

EXPLANATORY STATEMENT

Issued by the Authority of the Minister for Health

Private Health Insurance Act 2007

Private Health Insurance Legislation Amendment Rules (No. 4) 2019

Authority

Section 333-20 of the *Private Health Insurance Act 2007* (the Act) authorises the Minister for Health to, by legislative instrument, make specified *Private Health Insurance Rules* providing for matters required or permitted by the corresponding Chapter, Part or section to be provided; or necessary or convenient to be provided in order to carry out or give effect to that Chapter, Part or section.

The *Private Health Insurance Legislation Amendment Rules (No. 4) 2019* (the Amendment Rules) make amendments to the *Private Health Insurance (Benefit Requirements) Rules 2011* (the Benefit Requirements Rules) and the *Private Health Insurance (Complying Product) Rules 2015* (the Complying Product Rules).

Under subsection 33(3) of the *Acts Interpretation Act 1901*, where an Act confers a power to make, grant or issue any instrument of a legislative or administrative character (including rules, regulations or by-laws), the power shall be construed as including a power exercisable in the like manner and subject to the like conditions (if any) to repeal, rescind, revoke, amend, or vary any such instrument.

Purpose

The purpose of the Amendment Rules is to make consequential amendments to the Benefit Requirement Rules and the Complying Product Rules to reflect changes to the Medicare Benefits Schedule (MBS), which take effect from 1 November 2019.

In particular, the Benefit Requirements Rules are amended to:

- omit four redundant colonoscopy MBS items and insert eight new colonoscopy MBS items;
- omit one ear, nose and throat MBS item and insert a new ear, nose and throat MBS item;
- insert a new plastics and reconstructive surgery MBS item;
- include five new diagnostic imaging MBS items; and
- correct the classification of an MBS item for minimum accommodation benefits.

The Complying Product Rules are amended to:

- omit or insert selected Medicare Benefit Schedule (MBS) in Schedules 5, 6 and 7 (the clinical categories, common treatments list and support treatments list respectively) as consequential amendments to reflect changes to the MBS effective from 1 November 2019 and consistent with the amendments to the Benefit Requirements Rules outlined above;
- insert 14 new MBS eating disorder items in the clinical category “Hospital psychiatric services” in Schedule 5;
- omit redundant out-of-hospital MBS items from Schedule 6; and

- refine the expression of time in Rule 14 in which private health insurers have to act.

Background

The Benefit Requirements Rules provide for the minimum benefit requirements for psychiatric, rehabilitation and palliative care and other hospital treatments. The minimum benefits are reviewed regularly and routinely increased in line with annual movements in Consumer Price Index.

Schedules 1 to 5 of the Benefit Requirements Rules set out the minimum levels of accommodation benefits which are payable for hospital treatment. Namely, benefits for overnight accommodation (Schedules 1 and 2), same day accommodation (Schedule 3), nursing-home type patients (NHTPs, Schedule 4) and second-tier default benefits (Schedule 5).

Schedule 1 of the Benefit Requirements Rules sets benefits for different patient categories by categorising MBS item numbers into overnight patient classifications comprising ‘Advanced surgical patient’, ‘Obstetric patient’, ‘Surgical patient’, ‘Psychiatric patient’, ‘Rehabilitation patient’ and ‘Other patients’ for private hospitals and public hospitals in Victoria and Tasmania. Schedule 2 sets average benefits for all patients in all other State and Territory public hospitals. Schedule 3 sets out different benefits for four separate procedure bands for identified MBS item numbers for the same-day hospital accommodation benefits, which are payable for privately insured patients in all states and territories.

The minimum benefits payable per night for hospital treatment provided to NHTPs in Schedule 4 of the Benefit Requirements Rules is subject to review and change twice annually, to reflect the indexation applied to the Adult Pension Basic Rate and Maximum Daily Rate of Rental Assistance.

Schedule 5 of the Benefit Requirements Rules requires a health insurer to pay second tier default benefits for most episodes of hospital treatment provided in private hospital facilities that are specified in Schedule 5 if the health insurer does not have a negotiated agreement with the hospital. Schedule 5 generally sets a higher minimum level of benefit (for overnight treatment and day only treatment provided in specified facilities) than the minimum benefit set for such treatment by Schedules 1, 2 and 3 of the Benefit Requirements Rules.

The Complying Product Rules were amended on 1 April 2019, to introduce new gold/silver/bronze/basic product tiers and related clinical categories for hospital cover. This included allocating all hospital treatment MBS items to specified groups to provide clarity in the administration of treatments to be covered by insurers for clinical category arrangements.

