

EXPLANATORY STATEMENT

Issued by the authority of the Minister for Aged Care and Minister for Sport

Aged Care Act 1997

*Aged Care Legislation Amendment (Independent Health and Aged Care Pricing Authority)
Instrument 2022*

Authority

Section 96-1 of the *Aged Care Act 1997* (**Aged Care Act**) provides that the Minister has the power to make instruments providing for matters required or permitted, or necessary or convenient to give effect to the relevant Part or section of the Aged Care Act.

Paragraph 95B-1(2)(e) of the Aged Care Act provides that the functions of the Aged Care Pricing Commissioner can be specified by the Minister by legislative instrument.

Section 52G-3 of the Aged Care Act provides that the Minister may, by legislative instrument determine the maximum amount of refundable accommodation deposit amount that an approved provider may charge a person.

Under subsection 33(3) of the *Acts Interpretation Act 1901* (**AI Act**), 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.

Section 4 of the AI Act as applied by section 13 of the *Legislation Act 2003* provides, among other things, that if an Act is enacted and at a time after its enactment (the start time) the Act will confer power to make an instrument, that power may be exercised before the start time as if the relevant commencement had occurred. However, in general terms, the exercise of this power does not confer a power or right to impose an obligation on a person before the relevant commencement.

Purpose

The purpose of the *Aged Care Legislation Amendment (Independent Health and Aged Care Pricing Authority) Instrument 2022* (**Amending Instrument**) is to replace references to the Aged Care Pricing Commissioner with references to the Independent Health and Aged Care Pricing Authority (**Pricing Authority**). The Amending Instrument supports the implementation of the amendments made by Schedule 8 to the *Aged Care and Other Legislation Amendment (Royal Commission Response) Act 2022* (Royal Commission Response Act 2022) and the amendments made by this Instrument are consequential to the amendments made by Schedule 8. An additional purpose is to repeal other instruments that are no longer required as a result of the Royal Commission Response Act 2022 and the Aged Care Legislation Amendment (Royal Commission Response No. 1) Act 2021 (Royal Commission Response No. 1 Act).

The Amending Instrument:

- repeals the *Aged Care (Aged Care Pricing Commissioner—Other Functions) Instrument 2015* and the *Committee Principles 2014*; and
- amends the *Aged Care (Subsidy, Fees and Payments) Determination 2014*, the *Extra Service Principles 2014*, the *Fees and Payments Principles 2014 (No. 2)*, and the *Information Principles 2014*.

The amendments made by the Amending Instrument are technical changes which replace references to the Aged Care Pricing Commissioner with references to the Pricing Authority as a result of the expansion of the Pricing Authority's functions through amendments in Schedule 8 to the Royal Commission Response Act 2022. The changes also reflect the need to repeal the *Committee Principles 2014* as a result of the changes set out in the Royal Commission Response No 1 Act.

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

Background

The Pricing Authority

Recommendations 11 and 115 of the Final Report of the Royal Commission into Aged Care Quality and Safety recommended that the Government establish an Independent Health and Aged Care Pricing Authority, which would have broad powers in relation to funding and the regulation of the market and broadly included the current function of the Aged Care Pricing Commissioner.

Part 6.7 of the Aged Care Act established the office of the Aged Care Pricing Commissioner. Part 6.7 has been repealed by the Royal Commission Response Act 2022, with the functions of the Aged Care Pricing Commissioner being conferred on the Pricing Authority.

Upon commencement of the Royal Commission Response Act 2022, the Pricing Authority will become responsible for:

- The approval of extra service fees that can be charged by residential care providers;
- The approval of proposed accommodation payments that are higher than the maximum amount determined by the Minister under section 52G-3 (currently \$550,000); and
- Any other functions conferred on the Pricing Authority by the Minister or under Commonwealth law.

These amendments finalise the transfer of the functions of the Aged Care Pricing Commissioner to the Pricing Authority by aligning subordinate legislation with the amendments being made to the Aged Care Act.

The Committee Principles 2014

In 2012, the Aged Care Financing Authority (ACFA) was established as a statutory body, providing independent and transparent advice to the Australian Government on funding and financing issues in the aged care sector. ACFA was abolished as a result of amendments made by the Royal Commission Response No.1 Act.

Given this, the Amending Instrument also repeals the *Committee Principles 2014* which set out ACFA's functions and governance arrangements. As ACFA ceased operations in June 2021 these Principles are no longer needed.

