

## EXPLANATORY STATEMENT

### *Health Insurance Act 1973*

#### *Health Insurance Legislation Amendment (2022 Measures No. 3) 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 (GMST) or the pathology services table (the PST) shall, in specified circumstances and for specified statutory provisions, be treated as if it were specified in the Table.

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*.

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*.

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 Legislation Amendment (2022 Measures No. 3) Determination 2022* (the Amendment Determination) is to:

- amend the flag fall amounts for services provided by general practitioners (GPs) and other medical practitioners (OMPs) under the *Health Insurance (Section 3C General Medical – Expansion of GP and Allied Health Mental Health Services) Determination 2020* (the Mental Health Determination);
- repeal the *Health Insurance (Section 3C General Medical Services - General Practitioner Telehealth Services) Determination 2018* and the *Health Insurance (Section 3C General Medical Services – Mental Health Services for Bushfire Response) Determination 2020* (collectively, the Bushfire Services Determinations); and
- extend the cessation date for the *Health Insurance (Section 3C Pathology Services – COVID-19) Determination 2020* (the Pathology COVID-19 Determination) and the *Health Insurance (General Practice COVID- 19 Management Support Service) Determination 2021* (the COVID-19 Support Service Determination) from 30 June 2022 to 30 September 2022.

### Amendment to the Mental Health Determination

On 1 March 2022, the *Health Insurance Legislation Amendment (2021 Measures No. 4) Regulations 2021* amended the *Health Insurance Regulations 2018* (HIR) to include a number of general practice service items that were originally created in

response to the COVID-19 pandemic. These general practice items included temporary services to support the mental health of aged care residents during the COVID-19 pandemic under the *Better Access to Psychiatrists, Psychologists and General Practitioners through the MBS initiative* (also known as Better Access). Prescribing these items in the HIR changed the benefit calculation from 85% to 100% of the fee.

On 1 March 2022, the schedule fees for the affected general practice service items were reduced by the *Health Insurance Legislation Amendment (Section 3C General Medical Services – Telehealth and Phone GP Fee Alignment) Determination 2021* (the Fee Alignment Determination). This was to ensure patients received the same amount for a GP or OMP service in the Mental Health Determination following the change in the benefit calculation to 100% of the fee.

Subclauses 11(1) and (2) of the Mental Health Determination increase the fee for the attendance service provided to the first patient attended during a residential aged care facility visit. This amount is intended to reflect the cost doctors incur when providing professional services in residential aged care facilities. Subclauses 11(1) and (2) only apply to the attendance for the first patient seen at the residential aged care facility.

Where an attendance item specified in those provisions was subject to a change in benefit level from 85% to 100% and a corresponding fee reduction on 1 March 2022, the amount specified in the subsections should have been reduced so there was no change in the benefit amount for those services. However, this change was overlooked and not included in the 1 March 2022 legislative package.

Schedule 1 of the Amendment Determination amends section 11 of the Mental Health Determination to correct this omission. New subsection 11(3) will correct the flag fall amount for the first patient attended for an GP service at a residential aged care facility to which items 93400, 93401, 93402, 93403, 93421, 93287 or 93288 apply. New subsection 11(4) will correct the flag fall amount for the first patient attended for an OMP service at a residential aged care facility to which items 93431, 93432, 93433, 93434, 93451, 93291 or 93292 apply. This change is administrative only and ensures patients will receive the same benefit amount as they were receiving prior to 1 March 2022.

#### Cessation of Bushfire Services Determinations

The Bushfire Services Determinations provide mental health services for patients affected by bushfires, including general practice telehealth services and services provided under the Better Access. Schedule 2 of the Amendment Determination inserts new sections into each of the Bushfire Services Determinations, which provide that the Determinations will cease on 30 June 2022 at 11.59pm.

#### Extension of COVID-19 Services

Schedule 3 of the Amendment Determination extends the cessation date for the Pathology COVID-19 Determination and the COVID-19 Support Service Determination from 30 June 2022 to 30 September 2022 at 11.59pm.

The extension of these services was announced by Government in the 2022-23 Budget under the *COVID-19 Response Package – guaranteeing Medicare and access to medicines* measure.

**Consultation**

Consultation for the extension of the Pathology COVID-19 Determination was undertaken with the Royal College of Pathologists of Australasia, Australian Pathology, and Public Pathology Australia.

No consultation was undertaken for the changes to the Mental Health Determination as they are administrative in nature.

No consultation was undertaken on the cessation of the Bushfire Services Determinations. These bushfire services were extended from 31 December 2021 to 30 June 2022 to give eligible patients access to services whilst the Government considered ongoing telehealth arrangements. Eligible Australians will continue to have access to the Better Access scheme beyond 30 June 2022. Patients will also continue to have access to general practice mental health services under the *Health Insurance (Section 3C General Medical Services – Telehealth and Telephone Attendances) Determination 2021*, which continues remote service options introduced as part of the Government’s response to the COVID-19 pandemic.

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

The Amendment Determination commences on 11 April 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 (2022 Measures No. 3) Determination 2022***

Section 1 – Name

Section 1 provides for the Amendment Determination to be referred to as the *Health Insurance Legislation Amendment (2022 Measures No. 3) Determination 2022*.

