

EXPLANATORY STATEMENT

Issued by the Authority of the Minister for Health and Aged Care

Private Health Insurance Act 2007

Private Health Insurance Legislation Amendment Rules (No. 9) 2022

Authority

Section 333-20(1) of the *Private Health Insurance Act 2007* (the Act) authorises the Minister to, by legislative instrument, make specified 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.

The *Private Health Insurance Legislation Amendment Rules (No.9) 2022* (the Amendment Rules) amends the:

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

Under subsection 33(3) of the *Acts Interpretation Act 1901*, 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 Amendment Rules make consequential amendments to the Benefit Requirements Rules to implement changes to the private health insurance procedure type classification of items of the Medicare Benefits Schedule (MBS) to reflect the introduction of a new temporary substitute positron emission tomography (PET) item for use when the preferred service using gallium-67 (Ga-67) is unavailable due to Ga-67 supply disruptions. The new temporary MBS item 61527 takes effect 1 August 2022.

Changes to the procedure type classification of MBS items is achieved by amending Schedule 3 of the Benefit Requirements Rules for the purpose of specifying minimum hospital accommodation benefit requirements, to classify the item 61527 as a Type C procedure. No change is required to the *Private Health Insurance (Complying Product) Rules 2015* for the purposes of classifying item 61527 as it is in the Diagnostic Imaging Services Table (DIST) which is automatically categorised as Support treatment.

In alignment with the cessation of temporary specialist in-hospital telehealth MBS items on 30 June 2022, the Amendment Rules will also repeal consequential amendments made to the Health Insurance Business Rules to ensure the items would not be considered Hospital treatment under the *Private Health Insurance Act 2007*.

The MBS item changes relevant to these Amendment Rules, are given effect by, and detailed in the following legislative instrument, accessible on the Federal Register of Legislation (FRL) at www.legislation.gov.au:

- *Health Insurance (Section 3C General Medical Services -Telehealth and Telephone Attendances) Determination 2021*; and
- *Health Insurance (Section 3C Diagnostic Imaging Services – PET and Gallium-67 Services) Determination 2022*.

The above instruments make changes to MBS items of the diagnostic imaging services table (DIST) and cessation of temporary telehealth items to reflect Government policy.

Detailed information on MBS items, including fact sheets and quick reference guides, can be accessed at MBS Online available at www.mbsonline.gov.au and in the Explanatory Statement that accompanies each set of regulatory changes. These statements also outline consultation that took place on the MBS changes.

The private health insurance change commencing 1 August 2022 is detailed in the Attachment to this Explanatory Statement. Further information can be accessed in private health insurance information provided online at www.health.gov.au.

Consultation

Stakeholders were notified of the introduction of a new temporary substitute positron emission tomography (PET) item for use when the preferred service using gallium-67 (Ga-67) is unavailable due to Ga-67 supply disruptions in the Department's 15 July 2022 Weekly industry email and *PHI Regulatory Amendments and Consultations Calendar*.

As item 61527 mirrors, and is a direct substitute for, items 61429, 61430, 61442, 61450 and 61453 it is categorised under *Support list (DI)* and classified as *Type C procedure*. Stakeholders did not provide any feedback opposing the proposed classification.

Background

The Health Insurance Business Rules outline the classes of treatments considered to be hospital treatment for the purposes of the Act. MBS items with the potential to be provided to privately insured patients as hospital treatment are allocated to clinical treatment categories under the Complying Product Rules and hospital accommodation procedure type classifications under the Benefit Requirements Rules, to provide clarity in the administration of treatments by insurers and facilitate claims and benefit payments.

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 by private health insurers associated with private patients' hospital treatment: benefits for overnight accommodation (Schedules 1 and 2); same-day accommodation (Schedule 3); Nursing-Home Type Patients (NHTP) (Schedule 4) and second-tier default benefits (Schedule 5).

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 (at Part 3 of Schedule 1).

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 *Private Health Insurance (Health Insurance Business) Rules 2018*, establish that Type C procedures do not normally qualify for minimum benefits for hospital treatment, including for accommodation, except in circumstances where a patient may receive as hospital treatment a Certified Type C Procedure (at Part 2 of Schedule 3).

