

EXPLANATORY STATEMENT

Health Insurance Act 1973

Health Insurance (General Medical Services Table) Amendment (2023 Measures No. 1) Regulations 2023

The *Health Insurance Act 1973* (the Act) sets out the principles and definitions governing the Medicare Benefits Schedule (MBS). The Act provides for payments by way of medical benefits and for other purposes.

Subsection 133(1) of the Act provides that the Governor-General may make regulations, not inconsistent with the Act, prescribing all matters required or permitted by the Act to be prescribed, or necessary or convenient to be prescribed for carrying out or giving effect to the Act.

Part II of the Act provides for the payment of Medicare benefits for professional services rendered to eligible persons. Section 9 of the Act provides that Medicare benefits be calculated by reference to the fees for medical services set out in prescribed tables.

Subsection 4(1) of the Act provides that regulations may prescribe a table of general medical services which sets out items of general medical services, the fees applicable for each item, and rules for interpreting the table. The table made under this subsection is referred to as the General Medical Services Table. The most recent version of the regulations is the *Health Insurance (General Medical Services Table) Regulations 2021* (GMST).

Purpose

The purpose of the *Health Insurance (General Medical Services Table) Amendment (2023 Measures No. 1) Regulations 2023* (the Regulations) is to amend:

- the schedule fees for seven melanoma excision items introduced on 1 November 2022 by the *Health Insurance Legislation Amendment (2022 Measures No. 3) Regulations 2022*; and
- five otolaryngology items (41509, 41635, 41825, 41861 and 41545) to ensure they align with clinically appropriate practice.

The melanoma excision items introduced on 1 November 2022 were announced in the March 2022-23 Budget under the *Guaranteeing Medicare – Medical Benefits Schedule new and amended listings* measure. The schedule fees for the new melanoma excision items were intended to mirror the fees for the existing benign excision items. However, at the time of implementation on 1 November 2022, the schedule fees for these items did not include the 1 July 2022 indexation factor of 1.6%. Accordingly, these changes will increase the schedule fees for items 31377, 31378, 31379, 31380, 31381, 31382 and 31383 to apply indexation.

On 1 March 2023, the *Health Insurance Legislation Amendment (2022 Measures No. 4) Regulations 2022* (the March 2023 MBS Regulations) will implement the Government's response to recommendations from the Medicare Benefits Schedule (MBS) Review Taskforce (the Taskforce) in relation to services for otolaryngology diagnostic procedures, audiology services and ear, nose, and throat surgical operations. These changes were announced in the March 2022-23 Budget under the *Guaranteeing Medicare – Medical Benefits Schedule new and amended listings* measure. The Regulations will make further amendments to items 41509, 41545, 41635, 41825 and 41861 to align

these items with the policy intention of the Government's response to the Taskforce's recommendations.

Consultation

The changes to melanoma services implemented on 1 November 2022 were developed by the Department of Health and Aged Care in collaboration with the Dermatology and Skin Services Advisory Group (DASAG), containing representatives from the Australian Medical Association (AMA), Australasian College of Dermatologists (ACD) and Australian Society of Plastic Surgeons (ASPS). No further consultation was undertaken regarding the revisions to the fees for the melanoma items implemented on 1 November 2022 as the changes will align these items with the original policy intention of the DASAG.

The Taskforce and medical professional organisations were consulted on the March 2023 MBS Regulations for the otolaryngology, head, and neck surgery services. The Otolaryngology Implementation Liaison Group (ILG) was held in November 2020, which included representatives from the AMA, Australasian Society of Otolaryngology, Head and Neck Surgery, Laryngology Society of Australia, Audiology Australia, Independent Audiologists Australia and Private Healthcare Australia. Overall, the ILG was supportive of the changes, with no particularly contentious issues. Further out-of-session consultation was undertaken during drafting of the items, to ensure policy intent was maintained.

Details of the Regulations are set out in the Attachment.