Section 2 – Commencement

Section 2 provides that the Amendment Determination commences on 11 April 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 – Flag fall amendments

*Health Insurance (Section 3C General Medical – Expansion of GP and Allied Health Mental Health Services) Determination 2020 (Mental Health Determination)*

**Amendment item 1** repeals and replaces section 11 of the Mental Health Determination, which provides the flag fall amounts for general practitioner and other medical practitioner services performed at a residential aged care facility. New subsections 11(3) and (4) will provide the flag fall amounts for general practitioner and other medical practitioner services with a benefit of 100% of the fee.

Schedule 2 – Cessation of bushfire services

*Health Insurance (Section 3C General Medical Services - General Practitioner Telehealth Services) Determination 2018 (GP Telehealth Determination)*

*Health Insurance (Section 3C General Medical Services – Mental Health Services for Bushfire Response) Determination 2020 (Bushfire Response Determination)*

**Amendment item 2** inserts section 3A in the GP Telehealth Determination, which provides that this instrument will cease on 30 June 2022 at 11.59pm.

**Amendment item 3** inserts section 3A in the Bushfire Response Determination, which provides that this instrument will cease on 30 June 2022 at 11.59pm.

Schedule 3 – Extension of COVID-19 services

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

*Health Insurance (General Practice COVID- 19 Management Support Service) Determination 2021 (COVID-19 Support Service Determination)*

**Amendment item 4** extends the cessation date for services in the Pathology COVID-19 Determination from 30 June 2022 to 30 September 2022 at 11.59pm.

**Amendment item 5** extends the cessation date for item 93715 in the COVID-19 Support Service Determination from 30 June 2022 to 30 September 2022 at 11.59pm.

## Statement of Compatibility with Human Rights

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

*Health Insurance Legislation Amendment (2022 Measures No. 3) 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

The purpose of the *Health Insurance Legislation Amendment (2022 Measures No. 3) Determination 2022* (the Amendment Determination) is to:

- amend the flag fall amounts for services provided by general practitioners (GPs) and other medical practitioners (OMPs) under the *Health Insurance (Section 3C General Medical – Expansion of GP and Allied Health Mental Health Services) Determination 2020* (the Mental Health Determination);
- repeal the *Health Insurance (Section 3C General Medical Services - General Practitioner Telehealth Services) Determination 2018* and the *Health Insurance (Section 3C General Medical Services – Mental Health Services for Bushfire Response) Determination 2020* (collectively, the Bushfire Services Determinations); and
- extend the cessation date for the *Health Insurance (Section 3C Pathology Services – COVID-19) Determination 2020* (the Pathology COVID-19 Determination) and the *Health Insurance (General Practice COVID-19 Management Support Service) Determination 2021* (the COVID-19 Support Service Determination) from 30 June 2022 to 30 September 2022.

### Amendment to the Mental Health Determination

On 1 March 2022, the *Health Insurance Legislation Amendment (2021 Measures No. 4) Regulations 2021* amended the *Health Insurance Regulations 2018* (HIR) to include a number of general practice service items that were originally created in response to the COVID-19 pandemic. These general practice items included temporary services to support the mental health of aged care residents during the COVID-19 pandemic under the *Better Access to Psychiatrists, Psychologists and General Practitioners through the MBS initiative* (also known as Better Access). Prescribing these items in the HIR changed the benefit calculation from 85% to 100% of the fee.

On 1 March 2022, the schedule fees for the affected general practice service items were reduced by the *Health Insurance Legislation Amendment (Section 3C General Medical Services – Telehealth and Phone GP Fee Alignment) Determination 2021* (the Fee Alignment Determination). This was to ensure patients received the same amount for a GP or OMP service in the Mental Health Determination following the change in the benefit calculation to 100% of the fee.

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Where an attendance item specified in those provisions was subject to a change in benefit level from 85% to 100% and a corresponding fee reduction on 1 March 2022, the amount specified in

the subsections should have been reduced so there was no change in the benefit amount for those services. However, this change was overlooked and not included in the 1 March 2022 legislative package.

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#### Extension of COVID-19 Services

Schedule 3 of the Amendment Determination extends the cessation date for the Pathology COVID-19 Determination and the COVID-19 Support Service Determination from 30 June 2022 to 30 September 2022 at 11.59pm.

The extension of these services was announced by Government in the 2022-23 Budget under the *COVID-19 Response Package – guaranteeing Medicare and access to medicines* measure.

### **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

The changes to the Mental Health Determination are administrative in nature and will ensure that the flag fall amount received by general practitioners and other medical practitioners for these services remains as it should have been from 1 March 2022.

The extension of the Pathology COVID-19 Determination and the COVID-19 Support Service Determination will give patients continued access to these services.

Despite the cessation of the Bushfire Services Determinations, eligible Australians will continue to have access to the Better Access scheme beyond 30 June 2022 under *the Health Insurance (Section 3C General Medical – Expansion of GP and Allied Health Mental Health Services) Determination 2020*. Patients will also continue to have access to general practice mental health services under the *Health Insurance (Section 3C General Medical Services – Telehealth and Telephone Attendances) Determination 2021*, which continues remote service options introduced as part of the Government's response to the COVID-19 pandemic.

**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.

**Travis Haslam**  
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**Medical Benefits Division**  
**Health Resourcing Group**  
**Department of Health**