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. 12) 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.12) 2022* (the Amendment Rules) amends the:

- *Private Health Insurance (Benefit Requirements) Rules 2011* (the Benefit Requirements Rules); and,
- *Private Health Insurance (Complying Product) Rules 2015* (the Complying Product 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 and the Complying Product Rules to implement changes to the private health insurance (PHI) clinical categorisation and procedure type classification of items of the Medicare Benefits Schedule (MBS) to reflect changes to MBS items commencing 1 November 2022.

Changes to the clinical categorisation and procedure type classification of MBS items are achieved by amending:

- Schedule 5 and 6 of the Complying Product Rules for the purpose of describing hospital treatment(s) that must be covered under insurance policies, to categorise new and reviewed MBS items by clinical category and remove deleted items, as appropriate. Note that new MBS Pathology Services Table (PST) items and Diagnostic Imaging Services Table (DIST), are automatically categorised as Support treatments so do not need to be specifically listed under Schedule 7.
- Schedules 1 and 3 of the Benefit Requirements Rules for the purpose of specifying minimum hospital accommodation benefit requirements, to classify new and reviewed MBS items against procedure type classifications, and remove deleted items, as appropriate.

The MBS item changes relevant to these Amendment Rules, are given effect by, and detailed in, the following legislative instruments that in 2022 could be viewed on the Australian Government Federal Register of Legislation (FRL) website (http://www.legislation.gov.au):

- *Health Insurance Legislation Amendment (2022 Measures No.3) Regulations 2022*
- *Health Insurance (Section 3C Co-Dependent Pathology Services) Amendment Determination (No. 6) 2022*

The above instrument will make changes to MBS items of the General Medical Services Table (GMST), PST and DIST, commencing 1 November 2022, to reflect Government policy. Many of these MBS changes relate to measures announced in the 2022-23 Budget *Guaranteeing Medicare – Medical Benefits Schedule new and amended listings, Guaranteeing Medicare – Supporting patient access to Magnetic Resonance Imaging* and *Women's Health Package* measure.

The changes implement the Government's response to recommendations from the clinician-led MBS Review Taskforce (the Taskforce) or the independent Medical Services Advisory Committee (MSAC). These MBS item changes include:

- new co-dependent item for METex14sk testing (73436) in patients with locally advanced or metastatic non-small cell lung cancer
- two new items ((30661 and 30662) and four (43882, 44108, 44111 and 44114) amended items for paediatric surgery
- new item (36530) for cryoablation for biopsy-confirmed renal cell carcinoma
- new item (39141) for reprogramming of a neurostimulator for the management of chronic neuropathic pain
- seven new items (31377 to 31383) and six amended items (31371 to 31376) for melanoma excision
- amended item (45617) for Oculoplastic surgery to support patient access by removing reference to visual field testing
- new item (40863) for deep brain stimulation for the treatment of Parkinson's disease, essential tremor, and dystonia
- two new items (11736 and 11737) for cardiac implanted loop recorders
- amendment to six varicose veins items (32520, 32522, 32523, 32526, 32528 and 32529) to allow co-claiming with appropriate venography items
- amendment to eight cardiothoracic surgery items (38510, 38513, 38516, 38517, 38555, 38556, 38557 and 38572)
- three new items (47790, 47791 and 47792) and five amended items (47967, 49212, 49236, 49215 and 49734) for orthopaedic surgery to address unintended consequences, such as service gaps, in response to MBS Taskforce Review recommendations
- removal of one item (173) and amendment to four acupuncture items (193, 195, 197 and 199) to allow appropriately credentialled medical practitioners to provide acupuncture services
- new item (63563) for pelvic MRI for the investigation of sub-fertility
- amendment to existing obstetric MRI item (63454) to expand clinical indication to include all suspected fetal abnormalities
- new obstetric MRI item (63549) for multiple pregnancies for fetal abnormalities
- six new (55740, 55741, 55742, 55743, 55757 and 55758) pregnancy ultrasound items
- new positron emission tomography (PET) item (61612) for initial staging for patients diagnosed with rare and uncommon cancers

- amendment to liver MRI item (63545) to include all cancer types that have potentially spread to the liver
- amendment to breast MRI item (63464) to increase eligible age
- permanent introduction of three nuclear medicine diagnostic imaging items (61333, 61336 and 61341) to support patient access to alternative PET imaging services during radiopharmaceutical technetium-99m (Tc-99m) supply disruptions
- seven new items (73422 to 73428) for genetic testing for the diagnosis of early-onset or familial neuromuscular disorders
- removal of one item (73073) and amendment to two National Cervical Screening Program items (73072 and 73074) to expand access to self-collected cervical screening and other administrative amendments
- other minor technical and administrative amendments.

Detailed information on MBS items, including fact sheets and quick reference guides, could in 2022 be viewed on the Department of Health and Aged Care's ('the Department's) website 'MBS Online' (http://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 classification and categorisation changes commencing 1 November 2022 are detailed in the Attachment to this Explanatory Statement. Further PHI clinical category and procedure type information could in 2022 be viewed on the Department's website (http://www.health.gov.au).

