

EXPLANATORY STATEMENT

Private Health Insurance Act 2007

Private Health Insurance Legislation Amendment Rules (No.7) 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.7) 2020* (the Amendment Rules) amends the:

- *Private Health Insurance (Benefit Requirements) Rules 2011* (the Benefit Requirements Rules);
- *Private Health Insurance (Complying Products) Rules 2015* (the Complying Product Rules); and,
- *Private Health Insurance (Health Insurance Business) Rules 2018* (the Business Rules).

The Amendment Rules make consequential amendments to the Benefit Requirements Rules and the Complying Products Rules to reflect changes to items of the Medicare Benefits Schedule (MBS) that take effect from 1 November 2020. The MBS changes, are given effect by, and detailed in, the following legislative instruments, accessible on the Federal Register of Legislation (FRL) at www.legislation.gov.au:

- *Health Insurance Legislation Amendment (2020 Measures No. 2) Regulations 2020*;
- *Health Insurance (Section 3C Diagnostic Imaging Services – Computed Tomography Angiography) Determination 2020*; and,
- *Health Insurance (Section 3C General Medical Services – Extracorporeal Photopheresis) Determination 2020*.

The MBS changes commencing 1 November 2020 introduce 40 new items, 182 amended items (of which 33 are amendments to fees) and remove from the MBS 68 ceased items. These MBS item changes:

- amend blood product services to reflect contemporary clinical practice and improve quality of care;
- restructure chemotherapeutic procedures;
- introduce a new item for computed tomography (CT) angiography of the pulmonary artery for an initial investigation for pulmonary embolism;

- introduce new items for neurosurgery and promoting the use of higher value neurology items;
- introduce new items for treatment of cutaneous T-cell lymphoma (CTCL) with extracorporeal photopheresis;
- introduce new items, update item descriptions and relevant application provisions to align with contemporary practice, tighten clinical indicators and restrict inappropriate co-claiming of selected urology services items; and
- other minor and administrative amendments.

These MBS changes implement decisions of the Medical Services Advisory Committee, and the Government's response to the clinician led Medicare Benefits Schedule Review. Detailed information on the MBS items, including an online webinar explaining the changes, fact sheets and quick reference guides, are available at MBS Online available at www.mbsonline.gov.au.

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 Act) are further considered for allocation to clinical treatment categories and hospital accommodation benefit classifications to provide clarity in the administration of treatments to be covered by insurers. The classification and categorisation changes commencing 1 November 2020 are detailed in the Attachment to this Explanatory Statement.

The Amendment Rules also make amendments to the Business Rules as a consequence of changes to hospital accreditation certification by the Australian Commission for Safety and Quality in Health Care (ACSQHC), made during the COVID-19 pandemic. The Business Rule amendments will allow for second-tier expiry dates issued by the Department of Health (the Department) to maintain alignment with revised hospital accreditation expiry dates, streamlining administrative processes and supporting business continuity arrangements for hospitals with second-tier private health insurance eligibility.

These changes are achieved by amending:

- Schedules 1 and 3 of the Benefit Requirements Rules for the purpose of specifying minimum hospital accommodation benefit requirements, to classify new, amended and reviewed MBS services against procedure type classifications, and remove deleted items, as appropriate;
- Schedules 5, 6 and 7 of the Complying Product Rules for the purpose of describing hospital treatment(s) that must be covered under insurance policies, to categorise new, amended and reviewed MBS items against clinical category, common or support treatment list, and remove deleted items, as appropriate;
- Part 2A of the Health Insurance Business Rules for the purpose of second-tier default benefits transitional arrangements applicable during the COVID-19 pandemic. The changes align second-tier expiry dates to 60 days after accreditation under the ACSQHC National Safety and Quality Health Service (NSQHS) Standards. The Amendment Rules also repeal temporary transitional arrangements that were associated with the Department's commencement of administration of second-tier default benefits on 1 January 2019, now finalised.

