

EXPLANATORY STATEMENT

Private Health Insurance Act 2007

Private Health Insurance Legislation Amendment Rules (No.5) 2020

Authority

Section 333-20(1) of the *Private Health Insurance Act 2007* (the Act) authorises the Minister to, by legislative instrument, make 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.

Subsection 33(3) of the *Acts Interpretation Act 1901*, 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 *Private Health Insurance Legislation Amendment Rules (No.5) 2020* (the Amendment Rules) amends 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).

The Amendment Rules make consequential amendments to the Benefit Requirement Rules and the Complying Product Rules to reflect changes to cardiac services items and pathology items of the Medicare Benefits Schedule (MBS) that will take effect on 1 August 2020.

This is achieved by:

- Amending Schedule 3 of the Benefit Requirements Rules for the purpose of minimum hospital accommodation benefit requirements, to classify new MBS cardiac services as Type C Procedures, specifically, procedures not normally requiring hospital treatment. Deleted MBS items have also been removed from Schedule 3.
- Amending Schedule 7 of the Complying Product Rules for the purpose of describing hospital treatment(s) that must be covered under insurance policies, to place new cardiac services MBS items into the Support treatments category, and remove deleted MBS items.

Background

The Department of Health (the Department) assesses all changes to MBS items for their impact on, and implementation as appropriate to, the Private Health Insurance Rules. MBS items with the potential to be provided to privately insured patients as hospital treatment (defined in section 121-5 of the *Private Health Insurance Act 2007*) are further considered for allocation to clinical treatment categories and hospital accommodation classifications to provide clarity in the administration of treatments to be covered by insurers.

MBS cardiac services changes and inclusion in the Amendment Rules

From 1 August 2020, changes will commence to MBS items for cardiac services. These amendments are part of the Government's response to changes recommended by the clinician-led MBS Review Taskforce. The cardiac services MBS item changes are enacted by the:

- *Health Insurance Legislation Amendment (2020 Measures No. 1) Regulations 2020* (the Regulations), which removes 18 MBS items comprising of five echocardiographic items (55113, 55114, 55115, 55116 and 55117) and four nuclear medicine items (61302, 61303, 61306 and 61307) from the Diagnostic Imaging Services Table (DIST) in the *Health Insurance (Diagnostic Imaging Services Table) Regulations (No. 2) 2020*, and nine cardiovascular items (11700, 11701, 11702, 11708, 11709, 11710, 11711, 11712 and 11722) from the General Medical Services Table (GMST) in the *Health Insurance (General Medical Services Table) Regulations (No. 2) 2020*.

The Amendment Rules will remove the above 18 MBS items from the Benefit Requirements Rules Type C procedures, and Complying Products Rules Support Treatments list.

- *Health Insurance (Section 3C General Medical Services – Cardiac Services) Determination 2020* (the GMST Determination), which lists 10 new MBS cardiac testing items to align with clinical guidelines regarding the types of medical practitioners who can conduct and interpret electrocardiograph testing, and clarify the requirements and frequency for exercise or pharmacological electrocardiogram stress testing for optimal patient safety. The new items will replace the nine existing cardiovascular items removed from the GMST by the Regulations.

Items 11705, 11729, 11730 and 11731 are not subject to the limits on location of service under subsection 8(1) 'Restriction of items' of the GMST Determination, and may be claimed by an 'admitted patient' as defined in section 4 of the GMST Determination. While these new items do not normally require hospital treatment, in some circumstances they may be undertaken in hospital, and so are included in the Amendment Rules.

- *Health Insurance (Section 3C Diagnostic Imaging Services – Cardiac Services) Determination 2020* (the DIST Determination), which lists 19 new MBS cardiac diagnostic imaging services items, these being new ultrasound items for an echocardiographic examination, four new ultrasound items for stress echocardiography testing, and seven new items for myocardial perfusion studies.

The 19 new MBS cardiac diagnostic imaging services items will replace the echocardiographic items and nuclear medicine items removed from the DIST by the Regulations. While these DIST items do not normally require hospital treatment, in some circumstances they may be undertaken in hospital, and so are included in the Amendment Rules.

MBS Co-Dependent Pathology Services changes and inclusion in the Amendment Rules

From 1 August 2020, changes will commence to MBS Co-Dependent Pathology Services. These amendments include the listing of two new items 73301 and 73302 to expand testing

for access to olaparib to patients who have BRCA variants detected, regardless of whether the BRCA variants are the result of germline variant/s or not. The new items were supported by the Medical Services Advisory Committee and the Pharmaceutical Benefits Advisory Committee. The changes are enacted by the:

- *Health Insurance (Section 3C Co-Dependent Pathology Services) Amendment Determination (No. 5) 2020* amending the *Health Insurance (Section 3C Co-Dependent Pathology Services) Determination 2018*.

As pathology services items, items 73301 and 73302 will be automatically included in the Support treatments list in the Complying Product Rules.