Commencement

The Amending Instrument commences the later of the start of the day after the instrument is registered and immediately after the commencement of Schedule 8 to the Royal Commission Response Act.

Consultation

The repeal of the *Aged Care (Aged Care Pricing Commissioner—Other Functions) Instrument 2015* and the amendments to the *Aged Care (Subsidy, Fees and Payments) Determination 2014*, the *Extra Service Principles 2014*, the *Fees and Payments Principles 2014 (No. 2)*, and the *Information Principles 2014* are required as a result of the Aged Care Pricing Commissioner's functions being conferred on the Pricing Authority through the amendments in Schedule 8 to the Royal Commission Response Act 2022. No additional consultation has occurred as these amendments are consequential in nature.

The Royal Commission Response No.1 Act abolished ACFA and this necessitates repeal of the *Committee Principles 2014* which are no longer required. No further consultation has occurred as the repeal is an administrative matter following the conclusion of ACFA's operations in 2021.

Regulation Impact Statement (RIS)

Consistent with the Office of Best Practice Regulation's (OBPR) Regulatory Impact Statement (RIS) requirements, the Department of Health and Aged Care certifies that a package of independent reviews undertook a process and analysis equivalent to a RIS as it pertains to the Royal Commission Response Act 2022. The certification and list of reviews are available at the end of the Explanatory Memorandum.

In addition, the RIS for measures which are not covered by this certification are also reproduced in the Explanatory Memorandum for the Royal Commission Response Act 2022.

In relation to the repeal of the *Committee Principles 2014*, the OBPR considers this proposal is unlikely to have more than minor regulatory impact and therefore did not require the preparation of a RIS (OBPR reference: OBPR22-02652).

ATTACHMENT

Details of the *Aged Care Legislation Amendment (Independent Health and Aged Care Pricing Authority) Instrument 2022*

Section 1 provides that the name of the instrument is the *Error! Use the Home tab to apply ShortT to the text that you want to appear here.* (the Amending Instrument).

Section 2 provides that the Amending Instrument commences on the later of the start of the day after the instrument is registered and immediately after the commencement of Schedule 8 to the *Aged Care and Other Legislation Amendment (Royal Commission Response) Act 2022*.

Section 3 provides that the authority for the amending instrument is the *Aged Care Act 1997*

Section 4 provides that each instrument that is specified in a Schedule to the Amending Instrument is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule has effect according to its terms.

SCHEDULE 1 – AMENDMENTS

Aged Care (Subsidy, Fees and Payments) Determination 2014

Item 1 - Section 110 (note)

Item 1 of Schedule 1 amends the note under section 110 to amend reference to the “Aged Care Pricing Commissioner” (wherever occurring), to the “Pricing Authority”.

Extra Service Principles 2014

Item 2 - Subsections 17(1), (2) and (3)

Item 2 retains the approved providers requirements that must be met for their proposed extra service fees but amends the entity that this must be reported to, from the “Aged Care Pricing Commissioner”, to the “Pricing Authority”.

Fees and Payments Principles 2014 (No. 2)

Item 3 - Section 4 (definition of *approval day*)

Item 3 retains the definition of *approval day* for an approved accommodation amount above the Ministers approved amount set out in 52G-3 of the Act, but amends the entity providing the approval from “Aged Care Pricing Commissioner”, to the “Pricing Authority”.

Item 4 - Section 4 (definition of *approval year*)

Item 4 retains the definition of *approval year* an approved accommodation amount above the Minister’s approved amount set out in 52G-3 of the Act, but amends the entity providing the approval from “Aged Care Pricing Commissioner”, to the “Pricing Authority”.

Item 5 - Section 4

Item 5 replaces the definition in the Fees and Payments Principles to refer to a Pricing Authority approved amount.

Item 6 - Section 4 (definition of *Pricing Commissioner approved amount*)

Item 6 repeals the definition (including the note) from the Fees and Payments Principles.

Item 7 - Section 4 (paragraph (b) of the note at the end)

Item 7 repeals the note from the Fees and Payments Principles.

Item 8 - Section 4 (after paragraph (c) of the note at the end)

Item 8 amends the note pertaining to unrealisable asset inserting the “Pricing Authority” at (ca).