Background

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 Act) are further considered for allocation to clinical treatment categories and hospital accommodation benefit classifications to provide clarity in the administration of treatments to be covered by insurers.

The Amendment Rules

The consequential amendments in these Amendment Rules are administrative in nature and do not substantively alter existing arrangements established under the Act.

Benefit Requirements Rules

The Benefit Requirements Rules provide for minimum benefit requirements for psychiatric care, rehabilitation, palliative care and other hospital treatments. Schedules 1 to 5 of the Benefit Requirements Rules set out the minimum levels of accommodation benefits payable for hospital treatment where the treatment is provided in the circumstances specified in the particular Schedule relevant to that 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. Schedule 3 also lists MBS items not normally considered hospital treatment. 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 Requirements 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 Requirements 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 an individual

patient. Part 2 of Schedule 3 identifies MBS items against Type B procedure Band 1, or the Type B non-band specific classification. The Benefit Requirements Rules also 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 of the Benefit Requirements Rules also identifies by MBS item those services that do not normally require hospital treatment ('Type C procedures'). The Benefit Requirements Rules, together with the Business Rules, establish that Type C procedures do not normally qualify for minimum benefits for hospital treatment nor accommodation, except in circumstances where a patient may receive as hospital treatment a Certified Type C Procedure.

Schedule 5 of the Benefit Requirements Rules provides for the categorisation of private hospitals, and calculation of minimum benefits, for the purposes of second-tier default benefits. Second-tier default benefits are benefits payable by insurers for treatment where the insurers do not otherwise have an agreement with the hospital, and the hospital has been assessed and included in the class of hospitals eligible for second-tier default benefits.

Complying Product Rules

The Complying Product Rules sets 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.

MBS items that are likely to be relevant to the scope of cover for only one clinical category have been placed against that category in the table at Schedule 5 of the Complying Product Rules. Where an MBS item is not likely to be a reason for admission for hospital treatment it has generally been placed in the Support treatments list, even if specific to a single body system.

MBS items that may be relevant to the scope of cover for two clinical categories are placed against the clinical category that is in the lowest product tier for which the MBS item is likely to apply.

The Common treatments list (Schedule 6) consists of MBS items that are used across, and therefore common to, multiple clinical categories (more than 2). For example, professional attendances by a medical practitioner are on the Common treatments list. MBS items on the Common treatments list will generally be for treatments that may be the primary reason for an admission. In some cases they may also be associated with or support another treatment that is the reason for admission. Insurers are required to cover MBS items in the Common treatments list where the treatment falls within the scope of cover for the clinical categories included in an insurance policy.

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. MBS items of the Diagnostic Imaging Services Table (DIST), Pathology Services Table (PST) and 3C Determination items are automatically categorised as Support Treatments under Schedule 7 of the Complying Product Rules.

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.

'Type C' procedures under the *Private Health Insurance (Benefit Requirements) Rules 2011* are also listed in the clinical categories or the Common or Support treatments list. Type C services do not normally require, but may be provided as, hospital treatment with the appropriate certification. Inclusion of an MBS item against a clinical category or in the Common or Support treatments lists has no bearing on whether that service requires a hospital admission and does not imply these services necessarily require admission.

MBS items which cannot be claimed for services provided as hospital treatment are not intended to be listed in the clinical categories, Common treatment or Support treatment lists. Some MBS items may also state they can only be claimed for treatments in, for example, a residential aged care facility.

Business Rules

Together with the *Private Health Insurance Act 2007*, the Health Insurance Business Rules detail what is, and is not, health insurance related business.

Part 2A of the Business Rules outlines arrangements relating to the Second-tier eligible hospitals class. Insurers pay second-tier default benefits for private hospital treatment if the insurer does not have an agreement with the hospital and the hospital has been assessed and found second-tier default benefits eligible.

The amendments in the Amendment Rules are administrative in nature and do not substantively alter existing arrangements.

Commencement

The Amendment Rules commence on 1 November 2020.