The Amendment Rules

The consequential amendments in these Amendment Rules to implement the 1 August 2020 MBS changes are administrative in nature and do not substantively alter existing arrangements. Classifications and categorisations of the new MBS items are consistent with the removed items they replace.

Benefit Requirements Rules

The Benefit Requirements Rules provide for the minimum benefit requirements for psychiatric care, rehabilitation, palliative care and other hospital treatments. Schedules 1 to 5 of the Benefit Requirements Rules also set out the minimum levels of accommodation benefits payable for hospital treatment. Overnight hospital accommodation benefits payable by insurers are in Schedules 1 and 2 of the Benefits Requirement Rules. Same-day hospital accommodation benefits payable by insurers are in Schedule 3. Nursing-home type patient accommodation benefits payable by insurers are in Schedule 4. Second-tier default benefit arrangements are in Schedule 5.

Schedule 1 of the Benefit Requirements Rules also sets benefits for different patient categories by categorising MBS item numbers into patient classifications for accommodation benefits. Procedures requiring hospital treatment that includes part of an overnight stay ('Type A procedures') comprise 'Advanced surgical patient', 'Obstetric patient', 'Surgical patient', 'Psychiatric patient', 'Rehabilitation patient' and 'Other patients.'

Against these patient classifications, Schedule 1 sets out the minimum accommodation benefit payable by insurers per night for overnight accommodation for private patients at private hospitals in all states and territories, and for private patients in overnight shared ward accommodation at public hospitals in Victoria and Tasmania.

Schedule 2 of the Benefit Requirement Rules states the minimum accommodation benefit payable by insurers per night, for private patients in overnight shared-ward accommodation at all other State and Territory public hospitals. For each jurisdiction listed in Schedule 2, the minimum benefit payable by insurers per night is averaged across all patients, rather than being specific to patient classification as for Schedule 1.

Schedule 3 of the Benefit Requirement Rules sets out minimum same-day hospital accommodation benefits payable by insurers for procedures requiring hospital treatment that does not include part of an overnight stay at a hospital ('Type B procedures'). Type B procedures are further classified into four separate treatment bands (1 to 4) based on

anaesthesia type and/or theatre time, and a fifth ‘non-band specific’ classification for items that could fall into different bands depending on how treatment is delivered to the individual patient. Part 2 of Schedule 3 identifies Type B procedure MBS items against those treatment bands, and the non-band specific classification. The Benefit Requirement Rules sets out circumstances in which benefits for accommodation including part of an overnight stay may be payable for patients receiving a Certified Type B Procedure.

Schedule 3 also identifies by MBS item those procedures that do not normally require hospital treatment (‘Type C procedures’) so do not normally qualify for minimum benefits for hospital accommodation. The Benefit Requirement Rules sets out circumstances in which benefits for accommodation may be payable for patients receiving a Certified Type C Procedure.

Complying Product Rules

The Complying Product Rules set out the gold, silver, bronze and basic product tiers for hospital cover, and which clinical treatment categories are included in each Hospital Treatment Product Tier.

The 38 clinical categories (Schedule 5) are treatments that must be covered by private health insurance products in the product tiers basic, bronze, silver and gold.

The Common treatments list (Schedule 6) consists of MBS items that are used across, and therefore common to, multiple clinical categories.

The Support treatments list (Schedule 7) consists of MBS items, such as pathology tests and diagnostic tests, which are generally used to support the provision of a primary treatment in one of the clinical categories, or in the Common treatments list. Items in the Support treatments list are unlikely to be the primary reason for treatment in hospital. Insurers are not required to provide benefits for items not delivered as hospital treatment, even if the item is on the Support treatments list.

Insurers are required to provide cover for MBS items in the Common and Support treatments lists where the MBS item is for hospital treatment within the scope of cover for a clinical category included in a patient’s private health insurance policy.

Commencement

The Amendment Rules commence on 1 August 2020.

Consultation

As the amendments relating to cardiac services MBS items are the same as those in the Regulations and the GMST and DIST Determinations, detail on the consultation undertaken can be found in the Explanatory Statements of those instruments published on the Federal Register of Legislation, and online from the MBSOnline website available at www.mbsonline.gov.au.

Consultation was also undertaken on the proposed changes to private health insurance rules to implement the MBS changes. On 25 June 2020, the Department consulted peak representative bodies for private insurers and private hospitals on proposed changes to private

health insurance rules based on draft amendments to cardiac services MBS items. Responses were received from the peak representative bodies Private Healthcare Australia, and the Australian Private Hospitals Association.

On 29 June 2020, a stakeholder webinar provided by the Department, and Services Australia, shared further details of the proposed changes with attendees, followed by a question and answer session.

On 24 July 2020, the Department's weekly email to stakeholders provided advice of the new co-dependent pathology services items and invited feedback on their proposed listing as support treatments.

Medical officers within the Department provided advice to determine the appropriate level of accommodation benefits and clinical categories in respect of the MBS items added by the Amendment Rules, and to the Benefit Requirements Rules and Complying Product Rules respectively.