Consultation

Private Health Insurance Rules classifications for MBS items
Medical officers within the Australian Government Department of Health provide expert clinical advice to assist in determining the appropriate private health insurance clinical category and level of accommodation benefits for MBS items in private health insurance rules.

The Department's weekly email with *Regulatory Amendments and Consultations Calendar* to private health sector stakeholders including peak insurer and hospital representative associations, private health insurers and private hospitals, includes information on anticipated changes to MBS items and consultation processes.

Consultation for proposed 1 November 2022 private health insurance classifications of these MBS items included notifications of consultations in the *Regulatory Amendments and Consultations Calendar* and seeking direct feedback throughout May to June 2022 and in October 2022 on draft proposed changes from representatives of those most likely to be directly impacted, including:

- Private Healthcare Australia (PHA);
- Australian Private Hospitals Association (APHA);
- Day Hospitals Australia;
- Members Health Fund Alliance;
- Catholic Health Australia;
- HAMBS (Hospital and Medical Benefits System);
- Australian Health Service Alliance;
- National Procedures Banding Committee (industry committee); and,

- Clinical college and professional medical association representatives.

Feedback received from stakeholders was considered when determining the final amendments.

MBS item related consultation

The Amendment Rules relating to clinical categorisations and procedure type classifications are consequential to MBS items changes. Detail on the MBS items and consultations undertaken, including by the Taskforce, MSAC and with medical professional organisations can be found in the Explanatory Statements to the MBS Regulations that in 2022 could be viewed on the Australian Government FRL website (http://www.legislation.gov.au), and the Department's 'MBS Online' website (http://www.mbsonline.gov.au).

Implementation liaison groups (ILGs) involving professional bodies and clinical experts also inform development of MBS items. Consultation encompasses private hospital and private health insurance sector representation, including from the APHA and PHA.

Background

MBS items with the potential to be provided to privately insured patients as hospital treatment are allocated to clinical categories under the Complying Product Rules and to hospital accommodation procedure type classifications under the Benefit Requirements Rules, to provide clarity in the administration of treatments across policy tiers by insurers and facilitate claims and benefit payments.

Complying Product Rules

The Complying Product Rules sets out the 'Basic, Bronze, Silver and Gold' product tiers for complying health insurance policies, and which clinical categories of treatment are included in each 'Hospital Treatment Product Tier.'

Schedule 5—Clinical categories

The 38 'Clinical categories' in column 1 of the table in 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 (column two of the table) for only one clinical category have been placed against that category in the table at Schedule 5 of the Complying Product Rules. The mention of an MBS item against a particular category does not mean it is only covered under that clinical category.

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. If an MBS item is relevant to the scope of cover for three or more clinical categories it has generally be placed into the list of 'Common treatments' (Schedule 6).

Where an MBS item is not likely to be a reason for admission for hospital treatment it has generally been placed into the list of 'Support treatments' (Schedule 7) even if specific to a single body system.

Schedule 6—Common treatments

The Common treatments list (Schedule 6) consists of MBS items that are used across, and therefore common to, multiple clinical categories (more than 2). For example, professional attendances by a medical practitioner are on the Common treatments list except where the MBS descriptor expressly prevents claims for hospital treatment.

MBS items on the list of Common treatments will generally be for treatments that may be the primary reason for admissions for hospital treatment. In some cases they may also be associated with, or support, another treatment that is the reason for admission.

Insurers are required to cover MBS items in the list of Common treatments where the treatment falls within the scope of cover for the clinical categories included in an insurance policy, and the treatment is delivered as hospital treatment.

Schedule 7—Support treatments

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 of the Diagnostic Imaging Services Table (DIST), Pathology Services Table (PST) and 3C Determination items are automatically categorised as Support Treatments under Schedule 7 of the Complying Product Rules, so are not individually listed in the Rules. Support list PST and DIST items are listed in PHI technical documentation.

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 or 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.

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 1 and 2— Type A procedures

Schedule 1 of the Benefit Requirements Rules provides for benefits for different patient categories by categorising MBS item numbers into patient classifications for accommodation benefits. Procedures requiring hospital treatment that includes part of an overnight stay ('Type A procedures') comprise 'Advanced surgical patient', 'Obstetric patient', 'Surgical patient', 'Psychiatric patient', 'Rehabilitation patient' and 'Other patients.'

Against these patient classifications, Schedule 1 sets out the minimum accommodation benefit payable by insurers per night for overnight accommodation for private patients at private hospitals in all states and territories, and for private patients in overnight shared ward accommodation at public hospitals in Victoria and Tasmania.

Schedule 2 of the Benefit Requirements Rules states the minimum accommodation benefit payable by insurers per night, for private patients in overnight shared ward accommodation at all other State and Territory public hospitals. For each jurisdiction listed in Schedule 2, the minimum benefit payable by insurers per night is averaged across all patients, rather than being specific to patient classification as for Schedule 1.

