

## EXPLANATORY STATEMENT

### *Health Insurance Act 1973*

#### *Health Insurance Legislation Amendment (Extension of Cessation Dates and Pathology COVID-19 Services Amendments) Determination 2021*

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 PST) and the general medical services table (GMST) shall, in specified circumstances and for specified statutory provisions, be treated as if it were specified in the Table.

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

The GMST is set out in the regulations made under subsection 4(1) of the Act. The most recent version of the regulations is the *Health Insurance (General Medical Services Table) Regulations 2021*.

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**

Since 13 March 2020, the Australian Government has been providing temporary access to Medicare benefits for certain medical services to protect Australians during the coronavirus (COVID-19) pandemic.

The purpose of the *Health Insurance Legislation Amendment (Extension of Cessation Dates and Pathology COVID-19 Services Amendments) Determination 2021* (the Amendment Determination) is to:

- amend the cessation date of three legislative instruments; and
- make Government policy changes to the COVID-19 pathology services from 1 January 2022.

### Amend cessation dates

Schedule 1 of the Amendment Determination will extend the cessation date of two legislative instruments:

- the *Health Insurance (Section 3C Pathology Services – COVID- 19) Determination 2020* (Pathology Services COVID-19 Determination), which lists temporary COVID-19 pathology services, will have its cessation date extended by six months (from 31 December 2021 to 30 June 2022 at 11.59pm); and
- the *Health Insurance (Section 3C General Medical – Expansion of GP and Allied Health Mental Health Services) Determination 2020*, which lists temporary mental

health treatment items, will have its cessation date extended by 12 months (from 31 December 2021 to 31 December 2022 at 11.59pm).

Schedule 1 of the Amendment Determination will also clarify the *Health Insurance (Section 3C General Medical Services – COVID-19 Telehealth and Telephone Attendances) Determination 2020* ceases at 11.59pm of 31 December 2021. This change clarifies that a person who receives a service on 31 December 2021 will be entitled to receive a Medicare benefit.

#### Pathology COVID-19 Determination

Schedule 2 of the Amendment Determination amends two items (69479 and 69480) and repeals item 69501 in the Pathology COVID-19 Determination. Items 69479 and 69480 will be amended to allow pathology providers to charge a fee above the Medicare benefit amount (to a maximum amount equal to the schedule fee) for private patients admitted to hospital.

Patients who have elected to be treated as a private patient will be able to use their private health insurance to cover the service fee above the Medicare benefit amount. The schedule fees for items 69479 and 69480 will be reduced by 15 per cent to reflect adjustments in the cost of providing the service. It will continue to be a requirement that out-of-hospital COVID-19 pathology tests be bulk-billed to attract a Medicare benefit.

Item 69476, 69477 and 69501 will cease from 1 January 2022. Item 69476 and 69477 are redundant as the services could only be provided for tests rendered between 13 March 2020 and 31 March 2020.

Item 69501 is a test for asymptomatic drivers of heavy vehicles and rail crew and asymptomatic aged care workers in Victoria. This item is being deleted as these persons can access workplace related COVID-19 testing or state and territory governed border control related COVID-19 testing free-of-charge under the National Partnership on COVID-19 Response (NPCR) between the Australian Government and state and territory governments.

Where COVID-19 testing is undertaken for public health purposes, for example asymptomatic testing for travel, workplace testing, or testing of casual or close contacts, it is appropriately funded through the NPCR.

#### **Consultation**

Consultation for the changes to COVID-19 pathology services was undertaken with the Royal College of Pathologists of Australasia, Australian Pathology and Public Pathology Australia.

The extension of the *Health Insurance (Section 3C General Medical – Expansion of GP and Allied Health Mental Health Services) Determination 2020* responds to broader sector and consumer feedback that ongoing additional support is warranted in recognition of the continuing mental health impacts of the pandemic, as well as to help facilitate treatment planning for patients currently receiving services.

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

Sections 1 to 4 and Schedule 1 of the Amendment Determination commence immediately after registration of the instrument. Schedule 2 commences on 1 January 2022.

The Amendment 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 Legislation Amendment (Extension of Cessation Dates and Pathology COVID-19 Services Amendments) Determination 2021.***

Section 1 – Name

Section 1 provides for the Amendment Determination to be referred to as the *Health Insurance Legislation Amendment (Extension of Cessation Dates and Pathology COVID-19 Services Amendments) Determination 2021*.

Section 2 – Commencement

Section 2 provides that Sections 1 to 4 and Schedule 1 of the Amendment Determination commence immediately after registration of the instrument. Schedule 2 commences on 1 January 2022.

Section 3 – Authority

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

Schedule 1 – Amend Cessation Dates

**Amendment item 1** amends section 3 of the *Health Insurance (Section 3C Pathology Services – COVID- 19) Determination 2020* to extend the cessation date to 30 June 2022 at 11.59pm.

**Amendment item 2** amends section 4 of the *Health Insurance (Section 3C General Medical – Expansion of GP and Allied Health Mental Health Services) Determination 2020* to extend the cessation date to 31 December 2022 at 11.59pm.

**Amendment item 3** amends section 4 to clarify the *Health Insurance (Section 3C General Medical Services - COVID- 19 Telehealth and Telephone Attendances) Determination 2020* will cease at 11.59pm on 31 December 2021.

