items 10942 and 10943 and substitutes new fees of \$33.45.

Part 2 – Other amendments

Health Insurance (Diagnostic Imaging Services Table) Regulation 2014

Item [19] – Clause 2.2.6 of Schedule 1

Item 19 repeals clause 2.2.6 of Schedule 1 of the DIST and substitutes new clause 2.2.6 to clarify the restrictions applied to cone beam computed tomography items 57362 and 57363. Paragraph (b) and (c) of clause 2.2.6 are deleted.

Item [20] – Part 3 of Schedule 1 (definition of *dental specialist*)

Item 20 repeals the definition of ‘dental specialists’ from Part 3 of Schedule 1 of the DIST.

Health Insurance Regulations 1975

Item [21] – Paragraph 10(1)(b)

Item 21 inserts items “57362, 57363” after item “56068”.

Item [22] – Paragraph 10(1)(d)

Item 22 inserts items “57362, 57363” after item “57345”.

Statement of Compatibility with Human Rights

Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011

Health Insurance Legislation Amendment (Optometric Services and Other Measures) Regulation 2014

This Legislative Instrument is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Overview of the Legislative Instrument

The *Health Insurance Legislation Amendment (Optometric Services and Other Measures) Regulation 2014* (the Regulation) amends the *Health Insurance (General Medical Services Table) Regulation 2014* (GMST), the *Health Insurance (Diagnostic Imaging Services Table) Regulation 2014* (DIST) and the *Health Insurance Regulations 1975* (HI Regulations) to implement 2014-15 Budget measures and otherwise ensure that the diagnostic services funded through the Medicare Benefits Schedule (MBS) continue to be up-to-date, representative of best medical practice, and reflective of government commitments.

In accordance with Subsections 4(1) and 4AA(1) of the *Health Insurance Act 1973* (the Act), the GMST and DIST prescribe tables of medical services containing items of medical services, the amounts of fees applicable for each item, and rules for interpretation. The HI Regulations prescribe other ‘matters’ which the Governor-General may make regulations for in accordance with subsection 133(1) of the Act.

The Regulation will amend the GMST on 1 January 2015 by;

- reducing the MBS fees for optometry services by 5.88 per cent, reducing the MBS rebate for these services by 5 per cent;
- repealing subclause 2.28.4(2) of Schedule 1 to remove the charging cap that currently applies to optometrists accessing the Medicare Benefits Schedule, enabling them to set their own fees in a similar manner to other health providers;
- extending the period between claiming Medicare rebateable comprehensive eye examinations from two years to three years for asymptomatic people aged under 65 years; and
- reducing the period between claiming Medicare rebateable comprehensive eye examination from two years to one year for asymptomatic patients aged 65 years and over.

The Regulation will amend the DIST on 1 January 2015 to clarify the restrictions to be applied to cone beam computed tomography items 57362 and 57363. These items were inserted in the DIST on 1 November 2014, along with clause 2.2.6 which sets out the restrictions to be applied to these items.

The proposed Regulation would amend clause 2.2.6 of the DIST to ensure unnecessary inclusions in paragraph (b) and (c) of clause 2.2.6 would be deleted. The reasons being that;

- the requirement in paragraph (b) is already covered by section 16EA of the Act which requires equipment for Medicare rebated diagnostic imaging services to be provided by practices which are accredited under a diagnostic imaging accreditation scheme; and
- the requirement in paragraph (c) is already covered by regulation 10(1)(c) which restricts requests for certain diagnostic imaging services to dental specialists.

As a consequence of removing paragraph (c) from clause 2.2.6; the definition of ‘dental specialists’ will also be removed from Part 3 of Schedule 1 of the DIST.

The Regulation will also amend the HI Regulations to clarify that items 57362 and 57363 can also be requested by prosthodontists, and oral medicine specialist or oral pathology specialists, by inserting these items in 10(1)(b) and (d) of the HI Regulations.

Human rights implications

The regulations engage Articles 2, 9, and 12 of the International Covenant on Economic Social and Cultural Rights (ICESCR), specifically the rights to health and social security.

The Right to Health

The right to the enjoyment of the highest attainable standard of physical and mental health is contained in Article 12(1) of the ICESCR. The UN Committee on Economic Social and Cultural Rights (the Committee) has stated that the right to health is not a right for each individual to be healthy, but is a right to a system of health protection which provides equality of opportunity for people to enjoy the highest attainable level of health.

The Committee reports that the ‘*highest attainable standard of health*’ takes into account the country’s available resources. This right may be understood as a right of access to a variety of public health and health care facilities, goods, services, programs, and conditions necessary for the realisation of the highest attainable standard of health.

The Right to Social Security

The right to social security is contained in Article 9 of the ICESCR. It requires that a country must, within its maximum available resources, ensure access to a social security scheme that provides a minimum essential level of benefits to all individuals and families that will enable them to acquire at least essential health care. Countries are obliged to demonstrate that every effort has been made to use all resources that are at their disposal in an effort to satisfy, as a matter of priority, this minimum obligation.

The Committee reports that there is a strong presumption that retrogressive measures taken in relation to the right to social security are prohibited under ICESCR. In this context, a retrogressive measure would be one taken without adequate justification that had the effect of reducing existing levels of social security benefits, or of denying benefits to persons or groups previously entitled to them. However, it is legitimate for a Government to re-direct its limited resources in ways that it considers to be more effective at meeting the general health needs of all society, particularly the needs of the more disadvantaged members of society.

Analysis

The amendments advance rights to health and social security by increasing access to publicly subsidised health services which are safe, clinically effective, and cost-effective and redirecting resources within Medicare to more effectively meet the general health needs of society. Specifically, the human rights implications are as follows:

- the amendments to extend the period between claiming comprehensive eye examinations from one year for asymptomatic people aged under 65 years and reduce the period from two years to one year for asymptomatic people aged 65 years and over, will improve the effectiveness of Medicare. Redirecting resources from one age group to the other will ensure access to publicly subsidised health services is both clinically effective and cost-effective;
- the reduction in the Medicare fees for optometric services will also improve the effectiveness of Medicare. While it will reduce the Medicare rebate received by patients for these services, this is a reasonable and proportionate amendment to ensure that Medicare remains financially sustainable;
- the removal of the charging cap that currently applies to optometrist accessing the Medicare Benefits Schedule (MBS) will enable these optometrists to set their own fees in a similar manner to other health providers accessing the MBS. This amendment does not affect the right to health or the right to social security;
- the amendment to clause 2.2.6 of the DIST is administrative in nature and maintains the status quo;
- the removal of the definition of ‘dental specialists’ from part 3 of Schedule 1 of the DIST is also administrative in nature and maintains the status quo;
- the inclusion of items 57362 and 57363 in paragraphs 10(1)(b) and (d) of the HI Regulations clarifies that these items can also be requested by prosthodontists, oral medicine specialists or oral pathology specialists, thereby advancing rights to safe and effective health care.

Conclusion

The Legislative Instrument is compatible with human rights because it advances the protection of human rights, and to the extent that it may limit human rights, those limitations are reasonable, necessary, and proportionate.

Peter Dutton
Minister for Health