

## EXPLANATORY STATEMENT

### *Health Insurance Act 1973*

#### *Health Insurance (Extended Medicare Safety Net) Amendment (Indexation) Determination 2022*

#### **Authority**

Subsection 10B(1) of the *Health Insurance Act 1973* (the Act) provides that the Minister for Health and Aged Care may, by legislative instrument, determine to which Medicare items subsections 10ACA(7A) and 10ADA(8A) apply and the maximum increases in Medicare benefit payable for those items under the Extended Medicare Safety Net (EMSN).

Subsections 10ACA(7A) and 10ADA(8A) of the Act provide that where a Medicare item is listed in a determination made under section 10B, the EMSN benefit must not exceed the amount determined as the EMSN benefit cap.

#### **Purpose and operation**

The increase in the Medicare benefit payable under the EMSN is commonly referred to as the 'EMSN benefit' and the maximum increase amount is known as the 'EMSN benefit cap'. The EMSN provides an additional benefit for Australian families and singles who incur high out-of-pocket costs for Medicare eligible out-of-hospital services. Once the relevant annual threshold of out-of-pocket costs has been met, Medicare will pay up to 80 per cent of any future out-of-pocket costs for out-of-hospital Medicare services for the remainder of the calendar year.

Under subsection 10B(1) of the Act, the Minister for Health and Aged Care may by legislative instrument apply caps on the maximum additional benefit paid (known as EMSN benefit caps) to items under the EMSN. These items, and their relevant EMSN benefit caps, are prescribed in the *Health Insurance (Extended Medicare Safety Net) Determination 2017* (the Principal Determination).

The purpose of the *Health Insurance (Extended Medicare Safety Net) Amendment (Indexation) Determination 2022* is to amend the Principal Determination to:

- index the fixed dollar EMSN benefit cap of 76 items by 7.3 per cent to provide a greater benefit for patients; and
- apply EMSN benefit caps to recently listed attendance items consistent with the general capping arrangements for attendances services;
- apply fixed EMSN benefit caps to recently listed obstetric telehealth services and obstetric ultrasound services; and
- repeal the *Health Insurance (Extended Medicare Safety Net) Amendment (Repetitive Transcranial Magnetic Stimulation Capping) Determination 2021*.

#### **Consultation**

Consultation was not undertaken on indexation of the EMSN fixed benefit caps as it is machinery in nature. Indexation of EMSN fixed benefit caps is a business-as-usual process which is completed on 1 January of each year to ensure the value of the fixed caps remains relative with the value of the respective item's Schedule fee, which is indexed on 1 July of each year.

In the 2012-13 Budget under the *Extended Medicare Safety Net – capping benefits including for items with excessive fees* measure, the Government announced that an EMSN benefit cap would be applied to all attendance items from 1 November 2012. While stakeholders expect all attendance items to be subject to a EMSN benefit cap of 300 per cent of the Schedule fee or \$500.00 (whichever is the lesser amount), they will be notified of the capping arrangements for the new attendance groups in the Medicare Benefits Schedule XML data file which will be made available for download on MBS Online ([www.mbsonline.gov.au](http://www.mbsonline.gov.au)).

Consultation on the implementation of the EMSN benefit caps for obstetric ultrasound services was undertaken with the Australian Diagnostic Imaging Association, the Australasian Sonographers Association, the Australasian Society for Ultrasound in Medicine and the Royal Australian and New Zealand College of Radiologists.

### **Commencement**

The Amendment Determination is a disallowable legislative instrument for the purposes of the *Legislation Act 2003* and will commence the later of the day after registration or the day after this instrument has been approved by each House of Parliament. Schedule 1 of the Amendment Determination will commence on 1 January 2023 or the day this instrument is approved by each House of Parliament, whichever occurs later.

Details of the Amendment Determination are set out in **Attachment A**. The Amendment Determination is compatible with the rights and freedoms recognised or declared under section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*. A statement of compatibility with human rights is set out in **Attachment B**.

