

EXPLANATORY STATEMENT

Health Insurance Act 1973

Health Insurance (Section 3C Pathology Services – COVID-19) Amendment (No. 5) 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 as an item in the Table.

The Table is set out in the regulations made under subsection 4A(1) of the Act. The *Health Insurance (Pathology Services Table) Regulations 2020* is the most recent version of the Table.

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. 5) Determination 2020* (Amending Determination) is to expand the SARS-COV-2 testing item introduced on 28 July 2020 to apply to a person who drives a heavy vehicle interstate.

This expansion will enable the rapid screening of asymptomatic people who are employed, hired, retained or contracted, to travel interstate as a driver of a heavy vehicle. This will help protect Australian residents from the spread of coronavirus (COVID-19) from people who are required to drive a heavy vehicle to transport goods across state and territory borders.

The Amending Determination will amend the *Health Insurance (Section 3C Pathology Services – COVID-19) Determination 2020* (the Principal Determination) so that MBS item 69501 will also cover interstate heavy vehicle drivers. Private pathology will be able to provide this service to people who are required to travel interstate by driving a heavy vehicle.

The test will not require a request from a medical practitioner. Performance of item 69501 is conditional on the results of the test being provided to the interstate heavy vehicle driver and the relevant state or territory public health unit within 24 hours of delivery of the pathology specimen to an accredited pathology laboratory.

The service must be bulk-billed at no cost to the driver of the heavy vehicle, and it cannot be performed with another pathology item in the Principal Determination or in the Table.

This service does not replace the existing SARS-COV-2 items in the Principal Determination for testing patients who may have contracted COVID-19. For these patients, the relevant item that should be claimed is:

- item 69479 where the service is performed for private patients in public pathology laboratories; or
- item 69480 where the service is performed by the private pathology sector.

Consultation

Due to the short timeframe in drafting this legislative instrument to implement screening of asymptomatic drivers of heavy vehicles, it was not reasonably practicable to undertake consultation with representatives of persons affected by the instrument considering the nature of the emergency.

Details of the Amending Determination are set out in the Attachment.

The Amending Determination commences immediately after registration of the instrument.

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

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

ATTACHMENT

Details of the Health Insurance (Section 3C Pathology Services – COVID-19) Amendment (No. 5) Determination 2020Section 1 – Name

Section 1 provides for the instrument to be referred to as the *Health Insurance (Section 3C Pathology Services – COVID-19) Amendment (No. 5) Determination 2020*.

Section 2 – Commencement

Section 2 provides that the instrument commences immediately after registration.

Section 3 – Authority

Section 3 provides that the instrument 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 Amending 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 Amending Determination has effect according to its terms.

Schedule 1 – Amendments

Subsection 3C(3) of the Act provides that a determination made under subsection 3C(1) may make provision for and in relation to the specification of a matter or thing by applying, adopting or incorporating, with or without modification, the provisions of this Act or the regulations as in force at a particular time or as in force from time to time.

Subsection 5(2) of the Principal Determination states that, unless the contrary intention appears, a reference in the Principal Determination to a provision of the Act or the *National Health Act 1953* or regulations made under the Act or under the *National Health Act 1953* as applied, adopted or incorporated in relation to specifying a matter is a reference to those provisions as in force from time to time and any other reference to provisions of an Act or regulations is a reference to those provisions as in force from time to time.

Item 2 of the Amending Determination repeals and substitute's item 69501. The item will be amended to include the testing of a person who is employed, hired, retained or contracted to travel interstate as a driver of a heavy vehicle. This includes a person who is driving the vehicle and a person accompanying the person driving the vehicle on the journey who will be sharing in the task of driving the vehicle.

The test must be:

- bulk-billed by the approved pathology practitioner who performs the test; and
- performed by the private pathology sector; and

- the results of the tests must be provided to the person being tested and to the relevant state and territory public health unit, within 24 hours of delivery of the pathology specimen to the accredited pathology laboratory where the service is rendered.

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. 5) 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. 5) Determination 2020* (Amending Determination) is to expand the new SARS-COV-2 testing item introduced on 28 July 2020 to apply to a person who drives a heavy vehicle interstate.

This expansion will enable the rapid screening of asymptomatic people who are employed, hired, retained or contracted, to travel interstate as a driver of a heavy vehicle. This will help protect Australian residents from the spread of COVID-19 from people who are required to drive a heavy vehicle to transport goods across state and territory borders.

The Amending Determination will amend the *Health Insurance (Section 3C Pathology Services – COVID-19) Determination 2020* (the Principal Determination) to expand the rapid COVID-19 screening test for heavy vehicle drivers (item 69501) performed by the private pathology sector. The test will be available to people who are required to travel interstate by driving a heavy vehicle.

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 that drivers of heavy vehicles who are required to travel interstate can be screened for COVID-19. This will assist to prevent the spread of COVID-19 across state and territory borders and enable the rapid screening of asymptomatic people who are required to travel interstate as a driver of a heavy vehicle.

Conclusion

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

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