The introduction of product tiers, with related clinical categories and MBS item allocation, will provide consumers with greater certainty about the treatments covered by health insurance products. Consumers will be able to more easily understand and compare competing policies.

Rule 14 of the Complying Product Rules sets out the information private health insurers must give the Private Health Insurance Ombudsman about changes to their premiums which have been approved by the Minister for Health. It also sets out the timeframes in which this information must be given.

Commencement

The Amendment Rules commence on 1 November 2019.

Details

Details of the Amendment Rules are set out in the **Attachment**.

Consultation

Representative organisations, including the Australia and New Zealand College of Anaesthetists, Australian Society of Anaesthetists, the Gastroenterological Society of Australia, the Colorectal Surgical Society of Australian and New Zealand, the Australian College of Dermatologists, the Australian Society of Otolaryngology and the Royal Australian and New Zealand College of Radiologists were consulted regarding these Amendments.

Peak private health insurance organisations (Private Healthcare Australia, Members Health Fund Alliance) and the Australian Private Hospitals Association were also consulted about these amendments.

Any changes to MBS items have undergone extensive consultation which were carried out separate to the consultation carried out in relation to the changes to the Benefit Requirement Rules and the Complying Product Rules. The MBS Review is conducted by expert committees and working groups focusing on specific areas of the MBS. The clinical committee reports were released for public consultation and specific items were also consulted upon. Details of the consultation process are set out for example in the Explanatory Statement for the Health Insurance Legislation Amendment (2019 Measures No. 1) Regulations 2019.

The Amendment Rules are a legislative instrument for the purposes of the *Legislation Act 2003*.

ATTACHMENT

DETAILS OF THE *PRIVATE HEALTH INSURANCE LEGISLATION AMENDMENT RULES (No. 4) 2019*

Section 1 Name

Section 1 provides that the name of the instrument is the *Private Health Insurance Legislation Amendment Rules (No. 4) 2019* (the Amendment Rules).

Section 2 Commencement

Section 2 provides that the instrument commences on 1 November 2019.

Section 3 Authority

Section 3 provides that the Amendment Rules are made under section 333-20 of the *Private Health Insurance Act 2007*.

Section 4 Schedules

Section 4 provides that each instrument that is specified in a Schedule to the instrument is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to the instrument has effect according to its terms.

Schedule 1 – Amendments

Private Health Insurance (Benefit Requirements) Rules 2011

Item 1 - Subclause 4(3) of Schedule 1

Item 1 amends the *Private Health Insurance (Benefit Requirements) Rules 2011* (the Benefit Requirements Rules) to insert Medicare Benefits Schedule (MBS) item 30608 into subclause 4(3) of Schedule 1 of the Benefit Requirements Rules. This amendment provides for the correct classification of MBS item 30608 as a “Type A, advanced surgical patient” procedure for the purposes of minimum benefits payable by private health insurers for overnight hospital accommodation. MBS item 30608 has a MBS fee in excess of \$866.60, which is one of the criterion for classification as “Type A”, “advanced surgical patient” under the Benefit Requirement Rules.

Item 2 – Subclause 6(3) of Schedule 1

Subclause 6(3) of Schedule 1 sets out the MBS item numbers that form part of the criteria for a patient to be considered a “surgical patient” for the purposes of the Benefit Requirement Rules. This subclause also includes a qualifier – the MBS fee for the professional service the patient will receive must be between \$258.05 and \$866.60.

Item 2 amends this subclause to omit MBS item 30608 as this MBS item has an MBS fee greater than \$866.60.

Item 2 also amends this subclause to omit MBS items 32090 and 32093. The effects of these amendments are that MBS items 32090 and 32093 are no longer included in the list of “Type A”, “Surgical patient” (as these numbers are omitted from the MBS from 1 November 2019).

Item 3 – Subclause 6(3) of Schedule 1

Item 3 amends this subclause 6(3) to insert MBS item 45627. The effects of this amendment is that MBS item 45627 is included in the list of “Type A”, “Surgical patient” procedures which qualify for overnight accommodation minimum benefits.

Item 4 – Paragraph 4(1)(a) of Schedule 3 (Items under the heading, “T8: Surgical Operations”)

Item 4 amends table T8: Surgical Operations in paragraph 4(1)(a) of Schedule 3 of the Benefit Requirements Rules to omit MBS items 32088 and 32090. The effect of these amendments is that MBS items 32088 and 32090 will no longer be included in the list of “Type B”, “Band 1” procedures (as these numbers are omitted from the MBS from 1 November 2019).

