

## EXPLANATORY STATEMENT

Issued by the Authority of the Minister for Health

*Health Insurance Act 1973*

*Health Insurance (Section 3C Pathology Services – COVID-19) Determination 2020*

Subsection 3C(1) of the *Health Insurance Act 1973* (the Act) provides that the Minister may, by legislative instrument, determine that a health service not specified in an item in the pathology services table (the Table) shall, in specified circumstances and for specified statutory provisions, be treated as if it were specified in the Table.

The Table is set out in the regulations made under subsection 4A(1) of the Act. The most recent version of the regulations is the *Health Insurance (Pathology Services Table) Regulations 2019*.

### **Purpose**

On 11 March 2020, the Prime Minister, the Hon. Scott Morrison MP, announced a comprehensive \$2.4 billion health package to protect all Australians, including vulnerable groups such as the elderly, those with chronic conditions and Aboriginal and Torres Strait Islander communities, from the coronavirus (COVID-19).

The purpose of the *Health Insurance (Section 3C Pathology Services – COVID-19) Determination 2020* (the Determination) is to ensure adequate capacity to provide accessible and rapid laboratory testing of severe acute respiratory syndrome coronavirus 2 (SARS-CoV-2), which is the virus that causes the disease commonly known as COVID-19.

The test will be able to be requested by all medical practitioners and will only be claimable where the service has been bulk billed.

The Determination provides the legal basis for the payment of Medicare benefits for a pathology service to test for SARS-CoV-2 under new item 69485. A service described in item 69485 will be required to be provided in conjunction with other separate viral respiratory tests (provided under items 69494, 69495 or 69496) to determine if the patient has COVID-19 or another respiratory virus such as influenza.

### **Consultation**

Consultation on item 69485 was undertaken with the Royal Australasian College of Pathologists, Australian Pathology and Public Pathology Australia.

Details of the Determination are set out in the [Attachment](#).

The Determination commences on 13 March 2020 and is repealed at the end of 30 September 2020.

The Determination is a legislative instrument for the purposes of the *Legislation Act 2003*.

Authority: Subsection 3C(1) of the  
*Health Insurance Act 1973*

## **Details of the *Health Insurance (Section 3C Pathology Services – COVID-19) Determination 2020***

### Section 1 – Name

Section 1 provides for the Determination to be referred to as the *Health Insurance (Section 3C Pathology Services – COVID-19) Determination 2020*.

### Section 2 – Commencement

Section 2 provides that the Determination commences on 13 March 2020.

### Section 3 – Cessation

Section 3 provides that the Determination will cease on 30 September 2020, unless earlier revoked.

### Section 4 – Authority

Section 4 provides that the Determination is made under subsection 3C(1) of the *Health Insurance Act 1973*.

### Section 5 – Definitions

Section 5 defines terms used in the Determination.

### Section 6 – Treatment of relevant services

Section 6 provides that a clinically relevant service provided in accordance with the Determination shall be treated, for relevant provisions of the *Health Insurance Act 1973* and *National Health Act 1953*, and regulations made under those Acts, as if it were both a professional service and a pathology service and as if there were an item specified in the pathology services table for the service.

### Section 7 – Application of provisions of the pathology services table

Section 7 specifies provisions of the pathology services table that apply as if item 69485 was specified in the relevant provisions in the pathology services table.

Subsection 7(1) of the Determination provides that item 69485 will be treated as if it was specified in subclause 1.7(2)(a) of the Table. Clause 1.7 of the Table applies the meaning of a *set of pathology services*, which are referred to in clause 1.6 of the Table. Clause 1.6 provides where if a set of pathology services are requested, the pathology services in the set are to be treated as individual pathology services in accordance with Clause 1.6. Clause 1.6 gives effect to the general pathology services rule known as ‘episode coning’.

For pathology services under the Medicare Benefits Schedule, a patient episode comprises a pathology service or services which are requested for a single patient, on the same day by one or more practitioners.

Episode coning is an arrangement, described in clause 1.6 of the Table, which places an upper limit on the number of services in an episode for which Medicare benefits are payable. Generally, when more than three items are requested in an episode Medicare only pays for the three most expensive items.

Item 69485 will be exempt from clause 1.6 by treating the item as if it was specified in subclause 1.7(2)(a) of the Table. Subclause 1.7(2)(a) provides items that are not included in a set of pathology services for the purposes of clause 1.6, and are therefore exempt from the episode coning rule provided for under clause 1.6 of the Table.

#### Schedule – Relevant services

The Schedule specifies the service and the associated fee for item 69485.

## Statement of Compatibility with Human Rights

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

*Health Insurance (Section 3C Pathology Services – COVID-19) Determination 2020*

This 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 Determination

On 11 March 2020, the Prime Minister, the Hon. Scott Morrison MP, announced a comprehensive \$2.4 billion health package to protect all Australians, including vulnerable groups such as the elderly, those with chronic conditions and Aboriginal and Torres Strait Islander communities, from the coronavirus (COVID-19).

The purpose of the *Health Insurance (Section 3C Pathology Services – COVID-19) Determination 2020* (the Determination) is to ensure adequate capacity to provide accessible and rapid laboratory testing of severe acute respiratory syndrome coronavirus 2 (SARS-CoV-2), which is the virus that causes the disease commonly known as COVID-19.

The test will be able to be requested by all medical practitioners and will only be claimable where the service has been bulk billed.

The Determination provides the legal basis for the payment of Medicare benefits for a pathology service to test for SARS-CoV-2 under new item 69485. A service described in item 69485 will be required to be provided in conjunction with other separate viral respiratory tests (provided under items 69494, 69495 or 69496) to determine if the patient has COVID-19 or another respiratory virus such as influenza.

### Human rights implications

This instrument engages Articles 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

This instrument advances the right to health and the right to social security by ensuring people who may have been affected by COVID-19 can access pathology services for specific testing of the virus, which are clinically effective, safe and cost-effective.

### **Conclusion**

This instrument is compatible with human rights as it maintains the right to health and the right to social security.

**David Weiss**  
**First Assistant Secretary**  
**Medical Benefits Division**  
**Health Financing Group**  
**Department of Health**