Item 9 - Section 21 (paragraph (b) of Note 1)

Item 9 amends the note pertaining to when a maximum amount is above the Minister’s approved amount set out in 52G-3 of the Act, to reflect that approval is sought from the “Pricing Authority” rather than the “Aged Care Pricing Commissioner”.

Item 10 - Section 21 (paragraph (b) of Note 1)

Item 10 amends the note pertaining to when an amount is above the Minister’s approved amount set out in 52G-3 of the Act, to reflect that the approved amount will be referred to as the “Pricing Authority approved amount” rather than the “Pricing Commissioner approved amount”.

Items 11 to 15 - Paragraph 23(a), Paragraph 23(c), Paragraph 25(2)(b), Subsection 25(5) (note) and Subsection 25(6) (note)

Items 11 to 15 amend paragraph 23(a), paragraph 23(c), paragraph 25(2)(b), subsection 25(5) (note), subsection 25(6) (note) to replace references to the “Aged Care Pricing Commissioner” with references to the “Pricing Authority” in respect of applications for approval to charge a higher maximum accommodation payment amount.

Items 16 to 21 – Section 26 (heading), Subsections 26(1) to (4), Paragraph 26(4)(b), Subsections 26(5) and (6), Section 27 (heading) and Subsections 27(1), (3) and (4)

Items 16 to 21 amend section 26 (heading), subsections 26(1) to (4), paragraph 26(4)(b), subsections 26(5) and (6), section 27 (heading) and subsections 27(1), (3) and (4) to replace references to the “Aged Care Pricing Commissioner” with references to the “Pricing Authority” in respect of decisions and notifications regarding approval to charge a higher maximum accommodation payment amount.

Items 22 and 23 – Section 29 (heading) and Section 29

Items 22 and 23 amend section 29 (heading) and section 29 to replace references to the “Aged Care Pricing Commissioner” with references to the “Pricing Authority” in respect of the indexation of the now Pricing Authority approved amount under section 26 of the *Fees and Payments Principles 2014 (No. 2)*.

Information Principles 2014

Item 28 – Paragraph 6(1)(e)

Item 28 repeals the paragraph relating to the Pricing Commissioner from the *Information Principles 2014* as the Secretary will have the power to disclose protected information (for the purposes of the Aged Care Act) to the Pricing Authority under new paragraph 86-3(1)(cd) of the Aged Care Act, as introduced through Item 27 of Schedule 8 to the Royal Commission Response Act 2022.

SCHEDULE 2 - REPEALS

Aged Care (Aged Care Pricing Commissioner—Other Functions) Instrument 2015

Item 1 – The whole of the instrument

Item 1 repeals the *Aged Care (Aged Care Pricing Commissioner—Other Functions) Instrument 2015* as the functions of the Pricing Commissioner have been conferred on the Pricing Authority.

Committee Principles 2014

Item 2 – The whole of the instrument

This item repeals the *Committee Principles 2014* in full as the Aged Care Financing Authority (ACFA) has been abolished.

Statement of Compatibility with Human Rights

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

Aged Care Legislation Amendment (Independent Health and Aged Care Pricing Authority) Instrument 2022

The *Aged Care Legislation Amendment (Independent Health and Aged Care Pricing Authority) Instrument 2022* (Amending 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 Legislative Instrument

The Amending Instrument repeals the *Aged Care (Aged Care Pricing Commissioner—Other Functions) Instrument 2015* and the *Committee Principles 2014*. The Amending Instrument also amends the *Aged Care (Subsidy, Fees and Payments) Determination 2014*, the *Committee Principles 2014*, the *Extra Service Principles 2014*, the *Fees and Payments Principles 2014 (No. 2)*, and the *Information Principles 2014*.

The amendments made by the Amending Instrument are technical changes to the references to the name of the Aged Care Pricing Commissioner to the Pricing Authority as a result of the expansion of the Pricing Authority's functions through amendments in Schedule 8 of the *Royal Commission Response Act 2022*.

The Amending Instrument also repeals the *Committee Principles 2014* as a consequential amendment as the Aged Care Financing Authority was abolished by amendments in the *Aged Care and Other Legislation Amendment (Royal Commission Response No.1) Act 2021*

Human rights implications

The Amending Instrument does not engage any of the applicable rights or freedoms.

Conclusion

The Amending Instrument is compatible with human rights as it does not raise any human rights issues.

The Hon Anika Wells MP

Minister for Aged Care and Minister for Sport