

## EXPLANATORY STATEMENT

### *Health Insurance Act 1973*

#### *Health Insurance (Section 3C Midwife and Nurse Practitioner Services) Amendment (Transitional Provision) Determination 2022*

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

The Table 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**

On 1 March 2022, the *Health Insurance (Section 3C Midwife and Nurse Practitioner Services) Amendment (No. 2) Determination 2021* amended the *Health Insurance (Section 3C Midwife and Nurse Practitioner Services) Determination 2020* (the Principal Determination) to restrict claiming of maternity care plan item 82115 to instances where the patient has had at least two antenatal attendances with the claiming participating midwife in the preceding six months. This change was part of the Government's response to the MBS Review Taskforce's Report on Primary Care.

The purpose of the *Health Insurance (Section 3C Midwife and Nurse Practitioner Services) Amendment (Transitional Provision) Determination 2022* (the Amendment Determination) is to insert a transitional provision in the Principal Determination that allows participating midwives to provide a service to a patient under item 82115 even where they have not had two antenatal attendances with the patient in the six months before the service is provided. This transitional provision will only apply to services provided from 1 March 2022 to 31 August 2022 and will be retrospectively applied from 1 March 2022.

The Amendment Determination addresses concerns that in the six months prior to the amendment of item 82115, participating midwives may not have had the required two antenatal visits with the patient to claim item 82115 as at the time they were not aware of the upcoming requirement. The transitional provision will ensure patients continue to have access to midwife services for maternity care plans during the six month period from 1 March 2022 to 31 August 2022. From 1 September, the new arrangements for item 82115 introduced by the *Health Insurance (Section 3C Midwife and Nurse Practitioner Services) Amendment (No. 2) Determination 2021* will apply to these services.

**Consultation**

Consultation on this change was undertaken between the Department of Health and Services Australia. The six month transition period, is an administrative change to ensure that the sector has time to adhere to the requirements to claim maternity care plan item 82115.

As this is an administrative change, consultation with the sector was not undertaken.

Details of the Determination are set out in the Attachment.

The Determination commences retrospectively on 1 March 2022.

The 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 (Section 3C Midwife and Nurse Practitioner Services) Amendment (Transitional Provision) Determination 2022***

Section 1 – Name

Section 1 provides for the Determination to be referred to as the *Health Insurance (Section 3C Midwife and Nurse Practitioner Services) Amendment (Transitional Provision) Determination 2022*.

Section 2 – Commencement

Section 2 provides that the Determination commences on 1 March 2022.

Section 3 – Authority

Section 3 provides that the 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 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

*Health Insurance (Section 3C Midwife and Nurse Practitioner Services) Determination 2020*  
(Principal Determination)

**Amendment item 1** inserts Part 4 into the Principal Determination, which contains section 21. Section 21 provides a transitional provision that, from 1 March 2022 to 31 August 2022, allows participating midwives to provide a service to a patient under item 82115 even where they have not had two antenatal attendances with the patient in the six months before the service is provided. This means that a service provided from 1 March 2022 to 31 August 2022 will apply to item 82115 even if the participating midwife has not had at least two antenatal attendances with the patient in the six months before the service is provided. A service provided on 1 September 2022, or any later date, will only apply to item 82115 if the participating midwife has had at least two antenatal attendances with the patient in the six months before the service is provided.

## Statement of Compatibility with Human Rights

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

*Health Insurance (Section 3C Midwife and Nurse Practitioner Services) Amendment (Transitional Provision) Determination 2022*

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

On 1 March 2022, the *Health Insurance (Section 3C Midwife and Nurse Practitioner Services) Amendment (No. 2) Determination 2021* amended the *Health Insurance (Section 3C Midwife and Nurse Practitioner Services) Determination 2020* (the Principal Determination) to restrict claiming of maternity care plan item 82115 to instances where the patient has had at least two antenatal attendances with the claiming participating midwife in the preceding six months. This change was part of the Government's response to the MBS Review Taskforce's Report on Primary Care.

The purpose of the *Health Insurance (Section 3C Midwife and Nurse Practitioner Services) Amendment (Transitional Provision) Determination 2022* (the Amendment Determination) is to insert a transitional provision in the Principal Determination that allows participating midwives to provide a service to a patient under item 82115 even where they have not had two antenatal attendances with the patient in the six months before the service is provided. This transitional provision will only apply to services provided from 1 March 2022 to 31 August 2022 and will be retrospectively applied from 1 March 2022.

The Amendment Determination addresses concerns that in the six months prior to the amendment of item 82115, participating midwives may not have had the required two antenatal visits with the patient to claim item 82115 as at the time they were not aware of the upcoming requirement. The transitional provision will ensure patients continue to have access to midwife services for maternity care plans during the six month period from 1 March 2022 to 31 August 2022. From 1 September, the new arrangements for item 82115 introduced by the *Health Insurance (Section 3C Midwife and Nurse Practitioner Services) Amendment (No. 2) Determination 2021* will apply to these services.

### 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

This instrument maintains the rights to health and social security and the right of equality and non-discrimination by ensuring patients continue to have access to midwife services for maternity care plans as part of new arrangements for item 82115.

### **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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