

EXPLANATORY STATEMENT

Health Insurance Act 1973

Health Insurance (Section 3C Pathology Services – COVID-19) Amendment (No. 3) 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The Table is set out in the regulations made under subsection 4A(1) of the Act, which is repealed and remade each year. The most recent version of the regulations is the *Health Insurance (Pathology Services Table) Regulations 2020*.

This instrument relies on subsection 33(3) of the *Acts Interpretation Act 1901* (AIA). Subsection 33(3) of the AIA provides that 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 *Health Insurance (Section 3C Pathology Services – COVID-19) Amendment (No. 3) Determination 2020* is to amend the *Health Insurance (Section 3C Pathology Services – COVID-19) Determination 2020* (the Principal Determination) to refer to clauses in the pathology services table, as renumbered in the *Health Insurance (Pathology Services Table) Regulations 2020* (PST 2020).

Although Schedule 1 applies retrospectively, it is not contrary to section 12 of the *Legislation Act 2003* as it does not disadvantage a person and only applies a liability on the Commonwealth for the retrospective period.

Consultation

Consultation was not undertaken on updating the relevant clauses in the determination as these changes are machinery in nature and do not alter the existing arrangements. There is no change to the arrangements for patients or health professionals, and Medicare will continue to subsidise those services.

Consultation was not undertaken on the editorial changes in the remade PST 2020 as these changes were made by the First Parliamentary Counsel under section 15V of the *Legislation Act 2003*.

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

The Determination commences on 1 May 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) Amendment (No. 3) 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) Amendment (No. 3) Determination 2020*.

Section 2 – Commencement

Section 2 provides that the Determination commences on 1 May 2020.

Section 3 – Authority

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

Section 4 – Schedules

Section 4 provides that each instrument that is specified in a Schedule to this Determination is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to this Determination has effect according to its terms.

Schedule 1 – Amendments

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

Item 1 – Subsection 7(1)

Item 1 repeals and substitutes subsection 7(1) of the Principal Determination to make a consequential amendment by replacing reference to clause 1.7 (which prescribes the meaning of a *set of pathology services*) and paragraph 1.7(2)(a) (which provides items where a set of pathology services does not apply) of the pathology services table (PST) with renumbered clause 1.2.9 and paragraph 1.2.9(2)(a). The clauses in the PST have been renumbered to reflect current drafting standards and formatting

Item 2 – Schedule 1 (item 69479)

Item 2 repeals and substitutes item 69479 to make a consequential amendment by replacing reference to clause 2.10.1 (which includes the meaning of *prescribed laboratory*) of the PST with clause 4.1 (which prescribes the dictionary in the PST). The meaning of *prescribed laboratory* has been moved to the Dictionary of the PST to reflect current drafting standards and formatting.

The reference to clause 2.10.1 in items 69476 and 69477 does not require to be updated, as these items refer to pathology tests that were bulk-billed between 13 March 2020 and 31 March 2020. The meaning of *prescribed laboratory* was provided in clause 2.10.1 in the *Health Insurance (Pathology Services Table) Regulations 2019* during this period.

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) Amendment (No. 3) 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

The purpose of the *Health Insurance (Section 3C Pathology Services – COVID-19) Amendment (No. 3) Determination 2020* is to amend the *Health Insurance (Section 3C Pathology Services – COVID-19) Determination 2020* (the Principal Determination) to refer to the clause in the pathology services table, as renumbered in the *Health Insurance (Pathology Services Table) Regulations 2020*.

Although Schedule 1 applies retrospectively, it is not contrary to section 12 of the *Legislation Act 2003* as it does not disadvantage a person and only applies a liability on the Commonwealth for the retrospective period

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 maintains rights to health and social security by ensuring access to publicly subsidised health services, which are clinically effective and cost-effective.

Conclusion

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

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