Item 5 – Subclause 5(1) of Schedule 3

Item 5 amends subclause 5(1) of Schedule 3 to omit MBS items 32090 and 32093.

The effects of these amendments are that MBS items 32090 and 32093 are no longer included in the list of “Type B, non-band specific” procedures (as these items are omitted from the MBS from 1 November 2019).

Item 6 – Subclause 5(1) of Schedule 3

Item 6 amends subclause 5(1) of Schedule 3 to insert MBS items 32222, 32223, 32224, 32225, 32226, 32227, 32228 and 32229.

The effects of these amendments are that MBS items 32222, 32223, 32224, 32225, 32226, 32227, 32228 and 32229 are included in the list of “Type B”, “non-band specific” procedures which qualify for same-day hospital accommodation minimum benefits.

Item 7 – Clause 8 of Schedule 3 (Category 3 – Therapeutic procedures, under the heading “T8”):)

Item 7 amends clause 8 of Schedule 3 of the Benefit Requirement Rules to omit MBS item 41846 from the list of MBS items set out under the heading “Category 3 – Therapeutic procedures T8:”. Schedule 3 sets out those MBS items which are classified as “Type C” procedures under the Benefit Requirement Rules. “Type C” procedures do not normally require hospital treatment so they do not automatically qualify for any minimum benefits for hospital accommodation.

The effects of this amendments is that MBS item 41846 is no longer included in the list of “Type C” procedures (as this item is omitted from the MBS from 1 November 2019).

Item 8 – Clause 8 of Schedule 3 (Category 3 – Therapeutic procedures, under the heading “T8:”)

Item 8 amends clause 8 of Schedule 3 of the Benefit Requirement Rules to insert MBS item 41501 to the list of MBS items set out under the heading “Category 3 – Therapeutic procedures T8:”. Schedule 3 sets out those MBS items which are classified as “Type C” procedures under the Benefit Requirement Rules. “Type C” procedures do not normally require hospital treatment so they do not automatically qualify for any minimum benefits for hospital accommodation.

The effects of this amendments is that MBS item 41501 is included in the list of “Type C” procedures so it does not automatically attract minimum benefits for hospital accommodation.

Item 9 – Clause 8 of Schedule 3 (Category 5- Diagnostic Imaging Services, under the heading “I4:”)

Item 9 amends clause 8 of Schedule 3 of the Benefit Requirements Rules by inserting MBS item 61524 in the list of MBS items set out under the heading “Category 3 – Diagnostic Imaging Services I4:”. The effect of this amendment is MBS item 61524 is included in the list of “Type C” procedures so it does not automatically attract minimum benefits for hospital accommodation.

Items 10 - Clause 8 of Schedule 3 (Category 5 - Diagnostic Imaging Services, under the heading “I5:”)

Items 10 amends clause 8 of Schedule 3 of the Benefit Requirements Rules by inserting MBS items 63531, 63532, 63533 and 63534 in the list of MBS items set out under the heading “Category 5 – Diagnostic Imaging Services I5:”. The effect of this amendment is that MBS items 63531, 63532, 63533 and 63534 are included in the list of “Type C” procedures so it does not automatically attract minimum benefits for hospital accommodation.

Schedule 2 – Amendments

Private Health Insurance (Complying Product) Rules 2015

Item 1 – Paragraph 14(4)(a)

Item 1 amends paragraph 14(4)(a) of the *Private Health Insurance (Complying Product) Rules 2015* (the Complying Product Rules) by omitting the phrase “14 days” and inserting the phrase “10 business days”. Rule 14 of the Complying Product Rules sets out the information private health insurers must give the Private Health Insurance Ombudsman about changes to their premiums which have been approved by the Minister for Health. Subrule 14(4) provides the timeframe in which this information must be given.

This amendment refines the expression of time in subrule 14(4) to ensure that the 10 business days for private health insurers to act, which is implied in the expression “14 days”, is made explicit by amending the expression of time to “10 business days”. This amendment is administrative in nature.

Item 2 – Clause 2 of Schedule 5 (cell at table item dealing with clinical category “Hospital psychiatric services”, column headed “Treatments that must be covered (MBS Items) (see Notes 1, 2 and 3)”)

Item 2 inserts 14 new eating disorder Medicare Benefit Schedule (MBS) item numbers in the clinical category “Hospital psychiatric services”. The effect of these amendments is that these items are treatments which must be covered by private health insurance products in the product tiers basic, bronze, silver and gold.