Consultation

MBS Review related consultation

The Amendment Rules relating to clinical categorisations and procedure type classifications are consequential to MBS items changes. Detail on the MBS items and consultations undertaken by the MBS Review Taskforce can be found in the Explanatory Statements to the Regulations available online from FRL at www.legislation.gov.au, and in information factsheets and quick reference guides available from the MBS Online website at www.mbsonline.gov.au.

Implementation liaison groups (ILGs) involving professional bodies and clinical experts inform development of regulations. Consultation encompasses private hospital and private health insurance sector representation, including from the Australian Private Hospitals Association and Private Healthcare Australia.

Private health insurance consultation on classifications and categorisations for MBS items

Consultation for the 1 November 2020 amendments included seeking feedback on proposed changes from those most likely to be directly impacted, and this feedback has been taken into account when determining the final amendments.

MBS ILG members and medical officers with the Department provide expert clinical advice to assist in determining the appropriate level of accommodation benefits and clinical category in respect of the MBS items added by the Amendment Rules, to the Benefit Requirements Rules and Complying Product Rules respectively.

On 21 September 2020, the Department hosted a webinar to amendments of proposed changes. The webinar included details of the proposed private health insurance classifications and categorisations and contact details for feedback on private health insurance changes. The webinar is available online at www.mbsonline.gov.au along with MBS fact sheets and quick reference guides including private health insurance classifications and categorisations.

The Department also consulted key private health industry representative bodies on the proposed private health insurance classifications and categorisations including:

- Australian Private Hospitals Association
- Catholic Health Australia
- Day Hospitals Australia
- Private Healthcare Australia
- Members Health Fund Alliance

Second-Tier Business Rules consultation

This is a beneficial change to those directly impacted by the changes made by the Australian Commission for Safety and Quality in Health Care to accreditation of health services. The Amendment Rules formalise an emergency measure and notification was sent out in the PHI Circular 52/20, released in July 2020 and available online at <https://www1.health.gov.au/internet/main/publishing.nsf/Content/health-privatehealth-providers-circulars.htm>.

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

Details of the *Private Health Insurance Legislation Amendment (No. 7) Rules 2020*

Section 1 Name

Section 1 provides that the name of the instrument is the *Private Health Insurance Legislation Amendment Rules (No. 7) 2020*.

Section 2 Commencement

Section 2 provides that the instrument commences on 1 November 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.

All Schedule changes come into effect from 1 November 2020.

Schedule 1—Amendments—Minimum Accommodation Benefits

Private Health Insurance (Benefit Requirements) Rules 2011

Schedule 1 of the Amendment Rules repeals the existing MBS items listed as a Type A or Type B procedure in the Benefit Requirement Rules, and substitutes amended items that come into effect from 1 November 2020.

- Type A procedures normally involve hospital treatment that includes part of an overnight stay
- Type B procedures normally involve hospital treatment that does not include any part of an overnight stay.

Items added to the lists of procedure types may be new MBS items, or due to procedure type reclassification following item amendments. Similarly, MBS items deleted from lists may be due to deletion from the MBS, or procedure type reclassification.

Item 1 provides for an amended list of MBS items classified as a Type A procedure Advance surgical patient, from 1 November 2020; the amended list of MBS items reflects the following item changes:

- Additions: 33 (35551, 35552, 36610, 36611, 37015, 37016, 37018, 37019, 37021, 37048, 37213, 37214, 37245, 37340, 37344, 37372, 39109, 39113, 39604, 39638, 39639, 39641, 39651, 39700, 39703, 39710, 39720, 39801, 39900, 40004, 40104, 40119, 40709)

- Deletions: 26 (36526, 36527, 36540, 36648, 37444, 39106, 39112, 39500, 39603, 39609, 39640, 39642, 39646, 39650, 39653, 39658, 39660, 39662, 39706, 39709, 39800, 39806, 40000, 40003, 40103, 40118)