## **Details of the *Health Insurance (Extended Medicare Safety Net) Amendment (Indexation) Determination 2022***

### Section 1 – Name

Section 1 provides for the instrument to be referred to as the *Health Insurance (Extended Medicare Safety Net) Amendment (Indexation) Determination 2022* (Amendment Determination).

### Section 2 – Commencement

Section 2 provides that the Amendment Determination will not commence until it has been approved by each House of Parliament. Subject to Parliament's approval, the Amendment Determination will commence the later of the day after registration or the day after the Amendment Determination has been approved by each House of Parliament.

Subject to Parliament's approval, Schedule 1 of the Amendment Determination will commence on 1 January 2023. If Parliament approves the Amendment Determination after 1 January 2023, Schedule 1 will commence the day after it has been approved by each House of Parliament.

### Section 3 – Authority

Section 3 provides that the Amendment Determination is made under subsection 10B(1) of the *Health Insurance Act 1973* (the Act).

### Section 4 – Schedules

Section 4 provides that 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—Amendments**

#### ***Health Insurance (Extended Medicare Safety Net) Determination 2017 (Principal Determination)***

Schedule 1 amends the Principal Determination to index the EMSN fixed benefit caps, apply EMSN benefit caps to recently listed attendance items consistent with the capping arrangements for MBS attendances services, and apply fixed EMSN benefit caps to six obstetric ultrasound items that were recently listed.

#### **Amendment 1 – Paragraph 4(1)(b) (table)**

Amendment 1 repeals the table under paragraph 4(1)(b) of the Principal Determination and substitutes a new table of EMSN benefit cap amounts. Items 13206, 13210 and 16399 have all ceased within the last 12 months and have been consequently removed from this Amendment Determination. For the 54 items with fixed EMSN benefit cap amounts that have been retained, the 'maximum increase' amount in column 2 has been replaced with new values.

The new amounts have been indexed by an indexation factor of 7.3 per cent, which is the annual All Groups Consumer Price Index as reported in the September quarter 2022, rounded down to the nearest 10 cents. The September quarter 2022 is available at [www.abs.gov.au](http://www.abs.gov.au).

The substituted table will also apply new EMSN fixed benefit caps for obstetric telehealth video services (91850, 91851, 91852 and 91853) and telehealth phone services (91855, 91856, 91857 and 91858). The caps for these items will be identical to the caps for the equivalent service performed in person.

**Amendment 2 – Paragraph 4(3)(b) (after Group A41 in the table)**

Amendment 2 inserts Group A42 (Mental health planning for care recipients of a residential aged care facility), Group A45 (Nicotine and Smoking Cessation Counselling) and Group A46 (COVID-19 management support service) into the table of medical practitioner attendance groups that are subject to an EMSN benefit cap of 300 per cent of the Schedule fee or \$500.00 (whichever is the lesser amount). The new groups of attendance items were not previously in the Principal Determination as they were listed on the MBS on or after 2020.

**Amendment 3 – Paragraph 4(4)(b) (after Group M19 in the table)**

Amendment 3 inserts Group M25 (COVID-19 Additional psychological therapy services), Group M26 (COVID-19 additional focussed psychological strategies (allied health), Group M27 (Initial focussed psychological therapy services) and Group M28 (Initial focussed psychological strategies (allied mental health)) into the table of allied health attendance groups that are subject to an EMSN benefit cap of 300 per cent of the Schedule fee or \$500.00 (whichever is the lesser amount). The new groups of attendance items were not previously in the Principal Determination as they were listed on the MBS on or after 2020.

**Amendment 4 – Paragraph 4(6)(b) (table)**

Amendment 4 repeals the table under paragraph 4(6)(b) of the Principal Determination and substitutes a new table of EMSN benefit cap amounts. For the 22 items with fixed EMSN benefit cap amounts that were in the Principal Determination, the ‘maximum increase’ amount in column 2 has been replaced with new values. The new amounts have been indexed by an indexation factor of 7.3 per cent, which is the annual All Groups Consumer Price Index as reported in the September quarter 2022, rounded down to the nearest 20 cents. The September quarter 2022 is available at [www.abs.gov.au](http://www.abs.gov.au).

