

## EXPLANATORY STATEMENT

### *Health Insurance Act 1973*

#### *Health Insurance Legislation Amendment (2022 Measures No. 5) 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 (the 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 GMST or PST.

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. 5) Determination 2022* (the Amendment Determination) is to:

- extend the cessation date for the *Health Insurance (General Practice COVID-19 Treatment) Determination 2022* (the COVID-19 Treatment Determination) from 31 December 2022 to 31 December 2023; and
- extend the *Health Insurance (Section 3C Pathology Services – COVID 19) Determination 2020* (the Pathology COVID-19 Determination) from 31 December 2022 to 31 December 2023 and remove the requirement that fees charged for in-hospital services cannot exceed the schedule fee.

### Extension of COVID-19 services

Schedule 1 of the Amendment Determination will extend the cessation date for the COVID-19 Treatment Determination and the Pathology COVID-19 Determination to 31 December 2023. The extension of these instruments will allow patients to continue to access these COVID-19 support services.

### Amendments to pathology COVID-19 services

Schedule 2 of the Amendment Determination will amend four temporary pathology items for testing of COVID-19 and other respiratory pathogens (69506, 69507, 69511 and 69512) to allow pathology providers to charge fees more than the schedule fee for services provided in-hospital under these items and associated items 69508, 69509, 69510, 69513,

69514 and 69515. This change will align arrangements for these items with other MBS pathology services delivered in-hospital.

**Consultation**

On 12 December 2022, the Minister for Health and Aged Care, the Hon Mark Butler MP, announced the extension to the cessation date for the COVID-19 Treatment Determination and the Pathology COVID-19 Determination. The extension will ensure patients continue to have access to COVID-19 support services and will provide service providers with certainty about support provision.

Consultation was undertaken with pathology peak bodies, the Royal College of Pathologists of Australasia, Australian Pathology and Public Pathology Australia, regarding the change to charging arrangements for the temporary in-hospital pathology items for COVID-19 testing and other respiratory pathogens.

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

Schedule 1 of the Amendment Determination commences on 31 December 2022 and Schedule 2 of the Amendment Determination commences on 1 January 2023.

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. 5) 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. 5) Determination 2022*.

Section 2 – Commencement

Section 2 provides that Sections 1 to 4 and Schedule 1 of the Amendment Determination will commence on 31 December 2022 and Schedule 2 will commence on 1 January 2023.

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 – Extension of COVID-19 services

*Health Insurance (General Practice COVID-19 Treatment) Determination 2022* (COVID-19 Treatment Determination)

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

**Amendment item 1** amends section 4 to extend the cessation date of the COVID-19 Treatment Determination from 31 December 2022 to 31 December 2023.

**Amendment item 2** amends section 3 to extend the cessation date of the Pathology COVID-19 Determination from 31 December 2022 to 31 December 2023.

Schedule 2 – Amendments to pathology COVID-19 services

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

**Amendment item 1** amends items 69506, 69507, 69511 and 69512 to allow pathology providers to charge fees in excess of the schedule fee for services provided in-hospital under these items and associated items 69508, 69509, 69510, 69513, 69514 and 69515.

## 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. 5) 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. 5) Determination 2022* (the Amendment Determination) is to:

- extend the cessation date for the *Health Insurance (General Practice COVID-19 Treatment) Determination 2022* (the COVID-19 Treatment Determination) from 31 December 2022 to 31 December 2023; and
- extend the *Health Insurance (Section 3C Pathology Services – COVID 19) Determination 2020* (the Pathology COVID-19 Determination) from 31 December 2022 to 31 December 2023 and remove the requirement that fees charged for in-hospital services cannot exceed the schedule fee.

#### Extension of COVID-19 services

Schedule 1 of the Amendment Determination will extend the cessation date for the COVID-19 Treatment Determination and the Pathology COVID-19 Determination to 31 December 2023. The extension of these instruments will allow patients to continue to access these COVID-19 support services.

#### Amendments to pathology COVID-19 services

Schedule 2 of the Amendment Determination will amend four temporary pathology items for testing of COVID-19 and other respiratory pathogens (69506, 69507, 69511 and 69512) to allow pathology providers to charge fees more than the schedule fee for services provided in-hospital under these items and associated items 69508, 69509, 69510, 69513, 69514 and 69515. This change will align arrangements for these items with other MBS pathology services delivered in-hospital.

### 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'* considers 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 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 in the Amendment Determination will maintain the rights to health and social security and the rights of equality and non-discrimination by supporting patient access to clinically necessary laboratory testing for respiratory pathogens including COVID-19 and other COVID-19 support services.

### **Conclusion**

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

**Travis Haslam PSM  
Acting First Assistant Secretary  
Medical Benefits Division  
Health Resourcing Group  
Department of Health and Aged Care**