Item 2 provides for an amended list of MBS items classified as Type A procedure Surgical patient, from 1 November 2020; the amended list of MBS items reflects the following item changes:

- Additions: 10 (14234, 14237, 30629, 36822, 36823, 36840, 37039, 37046, 37215, 39610)
- Deletions: 31 (14230, 14233, 14236, 14242, 35551, 36605, 36630, 36642, 36818, 36825, 36857, 37245, 37340, 37372, 39109, 39600, 39606, 39700, 39703, 39721, 39812, 39900, 40006, 40009, 40015, 40100, 40115, 40709, 40800, 40903, 57356)

Item 3 provides for an amended list of MBS items classified as a Type B Band 1 procedure Surgical patient, from 1 November 2020; the amended list of MBS items reflects the following item changes:

- Additions: 1 (13950)
- Deletions: 11 (13703, 13915, 13918, 13921, 13924, 13927, 13930, 13933, 13936, 13948, 37011)

Item 4 provides for an amended list of MBS items classified as Non-band specific Type B day procedures, from 1 November 2020; the amended list of MBS items reflects the following item changes:

- Additions: 15 (11919, 14247, 14249, 30630, 36561, 36818, 36822, 36823, 37011, 37215, 37216, 37217, 37218, 37324, 37339)
- Deletions: 2 (37212, 37315)

Schedule 2—Amendments—Type C procedures

Private Health Insurance (Benefit Requirements) Rules 2011

Schedule 2 of the Amendment Rules makes amendments to the existing MBS items listed as Type C procedures in the Benefit Requirement Rules.

- Type C procedures do not normally require hospital treatment.

Items added (inserted) as Type C procedures may be new MBS items, or due to procedure type reclassification following item amendments. Similarly, MBS items removed (omitted) from lists may be due to deletion from the MBS, or procedure type reclassification.

Item 1 omits MBS items “11006”, “11009” and “11919” from Type C, Category 2 – Diagnostic procedures & investigations, Group D1.

Item 2 omits MBS items “13709”, “13760”, “13939”, “13942”, and “13945” from Type C, Category 3 – Therapeutic procedures, Group T1.

Item 3 omits MBS items “37217” and “37218”, and adds item 37388 to Type C under Category 3 – Therapeutic procedures, Group T8.

Item 4 omits MBS item “57355”, adds item “57357” to Type C under Category 5 – Diagnostic Imaging Services, Group I2.

Schedule 3—Amendments—Clinical categories, Common and Support Treatments

Private Health Insurance (Complying Product) Rules 2015

Schedule 3 of the Amendment Rules repeals the existing MBS items Clinical categories list, Common and Support Treatments List’s and substitutes the amended lists that come into effect from 1 November 2020.

- Clinical categories are the 38 categories described in Schedule 5 of the Complying Product Rules. The clinical categories ‘Scope of cover’ describes treatments that must be covered by an insurance policy for hospital treatment including that particular clinical category.
- Common treatments are MBS items that are used across two or more clinical categories, and are therefore ‘common to’ multiple clinical categories.
- Support treatments are 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.

Items added to the lists may be new MBS items, or due to recategorisation following item amendments. Similarly, MBS items deleted may be due to deletion from the MBS, or recategorisation.

Item 1 provides for an amended list of MBS items categorised against clinical categories, from 1 November 2020; the amended list of MBS items reflects changes to items of the following clinical categories:

- Clinical Category
 - Additions: 40 (13950, 14234, 14237, 14247, 14249, 30629, 30630, 36610, 36611, 36822, 36823, 37015, 37016, 37018, 37019, 37021, 37039, 37046, 37048, 37213, 37214, 37216, 37344, 37388, 37607, 37610, 39007, 39113, 39604, 39610, 39638, 39639, 39641, 39651, 39710, 39720, 39801, 40004, 40104, 40119)
 - Deletions: 67 (13915, 13918, 13921, 13924, 13927, 13930, 13933, 13936, 13939, 13942, 13945, 13948, 14230, 14233, 14236, 14239, 14242, 35551, 36526, 36527, 36540, 36605, 36630, 36642, 36648, 36825, 36857, 37212, 37315, 37420, 37444, 39003, 39006, 39009, 39012, 39106, 39112, 39500, 39600, 39603, 39606, 39609, 39640, 39642, 39646, 39650, 39653, 39658, 39660, 39662, 39706, 39709, 39721, 39800, 39806, 39812, 40000, 40003, 40006, 40009, 40015, 40100, 40103, 40115, 40118, 40800, 40903)

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.

