

EXPLANATORY STATEMENT

Issued by the Authority of the Minister for Health

Health Insurance Act 1973

Health Insurance (Extended Medicare Safety Net) Amendment (Indexation) Determination 2020

Section 10B of the *Health Insurance Act 1973* (the Act) provides that the Minister for Health may, by legislative instrument, determine to which Medicare items subsections 10ACA(7A) and 10ADA(8A) apply and the maximum increases in Medicare benefit payable for those items under the Extended Medicare Safety Net (EMSN).

The increase in the Medicare benefit payable under the EMSN is commonly referred to as the 'EMSN benefit', and the maximum increase amount is known as the 'EMSN benefit cap'. The EMSN provides an additional benefit for Australian families and singles who incur high out-of-pocket costs for Medicare eligible out-of-hospital services.

Subsections 10ACA(7A) and 10ADA(8A) of the Act provide that where a Medicare item is listed in a determination made under section 10B, the EMSN benefit must not exceed the amount determined as the EMSN benefit cap.

Purpose

The purpose of the *Health Insurance (Extended Medicare Safety Net) Amendment (Indexation) Determination 2020* (the EMSN Amendment Determination) is to amend the *Health Insurance (Extended Medicare Safety Net) Determination 2017* (the Principal Determination) to apply an EMSN cap to attendance items, coronavirus (COVID-19) telehealth items, one cardiac item and index the EMSN benefit caps that are a fixed dollar amount.

EMSN caps applied to uncapped attendance items

In the 2012-13 Budget under the *Extended Medicare Safety Net – capping benefits including for items with excessive fees* measure, the Government announced that an EMSN cap would be applied to all attendance items from 1 November 2012.

These changes improve the targeting of the EMSN, help manage Medicare expenditure and minimise unintended provider behaviour whilst continuing to provide support for patients with high out-of-pocket medical expenses.

Since the 1 November 2012 EMSN capping arrangements, additional attendance items have been added to the Medicare Benefits Schedule (MBS) in the specialities of addiction medicine (Group A31), sexual health medicine (Group A32), transcatheter aortic valve implantation case conference (Group A33), for services provided in residential aged care facilities (Group A35) and for bushfire recovery services (Group A39 and M17). These attendance items commenced without EMSN caps.

EMSN caps are also not currently applied to attendance items across orthodontic services (Group C1), oral and maxillofacial services (Group C2), consultations (Group O1) or miscellaneous therapeutic procedures (Group T1).

The Determination will apply an EMSN cap of 300 per cent of the Schedule fee or \$500.00 (whichever is the lesser amount) to Groups A31, A32, A33, A35, A39, M17 and O1. Attendance items in Groups C1, C2, and T1 will also be capped. This administrative change will ensure that EMSN capping arrangements are consistent across all attendance MBS services, and in line with the policy intent of the *Extended Medicare Safety Net – capping benefits including for items with excessive fees* measure.

EMSN caps applied to optometric services

Optometric services were not included in the 1 November 2012 capping arrangements, as Medicare benefits were only applicable if out-of-pocket costs did not exceed the Schedule fee. At the time, ‘participating’ optometrists who signed a “Common Form of Undertaking for Participating Optometrists” (the Undertaking) were eligible for Medicare rebates if they agreed to charge fees, which did not exceed the Schedule Fee (with limited exceptions) for optometrical services.

The Undertaking was revised to remove fee restrictions on 1 January 2015 enabling optometrists to set their charging practices in a similar manner to other health providers, and the Undertaking was revoked on 1 April 2016.

The Determination will apply an EMSN cap of 300 per cent of the Schedule fee or \$500.00 (whichever is the lesser amount) to optometric services (Group A10). This administrative change will ensure that EMSN capping arrangements are consistent across all attendance MBS services, and is in line with the policy intent of the *Extended Medicare Safety Net – capping benefits including for items with excessive fees* measure.

EMSN caps applied to COVID-19 telehealth items

On 13 March 2020, telehealth items commenced to help reduce the risk of community transmission of COVID-19 and to provide protection for patients and health care providers. The telehealth items mirror existing face-to-face out-of-hospital services and commenced without an EMSN cap applied to the services, including in cases where the equivalent face-to-face service is capped. The COVID-19 telehealth items are in Groups A40, A41, M18, M19 and O1.

The Determination will apply an EMSN cap of 300 per cent of the Schedule fee or \$500.00 (whichever is the lesser amount) to the COVID-19 telehealth services in groups A40, A41, M18, M19 and O1. This administrative change will ensure that EMSN capping arrangements are consistent across all attendance MBS services, and is in line with the policy intent of the *Extended Medicare Safety Net – capping benefits including for items with excessive fees* measure.

EMSN cap applied to cardiac item 11704

On 1 November 2012, an EMSN cap of 80 per cent of the schedule fee was applied to cardiac item 11700. This was in response to a review report of the EMSN titled ‘*Extended Medicare Safety Net. Review of Capping Arrangements Report 2011*’ that found excessive or incorrect billing practices of some items. The Government in the 2012-13 Budget agreed to apply an EMSN cap to this item.

On 1 August 2020, new MBS items for cardiac services were introduced which replaced existing services. These changes were part of the Government’s response to changes recommended by the clinician-led MBS Review Taskforce (the Taskforce) made during the 2018-19 Mid-Year Economic and Fiscal Outlook (MYEFO) under the *Guaranteeing Medicare – strengthening primary care* measure.

As part of these changes, item 11704 was introduced for a trace and formal report service to be performed by a specialist or consultant physician. This service replaced item 11700, which ceased on 1 August 2020.

The EMSN Amendment Determination will apply an EMSN benefit cap of 80 per cent of the schedule fee to cardiac item 11704 and will remove ceased item 11700. These changes will ensure that the EMSN benefit cap arrangements for cardiac services will continue to apply.