- The new MBS items are 90250, 90251, 92053, 90254, 90255, 90256, 90257, 90264, 90265, 90272, 90274, 90276 and 90278.

Item 3 – Clause 2 of Schedule 5 (cell at table item dealing with clinical category “Ear, nose and throat”, column headed “Treatments that must be covered (MBS Items) (see Notes 1, 2 and 3)”)

Item 3 omits MBS item 41846 from the clinical category “Ear, nose and throat”, included in Schedule 5 of the Complying Product Rules. The effect of this amendment is that MBS item 41846 is no longer included as a treatment that must be covered by private health insurance products in the product tiers gold, silver and bronze.

Item 4 – Clause 2 of Schedule 5 (cell at table item dealing with clinical category “Ear, nose and throat”, column headed “Treatments that must be covered (MBS Items) (see Notes 1, 2 and 3)”)

Item 4 inserts MBS item 41501 into, the clinical category “Ear, nose and throat” included in Schedule 5 of the Complying Product Rules. The effect of this amendments is that MBS item 41501 becomes a treatment that must be covered by private health insurance products in the product tiers gold, silver and bronze.

Item 5 – Clause 2 of Schedule 5 (cell at table item dealing with clinical category “Gastrointestinal endoscopy”, column headed “Treatments that must be covered (MBS Items) (see Notes 1, 2 and 3)”)

Item 5 omits MBS items 32088, 32089, 32090 and 32093 from the clinical category “Gastrointestinal endoscopy” included in Schedule 5 of the Complying Product Rules.

Item 6 – Clause 2 of Schedule 5 (cell at table item dealing with clinical category “Gastrointestinal endoscopy”, column headed “Treatments that must be covered (MBS Items) (see Notes 1, 2 and 3)”)

Item 6 inserts MBS items 32222, 32223, 32224, 32225, 32226, 32227, 32228 and 32229 into, the clinical category “Gastrointestinal endoscopy”, included in Schedule 5 of the Complying Product Rules. The effects of this amendment is that MBS items 32222, 32223, 32224, 32225, 32226, 32227, 32228 and 32229 are treatments that must be covered by private health insurance products in the product tiers gold, silver and bronze.

Item 7 – Clause 2 of Schedule 5 (cell at table item dealing with clinical category “Joint replacement”, column headed “Treatments that must be covered (MBS Items) (see Notes 1, 2 and 3)”)

Item 7 omits three arthroplasty MBS items (46324, 46325 and 50127) from the clinical category “Joint replacements”. These items can be used for hospital treatments in both joint reconstruction and joint replacement surgeries, which are both clinical categories in the Complying Product Rules.

Under paragraph 11F(2)(a) of the Complying Product Rules all hospital treatments that within scope of a clinical category must be covered if the clinical category is listed as an inclusion in an health insurance policy. This can include MBS items that may be listed in another clinical category if they are also within the scope of cover of more than one clinical category.

- The MBS items listed in individual clinical categories represent the minimum treatment requirements for each category not the only treatments to be covered. These lists are inclusive, not exhaustive.

The Department of Health became aware that some health insurance policy holders were being advised that joint reconstruction treatments using these MBS items would not be covered notwithstanding the policy holder having cover for the joint reconstruction category. To address this issue and to avoid future confusion MBS items 46324, 46325 and 50127 are omitted from the “Joint replacement” clinical category and under amendments in item 9 are inserted into Schedule 6 of the Complying Product Rules, the Common treatments list.

Item 8 – Clause 2 of Schedule 5 (cell at table item dealing with clinical category “Plastic and reconstructive surgery (medically necessary)”, column headed “Treatments that must be covered (MBS Items) (see Notes 1, 2 and 3)”)

Item 8 inserts MBS item 45627 in the clinical category “Plastic and reconstructive surgery, medically necessary under clause 2 of Schedule 5. This item reflects changes to the MBS to facilitate the elimination of trachoma as a public health issue and support the reporting of trachoma to the World Health Organisation.

Item 9 – Clause 1, Schedule 6 (table titled “Common treatments list”)

Item 9 repeals the Common treatments table set out in Schedule 6 of the Complying Products Rules and substitutes a new table in which 24 out-of-hospital (non-admitted) MBS items are omitted and three MBS items 46324, 46325 and 50127, previously included in the clinical category “Joint replacement” set out in Schedule 5 of the Comply Products Rules, (see item 7 above) are inserted.