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, when delivered as hospital treatment.

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.

Schedule 7—Support treatments list

The Support treatments list (Schedule 7) consists of MBS items, such as pathology tests and diagnostic tests, 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.

MBS items in the Diagnostic Imaging Services Table (DIST), Pathology Services Table (PST) and 3C Determinations 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 treatments or included in the 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.

Health Insurance Business Rules

A treatment with the potential to be provided to privately insured patients as hospital treatment can be excluded from the definition of hospital treatment under subsection 121-5(4) of the Act if it is specified in, or included in a class of treatments specified in, the Health Insurance Business Rules for the purposes of that subsection.

From 1 January 2022, 40 temporary MBS items were reinstated for specialist telehealth and phone services performed by the admitting medical practitioner or admitting dental practitioner for private patients admitted to hospital. These temporary telehealth MBS items were previously available from 15 September to 31 December 2021 and were excluded from the definition of hospital treatment for the purposes of the Act through consequential amendments to Rule 8 of the Health Insurance Business Rules made by the *Private Health Insurance (Health Insurance Business) Amendment Rules (No. 2) 2021*.

As these temporary MBS items ceased to be available on 30 June 2022, the associated changes to the Health Insurance Business Rules will be repealed.

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.

Commencement

The Amendment Rules commence on 1 August 2022.

Details

Details of the Amendment Rules are set out in the **Attachment**.

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

ATTACHMENT

Details of the *Private Health Insurance Legislation Amendment Rules (No. 9) 2022*

Section 1 Name

Section 1 provides that the name of the instrument is the *Private Health Insurance Legislation Amendment Rules (No. 9) 2022* (the Amendment Rules)

Section 2 Commencement

Section 2 provides that the instrument commences on 1 August 2022.

Section 3 Authority

Section 3 provides that the Amendment Rules are made under section 333-20(1) 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 August 2022.

Schedule 1—Amendments—Type C procedures

Private Health Insurance (Benefit Requirements) Rules 2011 (Benefit Requirements Rules)

Schedule 1 of the Amendment Rules repeals the existing list of MBS items classified as Type C procedures in the Benefit Requirements Rules and substitutes an amended list.

- Type C procedures normally do not involve hospital treatment.

Item 1 provides for an amended list of MBS items classified as Type C procedures, from 1 August 2022. The Amended list of MBS items reflects the addition of item 61527.

Schedule 2—Amendments—Specialist in-hospital telehealth

Private Health Insurance (Health Insurance Business) Rules 2018

Schedule 2 of the Amendment Rules is related to 40 temporary MBS items which were reinstated with a retrospective effect from 1 January 2022. The temporary MBS telehealth items were previously available from 15 September to 31 December 2021 for specialist telehealth and phone services performed by the admitting medical practitioner or admitting dental practitioner for private patients admitted to hospital.

Consequential amendments to Rule 8 of the Health Insurance Business Rules made by the *Private Health Insurance (Health Insurance Business) Amendment Rules (No. 1) 2022*, excluded these temporary telehealth MBS items from the definition of hospital treatment for the purposes of the Act.

The temporary MBS items ceased on 30 June 2022.

Item 1 repeals the exclusion at Part 3 Rule 8 of the Health Insurance Business Rules of the ceasing temporary MBS items.

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. 9) 2022

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. 9) 2022* (the Amendment Rules) is to amend the following instruments:

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

The Amendment Rules make consequential amendments to the:

- Benefit Requirements Rules to classify a new MBS item by procedure-type for the purposes of minimum benefits for accommodation; and
- Health Insurance Business Rules to repeal consequential amendments made that excluded temporary telehealth MBS items from the definition of hospital treatment, as those temporary items ceased on 30 June 2022.

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 amendment relating to insertion of an MBS item in the Benefit Requirements Rules is a consequence of the change to the MBS that took effect on 1 August 2022.

The addition of new MBS items to accommodation benefit classifications allows for the specified treatments under those items and the related minimum 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.

Brian Kelleher
Assistant Secretary
Private Health Industry Branch
Medical Benefits Division
Health Resourcing Group
Department of Health and Aged Care