Indexation

From 1 January 2021, all EMSN benefit caps of a fixed dollar amount will be substituted by a new value which has been indexed by the Consumer Price Index. The fixed EMSN benefits caps have been increased by 0.7 per cent (annual CPI as reported in the September quarter 2020). Indexing the EMSN benefit caps will provide a greater benefit for patients.

The EMSN Amendment Determination also makes machinery changes by removing items which have ceased from the Principal Determination.

Consultation

Consultation was not undertaken on the EMSN Amendment Determination as it is machinery in nature. Consultation was undertaken on the cardiac changes that were recommended by the MBS Review Taskforce and announced in the 2018-19 MYEFO under the *Guaranteeing Medicare – strengthening primary care* measure.

The MBS Review was conducted by expert committees and working groups focusing on specific areas of the MBS. The Cardiac Services Clinical Committee (CSCC) report on changes to cardiac services was released for public comment and further consideration taken based on stakeholder feedback. The CSCC report was then presented to the Taskforce for finalisation and endorsement of the recommendations, before being presented to Government.

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

The EMSN Amendment Determination will not commence until it has been approved by each House of Parliament. This instrument will commence the later of the day it is approved by each House of Parliament or the day after registration. Schedule 1 of the Determination will commence on 1 January 2021 or the day this instrument is approved by each House of Parliament, whichever occurs later.

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

Authority: Section 10B of the
Health Insurance Act 1973

Details of the *Health Insurance (Extended Medicare Safety Net) Amendment (Indexation) Determination 2020*

Section 1 – Name

Section 1 provides for the Determination to be referred to as the *Health Insurance (Extended Medicare Safety Net) Amendment (Indexation) Determination 2020*.

Section 2 – Commencement

Section 2 provides that the Determination will not commence until it has been approved by each House of Parliament. Subject to Parliament's approval, the Determination will commence the later of the day after registration or the day after the Determination has been approved by each House of Parliament.

Subject to Parliament's approval, Schedule 1 of the Determination will commence on 1 January 2021. If Parliament approves the Determination after 1 January 2021, Schedule 1 will commence the day after it has been approved by each House of Parliament.

Section 3 – Authority

Section 3 provides that the Determination is made under section 10B of the *Health Insurance Act 1973* (the Act).

Section 4 – Schedules

Section 4 provides that 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

Schedule 1 sets out the amendments to the *Health Insurance (Extended Medicare Safety Net) Determination 2017* (Principal Determination).

Item 1 – Subsection 4(1) (table)

Item 1 provides that the table in subsection 4(1) is repealed and substituted with a new table of EMSN benefit cap amounts. For 53 items with fixed EMSN benefit cap amounts, the 'maximum increase' amounts in column 2 have been replaced with new values. The new amounts have been indexed by the Consumer Price Index (CPI) in the September quarter 2020. The Australian Bureau of Statistics releases the CPI. The September quarter 2020 is available at www.abs.gov.au.

Item 2 – Paragraph 4(2)(a)

Item 2 repeals and replaces paragraph 4(2)(a) to insert item 11704 to provide that an EMSN cap of 80 per cent of the Schedule fee will be applied. Cardiac item 11704 is for a trace and formal report service, which replaced item 11700. Item 11700 is also removed as this item ceased on 1 August 2020.

Item 3 – Paragraph 4(3) (table)

Item 3 repeals and replaces the table under paragraph 4(3) with a new table. The new table provides that an EMSN cap of 300 per cent of the Schedule fee or \$500.00 (whichever is the lesser amount) will be applied to Groups A10 (optometrical services), A31 (addiction medicine), A32 (sexual health medicine), A33 (transcatheter aortic valve implantation case conference), A35 (non-referred attendance at a residential aged care facility), A39 (GP and medical practitioner bushfire services), A40 (COVID-19 telehealth services) and A41 (COVID-19 additional focusses psychological strategy services).

Item 4 – Paragraph 4(4) (table)

Item 4 repeals and replaces the table under paragraph 4(4) with a new table to provide that an EMSN cap of 300 per cent of the Schedule fee or \$500.00 (whichever is the lesser amount) will be applied to Groups M17 (psychologist and allied health bushfire services), M18 (COVID-19 allied telehealth services), M19 (COVID-19 midwife telehealth services) and O1 (orthodontic consultation services).

Item 5 – Paragraph 4(5)(a)

Item 5 repeals and replaces paragraph 4(5)(a) to insert the following items to apply an EMSN cap of 300 per cent of the Schedule fee or \$500.00 (whichever is the lesser amount):

- two items under Group C1 for orthodontic services (75001 and 75004);
- two items under Group C2 for oral and maxillofacial services (75150 and 75153); and
- one item under Group T1 for miscellaneous therapeutic procedures (13899).

Item 6 - Paragraph 4(6) (table)

Item 5 provides that the table in paragraph 4(6) is repealed and substituted with a new table of EMSN benefit amounts. For 22 items with fixed EMSN benefit cap amounts, the ‘maximum increase’ amounts in column 2 have been replaced with new values. The new amounts have been indexed by the Consumer Price Index (CPI) in the September quarter 2020. The Australian Bureau of Statistics releases the CPI. The September quarter 2020 is available at

www.abs.gov.au

Statement of Compatibility with Human Rights

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

Health Insurance (Extended Medicare Safety Net) Amendment (Indexation) 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

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

The instrument also implements consequential amendments by indexing the EMSN benefit caps of items with a fixed maximum increase amount by CPI to commence on 1 January 2021. Indexing the EMSN benefit caps will provide a greater benefit for patients as the benefit caps will be consistent with increases in CPI.

Conclusion

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

Greg Hunt
Minister for Health