The substituted table will also apply new EMSN fixed benefit caps for six obstetric ultrasound items (55740, 55741, 55742, 55743, 55757 and 55758). The Schedule Fee and EMSN caps for these new items were determined using the relativities to existing comparable ultrasound services.

**Schedule 2—Repeals**

***Health Insurance (Extended Medicare Safety Net) Amendment (Repetitive Transcranial Magnetic Stimulation Capping) Determination 2021 (EMSN rTMS Amendment Determination)***

Schedule 2 repeals the EMSN rTMS Amendment Determination, which would have amended the Principal Determination to apply fixed EMSN benefit cap amounts for four repetitive transcranial magnetic stimulation (rTMS) therapy items (14216, 14217, 14219 and 14220) on 1 November 2021.

However, the EMSN rTMS Amendment Determination never commenced as it was not approved by both Houses of Parliament. EMSN fixed benefit cap amounts were subsequently applied to items 14216, 14217, 14219 and 14220 by the *Health Insurance (Extended Medicare Safety Net) Amendment (Indexation) Determination 2021* on 1 January 2022. The EMSN rTMS Amendment Determination will be repealed to ensure that this instrument does not pass through both Houses of Parliament and override changes to the Principal Determination that have occurred since 1 November 2021.

**Amendment 5 – The whole instrument**

Amendment 5 repeal the EMSN rTMS Amendment Determination.

## Statement of Compatibility with Human Rights

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

*Health Insurance (Extended Medicare Safety Net) Amendment (Indexation) 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 legislative instrument

The increase in the Medicare benefit payable under the EMSN is commonly referred to as the ‘EMSN benefit’ and the maximum increase amount is known as the ‘EMSN benefit cap’. The EMSN provides an additional benefit for Australian families and singles who incur high out-of-pocket costs for Medicare eligible out-of-hospital services. Once the relevant annual threshold of out-of-pocket costs has been met, Medicare will pay up to 80 per cent of any future out-of-pocket costs for out-of-hospital Medicare services for the remainder of the calendar year.

Under subsection 10B(1) of the Act, the Minister for Health and Aged Care may by legislative instrument apply caps on the maximum additional benefit paid (known as EMSN benefit caps) to items under the EMSN. These items, and their relevant EMSN benefit caps, are prescribed in the *Health Insurance (Extended Medicare Safety Net) Determination 2017* (the Principal Determination).

The purpose of the *Health Insurance (Extended Medicare Safety Net) Amendment (Indexation) Determination 2022* is to amend the Principal Determination to:

- index the fixed dollar EMSN benefit cap of 76 items by 7.3 per cent to provide a greater benefit for patients; and
- apply EMSN benefit caps to recently listed attendance items consistent with the general capping arrangements for attendances services;
- apply fixed EMSN benefit caps to recently listed obstetric telehealth services and obstetric ultrasound services; and
- repeal the *Health Insurance (Extended Medicare Safety Net) Amendment (Repetitive Transcranial Magnetic Stimulation Capping) Determination 2021*.

### 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 rights to health and social security by ensuring access to publicly subsidised health services which are clinically effective and cost-effective.

The instrument makes machinery change to EMSN fixed benefits caps by applying indexation by the Consumer Price Index on 1 January 2023 to provide a greater benefit for patients.

This instrument will also apply:

- EMSN benefits caps to recently listed attendance items consistent with the general capping arrangements for attendances services on the Medicare Benefits Schedule;
- fixed EMSN benefit caps to recently listed obstetric telehealth services consistent with the capping arrangements for the equivalent face-to-face services; and
- fixed EMSN benefit caps to recently listed obstetric ultrasound services using capping arrangements comparable to other ultrasound services; and
- to repeal the *Health Insurance (Extended Medicare Safety Net) Amendment (Repetitive Transcranial Magnetic Stimulation Capping) Determination 2021*, which never commenced as it was not approved by both Houses of Parliament and the changes in this instrument were applied through subsequent amendments to the Principal Determination.

### **Conclusion**

This instrument is compatible with human rights as it maintains the right to health, the right to social security and the right to equality and non-discrimination.

Mark Butler  
Minister for Health and Aged Care