Schedule 2 – Pathology COVID-19 Services

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

**Amendment item 1** repeals the definitions for *aged care service*, *driver*, *heavy vehicle*, *Heavy Vehicle National Law* and *rail crew member*, terms relevant to repealed item 69501 (for item 69501 see **amendment item 8**).

**Amendment item 2** amends subsection 6(1) to remove references to repealed items 69476 and 69477 (for items 69476 and 69477 see **amendment item 5**).

**Amendment item 3** repeals subsections 6(2) and (3), which relates to relevant services for repealed item 69501 (for item 69501 see **amendment item 8**).

**Amendment item 4** amends subsection 7(1) to remove references to repealed items 69476 and 69477 (for items 69476 and 69477 see **amendment item 5**).

**Amendment item 5** repeals items 69476 and 69477. Items 69476 and 69477 are supplementary items in addition to item 69485, which has already been repealed, and only claimable for services provided between 13 March 2020 and 31 March 2020.

**Amendment item 6** amends item 69479 to allow pathology providers to charge a fee above the MBS benefit amount for private patients in hospital and to reduce the schedule fee by 15 per cent. The new schedule fee for item 69479 will remain 50 per cent of the schedule fee for item 69480, which has been reduced (for item 69480 see **amendment item 7**).

**Amendment item 7** amends item 69480 to allow pathology providers to charge a fee above the MBS benefit amount for private patients in hospital and to reduce the schedule fee by 15 per cent.

**Amendment item 8** repeals item 69501.

**Amendment item 9** repeals a note which relates to repealed items 69476 and 69477 (see **amendment item 5**).

## Statement of Compatibility with Human Rights

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

### *Health Insurance Legislation Amendment (Extension of Cessation Dates and Pathology COVID-19 Services Amendments) Determination 2021*

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

Since 13 March 2020, the Australian Government has been providing temporary access to Medicare benefits for certain medical services to protect Australians during the coronavirus (COVID-19) pandemic.

The purpose of the *Health Insurance Legislation Amendment (Extension of Cessation Dates and Pathology COVID-19 Services Amendments) Determination 2021* (the Amendment Determination) is to:

- amend the cessation date of three legislative instruments; and
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Schedule 1 of the Amendment Determination will also clarify the *Health Insurance (Section 3C General Medical Services – COVID-19 Telehealth and Telephone Attendances) Determination 2020* ceases at 11.59pm of 31 December 2021. This change clarifies that a person who receives a service on 31 December 2021 will be entitled to receive a Medicare benefit.

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Patients who have elected to be treated as a private patient will be able to use their private health insurance to cover the service fee above the Medicare benefit amount. The schedule fees for items 69479 and 69480 will be reduced by 15 per cent to reflect adjustments in the cost of providing the service. It will continue to be a requirement that out-of-hospital COVID-19 pathology tests be bulk-billed to attract a Medicare benefit.

Item 69476, 69477 and 69501 will cease from 1 January 2022. Item 69476 and 69477 are redundant as the services could only be provided for tests rendered between 13 March 2020 and 31 March 2020.

Item 69501 is a test for asymptomatic drivers of heavy vehicles and rail crew and asymptomatic aged care workers in Victoria. This item is being deleted as these persons can access workplace related COVID-19 testing or state and territory governed border control related COVID-19 testing free-of-charge under the National Partnership on COVID-19 Response (NPCR) between the Australian Government and state and territory governments.

Where COVID-19 testing is undertaken for public health purposes, for example asymptomatic testing for travel, workplace testing, or testing of casual or close contacts, it is appropriately funded through the NPCR.

### **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.

#### *The right of equality and non-discrimination*

The rights of equality and non-discrimination are contained in articles 2, 16 and 26 of the International Covenant on Civil and Political Rights (ICCPR). Article 26 of the ICCPR requires that all persons are equal before the law, are entitled without any discrimination to the equal protection of the law and in this respect, the law shall prohibit any discrimination and guarantee

to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

### Analysis

Extending the cessation date for the two determinations providing temporary COVID-19 services maintains the rights to health and social security and the right of equality and non-discrimination by continuing to provide patients with access to these items.

The changes to the COVID-19 pathology items maintains the rights to health and social security and the right of equality and non-discrimination by continuing to provide patients with access to bulk-billed out-of-hospital pathology services. For a person receiving a hospital service to which items 69479 and 69480 apply, the person will not have an out-of-pocket amount if an amount up to the schedule fee is charged and the patient has private health insurance hospital cover.

State and Territory governments are supported by the Commonwealth through the NPCR to provide appropriate public health surveillance, including screening programs. Asymptomatic drivers of heavy vehicles and rail crew and asymptomatic aged care workers in Victoria will continue to be able to access workplace related COVID-19 testing or State and Territory governed border control related COVID-19 testing free-of-charge under the NPCR between the Australian Government and state and territory governments.

Where COVID-19 testing is undertaken for public health purposes, for example asymptomatic testing for travel, workplace testing, or testing of casual or close contacts, it is appropriately funded through the NPCR.

### **Conclusion**

This instrument is compatible with human rights as it maintains the right to health, the right to social security and the right of equality and non-discrimination.

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