Item 2 provides for an amended list of MBS items categorised against the Common Treatments List, from 1 November 2020; the amended Common Treatments List reflects the following changes to items:

- Additions: 2 (35551, 35552)
- Deletions: 2 (37607, 37610)

Item 3 provides for an amended list of those MBS items categorised as Support Treatment and specifically identified in the Rules, from 1 November 2020.

MBS DIST, PST and 3C Determination items are automatically categorised as Support Treatments under Schedule 7 of the Complying Product Rules, and as such may not be individually identified in the Support Treatments List.

The amended Support Treatments List reflects the following changes to items:

- No additions
- Deletions: 2 (11006, 13709)

Schedule 4—Amendments—COVID-19 Accreditation Arrangements

Private Health Insurance (Health Insurance Business) Rules 2018 (the Business Rules).

Item 1 amends Subrule 7A to clarify that Hospital Casemix Protocol Data submission is required with every claim for private health insurance benefits, and not only those for second-tier default benefits.

Item 2 introduces new Subrule 7F, to allow for second-tier expiry dates issued by the Department of Health (the Department) to maintain alignment with revised hospital accreditation expiry dates.

The effect of this amendment, is that if a hospital is assessed as eligible for second-tier default benefits, the second-tier expiry date will be set to 60 days after the maintained accreditation was expected to expire (usually 3 years).

If the accreditation expiry date is later than the date the Department had calculated (due to delays in accreditation assessments), a new second-tier expiry date will be set to 60 days after that date.

Item 3 repeals Subrule 7E Transitional arrangements. Transitional arrangements that were initially brought in when the Department commenced the administration of second-tier default benefits, formerly under the auspices of the Second Tier Advisory Committee, from 1 January 2019. These arrangements aligned second-tier expiry to 60 days after accreditation expiry date. These arrangements are no longer needed as the transition has been applied to all eligible health services.

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. 7) 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. 7) 2020* (the Amendment Rules) is to amend the following instruments:

- *Private Health Insurance (Benefit Requirements) Rules 2011* (the Benefit Requirements Rules);
- *Private Health Insurance (Complying Product) Rules 2015* (the Complying Product Rules); and,
- *Private Health Insurance (Health Insurance Business) Rules 2018* (the Business Rules).

The Amendment Rules make consequential amendments to the:

- Complying Product Rules to categorise new MBS items into the appropriate clinical category, Common or Support Treatment for the purpose of describing hospital treatment(s) that must be covered under insurance policies;
- Benefit Requirements Rules to classify new and amended MBS items by procedure type for the purposes of benefits for accommodation, MBS fees for treatment or prostheses; and,
- Business Rules to amend second-tier expiry dates and keep the Department's administrative processes, and that of stakeholders, aligned with the hospital accreditation requirements.

Human rights implications

The Amendment Rules engage the right to health by facilitating the payment of private health insurance benefits for health care services, encouraging access to, and choice in, health care services. Under Article 12 of the International Covenant on Economic, Social and Cultural Rights, specifically the right to health, the Amendment Rules assist 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 that insurers do not differentiate the premiums they charge according to individual health characteristics such as poor health.

Analysis

The amendments relating to 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 that take effect on 1 November 2020.

The addition of new MBS items to accommodation benefit 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 disallowable 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 instrument is compatible with human rights because these changes continue to ensure that existing arrangements advancing the protection of human rights are maintained.