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

Details of the *Private Health Insurance Legislation Amendment (No. 5) Rules 2020*

Section 1 Name

Section 1 provides that the name of the instrument is the *Private Health Insurance Legislation Amendment Rules (No. 5) 2020*.

Section 2 Commencement

Section 2 provides that the instrument commences on 1 August 2020.

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—Type C procedures

Private Health Insurance (Benefit Requirement) Rules 2011 (the Benefit Requirement Rules)

Item 1 – clause 8 of Schedule 3 (Category 2 – Diagnostic procedures & investigations, under heading “D1”)

This item amends clause 8 of Schedule 3 of the Benefit Requirement Rules to remove from the Type C Procedures list, the following items:

11700, 11701, 11702, 11708, 11709, 11710, 11711, 11712 and 11722.

The effect of this amendment is that these Medicare Benefit Schedule (MBS) items are removed from the list of Type C procedures as they are longer included in the MBS.

This item also amends clause 8 of Schedule 3 of the Benefit Requirement Rules to add the following new items:

- 11705 (Twelve-lead electrocardiogram (ECG), report only)
- 11729 (ECG stress testing, for patients aged 17 years and more)
- 11730 (ECG stress testing, for patients aged under 17 years)
- 11731 (Ambulatory ECG (AECG) implanted ECG loop recording)

The effect of this amendment is to include items 11705, 11729, 11730, and 11731 as Type C procedures, which normally do not require hospital treatment.

Item 2 – clause 8 of Schedule 3 (Category 5 – Diagnostic Imaging Services, under heading “I1”)

This item amends clause 8 of Schedule 3 of the Benefit Requirement Rules to remove from the Type C procedures list, the following items:

55113, 55114, 55115, 55116, and 55117.

The effect of this amendment is that these MBS items are removed from the list of Type C procedures as they are longer included in the MBS.

This item also amends clause 8 of Schedule 3 of the Benefit Requirement Rules to add to the Type C procedures list, the following new items:

55126, 55127, 55128, 55129, 55132, 55133, 55134 and 55137 (Plain echocardiogram)
55141, 55143, 55145 and 55146 (Stress echocardiogram).

The effect of this amendment is that these MBS items are added to list of Type C procedures, which normally do not require hospital treatment.

Item 3 – clause 8 of Schedule 3 (Category 5 – Diagnostic Imaging Services, under heading “I4”)

This item amends clause 8 of Schedule 3 of the Benefit Requirement Rules to remove from the Type C procedures list, the following items:

61302, 61303, 61306 and 61307.

The effect of this amendment is that these MBS items are removed from the list of Type C procedures as they are longer included in the MBS.

Item 3 also amends clause 8 of Schedule 3 of the Benefit Requirement Rules to add to the Type C procedures list, Category 5 Diagnostic Imaging Services, heading I4, new MBS DIST items:

61321, 61324, 61325, 61329, 61345, 61357 and 61349 (Myocardial perfusion studies).

The effect of this amendment is that these MBS items are added to list of Type C procedures, which normally do not require hospital treatment.

Schedule 2—Amendments— Supports treatment list

Private Health Insurance (Complying Product) Rules 2015

Item 1 – clause 1 of Schedule 7 (table titled “Support treatments list table of MBS items”)

Item 1 repeals the table and substitutes it with a revised table containing the MBS items coming within the Schedule 7 – Support Treatments List from 1 August 2020. The effect of this amendment is to update the list of Support treatment MBS items, adding new items and deleting MBS items that no longer exist.

All new items in the DIST and PST of the MBS are automatically included in the Support treatments list.

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. 5) 2020

This disallowable 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 disallowable legislative instrument

The purpose of the *Private Health Insurance Legislation Amendment Rules (No. 5) 2020* (the Amendment Rules) is to amend the following instruments:

- *Private Health Insurance (Benefit Requirements) Rules 2011* (the Benefit Requirement Rules), and
- *Private Health Insurance (Complying Product) Rules 2015* (the Complying Product Rules).

The Amendment Rules amend the Benefit Requirement Rules and the Complying Product Rules to reflect changes to the Medicare Benefits Schedule (MBS) that will take effect on 1 August 2020. This is achieved through amendments to:

- Schedule 3 of the Benefit Requirements Rules to classify MBS items into appropriate procedure types to satisfy minimum hospital accommodation benefit requirements. Deleted MBS items have been removed.
- Schedule 7 of the Complying Product Rules to categorise MBS items into appropriate support treatment categories to denote what hospital treatment items must be covered under insurance policies. Deleted MBS items have been removed.

Human rights implications

The Amendment Rules engage Article 12 of the International Covenant on Economic, Social and Cultural Rights, specifically 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 of private health services to allow consumers to 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 August 2020.

The addition of new MBS items to accommodation benefit requirement classifications, and specified clinical categories, allows for the specified treatments under those items and the related benefit amounts to be claimed by patients who have the relevant private health insurance policies.

Conclusion

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