The Common treatments list consists of MBS items that are commonly used across multiple clinical categories. Insurers are required to cover MBS items in the Common treatments list where the treatment falls within scope of cover for a clinical category included in the health insurance policy-holder’s policy.

The Common treatments list applies to hospital insurance products so it is redundant to include out-of-hospital (non-admitted) MBS items in the Common treatments list. Therefore, the removal of the MBS items from the table is entirely administrative in nature.

The omitted MBS items are:

- 741, 745, 761, 763, 766, 769, 772, 776, 788, 789, 792, 812, 827, 829, 867, 868, 869, 873, 876, 881, 885, 891, 892 and 6087.

Item 10 – Clause 1 of Schedule 7 (table titled “Table of MBS items”)

Item 10 repeals the Support treatments table set out in Schedule 7 of the Complying Products Rules and substitutes a new table in which 31 anaesthetic MBS items are omitted and 10 new anaesthetic MBS items are inserted as a consequences of changes to the MBS from 1 November 2019.

The omitted MBS items are:

- 20705, 20805, 20953, 21927, 22001, 22018, 22040, 22045, 22050, 22070, 23021, 23022, 23023, 23031, 23032, 23033, 23041, 23042, 23043, 23051, 23052, 23053, 23061, 23062, 23071, 23072, 23073, 23081, 23082 and 23083.

The new MBS items inserted into Schedule 7 are:

- 18297, 22041, 22042, 23025, 23035, 23045, 23055, 23065, 23075 and 23085.

Statement of Compatibility with Human Rights

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

Private Health Insurance Legislation Amendment Rules (No. 4) 2019

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 purpose of the *Private Health Insurance Legislation Amendment (No. 4) Rules 2019* (the Amendment Rules) is to amend the following instruments:

- *Private Health Insurance (Benefit Requirements) Rules 2011*
- *Private Health Insurance (Complying Product) Rules 2015*

These Amendment Rules amend Schedules 1 and 3 of the *Private Health Insurance (Benefit Requirements) Rules 2011* (the Benefit Requirement Rules) to omit or insert selected Medicare Benefit Schedule (MBS) items for the purposes of hospital treatments which qualify for overnight or same-day accommodation benefits; and to correct the classification of an MBS item within patient categories in Schedule 1.

These Amendment Rules also amend the *Private Health Insurance (Complying Product) Rules 2015* (the Complying Product Rules) to omit or insert selected MBS items in Schedules 5, 6 and 7. In addition, the Amendment Rules also amend Schedule 6 to omit redundant out-of-hospital MBS items and to refine an expression of time in Rule 14.

Human rights implications

Some aspects of the Amendment Rules engage Article 12 of the International Covenant on Economic, Social and Cultural Rights, the right to health, by assisting with the progressive realisation by all appropriate means of the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.

Private health insurance regulation assists with the advancement of these human rights by improving the governing framework for private health insurance in the interests of consumers. Private health insurance regulation aims to encourage insurers and providers of private health goods and services to provide better value for money to consumers and to improve information provided to consumers so that consumers can make more informed choices when purchasing services. Private health insurance regulation also requires insurers to not differentiate the premiums they charge according to individual health characteristics such as poor health.

Analysis

The amendments relating to the omission or insertion of MBS items in the Benefit Requirement Rules and the Complying Product Rules are as a consequence of the changes to the MBS from 1 November 2019. The reclassification of an MBS item within Schedule 1 of the Benefit Requirements Rules is a correction of an administrative error. The refinement of the expression of time in Rule 14 is to ensure the implied 10 business days for private health insurers to advise the Private Health Insurance Ombudsman of changes to their respective premiums is now explicit in the Complying Product Rules.

The amendments removing redundant items from the Complying Product Rules are entirely administrative in nature and therefore do not engage human rights.

The addition of new MBS items to specified clinical categories allow for the specified treatments under those items and benefit amounts can be claimed by patients who have the relevant private health insurance policies.

Conclusion

This Legislative Instrument only engages human rights to the extent that it maintains current arrangements with respect to the regulation of private health insurance. Therefore, this Legislative Instrument is compatible with human rights because these changes continue to ensure that existing arrangements advance the protection of human rights are maintained.

Brian Kelleher
Assistant Secretary
Private Health Insurance Branch
Medical Benefits Division
Department of Health