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

Part 1 of Schedule 1 of the Regulations will commence on 1 March 2023 and Part 2 of Schedule 1 will commence immediately after the commencement of the *Health Insurance Legislation Amendment (2022 Measures No. 4) Regulations 2022*.

Authority: Subsection 133(1) of the
Health Insurance Act 1973

Health Insurance (General Medical Services Table) Amendment (2023 Measures No. 1) Regulations 2023

Section 1 – Name

This section provides for the Regulations to be referred to as *Health Insurance (General Medical Services Table) Amendment (2023 Measures No. 1) Regulations 2023*.

Section 2 – Commencement

This section provides for Part 1 of Schedule 1 of the Regulations to commence on 1 March 2023 and Part 2 of Schedule 1 to commence immediately after the commencement of the *Health Insurance Legislation Amendment (2022 Measures No. 4) Regulations 2022*.

Section 3 – Authority

This section provides that the Regulations are made under the *Health Insurance Act 1973*.

Section 4 – Schedules

This section provides for 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.

Schedule 1 – Amendments

Health Insurance (General Medical Services Table) Regulations 2021

Part 1—Melanoma services

Items 1 to 7 amend the schedule fees for items 31377, 31378, 31379, 31380, 31381, 31382 and 31383 to apply the indexation factor from 1 July 2022. These items were introduced on 1 November 2022 by the *Health Insurance Legislation Amendment (2022 Measures No. 3) Regulations 2022*.

Part 2—Otolaryngology, head, and neck surgery

Part 2 of Schedule 1 of the Regulations amends five items, which are being amended on 1 March 2023 by the *Health Insurance Legislation Amendment (2022 Measures No. 4) Regulations 2022* (the March 2023 MBS Regulations) as part the Government’s response to recommendations from the Medicare Benefits Schedule (MBS) Review Taskforce (the Taskforce) in relation to services for otolaryngology diagnostic procedures, audiology services and ear, nose and throat surgical operations. Accordingly, these changes will commence immediately after the commencement of the March 2023 MBS Regulations. The changes in Part 2 will ensure the five items align with clinically appropriate practice and may only be provided in specified circumstances in accordance with the Government’s response to the Taskforce recommendations.

Item 8 amends item 41509 to insert the requirement that services provided under this item must be performed under general anaesthesia and must be performed in-hospital to ensure the services align with clinically appropriate practice.

Item 9 amends item 41545 to address a typographical error that was not identified during the drafting of the 1 March 2023 MBS Regulations.

Items 10 to 12 amend items 41635, 41825 and 41861 to provide that services under these items may only be performed in-hospital to ensure the services align with clinically appropriate practice.

Statement of Compatibility with Human Rights

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

Health Insurance (General Medical Services Table) Amendment (2023 Measures No. 1) Regulations 2023

This Regulation 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 *Health Insurance (General Medical Services Table) Amendment (2023 Measures No. 1) Regulations 2023* (the Regulations) is to amend:

- the schedule fees for seven melanoma excision items introduced on 1 November 2022 by the *Health Insurance Legislation Amendment (2022 Measures No. 3) Regulations 2022*; and
- five otolaryngology items (41509, 41635, 41825, 41861 and 41545) to ensure they align with clinically appropriate practice.

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On 1 March 2023, the *Health Insurance Legislation Amendment (2022 Measures No. 4) Regulations 2022* (the March 2023 MBS Regulations) will implement the Government's response to recommendations from the Medicare Benefits Schedule (MBS) Review Taskforce (the Taskforce) in relation to services for otolaryngology diagnostic procedures, audiology services and ear, nose, and throat surgical operations. These changes were announced in the March 2022-23 Budget under the *Guaranteeing Medicare – Medical Benefits Schedule new and amended listings* measure. The Regulations will make further amendments to items 41509, 41545, 41635, 41825 and 41861 to align these items with the policy intention of the Government's response to the Taskforce's recommendations.

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 Regulations will maintain the rights to health and social security and the rights of equality and non-discrimination by ensuring access to publicly subsidised medical services are clinically and cost-effective as intended.

Conclusion

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

Mark Butler

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