Schedule 3— Type B procedures

Schedule 3 of the Benefit Requirements Rules sets out minimum same-day hospital accommodation benefits payable by insurers for procedures the normally require hospital treatment that does not include part of an overnight stay at a hospital ('Type B procedures').

Part 2 of Schedule 3 identifies MBS items against Type B procedure Band 1, or the Non-band specific Type B day procedure classification. Treatment Bands 1 to 4 are described based on anaesthesia and/or theatre time. The treatment band applicable to a Non-band specific Type B day procedure item is that relevant to the circumstances of the hospital treatment provided to a patient. 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 Schedule 1).

Schedule 3— Type C procedures

'Type C procedures' are those services that do not normally require hospital treatment. Schedule 3 Part 3 of the Benefit Requirements Rules identifies Type C procedures by MBS item.

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 Schedule 3) or a Certified Overnight Type C procedure.

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 November 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. 12) 2022*

Section 1 Name

Section 1 provides that the name of the instrument is the *Private Health Insurance Legislation Amendment Rules (No. 12) 2022* (the Amendment Rules)

Section 2 Commencement

Section 2 provides that the instrument commences on 1 November 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 commence 1 November 2022.

Schedule 1—Amendments—Clinical Categories and Common Treatments

Private Health Insurance (Complying Product) Rules 2015 (Complying Product Rules)

Schedule 1 of the Amendment Rules repeals the existing MBS items in the Clinical categories and the Common treatment tables of the Complying Product Rules and substitutes amended tables.

Items added to the table may be new MBS items, or due to recategorisation following item amendments. Similarly, MBS items deleted may be due to deletion from the MBS, or recategorisation.

Changes are detailed in the private health insurance clinical category and procedure type information provided at www.health.gov.au.

Item 1 provides for an amended list of MBS items categorised against Clinical category (Schedule 5) to include new items and remove items deleted from the MBS from 1 November 2022. The amended list reflects the amendments made to the following categories:

- 'Bone, joint and muscle'
- 'Brain and nervous system'
- 'Joint reconstructions'
- 'Kidney and bladder'
- 'Male reproductive system'
- 'Pain management with device'
- 'Skin'

Item 2 provides for an amended list of MBS items categorised in the Common treatments list (Schedule 6), from 1 November 2022. The amended Common treatments list reflects the deletion of MBS item 173.

Schedule 2—Amendments—Procedure types

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

Schedule 2 of the Amendment Rules repeals the existing MBS items listed as a Type A Surgical, Type B non-band specific day procedures, and Type C procedures in the Benefit Requirements Rules, and substitutes amended tables.

- Type A procedures normally involve hospital treatment that includes part of an overnight stay.
- Type B procedures normally involve hospital treatment that does not include any part of an overnight stay.
- Type C procedures normally do not require hospital treatment.

Items added to the lists of procedure types may be new MBS items, or due to procedure type reclassification following item amendments. Similarly, MBS items deleted from lists may be due to deletion from the MBS, or procedure type reclassification.

Item 1 provides for an amended list of MBS items classified as Type A procedures Surgical patient**,** from 1 November 2022. The amended list of MBS items reflects the following item changes:

- Additions: 5 (30662, 36530, 47790, 47791, 47792)

Item 2 provides for an amended list of MBS items classified as Non-band specific Type B day procedures. The amended list of MBS items reflects the following item changes:

- Additions: 10 (30661, 31377, 31378, 31379, 31380, 31381, 31382, 31383, 73425, 73426)

Item 3 provides for an amended list of MBS items classified as Type C procedures. The amended list of MBS items reflects the following item changes:

- Additions: 23 (11736, 11737, 39141, 40863, 55740, 55741, 55742, 55743, 55757, 55758, 61333, 61336, 61341, 61612, 63549, 63563, 73073, 73422, 73423, 73424, 73427, 73428, 73436)
- Deletions: 2 (173, 73073)

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. 12) 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. 12) 2022* (the Amendment Rules) is to amend the following instruments:

- *Private Health Insurance (Complying Product) Rules 2015* (the Complying Product Rules); and,
- *Private Health Insurance (Benefit Requirements) Rules 2011* (the Benefit Requirements Rules).

The Amendment Rules make consequential amendments to the:

- Complying Product Rules to categorise new items of the Medicare Benefits Schedule (MBS) into the appropriate Clinical category for the purpose of describing hospital treatment(s) that must be covered under health insurance policies;
- Benefit Requirements Rules to classify new and amended MBS items by procedure-type for the purposes of minimum benefits for accommodation and, in relation to Type C procedures, access to any minimum benefits as hospital treatment unless provided as a Certified Type C procedure; and,
- Remove deleted MBS items from the above Rules.

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 amendments relating to omission or insertion of MBS items in the Benefit Requirements Rules and the Complying Product Rules, and under definitions of hospital treatment are as a consequence of the changes to the MBS that take effect on 1 November 2022.

The addition of new MBS items to accommodation benefit classifications, and specified clinical categories, 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.

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